

AUSTRALASIAN POLITICAL STUDIES ASSOCIATION

POLITICS : MAY 1980

THE POLITICS OF LAW REFORM

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

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LAW REFORM : A BOOM INDUSTRY

The Australian Law Reform Commission is now in its fifth year. It is a permanent, independent statutory corporation established by the Australian Federal Parliament to report on the review, modernisation and simplification of federal laws in Australia. The Commission is only one of twelve law reform agencies, established in the various jurisdictions of Australia. Law reform commissions have now been set up in most countries of the Commonwealth of Nations. 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. It 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.

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 problems requiring the attention of local law makers. Some defects could be cured by judges who found room to manoeuvre within the principles of the imported 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 ....

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. In South Australia, a Law Reform Committee was appointed by Executive Proclamation in 1968. It is a part time body comprising judges, Crown law officers and private practitioners. The new Government of Dr. Tonkin has promised to set up a permanent full time Commission in due course. In the Northern Territory of Australia, in 1978, a 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 late entrant in this league of law reform agencies. Although a commission was established in the Capital Territory, 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 Australia. 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 Commission has assumed responsibilities as a clearing-house for the exchange of law reform information in Australasia.

The law reform institutions just described differ from each other in many ways. The relationships 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.

#### THE RATIONALE OF LAW REFORM

Alternative Advice : It has been suggested that bodies such as the Australian Law Reform Commission were established during the Whitlam Government "to supplement departmental policy proposals". Inferentially, it is suggested that the Law Reform Commission was established to provide alternative and even competing sources of policy advice and suggestions which would be useful for a reformist Administration. To prevent such a body representing a continuing threat, departments are said to have argued constantly for their assimilation into the bureaucratic structure or "departmentalisation" as the process became known (Sexton, 1979 : 191). But this fate did not befall the Law Reform Commission. On the contrary under both

the Whitlam and Fraser Administrations, it has secured a series of important tasks most (if not all) replete with sensitive policy questions, committed to it for study and report. Commenting on the way in which the present Government has used the Law Reform Commission, an editorial in the Australian Financial Review (24 October 1979) said this :

One of the more fascinating aspects of the Fraser style of government has been the use of the Law Reform Commission. Where the Whitlam Government might have charged into a socially innovative area such as national compensation with legislation at the ready, the Fraser Government ... has tended to the quieter approach of handing such issues over to the Law Reform Commission. Often, the public debate technique in the latter's approach can result in more being accomplished. The latest Law Reform Commission discussion paper on insurance concerns an industry where the Whitlam Government had tried and failed with a national compensation and a national superannuation scheme. Although the discussion paper is limited to the less controversial area of insurance contracts, the recommendations nevertheless provide the Fraser Government with some fundamental decisions on its relations with and controls over private industry.

When the legislation was introduced to establish the Law Reform Commission in 1973, it secured the support of spokesmen on both sides of the Commonwealth Parliament. Some will ascribe this to the common language which lawyers, even those divided in political allegiance, can speak when it suits them. Others may suggest that it was resignation and indifference rather than enthusiastic support that led to such unanimity. My own belief is that there is a general recognition in Parliaments throughout the common law world that legislatures are not keeping up with the need for legal change. Judges, who formerly fashioned and developed the common law are increasingly reticent to do so, in the age of the popularly elected and representative Parliament. It would be difficult, otherwise, to explain the way in which law reform commissions have sprung up at about the same time in almost every jurisdiction of the Commonwealth of Nations.

If departments argued for the assimilation of the Law Reform Commission into the bureaucratic structure of the Commonwealth, they did it privily, contrary to public statements and they were unsuccessful. Addressing the Third

Conference of Law Reform Agencies of Australia meeting in Canberra in May 1976, following the change of government, the Secretary of the Attorney-General's Department, Mr. (later Sir Clarrrie) Harders urged that law reform commissions should not tailor their proposals to the perceived attitudes of the government or Parliament of the day. The positive value of an independent commission was that it could take a broader view, less responsive to political winds. Furthermore, it could be bolder. It was better equipped than a Department of State to hear and consider representations from the public. It should not seek to second-guess Ministers. Nor should it become too close to the bureaucracy. It should guard its independence as a means of preserving its ability to speak out clearly with alternative advice on the direction in which the law should go. The bureaucracy would certainly have its chance to secure the ear of the Minister. The Law Reform Commission should use its opportunity so as not to be a pallid imitation of the public service but a creative and forward-looking alternative source of ideas for legislative change (Harders, 98-99).

The Business of Consultation : Theoretically, it would be possible for a group of law reformers to sit in isolation, searching their own experience and reading available material, to come up with law reform proposals. Such a procedure would be quite inadequate for the demands of the modern legislative process, the growing openness of government and the complexity of social and technical facts that must be grasped if the law is realistically to address the needs of society. The common feature of most modern institutional law reform is that it involves consultation of some kind before the final proposals for change are advanced. The English Law Commission developed a "working paper" as a procedure of testing tentative proposals for changes in the law, before proceeding to a final report attaching draft legislation. Typically the working paper 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. It is then circulated widely for comment and criticism.

The English 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 known as "Green Papers".

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 apparently 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. 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. Furthermore, one of the English Commissioners, Professor A.L. Diamond, has conceded that working papers are essentially passive and not very effective ways of communicating with the public at large (Diamond, 1977 : 405).

In Australia, the Australian Law Reform Commission has adopted a much higher profile. Principally because of the controversial nature of the references given to it by successive Attorneys-General, the Commission has been able to engage in a much more widespread public dialogue. Furthermore, it has positively sought to do so in a number of ways. So far, it has managed to secure the support of politicians of differing persuasions. Many of its proposals have passed into law on the initiative of both Federal and State Governments. The Prime Minister, Mr. Fraser, has described, with approbation, its efforts at "participatory law reform" and its endeavour to actively engender public interest in the tasks assigned to it by the government (Fraser, 1977 : 343).

The principal purpose of this paper is to describe some of the initiatives which the Australian Law Reform Commission has taken and to consider some of their implications for the lawmaking process and social reform.

AUSTRALIAN "PARTICIPATORY LAW REFORM"

Discussion Papers : Whatever the reason for consultation (to secure refinement of proposals, engender support for reform, promote public expectation of action or encourage a general climate sympathetic to legal change) success will only be achieved if there is some measure of communication between the would-be law reformer and his audience. The production of lengthy working papers, however scholarly and worthy in content, will not achieve the desired result if their size and complexity deters all but the most intrepid reader. Only a relatively brief, well-presented, portable and not too technical document was likely to fulfil the purpose of consultation. For this reason the Australian Commission developed a discussion paper deliberately written in less technical language. It was designed to be read by the interested layman as well as the expert lawyer. In the Commission's discussion papers there is less examination of the current law and this or that opinion of a particular judge. More emphasis is placed on the social issues which are under consideration and which will ultimately have to be addressed if legislation comes before Parliament. An effort is made to illustrate, with practical cases, the defects in the law to which reform is being addressed. These are drawn from complaints to the Commission, submissions and legal and other writing.

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 is unduly optimistic to expect interested groups to purchase discussion papers. It is enough to hope that they would find the time to comment. The aim of institutional law reform being consultation, 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, migrants and less well educated groups, whose legitimate interest in law reform may be as great as that of the educated and articulate middle class and whose needs may be greater. Lawyers and other "experts" tend to speak a special patois. New efforts must be made to convert their 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

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 Members of Parliament, judges, public servants and 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 elicit 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 the efforts being made to tackle those problems in an orderly and routine way.

Law reform is not a task for lawyers only, at least not in the projects given to the Australian Law Reform Commission on subjects as diverse as the recognition of tribal law of Australian Aborigines 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. 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

Public Hearings : Description 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 was the result of scepticism about the "limited number of people out of the total population that public meetings would reach" (Diamond, 1977 : 406). Lord Scarman has said that the possible use of public sessions in the English Commission cannot be ruled out. They had been urged upon him by Lord Chancellor Gardiner. He felt they might be unnecessary in England because of the existence of so many societies, lobbies and pressure groups upon every conceivable topic of social or economic importance (Scarman, 1979 : 2, 4). A former English Law Commissioner expressed a fear that public meetings would involve the Law Commissioners in "many irrelevant time-wasting suggestions".

In Australia, public hearings of the Law Reform Commission have now become a regular feature of the operations of the Australian Commission. The 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 recently, the public hearings have been conducted in normal court hours. The public hearings on the proposals for class actions in Australia were conducted in two sessions, the second of which ran from 6 p.m. In Melbourne the evening sitting was still in session after 10 p.m. and in Sydney finished not much earlier. Voluntary groups, not able to come during the day, came at night.

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 (Sawer, 1970 : 194). A recent analysis of regulatory hearings in the United States has suggested that they serve a function "as a drama" which helps to "mobilise public and political support for regulatory reform". According to the author it is an error to analogise a legislative hearing to a judicial or fact-finding hearing. The essential difference suggested was that the legislative hearing has an educational objective and a political purpose (Breyer, 1979 : 607).

On occasions the numbers attending and the quality of submissions to the public hearings of the Law Reform Commission have disappointed 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.

Public Hearings : Purposes : The hearings have many uses. In the first place, they "flush out" relevant 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

generally well attended by the media. It is also useful to have ordinary citizens come forward to explain their experiences 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 salutary 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 which 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, which 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. The result is not strictly a public seminar or debate, for the protagonists address 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, public hearings often identify aspects of a problem (or of a suggested solution) which have simply not been considered by the Commissioners.

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 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, limited Parliamentary time 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 number of individuals and organisations attending the public hearings of the Australian Law Reform Commission reflects 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.

Public Hearings : Elsewhere : 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 McHugh, and other Commissioners conducted

informal discussions with people who had complaints about lawyers and suggestions for the improvement of the legal profession, its 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.

Commenting on the Australian experience the New Law Journal in England (13 September 1979) has suggested that there is an obligation on lawyers in Britain to reconsider the introduction of public hearings on law reform proposals "in aid of the none-too-successful process of public consultation now existing". Lest there be any doubt, it is appropriate to say that the feared cases of the abuse of public hearings have been extremely rare. Sometimes individual citizens, with relevant experiences, hope for assistance in their particular cases. The distinction between helping them in their case and using their case to improve the legal system is one that can be readily explained. As a sidewind to the public hearings it has been possible, on occasions, to steer people with a genuine complaint in the direction of appropriate advice.

Use of the Media : Political views : Another feature of the techniques of the Australian Law Reform Commission has been the use of the public media. Speaking to a seminar on class actions, Mr. R.J. Ellicott described the process thus :

The 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 be congratulated - for having taken seemingly dry subjects onto television programmes ... (Ellicott, 1979 : 1).

Speaking of the Commission's controversial report on Unfair Publication : Defamation and Privacy in 1979, the Federal Attorney-General, Senator Durack, made the same point. He commended the Commission for having "taken the processes of law reform out of seclusion and into the market place". Tabling

The Law Reform Commission should be commended for the way it went about its reference. It has sought out the views not only of those involved in the legal aspects, but through seminars and public hearings it has sought to involve as many people from the community as possible. (Durack, 1979, 2834)

The use of the public media has its dangers. The tendency of the media to sensationalise, personalise and trivialise information frightens away many public officials and 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 communication 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 manifest 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 generally 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 which law reformers are tackling. But the discipline of brevity and simplicity is the price that must be paid for informing the community of what is going on. It is a discipline accepted by other groups in our society, including political leaders and social commentators. Lawyers, whose craft is words, must learn to use the modern media of



communication. Disparaging comments on "media lawyers" voiced by critics of the use of broadcasting and television represent backward looking intellectual snobbery.

In Australia, the technique of discussing law reform projects in the media is now 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. Mr. Fraser has suggested that the technique of involving the community is useful because the community will be governed by the law that is ultimately framed as a result of the law reform consultation:

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" (Fraser, 1977 : 343).

Use of the Media : Purposes : 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 the media involves. In the past, lawyers have not tended to use the public media in Australia. Judges and public administrators have been inhibited by the traditions of their office and the rules 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

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, probably, expand quite quickly 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 of the London School of Economics 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". 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 improbability 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 (Zander, 1978 : 12-13)

In the business of promoting change in the legal system, the media can be "invaluable allies". 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 of accuracy in media coverage, there should be no inhibitions about preparing a 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 editor's spike for the story. Experience teaches that what is needed is an eye-catching 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.

In Australia, the authorities, at least in government, have welcomed the public ventilation of sensitive questions of law reform. In part this may be because such public discussion deflects criticism and debate away from politicians towards the Law Reform Commission. In part, it comes, I believe, from the conviction by busy politicians that a law reform proposal that has been put to this modern test of fire is more likely to be workable and publicly sustainable than something drawn up

behind closed doors by a group of people however scholarly and however "expert". In the end, politicians introducing controversial reform legislation must face the media. Their path may be smoother if the reformer has gone before and debated, in a thoroughly public and open way, the issues which reforming legislation has to address.

Other Means of Consultation : The above list does not exhaust the new procedures of consultation developed by the Australian Law Reform Commission. Public and industry seminars are conducted in all State capitals in conjunction with the public sittings of the Commission. Business and lobby groups involved in proposals for reform are encouraged through their industry and professional organisations to come out into the open and debate their fears and concerns. In every reference a number of honorary consultants are appointed, representing a cross section of opinion and expertise. They ensure that in the most intimate deliberations of the Commission there is frank debate about the proposals for reform and the way they will affect the interest groups most closely concerned. The Commission's quarterly bulletin, Reform is distributed free of charge in government, judicial, political, administrative and academic circles. It has now been opened to public subscription for a small fee and continues to build a growing readership. The Commissioners are required by the Act to co-operate with Parliamentary Committees. From time to time they appear before such committees both at a Federal and State level to answer questions and provide information and 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 acceptability of its proposals to Government and Parliament. To this end it should in the course of preparing its reports, inform itself in the manner and to the extent it thinks necessary of

appropriate by consulting with Government 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 (Senate Committee Report, 1979 : 93).

In addition to the procedures of consultation and debate already mentioned, the Commission is now experimenting in the use of surveys and public opinion polls to gather representative opinion and expert advice. With the assistance of newspapers, questions relevant to tasks before the Commission have been included in national surveys of public opinion. In connection with an inquiry into the reform of the sentencing of federal offenders survey questionnaires have been submitted to judges, magistrates, federal prosecutors and prisoners. The results are called upon in the Commission's report. A reassuring outcome of the judicial survey was that nearly 80% of Australia's 506 judges and magistrates responded to the questionnaire, even though answering it would have taken these busy officials almost two hours. Many appended detailed submissions to their survey return.

Despite the costs and delays involved in the design and administration of surveys, there is little doubt that the development of law reform proposals in the future will involve increasing use of survey techniques. However uncomfortable the findings of the opinion survey may be, it is important for reformers to be aware of them. Furthermore surveys, opinion polls and statistics can permit the poor and inarticulate to express their needs and concerns more effectively than in a public forum. An ostrich-like attitude to the relevance of general 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.

Space does not permit an elaboration of special techniques of consultation adopted in relation to proposals affecting particularly disadvantaged groups such as Aborigines, prisoners, children and ethnic minorities.

Suffice it to say that the Commission has paid special attention to the need to consult these groups and to harness their interest in and support for the processes of orderly law reform.

#### CONCLUSIONS

The establishment of law reform bodies throughout Australia and indeed throughout the English-speaking world has a common theme. This is that widespread consultation is necessary to develop and improve the legal system. Such consultation is not always possible in the Parliamentary medium. It may not be congenial to the Executive and Departments of State who are in the midst of other urgent work. Widespread community consultation is not possible in the courtroom, where particular litigants only are before the court. This is why a number of recent decisions of the High Court have stressed the limited role of the courts in law reform today. Out of the disinclination or inappropriateness of the other institutions has come the opportunity of the law reform commissions.

The development of so many commissions, virtually simultaneously in most of the countries in which the common law has taken root, is a remarkable constitutional development. Of course it is a constitutional change in its incipient phase. It is not necessary that the law reform commission should be specifically mentioned in the national constitution (as it is in Papua New Guinea) for the phenomenon to be described as "constitutional". We may well be moving towards the development of new institutional arrangements which bridge the three present arms of government, as for example the Conseil d'Etat does in Francophone constitutions. The first phase, namely the creation of the machinery, is now virtually complete. The second phase involves a clarification of the precise relationship between the new commissions and the Executive Government, which appoints its members and gives it its programme, the Judiciary which often identifies the defects and inadequacies of current law, and the Parliament to which the new commissions ultimately report.

Various suggestions have already been made concerning this relationship. In 1971 Sir Anthony Mason, one of the Justices of the High Court of Australia, proposed that, to cope with the enormous needs of law reform and the inefficiencies of the parliamentary mechanism to process them, law reform proposals should automatically pass into law unless disallowed by Parliament within a given time (Mason, 1971 : 204). The need to avoid the twin perils of "window dressing" and "pigeon holing" led the Australian Law Reform Commission to return in each of its first four Annual Reports to the need for the establishment of a regular, routine procedure for processing its proposals. These calls were ultimately heeded by the establishment of an inquiry into the procedures of law reform in Australia by the Senate Standing Committee on Constitutional and Legal Affairs. The Committee's report, Reforming the Law, has suggested the adoption of a regular procedure by which reports would be referred automatically to an appropriate Senate Committee, upon the recommendations of which the Government would be committed to announce its response within a given, limited time. Perhaps significantly, the Senate Committee was not prepared to rule out a delegation of legislative power as envisaged by Sir Anthony Mason, if the "less drastic" measures suggested by it prove to be inadequate. Professor Gordon Reid of the University of Western Australia has pointed to the importance of the Committee's proposals :

The federal Law Reform Commission and the Parliament have recently moved, in a brilliant and unique way towards establishing a welcome reform for lawmaking in Australia. This envisaged synthesis will blend democratic values claiming the supremacy of Parliament with the elitist values which claim the supremacy of legal expertise. ... The national Law Reform Commission, which started four years ago as an apparent creature of the Executive Government, has recently been brought closer to a permanently linked relationship with the committees of the elected Australian Senate. .... Only five of the 27 Executive Ministers of State are in fact Members of the Australian Senate. It would be far more acceptable, therefore, and the planned Commission/Parliamentary nexus would be much stronger, if the 22 Executive Members in the House of Representatives were also confronted directly, in their Chamber, by enthusiasts of the Law Reform Commission and by advocates of the Commission's reports. (Reid, 1979 : 12)

It has been said that the special genius of English-speaking people is their ability to establish regular routine machinery to cope with controversy. In an age of the decline of judicial law-making, of increasing pressure for legal change and of competition for scarce Parliamentary time, the establishment of a law reform commission can be seen as an inevitable stimulus to the law making process.

The principal justification for the establishment of law reform commissions after the present model is to be found 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, freed from the shackles of party political commitment before reformed laws are proposed and passed upon in the Parliamentary forum.

The justification of this exhaustive effort of consultation can be briefly stated. It permits the gathering of factual information, particularly expert information. It secures a statement of relevant experiences, especially experiences which illustrate and individualize the defects in the law. It procures a practical bias in law reform proposals because they must be submitted to the scrutiny of those who can say how much the reforms will cost and whether or not they will work. It gathers commentary on tentative ideas which allow the commissioners of law reform to confirm their views, modify them or retreat, if shown to be wrong. It aids the commissioners in their task by assisting the clearer public articulation of issues and arguments for and against reform proposals. The whole process raises the public debate about law reform, ensures that the antagonists get to know each other, and usually, to respect each other's views. It raises community expectation, both of specific improvements to the legal system and routine, on-going consideration of law reform generally. Expectations of the latter may well promote the devotion of more resources to 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 improvement. 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 public consultation encourage a more open 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 consistent with other moves being taken in Australia to make public administration more directly accountable to the individual citizen. Public administration and the preparation of laws have hitherto been a rather secretive process in Australia. It is 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 which 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 Australian Law Reform Commission has been given a significant opportunity to assist the law makers in the development of the law in a number of highly contentious and socially relevant areas. Whether it succeeds will depend in part upon the quality and perceptiveness of its work and the success, in practice, of its proposals once implemented. But it will also depend upon the inclination of the Executive Government, the Public Service and the Parliament to act on its

proposals and to adopt regular, routine machinery to consider its suggestions : righting wrongs in the law and heeding the arguments, debated in the public forum, for their cure.

This analysis has touched some only of the political issues raised by the creation and operation of institutional law reform. The perennial questions of whether bodies of lawyers are appropriate to reform the law and whether government should hold the reins on commission programs have not been debated. No mention is made of the precise function of such commissions, if any, in following up and monitoring their proposals, after report. Specifically, nothing is said about the difficulties of interdepartmental review of proposals, the sensitive problems of involving the Commonwealth and the States simultaneously in efforts towards uniform law reform or the means of resolving differences in the advice of the many counsellors who now tender reports to the Government and the Parliament. The issues of the appointment of Commissioners and the resolution of differences of important social principle among them are not mentioned. Nor is there much said about the dangers of law reform commissions submitting to the pressure to show immediate returns in a "success list" of enacted legislative proposals. The potential to misuse inquiries for the purpose of postponing decisions or to deflect and exhaust debate, has not been scrutinised. These and other questions are obviously perceived by the law reform commissions of Australia. But it will require another paper and perhaps another author, less restrained by conventions than I am, to do justice to their examination.

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NOTE

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