ATTORNEY-GENERAL'S DEPARTMENT

JUNE 1983

UNIFORM LAW REFORM

June 1983

THE LAW REFORM COMMISSION

NOTE FOR THE ATTORNEY-GENERAL

NATIONAL LAW REFORM ADVISORY COUNCIL

OPTIONS PAPER

STATEMENTS OF POLICY

1. In the Prime Minister's policy speech before the March 1983 Federal Elections, a number of proposals were made concerning the law reform program of the new Government. One of the announced proposals was:

> The creation of a national Law Reform Advisory Council with representatives from law reform agencies and both sides of politics in every Parliament to co-ordinate uniform law reform developments.

2. A proposed action priorities program for the Attorney-General's Department for 1983-5, issued as a discussion draft on 13 February 1983, included the following item, which was attributed to discussions in the Labor Attorneys-General and Shadow Attorneys-General meetings, item I-18.

> 29. Establish, in co-operation with the States, a national Law Reform Advisory Council (with representatives from law reform agencies and both sides of every Parliament) to co-ordinate national and uniform law reform developments in areas of appropriate need, including criminal justice, commercial regulation, consumer and environment protection, road and industrial safety and gun control.

The program item was assigned a priority rating 1C. This indicated a desire to work to a target date of achievement before the end of 1983.

3. The law and justice policy of the Australian Labor Party contained a brief discussion of the proposal to establish the national Law Reform Advisory Council:

There are eight major Law Reform Commissions in the Commonwealth, the States and the Territories in addition to numerous other working parties and committees of review. The law reform agencies meet occasionally in conference but there is no official co-ordination of law reform on a national basis. The national Law Reform Advisory Council will comprise representatives from law reform agencies and from both Government and Opposition in the Commonwealth and each State and Territory. Its brief will be to co-ordinate national and uniform law reform developments, as has been done for many years by the uniform law commissioners in the US and Canada.

4. Also relevant is the proposal, announced in the same document, to create a full-time Secretariat to serve the Standing Committee of Attorneys-General and the proposed Council.

The Standing Committee meets infrequently and has no permanent Secretariat of its own. Little wonder that it has become a graveyard for law reform proposals rather than a vehicle for their implementation. Labor will establish a full time Secretariat to serve it and the Advisory Council to ensure that between meetings there is continuing work on the preparation and implementation of proposals for law reform.

5. Amongst matters listed where uniform law reform is to be encouraged were:

* consumer protection laws;
* road and industrial safety laws;
* crimes compensation;
* criminal investigation;
* complaints against police;
* sentencing and parole;
* transfer of prisoners;
* privacy; and
* deceptive electoral advertising.

6. On 28 and 30 March 1983, the Attorney-General met the Chairman of the Law Reform Commission (ALRC) and requested the preparation of a paper outlining various options for the establishment of the national Law Reform Advisory Council. On 3 May 1983, Commissioners of the ALRC met to discuss the proposal with members of the New South Wales Law Reform Commission (NSWLRC). Correspondence has also been received on the issue from the Chairman of the Tasmanian Law Reform Commission (TasLRC).

The issue of better co-ordination between Australia's law reform agencies has been added to the agenda for discussion at the 8th Australian Law Reform Agencies Conference (ALRAC) to be held in Brisbane 1-2 July 1983. The Attorney-General is to address that Conference. This paper, in accordance with the Attorney-General's request, presents a brief discussion of options available for the establishment of a national Law Reform Advisory Council.

THE PROBLEM

7. General Statement. A general statement of the problem of achieving uniform law reform in Australia is conveniently found in the recent book in which the Attorney-General, himself, took a leading part. See J McMillan, G Evans and H Storey, Australia's Constitution : Time for Change?, 1983. In Chapter 4, dealing with the division of legislative power, a section is devoted to 'uniform law reform' (see p 97). The text describes diversity of law in Australia as 'least obviously defensible' in areas such as business regulation, industrial relations and family law. Many other areas of the law are identified as suitable for uniform treatment, within a general framework of diversity of laws inevitable in a federation. Some are areas where problems have already arisen from diversity of law such as:

* consumer credit;
* food and drug standards;
* defamation.

8. Others are areas where new problems, particularly as a result of new technology, present the need for fresh and preferably national legislation (eg bio-technology). The authors state that, assuming some areas of the law are appropriate for uniform treatment, the question remains as to how this uniformity might best be achieved:

* by re-alignment of the Federal divisions of constitutional power;
* by institutional machinery of co-operation that avoids the necessity for constitutional change.

9. Essentially, discussion of uniform law reform machinery is discussion of the second option. In the past, there has been some achievement of uniform law reform through the Standing Committee of Attorneys-General (SCAG). The list is short but includes hire purchase legislation, child maintenance legislation, adoption and laws on the sale of human blood. The authors referred to the numerous impediments in the way of achieving uniformity through SCAG:

* protracted delays whilst officials and politicians worked towards argeement on a model law;
* still further delays in getting the law adopted by seven or possibly eight legislatures;
* the tendency to opt for the lowest common denominator of acceptability in order to achieve uniformity;
* subsequent presentation of the uniform package to the respective Parliaments by the Executive Government, effectively as a fait accompli;
* difficulty in updating and amending legislation, once passed and a tendency for disuniformity to creep in.

10. At this point, the authors outline the reforms that have been proposed to take account of the criticisms of the current machinery for the achievement of uniform laws in Australia:

> Reforms have been proposed ... for example : integrate the work of the Commonwealth and State law reform agencies to avoid duplication of work; replace all those agencies by a single national Law Reform Commission; make the Standing Committee of Attorneys-General a more effective body by providing it with a permanent Secretariat; or establish a national Law Reform Advisory Council comprising representatives of the various Parliaments (from both Government and Opposition sides) and law reform agencies. Similar bodies exist in the United States and Canada, which have been reasonably successful in promoting model Bills that have been adopted over the years by many of the State and Provincial legislatures.

11. Specific problems. Examining Australia's current law reform machinery, it is plain that a number of specific problems exist in adapting existing institutions to respond to the perceived need for the development of uniform laws in chosen areas. Among the problems are:

(a) Small resources. All of the law reform agencies in Australia are small, with heavy work programs, small personnel numbers and increasing demands placed on them. The annual incomes of the major Australian LRCs are as follows (excluding judicial salaries in some cases):

ALRC	$1,065,879
NSWLRC	737,000
WALRC	558,000
VLRC	300,000 (est)
QLRC	184,474
SALRC	Nil
NTLRC	66,250
TasLRC	35,600

Any proposal for major uniform law reform work programs, involving the existing law reform agencies, must take into account the small resources of those agencies. They are already extended on work in their own jurisdictions. The addition of major uniform law reform tasks would require additional resources. As this prospect seems unlikely at present, a question raised is whether it is possible to adopt a more efficient utilisation of the reports of particular agencies, so that they can, with adaptation, be used in other Australian jurisdictions.

(b) Duplication: The lastmentioned question, arises naturally out of a consideration of the present duplication of law reform effort in Australia. Such duplication is illustrated vividly in the pages of The Law Reform Digest. This publication takes given areas of the law and collects the details of the reports and recommendations of the Australian law reform agencies. A few items, taken at random, indicate the extent of duplication in law reform effort in Australia:

* Bail
  ** ALRC 2 Criminal Investigation 1975
  ** PNGLRC 4 Arrest Search and Bail 1976
  ** QLRC 25 Bail in Criminal Proceedings 1978
  ** SALRC 2 Criminal Investigation 1974
  ** TasLRC 11 Powers of Arrest, Search and Bail 1977
  ** VSLRC D3 of 1959 Powers of Members of the Police Force to Release Persons on Bail
  ** VSLRC D6 of 1959 Law and Practice in Respect of the Granting of Bail
  ** VSLRC D11 of 1974 Bail Procedures
  ** WALRC 64 Bail 1969
  ** NZCLRC Report on Bail 1983 (this is a recent report, not in the Digest)
  ** ACTCLRC Bail 1983 (current project)

* Defamation
  ** ALRC 11 Unfair Publication : Defamation and Privacy 1978
  ** NSWLRC 11 Defamation 1971
  ** SALRC 15 Reform of the Law of Libel and Slander 1972
  ** VSLRC D13 of 1955 Law of Defamation
  ** WALRC 8 Defamation : Privileged Reports 1972
  ** WALRC 8 Defamation 1979

* Evidence - General

  The entry under 'Evidence - General' in The Law Reform Digest lists no fewer than 45 Australian law reform reports dealing either with the general issue of evidence reform or particular aspects of evidence law, including:

  ** ALRC Federal Evidence Law (current project)
  ** NSWLRC 17 Evidence (Business Records) 1973
  ** NSWLRC 29 The Rule Against Hearsay 1978
  ** NZTGLRC Hearsay Evidence 1967
  ** QLRC 19 Evidence 1975
  ** SALRC 10 Evidence Act 1969
  ** SALRC 21 Evidence taken out of the Jurisdiction 1971
  ** TasLRC The Hearsay Rule 1972
  ** VSLRC D5 of 1951 Evidence Bill
  ** VSLRC D11 of 1958 Evidence Acts
  ** WALRC 27 The Admissibility of Computer Evidence

* Imperial Law
  ** ACTLRC Imperial Acts in Force in the ACT 1973
  ** NSWLRC 4 Application of Imperial Acts 1967
  ** SALRC 54, 55, 59, 61 Inherited Imperial Statute Law
  ** VSLRC D4 of 1922/D10 of 1979 Imperial Acts Application Bill

There are numerous other instances of duplication scattered throughout the entire text of The Law Reform Digest. Some special attention to the local variations in the law would undoubtedly be warranted. Some saving of time would often be achieved by utilising work done earlier by other law reform bodies, if known. However, the devotion of the scarce law reform resources in Australia to the review of identical or very similar areas of the law is a major lesson to be drawn from the Digest.

(c) Pressures for reform. If there were not large contemporary pressures for law reform, arising from changing social circumstances, moral attitudes and technology, the duplication of effort would be accepted as yet another inevitable attribute of the Federal system. That system involves duplication, including of laws, to be justified by arguments of history, decentralisation and protection of freedom. The objective of better co-ordination of law reform effort is not proposed as a means of dismantling or even significantly affecting the basic Federal division of powers. What is in issue is a recognition of the scarce resources, a realisation of the high present levels of duplication of effort and an endeavour to find, in some areas at least, an appropriate institutional mechanism to direct the aggregate national law reform effort in a more efficient and cost effective way.

CURRENT CO-ORDINATION IN AUSTRALIA

12. Digests and Indices. There is already some co-ordination of law reform effort in Australia, at least to the extent of:

* the exchange of information between law reform agencies;
* occasional use of the report of one law reform agency, with or without modifications, for the law of another jurisdictions.

13. So far as the exchange of information among Australian law reform agencies is concerned, the following means are used:

(a) The ALRC bulletin Reform, published quarterly, with information on law reform topics. Each issue of Reform contains a list of:

* new reports issued by Australian and overseas LRCs;
* new references given to the LRCs;
* a current report on the program presently before each LRC in Australia, New Zealand and Papua New Guinea.

(b) The ALRC will in mid-1983 publish The Law Reform Digest. This publicaton collects a digest of all law reform reports published by LRC's in Australia, New Zealand and Papua New Guinea between 1916 and 1980. It is arranged according to topics generally compatible with the Australian Digest. It identifies and classifies reports and follow-up legislation. This publication is expected to become an important working tool of Australasian LRCs and indeed LRCs in all common law countries. It will ensure that work on references henceforth cannot

proceed without full knowledge of any work already done by Australasian agencies. It will thereby reduce needless duplication and maximise the use to which completed reports and consequent legislation are put. In the past, the inadequate indexing of LRC reports frequently meant that work of other agencies was not discovered or was discovered long after work was well advanced.

(c) The ALRC previously published the interim Law Reform Digest with an index of LRC reports from Australia and throughout the Commonwealth of Nations. Although called a 'digest', this was in fact an index of LRC reports, working papers and other consultative documents. Its main use was in providing a rapid checklist of relevant overseas law reform reports, including by LRC's, Royal Commissions, Committees of Inquiry and so on. Production of this index system was discontinued in 1979 because of lack of resources in the ALRC. There is now no readily available specialised index to law reform reports being produced around the world. The gap will not be filled by The Law Reform Digest. This is confined to the region. Its contents terminate in 1980. It contains detailed analyses of recommendations and not a readily compilation of LRC publications. An index of law reform projects previously published by the Institute of Advanced Legal Studies in London has also been discontinued, apparently for want of resources. The result of poor indexing and analysis of LRC reports is continuing duplication of law reform effort and the failure to maximise law reform work already done.

(d) Exchange of publications is a well established feature of Australian and overseas LRCs. There is now an established exchange between all law reform bodies throughout Australia and the Commonwealth of Nations. This exchange proceeds free of charge and on a reciprocal basis. Most LRCs have an established library of law reform publications. This library is normally the first place to which LRCs, receiving a new reference, will have access.

(e) The Commonwealth Law Bulletin published by the Commonwealth Secretariat in London provides a regular summary of LRC reports. This bulletin provides a useful analysis of law reform reports and trends throughout the Commonwealth, including throughout Australia.

14. Interjurisdictional copying. So far as the utilisation of law reform reports by other jurisdictions is concerned, the tendency exists but is unsystematic, intermittent and unco-ordinated. Taking reports of the Australian Law Reform Commission as an illustration, it can be seem that a number of these have lead to legislation or proposed legislation in the States:

* ALRC 1 Complaints Against Police. Substantially implemented Cwlth and NSW; aspects implemented Vic and Qld.
* ALRC 2 Criminal Investigation. Aspect (bail) implemented NSW; substantial implementation promised Cwlth.
* ALRC 4 Alcohol, Drugs and Driving. Implemented ACT.
* ALRC 6 Insolvency : Regular Payment of Debts. Implemented SA.
* ALRC 7 Human Tissue Transplants. Implemented ACT. Substantially implemented Qld, NT, WA, SA and Vic. Proposed implemention NSW.
* ALRC 9 Complaints Against Police. See ALRC 1.
* ALRC 11 Unfair Publication. Proposed uniform law promised July 1983.
* ALRC 12 Privacy and the Census. Implemented in part, Cwlth.
* ALRC 14 Lands Acquisition and Compensation, Substantially implemented NT; proposed substantial implementation Cwlth, Vic.
* ALRC 16 Insurance Agents and Brokers. Proposed for implementation Cwlth.
* ALRC 18 Child Welfare. Unknown.
* ALRC 20 Insurance Contracts. Unknown.

15. The process has not been confined to State copying of Commonwealth laws. The Commonwealth substantially adopted the report of the NSWLRC Evidence (Business Records) 1973 (NSWLRC 17) in the Evidence Act 1905 (Cwlth), Part IIIA. The NSWLRC approach has also been adopted in other State jurisdictions. The influence of law reform proposals adopted in one State and their tendency to spread to other States can be seen in many areas of the law. Random examples that spring readily to mind include reform of the laws on censorship, mental health, homosexual offences, consumer credit, rape within marriage, suitors fund legislation and so. Chief Justice Bray of South Australia once described diversity of laws in Australia as 'the protectress of freedom'. It can permit experimentation in one jurisdiction which might not be ventured throughout the whole continent but, once seen to be effective and just, is available to be copied in other Australian jurisdictions. This is an advantage of the Federal system in a country comprising scattered communities of people enjoying a fairly high degree of homogeniety in race, culture, language and legal systems. But at the moment, the tendency to borrow law reform proposals, wherever originating, from one jurisdiction and using it in another, seems very much a matter of chance. Sometimes lobby groups (such as those that argue for reform of the laws on rape or homosexual offences) can promote the legal borrowing. Sometimes powerful business interests, arguing for the efficiencies of uniform commercial laws, can promote borrowing and even discussion at the Standing Committee of Attorneys-General. But the whole process is very much a matter of chance. Its success appears to depend upon the interests of particular politicians or officials, chance factors such as local publicity given to particular problems or powerful lobby groups rather than a systematic, routine and orderly examination, in one part of Australia, of the success or

failure of law reform experiments introduced elsewhere. It is not possible in this paper to review the large question of the exchange of information between law and law related departments throughout Australia. But within the small sphere of law reforming agencies, it is possible to contemplate a better system of co-ordination and co-operation than presently exists.

16. ALRAC Conferences. Since 1973 there has been an established forum for the Australian law reform agencies. This is the Australian Law Reform Agencies Conference (ALRAC). The Conference has now settled into a fairly regular pattern of meetings associated with the biennial meetings of the Law Council of Australia's Australian Legal Convention. The ALRAC Conference also meets intermittently between such Conventions. The record of the meetings held to date and the relevant host agency are as follows:

(1) 1973: Sydney (NSWLRC)
(2) 1975: Sydney (NWSLRC)
(3) 1976: Canberra (ALRC)
(4) 1977: Sydney (ALRC)
(5) 1979: Perth (WALRC)
(6) 1980: Hobart (TasLRC)
(7) 1982: Adelaide (SALRC)
(8) 1983: Brisbane (QLRC)

17. The arrangements for the ALRAC meetings are informal. They normally involve:

* A planning committee comprising the Chairman of the ALRC, the Chairman of the host agency and the Chairman of the preceding host agency to decide on the agenda.
* Invitations and notice of meeting are then distributed by the host agency.
* The host agency arranges the venue and covers basic costs.
* ALRAC meetings are typically opened by the Attorney-General or Chief Justice of the jurisdiction of the host agency.
* Meetings generally last 1-2 days.
* Meetings include a round table review of current programs and important developments in each participating agency, together with a small number of set speeches on themes of general interest, e.g. cost/benefit in law reform; methods of consultation in law reform; empirical research and social sciences in law reform, etc.
* The minutes of the ALRAC meetings, together with the verbatim record are prepared by the host agency.
* Publication of the minutes and record is an unsatisfactory position.

** The ALRC published the record of meetings 1, 2 and 3.

** The WALRC published the record of meetings 4 and 5.

** The record of meetings 6 and 7 remain unpublished and it is uncertain whether resources will be available to the QLRC to publish the record of meeting 8.

18. ALRAC resolutions. Typically, meetings of ALRC proceed by consensus. Few resolutions have been passed. The only resolution passed so far by the ALRAC meetings were:

* ALRAC 1 Procedures for uniform law reform (1975).
* ALRAC 2 Assignment of uniform law reform project to particular agencies (1975).
* ALRAC 3 Assignment of further projects jointly to LRCs (1975).
* ALRAC 4 Assignment to the ALRC of the clearing house functions for Australian LRCs (1975).
* ALRAC 5 Reform and The Law Reform Digest (1976).
* ALRAC 6 Venue of 4th Conference.
* ALRAC 7 Thanks to overseas visiting LRCs.
* ALRAC 8 Variation concerning Digest (1977).
* ALRAC 9 Venue for 5th meeting.

The records of the 6th and 7th ALRAC meetings are not available to disclose any further resolutions passed. However, in the light of the experience of the ALRAC in respect of uniform law reform, there has been a diminished inclination to formulate resolutions. More recent ALRAC meetings have been more in the nature of low-key exchanges of information and opinion.

19. Regional participation. The participation of the New Zealand Law Reform Council and the New Zealand Law Reform Committees, together with the Papua New Guinea Law Reform Commission are always invited in ALRAC meetings. There is normally representation from New Zealand and Papua New Guinea. In addition, participation has been invited from other law reform agencies. Amongst countries which have sent participants to the ALRAC meetings are the Alberta RLRR, Canada LRC, Fiji, France, India, Malaysia, Mauritius, Nauru, Nigeria, Ontario LRC, Sri Lanka, United States of America, the Law Commission of England and Wales and the Commonwealth Secretariat. In addition to the Australian law reform agencies, it has also become traditional to invite participation at ALRAC meetings of the Law Council of Australia, the NSW Law Foundation and Victoria Law Foundation and the Criminal Law Review Division of the NSW Department of the Attorney-General.

20. ALRAC and uniform law reform. The first resolutions of the ALRAC Conference were passed unanimously at the Second Conference in 1975. The Attorney-General, Senator Evans, participated in the Conference as a part-time member of the ALRC. The Conference resolved to recommend to the Standing Committee of Attorneys-General (SCAG) a procedure with reference to the promotion of uniform laws:

* that the LRCs, acting together from time to time, should suggest to SCAG subjects thought appropriate for uniform laws;
* that where appropriate the agencies also suggest the LRC(s) which should co-operate in formulating proposals;
* that SCAG decide subjects appropriate for investigation with a view to uniform laws and the LRC(s) to be involved;
* that the LRC(s) maintain close liaison with other agencies which should co-operate; and
* that, the tasks having been performed, the LRCs acting together then make recommendations to SCAG as to suggested uniform laws.

21. Acting on the assumption that this procedure would find favour, a number of suggestions were made recommending that SCAG should assign particular tasks to particular law reform agencies (Resolutions ALRAC 2, 3). See Australian Law Reform Agencies Conference, Minutes of the Second Conference, April 1975 in Record 13). Meeting shortly after the adoption of the resolutions by the ALRAC, the Standing Committee of Attorneys-General in July 1975 rejected the procedure proposed by the ALRAC. See ALRC 3, 52. The Annual Report of the ALRC for 1975 commented:

> An opportunity for significant practical progress in uniform law reform in Australia has been missed. When will it present itself again?

A signatory to that report was the present Federal Attorney-General.

22. At the third ALRAC Conference in 1976, Mr David Malcolm sought to propose a reconciliation between the desire of the combined ALRAC to contribute to uniform law reform and the desire of the Attorneys-General, expressed in the July 1975 rejection, to retain close political control over projects of law reform given to their agencies. He suggested instead:

* the law reform body might refer a suggestion for uniform law reform to its own Attorney-General;
* such Attorney-General could then decide whether to raise the matter with SCAG;

* the SCAG might decide to adopt the matter as a uniform law project and, if so, to refer it to a particular LRC with or without priority;
* in the light of a report to the Attorney-General, he could bring such report to SCAG;
* the SCAG should then decide whether to recommend legislative action and, where necessary, refer the matter to Parliamentary Counsel's Committee for final draft legislation.

23. A number of projects since 1976 have proceeded roughly along these lines. There have been no achievements of uniform law reform completed in this way. However, the WALRC has been especially active in promoting the notion of particular agencies working on uniform projects. It has, for example, secured terms of reference on review of the law relating to the formalities of oaths, declarations and attestations of documents. This project was to be done in consultation with the QLRC, but progress has not been significant. The WALRC has also, at the request of the SCAG received a reference to enquire into aspects of the law relating to medical treatment of minors, with a view to proposing a uniform law. The SCAG has also been examining the ALRC report on defamation law reform, with a view to a uniform defamation Act. A Draft Bill for a uniform defamation law has been promised by the SCAG at its meeting in April 1983. It is anticipated that the uniform Bill will be ready by July 1983.

24. Co-operation between agencies. In addition to the conjoint co-operation through the ALRAC, there have been cases of co-operation between particular agencies on specific references. Examples include:

* defamation : ALRC, WALRC;
* evidence law reform: ALRC, NSWLRC, VCJC;
* debt recovery law reform: ALRC, NSWLRC, TasLRC;
* privacy: ALRC, WALRC.

25. These exercises in co-operation include the association of personnel in meetings and in exchange of in-house documents, (sometimes) the appointment of a Commissioner of another LRC as a consultant, co-operation in empirical work and even some joint funding of research or study projects. Shortly after production of the ALRC report on defamation law reform, the WALRC produced its report on defamation reform in the form of commentary on the ALRC report. It is anticipated that a similar procedure will be followed by the WALRC in respect of the forthcoming report of the ALRC on privacy. There has been an exchange of research effort between the ALRC and the WALRC on privacy and numerous meetings between members and staff. However, in each case the overwhelming research responsibility has remained with the ALRC. The WALRC

contribution is, significantly, largely an ex post commentary designed to express approval or disapproval of particular recommendations and adaptations that would be necessary for adoption of proposed reforms in the Western Australian legal scene.

26. Critique of present arrangements. A review of the current arrangements for uniform law reform in Australia suggests the following critique:

(a) Few achievements. The achievement are notably few, indeed not a single uniform law has yet been achieved by institutional co-operation between law reform agencies in Australia.

(b) Achievement otherwise. The only notable recent achievement in uniform law reform origination in a LRC is the virtually uniform legislation on human tissue transplants following ALRC 7. However, this legislation has resulted from pressures from the medical profession, the Ministerial Council of Health Ministers and favourable public commentary rather than any effort by lawyers, law reform agencies or SCAG. No other law reform agency was involved in ALRC 7 either before, during or after the report.

(c) Political divisions. The political circumstances in which SCAG rejected ALRAC resolutions of 1975 are not exactly replicated in 1983. However, there are symptoms of the same political divisions which must be frankly recognised. The Tasmanian Dams case and the strong political feelings demonstrated at the Constitutional Convention in Adelaide could mar achievement in SCAG. On the other hand, the common political orientation of the Attorneys-General of the Commonwealth, NSW, Vic, SA and WA suggest that some progress in selected areas might be achieved. It is notable that the suggestion of a Uniform Law Reform Council arose out of earlier discussions in the meetings of Labor Attorneys-General and Shadow Attorneys-General, when many of the present Labor Governments were in Opposition.

(d) Continuing duplication. The present procedures are not systematic. There have been relatively few efforts to mobilise particular agencies on programs agreed to be urgent for law reform treatment. Despite the procedure suggested by Mr. Malcolm and adopted once or twice, the phenomenon of the duplication of law reform effort continues. Current examples include, and there are doubtless others:

* admiralty jurisdiction: ALRC, QLRC
* insurance contracts: ALRC, NSWLRC (as to part)
* in vitro fertilization: VLRC, NSWLRC (p.d.), Qld Cttee, WA Cttee
* evidence: ALRC, NSWLRC, QLRC, WALRC
* criminal records expunction: ALRC, WALRC
* administrative review: ARC, WALRC
* sentencing: ALRC, TasLRC

(e) Varying scope and inclination of LRCs. The scope of operation of particular law reform agencies varies not only in accordance with resources and manpower, but also in accordance with the kind of projects which the agencies have typically had before them. Virtually all of the ALRC projects have been devoted to large policy issues (such as recognition of Aboriginal customary laws, the introduction of class actions and review of criminal investigation). The NSWLRC, having for its first 15 years tackled technical 'lawyers law' areas, is now clearly also embarked on large policy issues (such as reform of the legal profession, de facto relationships and accident compensation). At the other end of the spectrum are small, part-time bodies made up of otherwise busy practising lawyers, such as the NTLRC, SALRC and VCJC. These committees have minimal research resources other than the part-time members themselves. They, accordingly, tend to tackle small projects which are self-contained and which typically avoid large policy questions. This is less true in the case of the SALRC and more true in the case of the VCJC. Obviously, the scope, the ability and perhaps the inclination of these smaller agencies to tackle major projects of uniform law reform for the whole country are distinctly circumscribed:

** they would not have the research resources;
** they would not have the appropriate experience in nationwide consultation;
** they would not have the resources necessary to engage in the painstaking task of consulting government and private interest groups in eight jurisdictions;
** they would not have the resources to process submissions;
** they would not have the funds or resources to conduct public hearings, public seminars and in particular outside their own jurisdiction; and
** they might not have the inclination, amongst their members, to tackle broad and controversial policy questions; although they could feel comfortable tackling smaller issues which, of their nature, require consultation with a smaller, more specialised legal and governmental audience.

(f) Legislative limits. The legislation establishing law reform agencies in most States confines the agency to working specifically on projects assigned to it by the local Attorney-General. It would not be legally possible for such agencies to receive reference from the Federal Attorney-General or from a combination of Attorneys-General meeting in the SCAG. Unless there were to be a radical amendment of the Law Reform Commission statutes, it would remain necessary for the local Attorney-General to assign particular tasks to the local LRC's. This means that the control of the local Attorney-General over the program of his LRC remains paramount in almost all jurisdictions. Any project for a uniform law reform report would tend to take second priority to urgent tasks of local concern having immediate relevance and desired promptly by local lawmakers and their advisers. As against such priorities, the projects on matters of long term uniform law reform would be likely to take a second place. Especially would this be so in small part-time bodies already hard-pressed for personnel and resources, particularly research resources.

OVERSEAS UNIFORM LAW REFORM

27. The United States. Two common law federations (the United States and Canada) and nations in the Continent of Europe have moved towards institutional arrangements for the development, in selected areas, of uniform laws. It is not appropriate, in this paper, to do more than to outline in general terms the arrangements in these jurisdictions. In the United States, there has, since 1892, been a National Conference of Commissioners on Uniform State Laws. The Commissioners meet annually at a conference of several days in which model Bills, drafted by committees are considered and discussed by the entire Conference. It is only when a draft has been considered and fully approved by a committee that it is studied in detail by the whole Conference. Acts are not finally approved and recommended by the Conference until considered, section by section, by at least two annual conferences. The National Conference has sponsored more than two hundred uniform and model Bills. Many of these have been enacted, either verbatim or in modified form, in one or more of the fifty States of the United States. The Uniform United States Commercial Code, in particular, was adopted in almost every State, representing not only an important move towards uniformity but also introducing a number of substantial reforms. The stated object of the National Conference is to promote uniformity in the law among the several States 'on subjects where uniformity is desired and practicable' (Constitution and By-laws, Article 1.2). Membership of the Conference is described in Article 2. Members consist of the Commissioners appointed by the authority of the several States of the United States. Wherever in a State an appointive authority does not assist or fails to act, the President of the Conference is empowered to request the appointment of one or more

Commissioners for that State by the President of the State Bar Association, as recognised by the American Bar Association. The term of Commissioners appointed pursuant to such a request must not exceed three years. In addition to the full members, there are associate members (Article 2.2). These comprise the Director or other Principal Administrative Officer of every State Legislative Reference Bureau or other agency 'charged by law with the duty of drafting legislation at the request of the legislature or Executive Officers of the State'. Associate members have the privilege of the floor and are eligible to serve on committees but may not participate in votes. In addition, by affirmative vote of two-thirds of the commission, certain persons may be made life members. They may also participate but not vote. All Commissioners and Associate Members must be a member of the Bar of a State. Provision is also made for Advisory Members (Article 2.8) and for certain privileges for former members (Article 2.9). Typically, the Governors of the States have appointed lawyers, judges and law professors as Commissioners. While the usual term is three years, it is common practice for Governors to reappoint participants, without regard to their political affiliation. It is assumed to be an obligation of State Commissioners that they will endeavour, at home in their States, to secure passage of agreed uniform Acts. The National Conference maintain a small administrative staff at its headquarters in Chicago. It is one of the oldest of State organisations designed to encourage interstate co-operation in the United States. Its origin in 1892 was the result of voluntary action on the part of State Governments. In justifying the Conference, the current Reference Book states:

> With the development of rapid transport and communications, the States are becoming increasingly interdependent socially and economically so that a single transaction may cross many State lines and involve citizens in many States. The confusion of laws amongst the several States may present, in some fields, a deterrent to free flow of goods, credit, services and persons between the States; restraint full economic and social development; and generate pressures for Federal intervention to compel uniformity. The Conference seeks to alleviate these problems.
>
> National Conference of Commissioners on Uniform State Laws, 1977-78 Reference Book, 62

28. The Conference is considered a State organisation and most of its financial support comes from State appropriations. Expenses are apportioned relative to size and financial abilities of the States. The American Bar Association also makes a yearly contribution as do certain foundations and other public spirited persons and groups. The only apparent Federal contribution is through the recognition of the Conference by the Internal Revenue Service for tax deduction purposes. So far as adoption of draft Bills for

uniform Acts is concerned, each State is entitled to one vote and an Act is not promulgated unless a majority of the States, represented at an annual meeting (and at least 20 jurisdictions) have approved the draft. In addition, each Uniform Act is submitted for approval to the House of Delegates of the American Bar Association. In practice, the drafting committees of the Commissioners establish liaison with the American Bar Association and other interested groups throughout the whole drafting process.

29. The schedule attached to the Reference Book on the National Conference indicates the large measure of acceptance of draft uniform Acts. Some drafts have secured no legislative action (eg abortion (1971)(1973); drug dependence treatment and rehabilitation (1973); law transactions (1975)). On the other hand, a number of uniform Acts have secured, with or without amendment, passage in virtually all States of the United States:

* Anatomical Gift (1968);
* Attendence of Out of State Witnesses (1931)(1936);
* Commercial Code (1951)(1957)(1962)(1966);
* Controlled Substances (1970);
* Criminal Extradition (1926)(1936);
* Declaratory Judgments (1922);
* Federal Tax Lien Registration (1926)(1966);
* Limited Partnership (1916)(1976);
* Partnership (1914);
* Photographic Copies as Evidence (1949);
* Reciprocal Enforcement of Support (1950)(1958)(1968);
* Simultaneous Death (1940)(1953);
* Testamentary Additions to Trusts (1960);
* Insurers-Liquidation (1939).

There are other bodies in the United States which work on uniform law proposals, eg the American Law Institute and the American Bar Association itslf. But the Conference remains the key, and most successful institution.

30. Canada. Following the United States example, and observing the achievement of uniform State laws in some appropriate areas, the Canadian Bar Association (CBA), early in the century, recommended the establishment of a similar body in Canada. It proposed that each Provincial Government should provide for the appointment of Commissioners to attend conferences organised to promote uniformity of legislation in the Provinces. The CBA idea was soon implemented by most Provincial Governments and later by the rest. The first meeting of the Conference of Commissioners on Uniformity of Laws throughout Canada took place in September 1918. In the following year, the name of the conference was changed and later still it was changed to the present title, Uniform Law Conference

of Canada. Although attempts have been made at various times to adopt a formal constitution, the decision on each occasion has been to carry on without the 'strictures and limitations' that would result from the adoption of a formal written code. The Conference meets during the week preceding the Annual Meeting of the CBA and generally at or near the same place. Only during the Second World War were Conferences cancelled; otherwise a strict annual regime is followed. There have been several joint sessions between the United States and Canadian Uniformity Conferences.

31. The Canadian Conference retains its links with the CBA. Matters can be placed on the Conference agenda on the request of the CBA. The President of the Conference makes an annual report to the CBA Annual Meeting. Since 1935 the Federal Government has sent representatives annually. In 1963 the Territories began to send representatives. The jurisdictions pay separately for their own delegates' expenses. No remuneration is paid to participants, most of whom are judges, government lawyers, law teachers, practising lawyers and, in recent years, LRC Commissioners. At the Conference, Commissioners are independent and not formally under instruction from home governments. The Conference itself decides on the matters where uniformity would be possible and advantageous. The Conference has a small secretariat which operates between meetings. The work of the Conference has included:

* attempts to reconcile differences between existing Provincial legislation; and
* attempts to provide model legislation in new areas of the law eg the Uniform Evidence Act dealing with photographic records and the Uniform Human Tissue Gift Act and the Uniform Proceedings Against the Crown Act.

Since 1968, the Conference has included a Legislative Drafting Workshop now known as the Legislative Drafting Section of the Conference. It meets for two days preceding the Annual Meeting of the Conference and in the same place. It is attended by legislative draftsmen from all jurisdictions.

32. Since its inception, the Canadian Conference has laboured under the lack of funds for legal research. Most delegates are reported to be too busy with their regular work to undertake detailed research. Since 1974 the Federal Government has been providing some funds for research. These have increased, somewhat, the output of the Conference. Some indication of the work of the Conference may be given by the following list of Uniform Acts recommended by it. The numbers of Provinces in which the Act has been enacted in whole or in part are also shown:

* Bills of Sale Act (1928): 9;
* Contributory Negligence Act (1924): 8;
* Defamation Act (1944): 8;
* Extra-Provincial Custody Orders Enforcement Act (1974): 8;
* Frustrated Contracts Act (1933): 9;
* Human Tissue Gift Act (1970): 9;
* Interpretation Act (1938): 10;
* Legitimacy Act (1920): 11;
* Proceedings Against the Crown Act (1950): 8;
* Reciprocal Enforcement of Judgments Act (1924): 11;
* Reciprocal Enforcement of Maintenance Orders Act (1946): 12;
* Regulations Act (1943): 9;
*Survivorship Act (1939): 11;
* Variation of Trusts Act (1961): 8;
* Vital Statistics Act (1949): 10;
* Warehousemen's Lien Act (1921): 10;

33. It may be seen from a study of the Acts prepared, adopted and presently recommended by the Canadian Conference:

* some of them are merely endeavours to secure uniformity in areas in which, under the Australian Constitution, the Federal Parliament has clear power eg vital statistics;
* the total list is not nearly as impressive as the list of achievements in the United States either in variety, number or controversy;
* a large number are dealing with relatively uncontroversial matters;
* even in this number, many of the matters have been resubmitted for reconsideration and amendment or revision of the Uniform Act, eg the Bills of Sale Act first proposed in 1928 was amended in 1931, 1932, 1955, 1959, 1964 and 1972;
* the tendency to rework old areas has led to a list of former Uniform Acts now withdrawn as obsolete or superseded;
* notwithstanding their lack of controversy, there is a significant list of Acts for which there is no Provincial enactment or a very low return. Examples include:
  ** Accumulations Act (1968): 2;
  ** Conflict of Laws (Traffic Accidents) Act (1970): 1;
  ** Domicile Act (1961): 0;
  ** Effect of Adoption Act (1969): 1;
  ** Foreign Judgments Act (1964): 2;
  ** Hotel Keepers' Act (1962): 0;

** Information Reporting Act (1977): 0;
** Medical Consent of Minors Act (1975): 1;
** Occupiers' Liability Act (1973): 1;
** Statutes Act (1975): 2.

34. Informal comments offered by Canadians visiting Australia concerning the Uniform Law Conference for Canada suggest that it does useful work but that:

* it is heavily dominated by people with an official point of view;
* its productivity has tended to slip and it is not regarded as dynamic, in part a problem of its participants and organisation;
* it is not the only method for achieving uniform laws, particularly in large or controversial subjects. For example, when differing approaches to evidence law reform were presented by the Law Reform Commission of Canada and the Ontario LRC, the procedure was adopted of appointing a joint Federal/Provincial Task Force to propose reconciliation of the two drafts. However, the Conference was later involved in the Uniform Evidence Act.
* the Conference fails to include key politicians and top public servants and is therefore regarded by them either with indifference or as a group of interested amateurs, providing friendly advice that might, sometimes, be a little useful.

The Conference publishes annually the proceedings of its annual meeting. The Presidential Address by Mr G F Coles QC, Appendix X, Uniform Law Conference of Canada, Proceedings of the 62nd Annual Meeting, 1980, 76, indicates the growing development of the facility of telephone conference calls to deal with limited agenda items. But it ends on a note of pessimism:

> It is very noticeable that a great deal of our efforts during the past number of years, particularly in the 60s and 70s, have not found acceptance in our Provincial jurisdictions. I do not know why this should be, but we would be remiss if this were not a concern deserving of our most serious attention. Too many talented and experienced people have contributed their time and effort in developing Uniform Acts and Amendments to the Criminal Code for such efforts not to have received more favourable consideration from our respective jurisdictions. The burden of propogating and promoting the work of this Conference rests with each of us and unless we do the job it won't be done. The purpose for which this Conference was organised is deserving of better efforts on the part of all.

For Australians, these comments have, despite the institutional differences, a familiar ring.

35. Europe. The achievement of uniform laws in Europe, and indeed beyond, has long been a concern in a number of institutions. The Hague Conference on Private International Law, for example, is established to work for the unification of private international law, particularly in the fields of commercial law and family law. The Nordic Council, UNCTAD, the Organisation for Economic Co-operation and Development and other interjurisdictional organisations have also sought, sometimes by the provision of model laws, sometimes by guidelines and recommendations, sometimes by draft treaties to promote uniform law reform developments. Thus the Guidelines adopted by the Council of the OECD on Trans Border Data Barriers and the Protection of Privacy, have provided basic principles upon which the ALRC report on Privacy has been based. Within Western Europe, two institutions have developed since the Second World War, which have influenced the design and promotion of uniform laws between the often different legal systems involved in countries with increasing trade and cultural connections. These are the Council of Europe and the Commission for the European [Economic] Communities. The Commission for the EEC operates under the Treaty of Rome. Pursuant to the Treaty, it is empowered to issue Directives requiring Member States to bring their law into harmony, notably in matters of commercial and trade law, where disharmony of laws discourages or interferes with the growth of trade between Member Countries. In advance of the issue of a Directive, exposure drafts are prepared for discussion in Member Countries. An example is the proposed EEC Directive on the Co-ordination of Legislative Statutory and Administrative Provisions Relating to Insurance Contracts. This Directive aims at harmonisation of the laws of Member Countries of the EEC on insurance. The difficulties of reconciling different legal systems, starting from different principles and infused by different institutions and machinery for enforcement, far outweigh the difficulties of reconciling laws withinthe basically similar legal systems of Australia. There was some discussion of the EEC Directive on Insurance in the recent ALRC Report on Insurance Contracts (ALRC 20) p.114.

36. The Council of Europe, established in Strasbourg, is set up pursuant to the Statute of the Council of Europe, 1949. One important aspect of the Council of Europe is the development of conventions and agreements, usually drawn up by experts and finally settled by the relevant Ministers. These deal with a whole range of public and private law matters. Member States signing the Treaties are expected to bring domestic law into line with the principles established in the Treaties. Some of these are drawn in considerable detail, though they normally confine their terms to matters of important principle and acknowledge the differing institutional machinery that will be used in Member

Countries for the attainment of the principles. In short, a proper measure of uniformity and diversity is acknowledged. More than 100 conventions and agreements have been drawn up by the Council of Europe since its establishment. A glance at the list will indicate the variety and importance of the subject matters dealt with, many of which are relevant to uniformity of laws between the States of Europe:

* European Convention Relating to the Formalities Required for Patent Applications (1953).
* Agreement on the Exchange of War Cripples (1955).
* European Convention on Extradition (1957).
* European Agreement on the Exchange of Therapeutic Substances of Human Origin (1958).
* European Convention on Compulsory Insurance Against Civil Liability in Respect of Motor Vehicles (1959).
* Convention on Reliability of Hotel Keepers Concerning the Property of Their Guests (1962).
* Agreement Relating to Application of the European Convention on International Commercial Arbitration (1962).
* European Convention on the Supervision of Conditionally Sentenced/Released Offenders (1962).
* European Convention on the Adoption of Children (1967).
* European Convention on the Transfer of Proceedings in Criminal Matters (1972).
* European Convention on the Calculation of Time Limits (1972).
* European Convention on the Legal Status of Children Born Out of Wedlock (1975).
* European Convention on the International Effects of Deprivation of the Right to Drive a Motor Vehicle (1976).
* European Convention on Products Liability in Regard to Personal Injury and Death (1977).
* European Agreement on the Transmission of Applications for Legal Aid (1977).

In addition to the publication of the above conventions and agreements, the Secretariat-General of the Council of Europe publishes explanatory memoranda in support of the treaties, organises conferences and seminars on private and public law matters, publishes numerous reports, including reports of cases heard before the European Court of Human Rights. Points to be noted from the work of the Council of Europe are:

* preliminary work is done by experts drawn from a high government level in the Member Countries;
* that work is then considered at a political level by the meetings of Ministers;
* the involvement of the key officials and Ministers frequently leads to pressure for enactment in domestic laws;
* the momentum built up by the large numbers of agreements, itself imposes pressure on Member Countries to bring domestic law into line and thereby to achieve harmony of laws;
* the Secretariat-General of the Council of Europe comprises a balanced representation of experts from different jurisdictions of Europe.

IDENTIFIED NEEDS

37. An improved institution. By comparison with the overseas bodies working on uniformity of laws in North America and Europe, Australia's institutional arrangements are spasmodic, indifferent, almost amateuristic:

* there is no permanent machinery that brings together the relevant components of elected and unelected government;
* too many burdens are being placed on busy political officers in SCAG. No such burdens are imposed in the US or Canadian Uniformity Conferences. In the EEC and the Council of Europe, the Ministers are reserved for basic political decisions at the end of the 'expert' attention; and
* the ALRAC Conference, weakened by the 1975 rebuff from SCAG, is little more than an irregularly meeting 'talk shop'. It has no permanent institution or secretariat. If there is co-ordination or co-operation between Australia's LRCs, it is more a function of particular personalities than institutional arrangements.

If, as Lord Scarman asserts, the genius of English speaking people is to find routine institutions for the resolution of difficulties, and if some improved measure of uniform law reform in Australia is desirable, the first need is to discover a more appropriate, effective and efficient institution(s).

38. Diminishing duplication. The Uniformity Conferences in the United States and Canada and the Council of Europe and EEC Commission in Europe, provide important machinery for identifying areas where harmony of laws would be desirable, working up proposals, debating models then translating them into action. The overseas institutional arrangements have differing strengths and weaknesses at each point in this chronoligical table. But clearly, in Australia there is still an unacceptable level of law reform work, proceeding in isolation from indifference to the work being done in different jurisdictions. Conceding that some degree of duplication is desirable and inevitable, there is much

room for improvement in the current level of exchange of information and research effort. There is a need for improvement in knowledge in what is going on in other law reform agencies, royal commissions, committees of enquiry, departments of State, to avoid unnecessary duplication and to ensure a proper measure of research co-ordination which pays respect to the independence of such bodies and their entire right to proffer different recommendations to their respective governments.

39. Improving use of current reports. Means are needed to harness the relevant administrators and politicians to ensure that appropriate decisions are made on the desirability of adapting major law reform proposals for either uniform or individual adoption in other jurisdictions. An example of this arises from ALRC 2 Criminal Investigation. That report represents a major review of criminal investigation law. The report should have acted as a catalyst for action in all jurisdictions of Australia. So far, it has not done so - possibly because State jurisdictions are waiting for passage of the Commonwealth legislation in its final form. But the basic impediment is political and administrative not law reform action. The law reform function has been effectively completed by the delivery of the report. The political and bureaucratic decisions have still to be made so that the obstacles lie not in the law reform camp, but elsewhere.

40. Developing a long-run program. Machinery is lacking effectively to consider a long-term program of uniform law reform, the assignment of parts of that program to appropriate LRCs or other bodies and the consideration of reports, once delivered, for their relevance to uniform law reform. The only present machinery is SCAG. It meets intermittently and its achievements are few and not notable. Tardy treatment of ALRC 11 Unfair Publication: Defamation and Privacy over many meetings held in Perth, Cooktown, Queenstown (NZ) and elsewhere is an illustration of the incapacity of such a body, organised as it is, to tackle with speed major, complex and sensitive questions.

41. State bodies, national tasks? Any plan for uniform law reform that includes proposals to utilise State LRCs, their varying composition, resources, research and investigation capacity for consultation must be taken into account. Furthermore, the varying willingness of State LRCs, as presently constituted, to embark upon large, controversial policy questions must also be considered. Any machinery for uniform law reform which ignores such features of the present law reform institutions in Australia will be doomed to fail. Consideration must also be given to the capacity and propriety of State LRCs engaging in major procedures of consultation in different jurisdictions of the country. The issue here is not only one of resources, though that could be a formidable obstacle. It is also an issue of appearances. Inquiries by a national institution, concerning a national or uniform law problem, are more likely to provoke responses than

inquiries by an institution plainly associated with a particular jurisdiction. Thus, inquiries by the WALRC concerning medical treatment of minors has lead to approaches to the ALRC by national bodies such as the Australian Medical Association questioning why a State institution is pursuing such a national problem. Although lawyers can understand a division of labour on law reform tasks and although such arrangements can be explained, they are not always understood by a variety of lobby and special interest groups. A capacity to consult such interest groups is a major consideration in any devolution of controversial national topics to State LRCs. In short, whilst it may be appropriate to refer small and technical tasks to some State LRC's major, controversial tasks involving large questions of policy present particular problems unless the LRC is appropriately funded and prepared to engage in national consultation and discussion. Alternatively, the State LRC can develop its proposals for its own jurisdiction, leaving the process of consultation and adaptation for other jurisdictions to their LRCs or Departments or other agencies.

42. Adapting reports to State laws. A further consideration is the possible need for substantial changes or modifications of LRC reports prepared for a particular jurisdiction in order to adapt them for other jurisdictions. At a time of much law making, it is difficult enough for an LRC to be fully aware of the laws of its own jurisdiction. Discovering accurately the up-to-date laws of other jurisdictions and proposing modifications that would accomplish the same policy and legal objective in those other jurisdictions would be itself a significant task. The issue is posed as to whether this is best done by the agency preparing the uniform report or whether it is best done subsequently by a home agency or department. Because of the separate development of Colonial and State laws in different parts of Australia, the superficial similarity of the legal systems deflects attention from the significantly different common law and legislative framework in which law reforms must be placed, if they are to achieve the same objectives in different Australian jurisdictions. The diversity of the laws of evidence in different parts of Australia, both common law and statutory, is illustrated in the research papers published by the ALRC in connection with its Federal evidence project. (see Evidence RP 1 and 2, 1982). It should not be considered that adaptations of reports and draft legislation attached to reports are necessarily simple, routine tasks. The painstaking and scrupulous attention to the detail of legislation takes much research and time. Such attention would be imperative if it were proposed that a practical uniform law reform report should be developed which included proposed legislation properly adapted for introduction (with consequent repeals) in the several Australian jurisdictions.

43. Involving elected participants. Consideration should also be given to an appropriate level of political involvement by elected officials in the process of uniform law reform. Otherwise law reform may become a captive of LRCs and non-elected officers of the Executive Government. This point was made in the book by McMillan, Evans and Storey. If a uniform 'package' is worked out by a uniformity conference and presented as a 'fait accompli' to legislatures (which they may not alter for fear of dislocating the 'consensus') the consequence of this may involve the loss of relative power from the elected legislature to the unelected Executive Government and its advisors and agencies. Similar problems have been faced in securing uniform companies and securities legislation in Australia. The suggestion for the involvement of politicians in the Uniform Law Reform Council is presumably designed to overcome this difficulty. However, it introduces difficulties of its own.

44. The introduction of a suggested political component in the Uniform Law Reform Council, as proposed in the Government's policy documents, introduces a number of problems. First, is the difficulty which some LRC participants, particularly State judges, might find in taking part in a body including politicians. Secondly, unless the politicians were at a relatively senior level, the participation might be and be seen as tokenism. Thirdly, participation of politicians might introduce elements of partisan politics which, however appropriate in the legislature or even in the SCAG, would complicate and embarrass the advisory functions of non-political LRCs. The only political LRC in Australia is the Victorian Parliament's Legal and Constitutional Committee (VLCC) successor to the Victorian Statute Law Revision Committee. Fourthly, the promised participation of politicians of different persuasions involves at least two from each jurisdiction, representing, with nine jurisdictions, 18 in all. Allowing for some additional representatives where there are more than two parties in Parliaments and for the representatives of LRCs and like bodies, the proposed Council would approach fifty members, without secretarial or executive staff. This is a large body, approximating the size of the Uniform Law Conference of Canada (85 participants). It would be difficult in the short meeting time to secure the passage of a great deal of business. Yet long meeting times could not be afforded because of the pressure of work on LRC's and the other duties of part-time members. The Canadian Conference does not include politicians.

45. Ensuring role of the ALRC. Finally, consideration must be given to the role of the Australian Law Reform Commission. Under the Law Reform Commission Act 1973, the Parliament included amongst the functions of that Commission:

6. (i)The functions of the Commission are, in pursuance of references to the Commission made by the Attorney-General...
(d) to consider proposals for uniformity between laws of the Territories and laws of the States...

46. The Commission has pursued these functions carefully. In addition, it has performed a number of clearing house and servicing functions that have given it pre-eminence among the Australian law reform agencies. The care taken by the ALRC Commissioners to respect the independence of the State and Territory LRCs has earned the ALRC the trust and confidence of other law reform agencies. Care should be taken in developing any new institution that the injection of political participants and the creation of a new national institution for law reform is not achieved at the cost of damaging the effectiveness of the ALRC and its acceptance as the principal law reforming agency in Australia, including for the purposes of the achievement of uniform laws. This paper now turns to discuss the options for action available to Government:

OPTIONS

47. Option 1 : Joint LRC/Politicians Council.

* Described. The first option is to proceed with the body described in the Government's policy documents and foreshadowed in the publication by McMillan, Evans and Storey. This is a joint Council comprising representatives of Australia's law reform agencies and politicians from government and opposition in each jurisdiction. As there are, potentially, nine jurisdictions (including the Commonwealth, ACT and NT) this envisages at least 18 politicans, possibly more to take into account the minority parties eg Australian Democrats, National Party, etc. To ensure a balance between politicans and law reformers, it would be necessary to contemplate at least two representatives from each LRC. But even this might not be adequate, if, to retain a balance between the votes of each jurisdiction, only one LRC were permitted for each State. In Victoria, there are three LRCs (the Law Reform Commission, the Chief Justice's Law Reform Committee and the Parlimentary Committee). A decision would have to be made concerning representation of LRCs. Some of the smaller Commissions would find it difficult to provide two or three representatives, particularly if meetings were to be more for a day or so and at great distances from their base. Attention would be needed to the funding of travel and accommodation, the venue for meetings, the provision of secretariat facilities, voting and speaking rights and so on. The minimum size of the body envisaged would appear to be about 40, but it could rise to 70 depending on numbers and proportions of representatives.

* Advantages. The advantages of the first model include:

  ** it is the model included in the Government's policy document and is apparently favoured by the Attorney-General;
  ** it includes politicians, and thereby avoids the presentation to elected representatives of faits accomplis worked out by LRCs and/or officers;
  ** it would facilitate the input of practical lay opinion to the choice of program and, possibly, recommendations on action;
  ** it could give some politicians a career interest in law reform and in following up, in their respective legislatures the uniform law reform proposals;
  ** bipartisan representation would ensure exploration of the maximisation of common ground and consensus.

* Disadvantages. The disadvantages in the model appear to be:

  ** the possible objection of principle that it equates or appears to equate elected representatives of the people with unelected advisory personnel;
  ** the unlikelihood of securing leading Members of Parliament for service in such a body;
  ** the possible unwillingness of some judges, presently signficantly represented in LRCs, to attend sessions with party politicians;
  ** the difficulty of arranging meetings to coincide with parliamentary recesses in all Australian Parliaments and with judicial and legal professional recesses;
  ** the large numbers contemplated and the difficulty of securing detailed debate because of such numbers;
  ** the risk of fractionalism, introduced by the presence of party politicians as illustrated in the recent Constitutional Convention;
  ** the disinclination of some lay participants to deal with detailed and technical law reform problems frequently involved in uniform law reform;
  ** the exclusion of a major power element, viz the officers and Parliamentary Counsel whose de facto capacity to contribute to law reform achievement is significant;
  ** the failure to link the proposed Council in an appropriate way with established institutions such as SCAG or other ministerial councils which include members of the Executive Government, with capacity and power to make necessary decisions.

* Conclusion. The proposed Council would be large, cumbersome and unlikely to be so constituted to be able to tackle the essential problems of uniform law reform. These problems, at their heart, lie in Executive Government and not in the LRCs or in Parliament. The proposed Council could possibly stimulate Executive Government. It could have useful advisory function to determine priorities of programs, assignments and to lobby for resources and action. But as an instrument for actively tackling the impediments to uniform law reform in Australia and deciding major controversies of policy, it would not be constituted in the optimum way.

48. Option 2 : Link LRCs and SCAG

* Described. The second option would be to endeavour to establish an appropriate link between LRCs and SCAG. Essentially this model involves reconsideration of the 1975 resolution of the ALRAC, as varied by the rejection of those resolutions and the alternative proposal of Mr David Malcolm. The notion would be to associate the law reform commissioners with the politicians in the SCAG, leading to interaction between the expert advisory body (ALRAC) and the established politically responsive body (SCAG). The precise mode of the relationship could involve either:

  ** the ALRAC suggesting topics for uniform law reform, assignment and considering such reports;
  ** the individual agencies proposing such topics to their own Attorney-General who could take them up in the SCAG; or
  ** the Attorneys-General themselves initiating topics, on their own motion, or as advised by their officers.

* Advantages. The advantages of the second model include:

  ** A relationship would be established between the advisory bodies (LRCs) and politicans at the level of the SCAG;
  ** the link is one between the relevant expert bodies and the decisive personnel in Executive Government, namely the law ministers, as advised by the their officers;
  ** the SCAG has an established institutional base which is itself to be enhanced by the provision of a secretariat which could improve its productivity and capacity to deal with uniform law reform. Criticism of past failures of SCAG must take into account the proposed increase capacity of SCAG;
  ** it is better to build on and adapt established institutions such as SCAG than to endeavour to create entirely new institutions;
  ** the proposal would avoid a large new institution and the uncomfortable mix of judges, law reformers and politicians.

* Disadvantages. The disadvantages of the second model include:

  ** the model has already been rejected, in substance, by the SCAG;
  ** the SCAG has failed to live up to its promise in the achievement of uniform law reform;
  ** the inevitable politicisation of a federation means that SCAG will continue to be divided in Australia on party grounds and unlikely to make significant achievements in uniform law reform;
  ** the proposal ignores the busy lives and excessive burdens placed on members of the SCAG, resulting in their being effectively unable to pay attention to detailed projects of law reform;
  ** the proposal envisages handing elected politicians faits accomplis designed by experts, whether LRC's or otherwise;
  ** the SCAG may be useful for responding to large questions, eg priorities for uniform law reform. It is less well adapted to the detailed work necessary to process uniform law proposals from initiation to final report and detailed draft legislation, adapted to various jurisdictions.

* Conclusion. This model is different from that proposed by the Government. It probably pay insufficient attention to the practical and political limitations on a body such as the SCAG, even allowing for an enhanced role with a secretariat and the provision of some research facilities. Nonetheless, it is realistic to endeavour in some ways to involve the SCAG in uniform law reform. The real issue is one of devising the correct role for SCAG and the correct relationship between it and the combined law reformers.

49. Option 3 : Enlarged ALRC

* Described: A third option would be to abandon the hopes of welding together the various law reform agencies in Australia and instead to expend the sums that would otherwise be devoted to a national uniformity conference, on enlarging the resources and role of the ALRC. This could be done either by leaving the ALRC as presently constituted, a Commonwealth agency exclusively, or by providing for the ALRC to have State divisions. There is already a provision in sub-section 12(8) for the appointment of ALRC Commissioners for particular Territories. It might be possible, with the consent of a State, to devise Commonwealth legislation which could establish Divisions of the ALRC for State law reform. There is already a partial precedent for a conjoint Federal/State instrumentality in the Criminology Research Council established under the Criminology Research Act 1971 (Cwlth), s 35. Under paragraph 35(1)(b) of that Act, the Council is to consist

of seven members of whom one is to represent each State. Provision is made for appointment by the Commonwealth Attorney-General 'upon the nomination of the appropriate Minister of State'. It is understood that the Council works well. At one stage in 1979, there was some discussion with the then Government of Tasmania concerning the possibility of the appointment of a State division or State members to the ALRC. The matter did not proceed. The alternative possibility of such an enlarged function for the ALRC is hinted in the book by McMillan Evans and Storey. It should perhaps now be considered as a third model.

* Advantages: The advantages of the third model include:

  ** in terms of cost-benefit, including opportunity costs, this would be the simplest and possibly the most effective means of hastening the pace of uniform law reform in practice;
  ** the ALRC already has the statutory function to seek uniform law reform;
  ** the ALRC has an established record in providing models for uniform law reform to the Commonwealth's plenary powers in the Territories. In a country which can boast few uniform laws, the ALRC achievements are already significant and will grow;
  ** the ALRC alone has a national standing and links with law departments, agencies of government, the judiciary, legal profession, universities and community groups, in all parts of Australia. Only a national LRC can hope to secure and maintain such links which are vitally necessary for consultation leading to effective uniform law reform;
  ** increased resources for the ALRC, in lieu of the uniformity body, could enhance the capacity of the ALRC to provide further models for uniform law reform;
  ** the current proposal to establish an ALRC office in the ACT could provide a new focus for general private law reform by the ALRC, appropriate for adaptation in the States;
  ** the combination of an enhanced ALRC and closer relationship to the SCAG for the ALRC could improve the prospects of achieving uniform law reform;
  ** the proposal would avoid creation of a national competitor for the ALRC with diffusion of the focus of law reform in Australia and possibly confusion as to the respective roles of the ALRC and the uniformity body.

* Disadvantages: The disadvantages of the third model include:

  ** the ALRC is specifically a Commonwealth agency established by Federal law;
  ** especially in times of political division, recommendations of a Federal agency may not be acceptable in particular States;
  ** work done in the context of the ACT may not be appropriate for other parts of Australia because of the special circumstances of that Territory;
  ** in the national tasks of the ALRC, especially under Federal power, it is possible that attention to general projects of State law reform suitable for uniform law reform may be overlooked;
  ** the complications of securing statutory amendment to the Law Reform Commission Act 1973, to permit State appointments or State divisions, are significant;
  ** the proposal is an enhancement of a Federal agency not the creation of new uniform Federal/State law reform body;
  ** the proposal is different to that promised by the Government

* Conclusion: In terms of the actual achievement of model laws for uniform law reform, the third constitutional model would probably involve the best value for money expended by the Commonwealth, at least in the short run. It would tap the national reputation and organisation of the ALRC and its established work towards uniform law reform within its statutory function. But it would not be a new national uniformity body and would not be seen as such. It would not involve politicians. It might not secure adequate involvement of State politicians and administrators to ensure active and prompt pursuit of new initiatives in uniform law reform.

50. Option 4 : ALRAC/OFFICERS/SCAG

* Description: The fourth model is the one that is presently preferred. It involves the more regular organisation of the Australian Law Reform Agencies Conference (ALRAC) so that the Conference would meet regularly, and in association with meetings of the Standing Committee of Attorneys-General. Under this model, the ALRAC would become, in effect, a law reform committee working in relation both to the officers, Parliamentary Counsel and SCAG itself. In the past, some State Attorneys-General have invited the relevant LRC Chairman to attend SCAG meetings with officers. Thus Mr Justice Reynolds (NSWLRC) attended meetings of SCAG considering defamation law reform based on the report of the NSWLRC. He did so virtually as part of the group of officers advising the Attorney-General for

NSW. The notion of this model is that the ALRAC Conference would meet more frequently, would have close liaison with the officers of the States and the Commonwealth and would be available for direct discussion on uniform law reform with the Ministers in SCAG. In this way it would be hoped to forge a link with politicians (in the SCAG) and with the critical administrators (officers and Parliamentary Counsel).

* Advantages. The advantages of the fourth model include:

  ** it would establish the ALRAC Conference on a more regular basis. At present its meetings are intermittent and linked more to law conferences than to meetings of relevant decision makers;
  ** the proposal would establish a formal and institutional link with the key politicians, viz SCAG;
  ** the link would enable frank discussion between politicians, law reformers and officers of topics for uniform law reform, capacities, skills and interests of particular agencies to tackle those topics and the resource needs, problems, political sensitivities and other concerns;
  ** it would permit SCAG to play a role which can be expected of key ministers meeting infrequently, viz the designation of priorities, the assignment of tasks, the consideration of resource needs and the subsequent evaluation of reports.
  ** it would also put the LRCs into contact with senior officers, whose support for LRC reports and attention to their detail is necessary if uniform law reform is to be achieved;
  ** although not involving backbench politicians, this model recognises the reality of public administration in Australia and the key position in that reality of ministers and also senior officials;
  ** the model also recognises the problem of present lines of communication, the lack of direct access by the combined law reformers to combined ministers and combined officials and the limited time of ministers and officials for law reform which can be best mobilised if this model is pursued;
  ** together with an enhancement in the secretariat and research capacities of SCAG, a modestly funded ALRAC could provide new impetus to the uniform law reform role of SCAG.

* Disadvantages. The disadvantages of the fourth model include:

  ** it relies too heavily on the SCAG, which has been politicised in the past and may be the future, frustrating significant achievements;

** it affords the LRCs a too direct link to Ministers who are entitled to advice, including on LRC matters, from their departmental officers and Parliamentary Counsel;

** it involves the expense of travel of LRC Chairmen, not all of whom might be available for meetings in connection with the SCAG. Yet high level attendence would be essential if the proposal were to be successful;

** it involves an over-estimation of the contribution of Chairmen of smaller LRCs, whose resources, interests and inclination to perform uniform law reform projects are likely to be small.

* Conclusion. This fourth model appears the most appropriate, on balance. Though it is different from that proposed in the policy documents of the government, it is believed it is more likely to address the problems which led to the Government's proposal. It tackles the key proposals of the Government, viz the need for a regular institution and the involvement of politicians. If necessary, a joint meeting, at least annually, of SCAG and the ALRAC could constitute the Uniformity Conference of Australia. This would achieve the Government's desire to establish links between professional law reform agencies and politically responsible politicians. If permanent heads of law departments were added, this would ensure that the three key personnel of each jurisdiction would be part of the uniformity conference viz:

* the law minister;
* the permanent head of the law department; and
* the chairman of the relevant law reform agency.

Although this proposal envisages a role for departmental heads and LRC Chairmen which goes beyond that normally granted to advisors and officials in relation to their Minister, the SCAG would retain the final say, merely combining with the advisors for the limited purpose of discussing uniform law reform. Ministers could, if meetings were protracted, assign deputies to represent different political viewpoints. In short, the notion is one of building upon and combining established institutions viz:

* ministers: SCAG
* officers: meetings of officers to the SCAG
* LRCs: ALRAC

The proposal has a further advantage of minimising expense and avoiding the creation of an entirely new institution. Instead it seeks to grant on to the SCAG arrangements a new law reform component, recognising the now established existence of LRCs in all Australian jurisdictions.

RECOMMENDATIONS

51. It is recommended that a Uniform Law Reform Council be established. The Council should comprise the Ministers meeting in the Standing Committee of Attorneys-General (or their delegate(s)), the permanent heads of the law departments of each Australian jurisdiction (or their delegate(s)) and the Chairmen of a designated law reform agency for each jurisdiction or their delegate(s).

52. The Uniform Law Reform Council should meet regularly, at least once a year, in association with the meetings of the Standing Committee of Attorneys-General and should be chaired by the host Attorney-General as President of the Uniform Law Reform Council of Australia.

53. The representatives from the nine jurisdictions of Australia viz the Commonwealth, the six States, NT and ACT, each jurisdiction sending three participants as above (ministerial, administrative and LRC).

54. The purposes of the Uniform Law Reform Council should be:

* the choice of a priority program of matters appropriate for uniform law reform;
* the recommendation for the assignment, with his consent, by the relevant Attorney-General, of a uniformity project to the LRC of a designated jurisdictions;
* consideration of reports of the possible applicability of current LRC work for uniform law reform or for adoption in particular other jurisdictions;
* consideration of reports following uniformity projects and;
* distribution and publicity for model Bills following uniformity projects;
* preparation and distribution of an annual report to be tabled in all Parliaments reviewing progress towards uniform law reform in Australia.

55. The proposed secretariat for SCAG should service the Uniform Law Reform Council.

56. For the time being, the ALRC should continue its clearing house functions for Australia's LRCs including the distribution of Reform and the distribution and updating of The Law Reform Digest. The Secretariat of the Council should take over the organisation of ALRAC meetings which should continue, to any extent needed, to supplement meetings of the Australian Law Reform Agencies, as a section of the Uniform Law Reform Council.

57. Each jurisdiction should provide funding for its own participants in the Council but the Commonwealth should supplement this funding by the provision of the secretariat for the SCAG and by possible support for publication of model Bills and the annual report of the Council.

58. The Council should be established by Commonwealth legislation to ensure its permanency. The legislation should be modelled on the inter-jurisdictional provisions of the Criminology Research Act 1971 (Cwlth).

59. Before the Council is established, these proposals should be discussed publicly and considered by the SCAG, the Standing Committee of Officers, the meeting of Parliamentary Counsel and the ALRAC Conference in Brisbane in July 1983.