UNITED KINGDOM NATIONAL COMMITTEE ON COMPARATIVE LAW

COLLOQUIUM ON "METHODS OF LAW REFORM"

UNIVERSITY OF WARWICK, 11-12 SEPTEMBER 1979

REFORMING LAW REFORM

NEW METHODS OF LAW REFORM IN AUSTRALIA

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

Institutional Reform Comes of Age: When the Law Reform Agencies of Australia held their Fifth Conference in Perth in July 1979, there were representatives present from eleven law reform commissions or committees established at a Federal and State level. In addition, participants took part from other agencies interested in reform of the law. Overseas representatives attended from the Commonwealth Secretariat, France, India, Papua New Guinea, Nova Scotia and Sri Lanka. Law reform in the Antipodes has come of age. Institutions for the systematic reform of the law now exists in every jurisdiction of the Australian continent. In New Zealand there is a Law Reform Council and part-time law reform committees are busily at work upon a multitude of projects. In Papua New Guinea, there is a permanent Law Reform Commission, with full-time officers, which enjoys a special role under the Constitution of that country. Law reform is spoken of in universities, professional and judicial circles. But it is also commonly referred to in the press and broadcasting media, in Parliament and in the community generally.

An understanding of the new methods of law reform in Australia requires an appreciation of the variety of law reform institutions.[1] This variety is an outgrowth of the Australian Federal Constitution under which a limited list of

specific powers is conferred upon the Commonwealth or Federal Parliament and, with few exceptions, the remaining powers to make laws remain with the Australian States.

Eleven Agencies of Law Reform: Institutional law reform is not a new thing in Australia. Even before the federation of the Australian colonies, it was obvious that the great transplantation of legal rules that occurred with the early English settlers had not been accomplished without significant defects requiring the attention of local law makers. Some defects could be cured by judges who found room to manoeuvre within the principles of the common law or the language of the Imperial statutes. The need for a more conceptual approach to the modernisation, simplification and reform of the inherited law was acknowledged in the oldest colony, New South Wales in 1870. In that year, the first law reform commission was established by Letters Patent, with Terms of Reference 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 ...".[2]

The output of this part-time body was small. Parliamentary attention to its recommendations was perfunctory. The experiment quietly faded away.

A century later, institutional law reform is a busy reality in all parts of Australia. The oldest of the State law reform agencies is the Victorian Statute Law Revision Committee, a Parliamentary body comprising members of both Chambers and all Parties of the Victorian Parliament. It was established in 1928. In 1944, the Chief Justice of Victoria set up a Law Reform Committee comprising judges and lawyers. It is still operating but is now chaired by the Victorian Law Reform Commissioner, Sir John Minogue, a statutory corporation sole. In South Australia, a Law Reform Committee was appointed by Executive Proclamation in 1968. It ius a part time body comprising judges, Crown law officers and private practitioners. In the Norther Territory of Australia, in 1978, a voluntary committee was established on the initiative of the judiciary. It includes local magistrates and legal practitioners.

All of the other States (New South Wales, 1966; Queensland, 1969; Western Australia, 1972; and Tasmania, 1974) have established statutory authorities with functions to advise on the review and modernisation of State law. A special committee on criminal law reform was appointed in South Australia in 1971 under the chairmanship of Justice Roma Mitchell.

The Commonwealth or Federal Government was a laggard in this league of law reform agencies. Although a commission was established in the Capital Territory, for which the Commonwealth has constitutional responsibilities, in 1971 the national Australian Law Reform Commission was not set up until 1975. Its mandate is limited to areas of Federal law. However, it has now absorbed the former Capital Territory Commission and through the Commonwealth's plenary constitutional powers in that Territory, the Australian Commission gains an opening to the whole body of private law. In addition, the Commission is required to consider proposals for uniformity of laws. At the invitation of the Australian Law Reform Agencies and with the consent of the Standing Committee of Commonwealth and State Attorneys-General, the Australian Law Reform Commission has assumed responsibilities as a clearing-house for the exchange of law reform information in Australasia.[3]

The law reform institutions just described differ from each other in many ways. The relationship they respectively enjoy to their Parliaments and to the Executive differ. The scope of the projects upon which they have typically been engaged differs. Some have tended to work upon narrow technical questions. Other have embarked upon major inquiries into controversial areas of the law, full of policy. Within the agencies, attitudes to law reform and to the proper functions of law reform commissions differ significantly from one jurisdiction to another. In these circumstances, it is inevitable that differing opinions will be held concerning the way in which a law reform agency should go about its task. The Australian Law Reform Commission in each of its Annual Reports to the Australian Parliament has outlined and discussed the methods adopted by it.[4] Successive reports have identified refinements of earlier procedures.

Most of the State law reform agencies have refrained from this public introspection about the procedures of law reform. However, in the last Annual Report of the Law Reform Commission of Western Australia an Appendix contained a detailed explanation and discussion of that Commission's procedures.[5]

As in most countries, the investment in law reform in Australia is small by comparison to the total investment in administering, enforcing and teaching the law. It is proper that those engaged in institutional law reform should seek to optimise efficiency in the achievement of their legitimate functions. There will be differences of view about what those functions are. In part, these differences will arise from the nature of particular tasks assumed by the law reform commissions. What follows is neither a synthesis of typical current Australian practice, nor is it a blueprint for what should happen as a universal rule, whether in Australia or elsewhere. Each institution engaged in the orderly reform of the law must tailor its methods to accord with such considerations as the nature of the projects undertaken, the availability of funds and manpower, the geographical area of the jurisdiction to be covered, local traditions and sensitivities and perceptions of the proper limits of law reform activity.

Generally speaking, most institutions issue a working paper or some form of consultative document. But beyond that there is much room for experimentation and variety of approach. This paper will outline the development of the working paper in Britain. It will then proceed to trace newer procedures of consultation lately tried in Australia. The special efforts of the Australian Law Reform Commission to consult particular communities which may be affected by proposals for law reform will be outlined. The paper will conclude with an attempt to identify the rationale for consultation, at least as seen by the Australian Commission.

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. The development of the "working paper" has been described as a "major contribution towards the methodology of law reform".[6] Its format 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.[7]

The Law Commission has now issued 73 working papers. 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".[8]

Of course, the technique of consultation is not without its problems. Despite every endeavour to emphasise the tentative or provisional basis of the reform proposal, the finished nature of the document and ignorance or mischief on the part of commentators often leads to the misunderstanding that the working paper is a final report.[9] A community used to hearing of laws only when they are in all but final form, takes time to adjust to a procedure which involves consultation before that final form is settled.

The other price of the working paper is delay. The preparation of tentative proposals and the ventilation of alternatives followed by extensive consultation, all takes time. Lord Scarman, the first Chairman of the English Law Commission, put it this way:

> "[The Working Paper] is given a wide circulation and is an open publication, which anyone interested can buy. The Commission may, and often does, consult experts and interested parties in the course of preparing a working paper. But the indispensable phase is consultation after its publication. This is a lengthy and time-consuming business. Though it imposes delay, it is the key to quality and acceptability. Consultation, wide enough to embrace all interests and deep enough to expose all the problems, may take a long time: but it can and usually does mean a swift passage through Parliament of a non-controversial Bill to give effect to a law reform proposal. At the very least, it will ensure that controversy is limited to genuine issues upon which a policy decision has to be taken".[10]

There is an inevitable tension between the pressures for speed and prompt delivery of a law reform report[11] and the desire of law reformers to consult widely and to identify with precision the target for lasting reform.[12]

Private Consultations: In addition to the distribution of working papers and consideration of comments on them, the English Law Commission pioneered various procedures of private consultation in which the legal profession especially has taken a key role

> "The Working Paper is published by H.M.S.O. from whom it can be bought, but it is distributed free to persons whose views are sought. The distribution of each working paper is considered separately having regard to the particular topic. All go to lawyers and lawyers' organisations - the judges, the Senate of the Inns of Court and the Bar, the Law Society and the Society of Public Teachers of Law for distribution to every Law Faculty at the universities. They will go to individual lawyers known to be interested in the subject of the working paper. They will also go to many non-legal organisations, including commercial and industrial concerns (as in the case of working papers on contract or consumer topics) and women's organisations (as in the case of working papers on family law)".[13]

Informal oral consultations[14] 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.[15] In addition to the procedures of consultation mentioned, the English 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.

When the Australian Law Reform Commission was established, ten years after the English 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".[16]

However, a number of techniques of consultation have been tried, additional to those devised in England.

Experimentation in the procedures of consultation is continuing. I propose to describe some of these new techniques. The need for something beyond the working paper and private consultation is now widely accepted. In a paper for the Australian Legal Convention, a former Law Commissioner, Professor A.L. Diamond, listed a number of defects in working papers as a method of consultation. He pointed to the fact that it "is essentially a passive method of consultation"

> "[I]t does not necessarily serve well as a fact-finding exercise ... For example, in our contract Working Paper on Firm Offers we sought information on how far business people regarded themselves as entitled to rely on "firm" offers and quotations in an attempt to see whether any change in the rule that an offer can be withdrawn at any time before acceptance would be justified. We knew perfectly well that simply asking the question and circulating a working paper, however widely, was not going to produce a very reliable answer. The difficulty is how to get a more reliable answer with the time and resources at our disposal".[17]

Professor Diamond listed as a second defect of the working paper that "it is not a very effective way of communicating with the public at large"

> "Working papers are clearly aimed largely at a legal audience, and although we try to circulate copies to non-legal recipients and they are often summarised in newspapers, we ought not to be surprised that many of them do not make much of an impact on the mass of the population ... Communication with the public is neither easy nor cheap".[18]

This difficulty of ensuring that working papers are put to the purpose for which they are designed, widespread consultation, is mentioned in the recent discussion paper of the New South Wales Law Reform Commission on the general regulation of the legal profession. Amongst reform proposals is the creation of a Community Committee on Legal Services comprising lawyers and various community groups. One reason advanced for this committee was greater representative participation in the work of institutional law reform:

> "Law Reform Commissions are frequently disappointed by the small amount of discussion which their proposals evoke, even when their potential impact on the general community is considerable. This may be because most laymen are daunted by technical legal questions. The [Community Committee on Legal Services] would have some accumulated expertise on legal matters and might often be a useful sounding board and source of ideas for, and critic of, the Law Reform Commissions".[19]

The experiments of the Australian law reform bodies in new methods of consulting the public represent Antipodean attempts to address, in modern ways, the problems of information and opinion gathering.

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.[20] 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 Commission, funds were available to pay consultants for their services. A modest retainer and daily fee were 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.

The experience in Australia has been that it is not difficult to secure the participation of the most talented people in the country in the process of law improvement, even without fee or reward, so long as the effort is seen to be part of a practical endeavour to improve the legal system in an informed and rational way. Of course, it is easier for some people to offer honorary service than for others. A small fund is retained for those not otherwise in receipt of income, whose contribution is necessary and who must be funded by the Law Reform Commission if they are fairly to be asked to take a part in the exercise. The willingness of experts in many disciplines to come forward and offer their time for the improvement of the law, is a heartening reflection of the interest in the community in law improvement and the willingness of citizens to take a part in its improvement.

In choosing consultants, the Australian Law Reform Commission has looked to a number of criteria. The possession of special knowledge and information is the first factor, but it is also important to balance competing attitudes. Thus, in a project on the introduction of class actions in Australia, the President of the Australian Consumers Association sits down

with representatives of business and industry. In the project on the improvement of debt recovery laws, the Executive Director of the Australian Finance Conference takes part with persons experienced in helping and counselling the poor and deprived. In the project on laws governing human tissue transplantation, medical experts were balanced by the appointment of a Professor of Philosophy, a Catholic theologian and the Dean of a Protestant College of Divinity. In the reform of police procedures, legal academics debate with senior police officers and administration representatives. For the reform of defamation laws in Australia, no fewer than 30 consultants were appointed, including journalists in the printed media, radio and television, newspaper editors and managers, legal academics, experienced barristers, lecturers in journalism and the Anglican Dean of Brisbane.

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 number of consultants appointed has exceeded 100. Consultants are appointed in every reference. Only one person approached to accept honorary appointment in this way has

declined the invitation and he for pressure of other work in a sole practice. In the end, the report is the responsibility of the Commissioners. Often, there are matters that cannot and should not be resolved by consensus with consultants. The reports make it plain that the responsibility for recommendations is that of the Commission alone. There is no doubt, however, that the reports of the Australian Law Reform Commission have been greatly influenced by the participation in the Commission's deliberations of the appointed consultants. The biases of lawyers have been exposed in the process of interdisciplinary exchange.

Discussion Papers: Soon after the establishment of the Australian Law Reform Commission, the Chief Justice of one of the Australian States urged me to bear in mind that busy judges, lawyers and others concerned about law reform proposals, do not necessarily have the time (even if they have the inclination) to read lengthy and scholarly working papers, in which the issues for reform are debated at great length. From this notion and the inspiration of my colleague, Commissioner M.R. Wilcox, Q.C., sprang the discussion paper. 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 published reports.

Being shorter and less technical, discussion papers lend themselves to a wider distribution, beyond the legal profession to community groups, commercial bodies and others likely to be interested in the proposals for reform. It seemed to us that it was unduly optimistic to expect interested groups to purchase discussion papers. It was enough to hope that they would find the time to comment. The aim of institutional law reform being consultation, it appeared to the Australian

Commission that every effort should be made to distribute the consultative document as widely as possible and free of charge. This conclusion had consequences for the style of the document, its content and its length. Discussion papers normally cover no more than 30 pages.

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 convert 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 more widely, 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 legal publications regularly circulating 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. Thus, a discussion paper on proposals for the reform of the law of compulsory acquisition of property was distributed to valuers and real estate agents throughout Australia, through the journals of those professions. Proposals for the reform of insurance law were distributed to the different branches of the insurance industry through industry magazines. Proposals for the introduction of class actions are presently being distributed through business and commercial journals. These efforts to "tap" the relevant professional and institutional interests supplement the specific distribution of the discussion paper to interested individuals and organisations. Inevitably, this circulation of proposals elicits many requests for the full discussion paper and many written and oral comments on the paper. These have to be considered by the Commission and consultants before the final report is written. Apart from the specific commentary on proposals, the distribution of discussion papers has raised the community's consciousness about the problems of the law and efforts being made to tackle those problems in an orderly and routine way.

In addition to the discussion papers and summaries, the Australian Law Reform Commission also publishes papers addressed to particular audiences. In-house research papers are distributed to the appointed consultants and limited numbers of specialist groups who will have a particular contribution to make to a research study of a defined but limited aspect of a project. Issues papers have been prepared at an early phase in the Commission's work on a reference for the purpose of identifying the questions which the Commission perceives as those necessary for answer in discharging the

reference. Orthodox working papers have also been prepared, surveying at length the subject matter of the reference and examining in detail the technical legal questions raised.

The point of this variety can be shortly stated. It is that law reform is not a task for lawyers only, at least in the projects given to the Australian Law Reform Commission on subjects as diverse as the recognition of tribal law of Australian Aboriginals and the protection of privacy in the computer age. Most law reform, if it is to be more than transitory, requires close consultation with the experts involved and consideration of public concerns. Because of the variety of interests aroused by law reform projects, differing audiences must be addressed by consultative documents. The Australian Commission continues to experiment with a number of consultative documents of varying length, technicality and sophistication, to ensure that communication with different audiences is achieved. Although this is time consuming and although it is impossible to communicate with every group in the community, care must be taken to avoid limiting consultation to the "experts" and to engaging in token consultation with those persons only who are likely to be of a similar mind to oneself.

Public Hearings: Consistent with this approach, 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 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".[21] 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".[22]

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".[23]

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 allows sufficient time for the discussion paper 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 or her 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 some 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. 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 6 p.m. to 9 p.m. The aim of this modification will be to ensure that individuals and organisations unable to 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.[24] It must be conceded that the business of sitting in all parts of a country the size of Australia is a time-consuming and physically exhausting one. Furthermore, sitting only in State capitals is not always satisfactory. Some of the provincial cities of the more populous States may have just as much call for a public hearing as the capital cities of the smaller States. In a Federal country, national institutions must observe certain proprieties and the limits of resources and time are always upon the Commission in its consultation procedures.

On occasions, the numbers attending and the quality of submissions disappoint the Commissioners. But this is the exception. As the procedures of public hearings have become better known, and as other bodies engaged in public consultation of this kind proliferate

in Australia in response to the moves for greater openness in government, the willingness of organisations and individual citizens to come forward increases. In contrast to the first two years when public hearings were introduced, the public hearings in 1978 and 1979 have generally been so well attended that they have run far beyond the hours originally fixed, imposing strains on the court reporting service which produces a transcript of the hearings. The hearings also impose rigours on the Commissioners who must generally keep one eye on the airline timetables which impose a discipline on the hearing circuit.

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 representatives of these interests present 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 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 outlined personal case histories 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. It is the practical impediments of cost, delay and simple 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 a 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 appropriate 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" from a remedy for defamatory publications in the 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. The increasing numbers of individuals and organisations attending the public hearings of the Law Reform Commission in Australia evidence one consequence of universal, compulsory education. This is the growing willingness of increasing numbers of citizens to take a part in the improvement of society.

Other law reform bodies in Australia, apart from the national Commission, have experimented with public hearings ancillary to the procedures of reform. The New South Wales Law Reform Commission, which is conducting an inquiry into the reform of the legal profession, decentralised its public hearings. Although the Australian Commission has on a number of occasions sat in suburbs of Sydney and Melbourne, the State Commission in New South Wales took its inquiry to numerous country centres and provincial towns. The Commissioners let it be known that they would be "at home" in a local municipal hall or other office. The Chairman, Mr. Justice Wootten and other

Commissioners conducted informal discussions with people who had complaints about lawyers and suggestions for the improvement of the legal profession, it organisation and the handling by it of complaints against practitioners. Such procedures need to be supplemented by empirical data, including surveys. But the hearings brought the issue before many local communities. They afforded people with experience, the opportunity to render it relevant to the design of new, improved laws.

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 has 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. One Australian Minister recently described the process thus:

> "The Australian Law Reform Commission ... has already done much to popularise the cause of law reform in this country and most of its recommendations have either been adopted or are under close study ... I think its true to say that under the guidance of Mr. Justice Kirby, the Commission has taken law reform into the living rooms of the nation. A matter for which he must congratulated ... for having taken seemingly dry subjects into television programmes ...".[25]

The use of the public media has its dangers. The tendancy of those in command of information distribution to sensationalise, personalise and trivialise information frightens 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.[26]

In Australia, the technique of discussing law reform projects in the media is now a commonplace. 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 Prime Minister of Australia has expressed approbation for this procedure in firm language:

> "We have deliberately set about what I might term 'participatory law reform'. If the law is to be updated, if the advances of science and technology are to be acknowledged and accommodated and if our traditional liberties are to be protected, it is vital that the community governed by the law should take part in helping to frame reforms in that law.
>
> I for one reject the notion that important reforms must be left to the 'experts' ... The Australian Law Reform Commission has ... actively sought to engender public interest in the tasks assigned to it by the Government. The Commission has held public sittings and seminars in all parts of the country. It has distributed widely, tentative proposals for reform and it has stimulated much informed discussion in the media. This process has amply shown that the Australian community will respond to an invitation to participate in the process of legal renewal. Public acceptance of the need for reform in many areas which have long remained untouched is now widespread".[27]

The Governor-General of Australia, Sir Zelman Cowen, himself a past Commissioner of the Australian Law Reform Commission, praised the attempts to involve the community in the work of the Commission:

> "The Commission ... has only been in existence for a very few years, but it has been very active and productive [matching] great intellectual capacity with a flair for publicising the issues of law reform and in doing so, I believe, has attracted public interest to a degree unparalled in my experience. The Commission ... has undertaken the task of law reform in widely diverse areas of the law. It has drawn upon a vast range of community resources; with limited funding it has sought the views and assistance of experts with appropriate and related experience ... The use of television programmes to debate the issues is also a significant illustration of the way in which the Commission seeks to present issues to the public as part of the process of reporting on matters of law reform referred to it ...".[28]

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 involve. 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.

At the heart of the earlier resistance was the notion that a good idea for the reform of the law would always triumph in the end. Professor Michael Zander has reminded us of F.M. Cornford's aphorism, first stated 70 years ago and as relevant today as it was then. Cornford asserted that nothing was ever done until everyone was convinced that it ought now to be done and has been convinced "for so long that it is now time to do something else".[29] Zander adds this warning of his own:

> "A reformer should never assume that a good idea need only be put forward to be acted upon ... In order to be effective it is often necessary to go to the trouble to take the next step. Many people, and especially academics, find this uncongenial. They regard their function as

> completed when they have written their original proposal and put it into circulation in a book or article. But this is to leave everything to chance. It assumes that those who have the power to do something about the proposal will receive the book or article, that they will read it, that having read it, they will not only agree with the writer's view but will feel moved to do something about it and to such an extent that they will 'carry the ball' in the face of the opposition that is bound to develop soon enough from one quarter or another. This is to pile improbabily on improbability.
>
> The danger, in other words, is not so much that one's proposal may be opposed as that it may not even be noticed.
>
> The innocent in public affairs tends to assume that those in authority will automatically get to hear of any new facts or ideas within their area of competence. This is far from being the case. If one believes one has new facts or ideas it is normally necessary to peddle them around before anyone will pay the slightest attention".[30]

Zander is right, in my view, to say that in the business of promoting change in the legal system, the media are "invaluable allies". In the context of the responsibilities of an academic, he puts forward views which apply equally, in my view, to the law reformer:

> "There is still a feeling in some quarters that an academic demeans himself by engaging in journalism. My own view, precisely to the contrary, is that communication with the general public (quite apart from questions of reform) is part of one's proper function as an academic. Apart from one's teaching and ordinary university duties, one should, I believe, try to undertake a full range of activities from scholarly books and articles in learned journals to the experts on one extreme to communication with the lay public through radio, television or newspaper articles at the other. University teachers are paid out of public funds. If they have an expertise in a field in which the public has (or should have) an interest, it is right that it should be made widely available. Disapproval of communication by experts with the general public is mainly intellectual snobbery".[31]

The use of the media necessitates assistance to the working journalist who is often over-awed by the law, judges, law reform commissions and the like, frightened by the mysterious technicalities of the law and concerned at his own ability to present an interesting story without falsifying the

issue or running into retaliation by powerful people. To overcome these impediments and also to ensure a minimum accuracy in media coverage, there should be no inhibitions in preparing the news release which summarises succinctly the issues to be debated. This should be done in an interesting way laying emphasis upon any news value in the story. Simply to regurgitate a technical recommendation in legalese is the best way to invite the edtor's spike for the story. Experience teaches that what is needed is an eyecatching title, a "lead in" that highlights the chief point of the law reform issue, a rapid summary, in simple language, of the main proposals or recommendations and a number of down-to-earth illustrations of the way in which current laws and procedures are not operating fairly. Not only does the preparation of a release of this kind follow the universal practice now adopted in all countries in the business of communicating information. It realistically addresses the journalist's perennial problem of deadlines for news copy. Above all, it contributes to the general accuracy of the report and a more faithful presentation of the law reform proposal. State law reform bodies in Australia have recently complained about distorted news stories of proposals for reform.

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 effect of encouraging the creation of a climate of opinion favourable to the reform of the law.[32] 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".[33]

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 tnat 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 new 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 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, otherwise, 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 have sometimes taken on a flavour of mobilised resistance to reform rather than open-minded consideration of reform proposals.

The Australian Commission has a quarterly bulletin, Reform, which is distributed free of charge to all those, government, judicial, political, administrative and academic, who have legitimate interest in law reform in Australia. Since this bulletin was opened to public subscription for a small fee to cover costs, it has built up and continues to attract a growing readership. An attempt is made through the bulletin to summarise the main themes of law reform in Australia and to do so in a brief and interesting way so that those who are not interested to know all of the details of law reform effort can nevertheless keep themselves generally briefed on the direction in which reform is moving.

The Commissioners are obliged by their statute to co-operate with Parliamentary Committees and from time-to-time appear before such committees, both at a Federal and State level, to answer questions and provide advice. In addition to the Parliamentary Committees, Commissioners attend before party committees, both of the governing and opposition parties, to brief Members of Parliament on the work of the Commission and to discuss projects under consideration in a general way. A recent report of the Australian Senate Standing Committee on Constitutional and Legal Affairs suggests that this was an area in which the Commission's procedures could be improved:

> "The Law Reform Commission, while fully maintaining and asserting its independence, should take into account the likely acceptablility of its proposals to Government and Parliament. To this end, it should in the course of preparing its report, inform itself in the manner and to the extent it thinks necessary or appropriate by consulting with Governments and Opposition politicians and interested community groups. The Government and Opposition parties should fully co-operate with the Commission in any steps it may take to inform itself in this way".[34]

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 and right to a correction order, to supplement the English common law's obsession with money damages as a sanction.

The Commission has also appointed overseas experts, one in the United States and the other in Britain as consultants and by the use of international telephone hook-up has conducted lengthy discussions about the reform proposals. The developments of telecommunications, and in particular of video-telephones, promise exciting new ways of reducing the tyranny of distance which has been a great source of Australia's physical and intellectual isolation.

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[35] 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.[36] A willingness to use surveys was evidenced by Professor Diamond who expressed a preference for this technique over public hearings. The two need not be alternatives.

> "A much more effective way of discovering what people have experienced and what is troubling them is the social survey. I am not much pursuaded of the value of obtaining opinions on matters which have not affected people personally and which they may never have thought about. The dissenting minority on the Committee on the Age of Majority made much of the social survey conducted on our behalf which showed that 'those between 16 and 24 years of age were opposed, by majorities of two to one, to any changes in the law' as to the age of majority. That is what I would have expected of persons who had not been inconvenienced by the old law. But the social survey can be a very useful instrument to

> discover facts such as the Report on Matrimonial Property which present social surveys we had commissioned. This gave us detailed information about the way married people did in fact manage their property and finance affairs and how far they understood and were affected by the law. We placed considerable weight on this information in our First Report on Family Property. The trouble with social surveys is that they are very expensive and take a lot of time. But the Law Commission have not given up the hope that they will be able to 'harness the social sciences to law reform' ".[37]

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. In the project on the reform of debt recovery laws, the Australian Law Reform Commission is working closely with colleagues in the New South Wales Law Reform Commission to scrutinise a survey return on all debt recovery process in New South Wales courts over a period of a year. Each Commission has a reference relevant to the improvement of debt recovery laws. Each came to a conclusion that sound reform, which was likely to last, could only be based on a thorough appreciation of the factual situation as it existed, and detailed study of the way in which current laws were operating. This survey will also be of help in estimating the differential costs of various reform proposals. It is significant that the Scottish Law Commission in its work on a related subject is also in the midst of a survey of a similar kind.[38]

In the Australian Commission's reference on the reform of the laws governing Federal offenders, surveys have been administered to Federal Prosecutors, designed to elicit actual practice in the prosecution of offences. That prosecution decisions can influence punishment by determining whether or not offenders will be charged and, if charged, at what level of offence they will be charged, scarcely admits of dispute. Yet in the part prosecution policies and the criteria adopted have not generally been submitted to open, public scrutiny.

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.

Soon after the survey was distributed, an objection was voiced in one State to the technique adopted and to the utility of the information that would be procured. This objection was widely circulated throughout Australia and though it had its effect upon the judges of that State, it appears to have had little impact on the magistrates of that State or on the judges and magistrates in other parts of the country. In fact, 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[39] 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.[40]

The latest effort of the Australian Law Reform Commission to sample opinion has involved the use of a national opinion poll. At the request of the Commissioners, the publishers of the Melbourne Age newspaper agreed to include in a regular national survey of public opinion, a number of questions designed to measure community attitudes to punishment and, specifically, imprisonment. The questions were designed

by properly qualified public opinion samplers, in consultation with the Commission and a consultant, Dr. Terrence Beed, Director of the Sample Survey Centre of the University of Sydney. At no cost to the Commission, the questions were submitted and the results published and made available to the Commission. As its part of the enterprise, the Commisssion agreed, through Professor Duncan Chappell, Commissioner in charge of the sentencing project, to comment on the public response. This commentary was published in the newspapers of Australia through which the poll was syndicated. It in turn added to the public's awareness of the Law Reform Commission's reference on sentencing. The response certainly showed what social commentators had suspected. There is a fairly strong move afoot towards a more retributive view of punishment and a disillusionment with the rehabilitationist ideals of the 1950s and 1960s. However uncomfortable the findings of the opinion survey may be, it is important for reformers in a democracy to be aware of them. An ostrich-like attitude to the relevance of public opinion for the reform of the law is as likely as not to come undone when the proposals are before Parliament. The age-old debate of whether it is the business of reformers to lead society or to reflect current social attitudes is not postponed by a stubborn refusal to discover accurately what those social attitudes are.

SPECIAL PROCEDURES OF CONSULTATION

Consulting Aboriginals: Apart from the efforts utilised to consult the general community about proposals for reform, special attempts must be made to consult particular communities within the country, who suffer disadvantages in communicating their information and opinion to the law reform Commissioners. A number of the references before the Australian Commission illustrate this problem and the means adopted to overcome it. One task raises the question of whether, contrary to current general practice, the Australian criminal justice system should recognise in any way the traditional law of Australian Aboriginals. Although the majority of Aboriginals now live in cities around Australia and many have been fully assimilated into the Australian community, a sizeable and growing minority live in outback towns and on

the outskirts of country settlements. A still smaller (but for the purposes of the reference, most significant) minority live in the remote vastness of the Australian inland, cut off from all but the most occasional contact with white Australians. It is for this last mentioned group that the Australian criminal justice system must, on occasions, appear most irrelevant and even unjust. Any attempt to consult this community of Australian citizens in the orthodox manner of a law reform commission, by working papers, seminars and public hearings, is doomed to failure. Even the use of social scientists and anthropologists has its difficulties because it is of the nature of traditional Aboriginal customs that they are secret and may often be revealed only to initiated Aboriginals or those outsiders who gain their special confidence. The difficulties of communication and consultation about the problem, let alone the various options for solution, are daunting. However, the Commission, having received the reference, cannot indulge the luxury of despair. In fact, Commissioners and the research staff have already engaged in a number of field visits in the remotest parts of Australia. Sitting in the midst of Aboriginal communities, inaccessible except by the most arduous of journeys, Commissioners and staff have discussed with the people affected, the ways in which the current legal system operates unfairly and various options for the improvement and reform of that system. Winning the confidence of Aboriginals living after the traditional mode is not easy in the short time available. The Commission must visit many remote areas of the country and talk with Aboriginals having quite different view points, different exposure to Western civilisation and different experience with its criminal justice system. But if the procedures of consultation mean anything, they require an effort that goes far beyond tokenism and reaches out to those who will be affected by a reform proposal.[41]

Sampling Prisoners: In its task on the reform of sentencing law, the Commission has also sought out prisoner opinion. With the aid of one of its consultants, Dr. G.M. McGrath, the Commission has distributed a national survey of offenders to all Federal prisoners throughout Australia. By arrangement with State prison authorities, the questionnaire is

being returned to the Commission uncensored and unreviewed in any way. An envelope has been sent to all prisoners permitting them to seal it and return the survey directly to the Commission. Not only is the opportunity given to express opinions, but factual evidence in relation to the prisoner's own experience is sought by a series of questions about bail, the trial, prison and parole. The physical confinement of prisoners and their distribution in gaols scattered over the continent make surveys of this kind the only realistic way of securing their relevant contribution to the Law Reform Commission's perceptions of the needs for reform.

Consulting Children: The project on the reform of child welfare laws involves the special difficulties of communicating with young children. Again, it would be idle to expect them to appear at public hearings or to respond to discussion papers. Although a facility to make submissions in camera is offered, and sometimes taken at public hearings, in the case of children, this might only ensure that their parents' point of view was voiced. It is necessary to ensure that the Commission is aware of at least some children's perceptions of the problems of young people in trouble with the law. Accordingly, the Commissioners are attending sessions at a cross-section of Canberra schools. Small, informal meetings with representative groups of school children have been arranged, with the co-operation of school authorities. A number of specific issues relevant to child welfare reform are identified in advance of the meeting and then discussed in an unstructured way with the children. The schools visited include public, private and church schools, schools in richer and poorer suburbs and schools run according to unorthodox as well as orthodox teaching traditions. The result is not, of course, perfect or particularly scientific. But the alternative is to fail entirely to consult children and to make the error of perceiving child welfare laws from the viewpoint only of adults.

The Views of Ethnic Minorities: One large minority in Australian society is increasingly having its voice heard. They are migrant, non-English speaking residents and their children, most of whom come from countries with legal

traditions quite different from those of the Anglophone majority. Special efforts are made to distribute information about the work of the Law Reform Commission through the 300 ethnic newspapers now published in Australia. Representatives of ethnic organisations and institutions established to voice ethnic concerns are carefully consulted in every project. Many of the reports of the Australian Law Reform Commission include recommendations relevant to the recognition needed in the legal system, of the presence in Australia of large, non-English speaking communities.[42]

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 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.[43] 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 legal renewal than has been the case in the past.

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. They are entirely consistent with other moves being taken in Australia to make public administration more directly accountable to the individual citizen. I refer to the establishment of Ombudsmen in all jurisdictions, the creation of the Administrative Appeals Tribunal, the passage of the Administrative Decisions (Judicial Review) Act 1977, which confers a right to reasons for administrative decisions and the introduction of the Freedom of Information Bill 1978. Public administration and the preparation of laws have hitherto been a rather secretive process. 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 encouragement of community as well as expert participation in law reform machinery may also have indirect effects which are beneficial. The social education that is involved in explaining the defects in the law may help to generate a perception of the injustices that would otherwise be shrugged off, overlooked or, worst of all, not even perceived. A discussion over a number of years, in a thoroughly public way, of alleged unfairness in this or that law or practice tends, in a liberal society, to promote a gradual acceptance of

the need to remove proved injustice repeatedly called to attention.

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 there is regular, routine machinery to identify injustice 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 the conviction that means are not really 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 communities is, after all, only worth boasting of if the rules which the law enforces are just and in tune with today's society.

FOOTNOTES

1. R.D. Nicholson, "Law Reform and the Legal Profession" (1977) 51 Australian Law Journal 396.

2. See J.M. Bennett, "Historical Trends in Australian Law Reform" (1969-70) 9 West. Aust. L.Rev., 213.

3. A short history of Colonial and post-Federation law reform in Australia is contained in Australian Law Reform Commission, Annual Report 1975 (ALRC 3).

4. ibid., ALRC 3, 39-42; ALRC 5 (1976), 48-52; ALRC 8 (1977), 21-24; ALRC 10 (1978), 23-24.

5. The Law Reform Commission of Western Australia, Annual Report 1977-1978, 34-37.

6. A. Diamond, "Law Reform and the Legal Profession" (1977) 51 ALJ 396,405.

7. ibid., 400.

8. Cf. M.A. Waldron, "The Process of Law Reform: The New B.C. Companies Act" (1976) 10 Brit. Col. L. Rev. 179.

9. Diamond, 400.

10. Lord Scarman, The Jawaharlal Nehru Memorial Lectures, 1979 "Law Reform - The British Experience", mimeo Lecture 2, 3-4.

11. Cf. Lord Diplock's criticism of the Law Commission (1974) 33 Cam. LJ 245.

12. M.L. Friedland, "The Work of the Law Reform Commission of Canada", mimeo, an address delivered to the Lawyers' Club of Toronto, 9 March 1972, 2.

13. Diamond, 400.

14. N. Marsh, "Law Reform in the United Kingdom: A New Institutional Approach" 13 William and Mary L. Rev. 263,276 (1971).

15. Diamond, 403.

16. Scarman, 3.

17. Diamond, 405.

18. ibid.

19. N.S.W. Law Reform Commission, Discussion Paper 1 "The Legal Profession: General Regulation", 1979, 193.

20. Law Reform Commission Act 1973 (Aust.), s.23(1).

21. Diamond, 406.

22. Scarman, 4.

23. Marsh, 279.

24. G. Sawer, "The Legal Theory of Law Reform" (1970) 20 Uni. Toronto LJ 183, 194. For a discussion of the methodology of United States Congressional inquiries as a medium of law reform see S. Breyer, "Analysing Regulatory Failure, Mismatches, Less Restrictive Alternatives, and Reform" 92 Harv. LR 549 at 607 (1979) ("The .... function served by the hearing was as a drama, which helped mobilise public and political support for regulatory reform. To analogize a legislative hearing to a judicial or fact finding hearing is to miss an essential difference: the legislative hearing has an educational objective and a political purpose. ....").

25. R.J. Ellicott, Q.C., M.P., Opening Speech "Class Actions", Conference of the N.S.W. Chamber of Manufactures, 28 May 1979, mimeo 1.

26. M. Zander, "Promoting Change in the Legal System", Inaugural Lecture 9 November 1978, mimeo 16.

27. J.M. Fraser, speech at the opening of the Australian Legal Convention (1977) 51 ALJ 343.

28. Sir Zelman Cowen, speech at the opening of the International Bar Association meeting, Sydney September 1978 cited [1978] Reform 63.

29. J.M. Cornford, Microcosmographia Academica, cited in Zander 3.

30. Zander, 12-13.

31. Zander, 15-16.

32. Zander, 16.

33. Zander, 16-17.

34. Australian Parliament, Senate Standing Committee on Constitutional and Legal Affairs, "Reforming the Law", May 1979, 93 (Recommendation 5.1).

35. J.H. Farrar, "Law Reform and the Law Commission", 1974, 125.

36. Cf. the writings of J. Baldwin and M. McConville, e.g., Allegations against Lawyers [1978] Crim L.R. 741.

37. Diamond, 406. The reference to harnessing the social sciences is from the 7th Annual Report of the Law Commission, 1971-72, para.2; Cf. 11th Annual Report of the Law Commission, 1975-6, para.6-8.

38. Scottish Law Reform Commission, Annual Report 1977-8, para.37.

39. Zander, 18-34.

40. Several other surveys were conducted by the Australian Law Reform Commission. See Alcohol Drugs and Driving" (ALRC 4), 1976, 90-91 (Public opinion poll on random breath tests). The N.S.W. Commission has also conducted surveys in relation to its inquiry into the legal profession.

41. The opportunity is also taken to consult with judges, magistrates, police, local community leaders, including members of the white community in remote districts.

42. Australian Law Reform Commission, Criminal Investigation (ALRC 2), 1975, Ch.9, Special Problems of Minority Groups; ibid., Unfair Publication (ALRC 11) 1979, Group defamation 52-4.

43. Zander 35.