

THE SIXTH COMMONWEALTH LAW CONFERENCE

NIGERIA, AUGUST 1980

LAW REFORM IN THE COMMONWEALTH OF NATIONS

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

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THE RISE OF LAW REFORM

One of the most remarkable and persistent features of the recent legal history of the countries of the Commonwealth of Nations is the development of institutional law reform. A scholarly wag was not far from the mark when he described law reform as a 'booming industry'.¹ Readers of that splendid publication of the Commonwealth Secretariat, the Commonwealth Law Bulletin, will know something of the busy programmes upon which the law reform agencies of the Commonwealth of Nations are working. Each issue of the Bulletin contains summaries of the proposals for legal change put forward in law reform commission (LRC) reports or consultative documents. Often the same issue will include proposals on similar subject matters of legal reform, worked up independently by law reform agencies in different Commonwealth countries.² The Australian Law Reform Commission publishes a quarterly bulletin, Reform,³ and a law reform index, which collects under familiar 'key words' relevant law reform reports of LRCs in all parts of the world.⁴ The Commonwealth Secretariat has lately published the pilot issue of a compilation of the law reform proposals of Commonwealth LRCs, including details on their implementation.⁵ An examination of this publication shows how very many of the reports of the law reform agencies have resulted in legislative action.

As disclosed in the Commonwealth Law Bulletin the present catalogue of Commonwealth LRCs stands as follows :

<u>COUNTRY</u>	<u>LAW REFORM AGENCY</u>
Antigua	Law Reform Advisory Committee
Australia	
Federal	Australian Law Reform Commission
NSW	NSW Law Reform Commission
Northern Territory	NT Law Review Committee
Queensland	Law Reform Commission of Queensland
South Australia	Law Reform Committee of South Australia
	Criminal Law Reform Committee of South Australia
Tasmania	Law Reform Commission of Tasmania
Victoria	Chief Justice's Law Reform Committee The Law Reform Commissioner Statute Law Revision Committee
Western Australia	Law Reform Commission of WA
Bahamas	Law Reform and Revision Commission
Bermuda	Law Reform Committee
Canada	
Federal	Law Reform Commission of Canada
Alberta	Institute of Law Research and Reform
British Columbia	Law Reform Commission of BC
Manitoba	Law Reform Commission
New Brunswick	Law Reform Division of the Department of Justice
Nova Scotia	NS Law Reform Advisory Commission
Ontario	Ontario Law Reform Commission
Prince Edward Island	Law Reform Commission
Saskatchewan	The Law Reform Commission
Fiji	Fiji Law Reform Commission
Ghana	Law Reform Commission
Gibraltar	Law Revision Committee
India	Law Commission of India
Jamaica	Law Reform Division, Ministry of Justice
Malaysia	Law Revision Committee

Mauritius	Law Revision Unit, Attorney-General's Office
New Zealand	Law Reform Council Contracts and Commercial Law Reform Committee Criminal Law Reform Committee Property Law and Equity Reform Committee Public and Administrative Law Reform Committee Torts and General Law Reform Committee
Nigeria	
Federal	Law Revision Committee Law Reform Commission of Nigeria
East Central State	Committee for Law Revision
Papua New Guinea	Law Reform Commission of PNG
Sierra Leone	Law Reform Commission
Sri Lanka	Law Commission of Sri Lanka
Trinidad & Tobago	Law Commission
Tonga	Law Reform Committee
Uganda	Commissioner for Law Reform
United Kingdom	The Law Commission of England and Wales Scottish Law Commission The Criminal Law Revision Committee The Law Reform Committee
Zambia	Law Development Committee

A glance at the list discloses the differing organisation and composition of the Commonwealth's LRCs. Some are units in a Department of the Executive Government; others are independent statutory authorities. Some are permanent commissions' others are ad hoc committees. Some deal with the wide brief of law reform; others are confined to law revision. Some initiate their own programmes; others are limited to working only on those matters assigned by the Law Minister. Some are well funded, producing handsome reports on a variety of challenging topics; others are confined to a modest programme of small technical subjects described in mimeograph publications of limited circulation. But through them all runs a common theme.

All evidence the recognition by the lawmakers of the Commonwealth of Nations that the existing machinery for developing the law and fashioning its principles and procedures has fallen upon hard times. With few exceptions the countries of the Commonwealth of nations have inherited the common law of England. The original 'dynamic' of that system of law was a force for adaptation, modernisation and reform. Old precedents were constantly stretched and developed to meet new social needs. A Federal Attorney-General in Australia put it well, when addressing an international law reform conference in Canberra:

We must never forget our dependence on and indebtedness to the common law. The dynamics of the common law in its formative stages embodies the true spirit of law reform - law and lawyers responding to new situations demanding just solutions. It is symbolic of its acceptance in the four corners of the world, that we are able to sit down at this stage and discuss the problems associated with its reform. It is not so many years ago that in many places law reform was simply a matter of considering the adoption of proposals originating at Westminster. We have all come a long way since those days. Yet none of us should forget the indebtedness we all have to the common law of England and the principles which it secures.⁷

Even in the heyday of the confident common law of England, critics pointed to its structural weakness. Sir Francis Bacon, at the end of the 16th century, called for a committee to take the whole body of the law of England into its hands. It should develop it systematically, released from dependence upon the haphazard chance factors of particular litigation: whether a barrister saw the important point; whether his client could afford to test it through the appeal courts; whether the judges wanted to grasp the nettle; whether this was the case to take a new direction. In 1859 Lord Westbury, later to be Lord Chancellor of England, advocated the establishment of a Ministry of Public Justice. He returned to Bacon's theme and the organisational defect of a system so heavily dependent upon judge-made law:

We have no machinery for noting, arranging, generalising and deducing conclusions from the observations which every scientific mind could naturally make on the way in which the law is working in the country. ... Why is there not a body of men in this country whose duty it is to collect a body of judicial statistics or, in more common phrase, make the necessary experiments to see how far the law is fitted to the exigencies of society, the necessities of the times, the growth of wealth and the progress of mankind?⁸

Lord Westbury's call was ultimately heard in the many countries where the common law took root. The flowering of 19th century enthusiasm for scientific law reform soon withered. But in the middle of this century, following the establishment of the Law Revision Committee and later the Law Reform Commission in England, the Law Commission of India and the English and Scottish Law Commissions, the movement revived. If some of the enthusiasms of the 1960s have been replaced by a cold-eyed realism in the 1980s⁹ the fact remains that institutional law reform throughout the Commonwealth of Nations is at this moment in full flower. Every jurisdiction must have its law reforming agency. The one Commonwealth jurisdiction which established and terminated its law commission, Sri Lanka, has now revived it. Under Mr. Victor Tennekoon Q.C., a former Chief Justice, the Law Commission of Sri Lanka is in the midst of a busy and highly relevant programme.

Part of the explanation for this institutional proliferation may be the pursuit of the fashionable. Part may be even the realisation by some politicians that difficult issues can occasionally be defused for a time by the handy availability of a permanent law reform institution.¹⁰ Part of the reason may be political tokenism : the creation of a small ill-funded, ill-staffed body almost as a placebo for public disquiet about the law's delay and the defects in its rules and procedures.

Within the Commonwealth of Nations, the declining jurisdiction of the Judicial Committee of the Privy Council and the development of active, self-confident local legislatures,

led in the four corners of the world to fresh scrutiny of the transplanted English law. Released from legislative and judicial dependence on London, local lawmakers increasingly questioned the appropriateness of some of the principles developed in earlier times for a very different society but transplanted during colonial times without regard to the special features of geography, race, religion, customs and social climate of the recipient jurisdiction. Many of the LRCs of the Commonwealth, including those in Australia, are now engaged in the business of adapting English law to the special characteristics of their own country. No doubt these and other considerations help to explain the sudden development of law reforming institutions throughout the Commonwealth. But I want to suggest that the fundamental reason for the development of so many law reform bodies in so many Commonwealth countries in such a short space of time is the coincidence of a number of universal pressures upon the legal systems of all of our countries and a growing recognition that our inherited institutions, including the judge-made common law, are simply incompetent to cope with contemporary pressures for change. My thesis is a simple one. Into the institutional vacuum left by a generally uninterested legislature, a distracted and over-busy Executive and a tongue-tied Judiciary, has come a new institution : the law reform agency. This is a high claim to make. But I believe that we are, throughout the Commonwealth of Nations, at the brink of nothing less than an important constitutional development. I refer to the all but universal development of law reform bodies whose function will be to fill part of the void left by the retreating common law faced with the pressure of enormous demands for legal change.

FOUR MAIN THEMES

It is a bold man who would try to describe the common forces for change that are at work in the varied countries of the Commonwealth of Nations today. Cultural, economic and social differences are self-evidently enormous. The growth of legislation, of local codification and post-independence adaptation of the laws make the generalisations that would have been possible even a decade or so ago much more problematical today.

Despite this it is safe to say that the challenge to the legal systems of the Commonwealth of Nations is uniformly the challenge of change. In all countries, the institutions, laws and procedures are coming under increasing question. Perceived wisdom is being questioned. The proper province and function of the law is passionately debated. The task of judges, lawyers, police and government officials becomes daily more difficult to perform. There are, I suggest, four themes which describe the chief forces at work in all of our societies and in their legal systems. Shortly expressed, these themes are big government, big business, big education and information and big science and technology.

So far as big government is concerned, we can all see the growth of the public sector and the increasingly important responsibilities it has to make decisions affecting every individual in society at various stages of his or her life. There will be no going back to what some contend are the 'good old days' of small government. There will be efforts in some countries to rein in the public purse, to reduce taxation, to introduce 'sunset clauses' in legislation, by which a particular Act will lapse after a given time and to limit and control the rapacious quango.¹¹ But I believe there is no chance of a return to the laissez faire society of the 19th century. On the contrary, I believe that throughout the Commonwealth of Nations the growing integration of our societies and their recognition of responsibility for the poor, inarticulate and underprivileged members will, if anything, gradually increase the role of government and its influence upon the lives of all citizens.

Whereas countries of the civil law tradition developed a detailed and specific administrative law, we of the common law tradition, under the influence of Dicey and others, largely failed to do so, despite enormous changes in the role of government and its multitudinous agencies:-

[T]he concept of the proper sphere of governmental activity has been completely transformed in all countries deriving their jurisprudence from the English common law. The State is a welfare state whether covertly or overtly; it provides elaborate

social services and undertakes the regulation of so much of the citizen's daily business, in order to carry out so many schemes of social and economic service and control.¹²

As a reaction to the growth of the power and influence of government, the courts, committees of inquiry¹³ and law reform agencies¹⁴ have devoted much attention to improving procedural processes to facilitate judicial scrutiny of official acts.¹⁵ But the most pervasive and uniform development has been what the former Chief Ombudsman of New Zealand, Sir Guy Powles, has described as the 'ombudsman explosion'. The Commonwealth Law Bulletin bears testimony to the universal attractiveness of the ombudsman 'idea'.¹⁶ Whereas the legal procedures of most Commonwealth countries follow the adversary mode, the ombudsman's procedure is inquisitorial.¹⁷ Whereas courts can be expensive, slow and frightening for ordinary citizens, the ombudsman is usually free, fast and approachable. Whereas courts can impose their will by an order that will be obeyed, the Ombudsman's sanctions are persuasion, mediation, reconciliation and if this fails, a report to Parliament and an appeal to public opinion.

The development of open government legislation in jurisdictions of the Commonwealth of Nations¹⁸ and the development of a coherent administrative law reflect the reaction of the legal order to the rapid growth of the public sector. Thirty years after Lord Hewart, the Lord Chief Justice of England, wrote 'The New Despotism' lawmakers and law reformers throughout the Commonwealth are putting forward effective, practical and accessible machinery to assert and uphold the rights of the individual against the unthinking administrator. This is a great challenge to our legal system and it is one in respect of which the common law's voice is often muted:

The consequent effects [of the modern welfare and administrative state] such as the increasing dependence of the citizen on the State, the expansion and increasing bureaucracy of the administrative apparatus, the swelling flood of legislation, are producing an increasing degree of disenchantment with the State, and a certain uneasiness based on a feeling

of powerlessness and mistrust vis-a-vis an anonymous bureaucracy that is difficult for the individual to comprehend.¹⁹

It is both inevitable and desirable that our legal institutions should shape up to responding to the universal growth of the role of government and its agencies. This is a pervasive phenomenon of contemporary life and it is one in respect of which our inherited legal order needs urgent attention.

The second theme I have mentioned is big business. It is scarcely likely that the same disciplines which are now being developed and enforced as against big government will not, in time, come to the rescue of the individual against large corporations. Private corporations can be equally unthinking, oppressive and bureaucratic. The problems of big business are somewhat different to the problems of big government. At least with big government, we share an ultimate national or sub-national identity. Through the ballot box there is generally the opportunity, however indirect and intermittent, to influence the conduct of government through the political process. But business can operate insensitively for its own purposes, without necessarily showing due regard to the needs of the country in which it operates. The ever-diminishing significance of distance and the ever-increasing speed and economy of international communications, make the development of international business both inevitable and, generally, desirable. But there are by-products which we will see in the last decade of this century. For example, the efficiencies which persuade electronic companies, motor manufacturers and others to centralise their research or other facilities in overseas developed countries may not always benefit the small market economies of the Commonwealth of Nations. The marriage of computers and data bases through satellite and other communication systems presents the very real possibility that vital data on individuals and businesses in one country will be stored increasingly outside that country. This is a concern which is already in the forefront of a great deal of European thinking at this time. With memories of invasions still fresh in mind, European leaders are sensitive to the external storage of personal data, sensitive or vulnerable data, data relevant

to national security and defence and data vital to the cultural identity of a country. Although these concerns are not yet in the forefront of the thinking of most countries of the Commonwealth of Nations, I believe that they will, in time, become matters upon which all of our countries will have to reflect. They will require new laws to protect national interests, for the interests of international and trans-national corporations do not necessarily coincide with national interests.

The growth of the large corporation, of the credit economy with its paraphernalia of credit cards, electronic fund transfers, telephone bank tellers and the like is already with us or just around the corner. The growth of consumerism and the need for laws to ensure consumer protection and fair trade practices is a common feature of most of the legal systems of the Commonwealth of Nations. Laws developed in England when debt was a reprehensible, deliberate wrong, are sadly out of place in the modern society fuelled by easy credit.²⁰ The law of insurance developed in England to suit the contractual relations of underwriters and shipping adventurers may need significant modification and adaptation to be appropriate to the mass consumer insurance market of today where, try as you will, the insured will not be induced to read his policy.²¹

To the forces of big government and big business must be added the impact of big education and information. Every one of our societies is in the midst of radical changes in moral, social and economic values. These changes should not surprise us. The extent of compulsory, universal education and the advance of widespread literacy and universal suffrage in recent times have given many more people the opportunity to interest themselves in community affairs. Education standards continue to rise. The proportions of persons continuing at school in Australia, as disclosed in the last four national censuses were :

Age	1961	1966	1971	1976
15	60.89%	73.74%	81.25%	86.43%
16	30.50%	42.45%	53.69%	59.13%
17	-	17.41%	29.17%	32.20%

Degrees conferred by the Australian universities have increased from 3 435 in 1955 to 8 731 in 1965 and 24 216 in 1965. Similar changes are happening throughout the Commonwealth of Nations. Perhaps the most dramatic sign is the increase in the numbers of young women continuing their education beyond the age of 16. In Australia, in the past decade, the percentage has doubled.

In all Commonwealth countries, our societies are better educated and more inquisitive. They are daily bombarded with news and information, views and comment to an extent only made possible by the technological advances in the distribution of information. In short, in a fast-changing society, we have a better educated citizenry, liable to question received wisdom and accepted values to a degree that would have been unthinkable in previous generations. Rapid political changes in most countries of the Commonwealth of Nations raise community expectations of improvement in society, including in its legal system. It is vital that these phenomena should be thoroughly understood by lawyers and lawmakers. Indeed, it is vital that they should be understood by all. Not only do they help to explain the challenge to long-established laws and institutions. They also justify many of the questions which are now being asked about the defects in our substantive laws and procedures.

The fourth great contemporary force for change is the impact on society of big science and technology. In many ways this is the most dynamic of the forces for change which are now at work. It is the one which the law and lawmakers find most difficult to accommodate. In some cases, science and technology present novel problems which can be swept under the carpet for a time but which will ultimately require the attention of lawmakers. In other cases science and technology may actually assist in the resolution of legal disputes. In many Commonwealth countries, for example, the Breathalyzer has been adopted by law to measure by a breath test the blood alcohol level of allegedly intoxicated drivers. The readings from this scientific instrument are substituted for unreliable unscientific impressionistic evidence.²² Numerous reports now urge the adoption of tape recording to set at rest some of the disputes about alleged confessions to police officers.²³

But if science and technology present solutions to some of the difficulties of the modern administration of justice, they also produce problems. Take for example the problems presented by the transplantation of organs and tissues from one person to another. In such operations it frequently becomes necessary to determine the 'death' of the donor for legal purposes. Although the common law has never attempted to define 'death' with precision and has left its diagnosis to the medical profession, it is generally accepted that the classical criteria for determining death were the cessation of respiration and circulation of the blood. Interpose an artificial ventilator in a modern hospital and these criteria become not only irrelevant but potentially mischievous.²⁴ Another vivid illustration of the impact of modern technology on the law is one which will affect all countries of the Commonwealth of Nations in time. It is the impact of computerisation. The advent of automated data systems will require a rapid reassessment of the law of fraud and theft, the law of evidence, copyright and patent law and so on. Computerisation presents special difficulties to society because of the vulnerability to accident, blackmail and deliberate destruction which miniature technology makes possible. The impact of computers on employment levels in society may also have social effects which our laws will have to address. The capacity of the computer to store vast masses of information, retrievable at ever-diminishing cost and ever-increasing speed, raises important issues for individual liberties including the privacy of individuals which inquiries in many Commonwealth countries have now begun to tackle.²⁵ The linkage of computers in different countries by satellite and telecommunications makes possible the modern ease of airline travel and hotel bookings. But it also raises great questions of individual rights, economic dependency and national security which lawmakers will have to tackle before this century is out.

THE DECLINE AND FALL OF THE COMMON LAW

To meet the challenges which I have described and which all countries of the Commonwealth of Nations to some extent or other face, what do we have? In many of our countries

the elected Parliament is not specially interested in the 'nuts and bolts' of law reform. All too often it is a 'weak and weakening institution'.²⁶ Often its procedures are frozen in a bygone age with the loss of valuable sitting time in 'the tedious and often unedifying process of voting'.²⁷ In Australia at least, the vast bulk of legislative work is still conducted in plenary sessions, where Party contests and Party discipline are strongest and where the Whips of the Executive Government hold sway. One thoughtful Australian observer of the Federal Parliamentary scene in Australia described the Parliamentary malaise Australia in language which is probably appropriate in many of the countries of the Commonwealth of Nations:

If as a nation we are concerned about the declining reputation of our politicians and of the political processes we should ask ourselves whether the state of our Parliament has any influence on this condition. I believe it has. It is not that our parliamentarians are undignified, it is that the Parliament-Executive relationship is such. By stripping our rank and file politicians of continuing responsibility in Parliament ... the proceedings have degenerated into a continuous and elementary election campaign. Subtlety, diplomacy, and verbal dexterity in Parliament will only develop in the context of Parliamentary responsibility, not with Parliamentary impotence.²⁸

The principal beneficiaries of the ailing Parliament are the Executive Government and the permanent civil service. But under the pressure of 'continuous and elementary election campaigns', repeated elections at short intervals and the sheer complexity of the modern challenges of change, it is extremely difficult for busy, distracted Ministers and their preoccupied permanent administrators, to look far into the future, consult the numerous experts, listen to the public voice and consider in a reasoned way the future direction of the law and its institutions, under the multiple pressures for change.

Since the frank abandonment of the 'fairy tale' that judges do not make the law, increasing attention has been paid to the role of the judiciary as a lawmaker. The original

'genius' of the common law lay in the capacity of its judges not only to provide predictability and certainty by the use of precedent but also to cope with change and new circumstances by the development of new rules or the modification of old rules where circumstances required it.²⁹ Now, we are seeing the general retreat in judicial lawmaking. The bold early dynamic of the common law is replaced by judicial caution. Lord Scarman predicts that 'case law will become as much as it already is, the interpretation of enacted law. It will lose its character as a separate source of law'.³⁰ Certainly, this prediction seems to be borne out in recent decisions of the highest courts of Australia. Within the space of a year or so, a number of decisions of the High Court of Australia illustrate the disinclination of the judges to adapt and revise old common law rules established in earlier times, to new social situations. In one case³¹ it was held that a convicted capital felon was disentitled to sue in the courts. He had lost his civil rights and although this rule originated at a time when convicted capital felons were uniformly executed, it was for Parliament not the courts to alter the rule. Likewise, it was for Parliament to change the rule in Searle v. Wallbank.³² The Court would not overrule or find inapplicable the common law as stated in that case concerning the liability of landowners for stock straying from their land. The advent of expressways and fast motor cars was not sufficient to warrant an alteration in the settled common law:

Where the law has been declared by a court of high authority, this Court, if it agrees that that declaration was correct when made, cannot alter the common law because the Court may think that changes in the society make or tend to make that declaration of the common law inappropriate to the times.³³

Explaining the Court's position, one judge pointed to the relative advantages of law reform bodies and disadvantages of the courts as a forum for radical legal change and modernisation:

[T]here are very powerful reasons why the Court should be reluctant to engage in [moulding the common law to meet new conditions and circumstances]. The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law

to the facts as found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not and cannot carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community, and whether they command popular assent. Nor can the Court call for and examine submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot, and does not, engage in the wide-ranging inquiries and assessments that are made by governments and law reform agencies as desirable, if not essential, preliminary to the enactment of legislation by an elected legislature. These considerations must deter a Court from departing too readily from a settled rule of the common law and by replacing it with a new rule.³⁴

More recently the High Court of Australia specifically refused a frank invitation to modify the common law of locus standi, precisely because the Executive Government had referred the subject to the Australian Law Reform Commission.³⁵

Although attitudes may differ marginally among the several Supreme Courts of the Commonwealth of Nations, it is reasonably safe to assert that in the presence of the popularly elected legislature, the powerful and active Executive Government and the burgeoning statute book, the Judiciary of today is not as prepared as its forebears were to contribute in the courts to significant measures of law reform. Exceptions exist both in terms of personalities and particular cases. But by and large we find ourselves in a time when Parliament is ill-organised and generally uninterested in law reform, the Executive and permanent bureaucracy are distracted by urgent daily tasks and the Judiciary is disinclined to play the creative role which was until recently the principal means of law modernisation and reform in the common law system.

The lack of interest, distraction and disinclination of others is the opportunity and challenge of law reforming bodies. Lord Scarman has said that a special feature of English-speaking people is their inclination to reduce matters of controversy and debate to routine arrangements. The challenges of change which I have identified will impose upon all modern societies and their legal systems considerable pressures for change and re-organisation. Although the bright hopes of the 1960s have dimmed somewhat, and realism requires us to acknowledge the limited capabilities and achievements of institutional law reform, the fact remains that there is a distinct need for a routine method to help lawmakers cope with the problems of fundamental change which face our countries.

CONSTRAINTS ON INSTITUTIONAL LAW REFORM

Setting up a law reform agency is one thing. Making it effective to fill the institutional gap I have identified may be quite another. It is not difficult to list the problems of the law reform agencies of the Commonwealth of Nations. With few exceptions, they are common problems and it is possible here to do no more than mention some of the chief of them.

An obvious constraint arises from the resources which are devoted to institutional law reform. A recent analysis showed that in Australia the amount expended on law reform, Federal and State, is small, divided and uneven.³⁶ It is obvious that the quality, speed and quantity of law reform effort will vary to some extent with the funds which society is prepared to devote to the enterprise. Thoroughgoing law reform, based upon empirical scrutiny of how current laws actually operate, is an expensive business beyond the purse of most Commonwealth law reform bodies. In Australia, the Federal Commission has found that large numbers of experts in the Judiciary, the legal profession, business, industry, other related professions and community groups are prepared to offer their services as consultants free of charge with no reward other than participation in a national project of legal renewal.³⁷ Limitations in resources are noted in most of the law reform bodies of the Commonwealth of Nations. The latest addition, the Nigerian Law Reform Commission, is reported to

have complained about the lack of funds devoted to its establishment and the consequential lack of full-time staff, accommodation, resources and facilities.³⁸

A second constraint arises from the tasks assigned to the LRCs. Most of the agencies work upon references given by the Executive, although some can initiate their own programme and others can suggest items appropriate for study. There are critics who complain that this control by government is a constraint on the freedom of law reform bodies and an inhibition in the way of their tackling the real causes of injustice and unfairness in the law.³⁹ A criticism of the English Law Commission was addressed to the programme it had adopted:

Instead of tackling [criminal and family law] the Commission devotes much time to lawyers' law - the minutiae of the law, of interest only to lawyers and only marginally affecting the general public. It is examining such topics as interest on contract debts, implied terms, rent charges and the vicarious liability of corporations. Not all of its work is so obscure; it has done very useful and important work in criminal and family law. But valuable though this work may be, its utility is diminished by the failure to tackle the problem of court procedures and that of the complexity of legislation.⁴⁰

This feeling is not confined to critics but is voiced by Lord Scarman himself, first Chairman of the English Commission. Describing the 'disillusion felt by many over the work of law reform' he explained:

It adds to the volume of the law; is focused on lawyers' law and has little, or nothing, to offer towards social and economic betterment of the community; does not enter the fields of public, constitutional or administrative law; and it offers no reform of the legal process or the legal profession.⁴¹

Whether it is necessary to overcome the resistance of political leaders who generally have control of the tasks assigned to law reform bodies or the myopia of lawyers and law reformers themselves concerning the real problems of society, there is no

doubt that new attention should be paid to the priorities of law reform so that the scarce resources available for this endeavour are devoted to improving those areas of the law's operations that are seen by the community to involve the greatest injustice or the most pressing inconvenience.

A third constraint relates to the processing of law reform proposals, once finally made. The legislation establishing most of the law reform agencies of the Commonwealth of Nations is silent upon what is to happen once a report is presented. The Canadian Law Reform Commission put the issue thus:

All reform involves change, but not all changes are reforms. Reform, then, is change for the better. But better, by whose lights? The Commission's principal function is to recommend reform ... However the power to implement any such recommended changes resides in the government of the day and in Parliament. ... This process follows all the settled norms and traditions of Parliamentary democracy, including, of course the government's responsibility to elected Members and the elected Members' ultimate responsibility to the electorate, diluted as it might be in regard to any particular law reform proposals.⁴²

Views will differ concerning the importance that should be attached to prompt legislative implementation of law reform proposals. Sometimes law reform suggestions are implemented by administrative action in advance of legislation. Sometimes judges adopt LRC proposals and incorporate them in the common law.⁴³ Sometimes, in a Federation, the legislature of one jurisdiction may adopt a law reform suggestion in advance of the jurisdiction for which the suggestion was actually prepared.⁴⁴ Sometimes legislation may be introduced based on a consultative document, even in advance of the final report of an LRC.⁴⁵ In Australia, we have even had the case of legislation being introduced in another Commonwealth country, based on a law reform report, still under examination in the various Australian jurisdictions.⁴⁶ So, law reform acts in mysterious ways.

Nevertheless, the record of a large number of unimplemented law reform proposals in countries of the Commonwealth of Nations suggests that new institutional machinery should be found to promote the routine consideration of law reform proposals. An Australian Senate Committee has proposed that the reports of the Australian Law Reform Commission should be automatically referred to a Parliamentary Committee and that the government should indicate within six months whether it intends to implement, in whole or part, the law reform report.⁴⁷ The Australian Government has still to react to this proposal. But the proposal clearly amounts to a Parliamentary response to the development of institutional law reform. The same commentator whose pessimistic view of the Parliamentary process in Australia has already been cited, took heart from this development:

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. The 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 Australian Senate ...⁴⁸

Whether the 'synthesis' will develop or whether the Commission will remain a 'creature' of the Executive Government will remain to be seen. The enemy of a great deal of legal reform is not frank opposition, and the powerful lobbies. All too often, it is governmental indifference, the Parliamentary agenda, bureaucratic inertia and intimidation by the technicalities, complexities and sheer boredom with much legal reform. Unless we can overcome these impediments, we will have reached an impasse. Law reform, which was formerly done in great measure by the courts of the common law will be postponed by the courts for Parliamentary attention. Unless Parliament and the Executive can be helped to focus that attention, injustices will pass unattended and the challenges for the law of the dynamic forces of change will elicit an inadequate and incompetent response.

CONCLUSIONS

Fashion and imitation do not fully explain the remarkable development of law reforming agencies throughout the Commonwealth of Nations in the past 20 years. These agencies amount to an institutional response to an institutional problem of the common law system. In the post-independence age of active legislatures, the judges of our tradition have retreated. What is now needed to cope with the challenges of change is a new institution that will help Parliament and the Executive to review, modernise and simplify the law, adapting its rules and procedures to the demands of rapidly changing societies, but in a way consistent with the democratic institutions of elected legislatures and responsible Executive Government.

The forces for change will not go away. On the contrary, they will increase apace. They include the growth of the role of government, of big business, of big science and technology in all our countries. The pressures for change of the law and its institutions are now fuelled by societies that are better educated and increasingly better informed. The old way of doing things, of requiring unquestioning obedience to rules laid down by authority has, uncomfortably for the lawmaker, passed. Our citizens will increasingly require that the law be fair and compatible with developments in society.

Into the vacuum left by the retreating Judiciary, indifferent Parliaments and distracted Executive Government, has come the law reform agency. It is a new institution and it is in its infancy. Its precise future relationship to the established organs of government has yet to be worked out although the start has been made. It may come to nothing and be subdued by the all powerful Executive. It may fall victim to its own bureaucratic and institutional forces. But with a little luck, it may be adapted to help our older institutions to cope with the enormous challenges of change they will face as this century closes.

Alvin Toffler, in his latest book,⁴⁹ suggests gloomily that our institutions simply cannot cope. The changes, he declares, are happening too fast and our elephantine lawmaking processes will simply prove inadequate to the pressures of change. This is a voice of despair. Those who know the adaptability of our legal system, stretching as it does through more than eight centuries, may be more sanguine. The Nigerian Federal Attorney-General and Minister of Justice, Chief R.O. Okinjide, speaking of the establishment of the Nigerian Law Reform Commission, put it thus:

Law is a living organism. It is not dead and we should not move on [the] camel's back in a jet age. We should move with the times ... and this is precisely what we intend to do. ... The law should be as advanced as the society. It must be our servant and not our master.⁵⁰

Lawmakers throughout the Commonwealth of Nations share these sentiments. It is up to the law reforming agencies to respond. But it is also up to the lawmakers to adapt their processes so that the response is translated in a regular and routine way into improvement of society by improvement of its laws.

FOOTNOTES

1. B. Shtein, 'Law Reform - A Booming Industry' (1970) 2 Australian Current Law Rev., 18.
2. See for example (1979) 5 Commonwealth Law Bulletin 447 (proposals on insurance law reform by the English Law Commission (WP No. 73 'Insurance Law: Non-Disclosure and Breach of Warranty') and by the Australian Law Reform Commission, Discussion Paper NDo. 7, 'Insurance Contracts').
3. A quarterly bulletin published by the Australian Law Reform Commission (ALRC) and distributed free of charge including to LRCs throughout the world.
4. Australian Law Reform Commission, Australian Law Reform Digest (Interim), mimeo, 1976, with Supplements.
5. Commonwealth Secretariat, 'Law Reform in the Commonwealth : Law Reform Proposals and Their Implementation', (Pilot issue), October 1979.
6. A list of agencies and addresses is contained in (1979) 5 Commonwealth Law Bulletin, 1402. It is updated regularly.
7. R.J. Ellicott, Opening Speech, Third Australian Law Reform Agencies Conference, Canberra, May 1976, in Australian Law Reform Agencies Conference, Minutes, Third Conference, 34.
8. Lord Westbury is cited as J.W. MacDonald, 'The New York Law Revision Commission' (1965) 28 Mod.L.Rev. 1, 2.
9. Lord Scarman, 'Law Reform - The British Experience', Jawaharlal Nehru Memorial Lectures, mimeo, January 1979.
10. P. Wilenski, 'Political Problems of Administrative Responsibility and Reform', (1979) 38 Australian Journal of Public Administration, 347.
11. Quasi autonomous non-governmental organisations.

12. G. Powles, 'Citizen's Hope : Ombudsmen for the 1980s' (1979) 5 Commonwealth Law Bulletin, 522.
13. For example, the Report of the United Kingdom Committee on Administrative Tribunals and Inquiries, 1957, Cmnd. 218 and the Report of the Commonwealth Review Committee (Australian Parliamentary Paper 144, 1971).
14. The Law Commission, Report on Remedies in Administrative Law, Law Com. No. 703. See also Law Reform Commission of Canada, Working Paper 18, 'Administrative Law: Federal Court. Judicial Review' 1977.
15. Important developments in Australia include the establishment of a Federal administrative law tribunal (Administrative Appeals Tribunal Act 1955) and the passage of an Act for the simplification of judicial review and the giving of reasons by administrators (Administrative Decisions (Judicial Review) Act 1977).
16. A list is contained in (1979) Commonwealth Law Bulletin 967.
17. Powles, 525.
18. Freedom of Information Bill 1979, Bill C-15 (Canada) (lapsed). Freedom of Information Bill (1979) (Aust.)
19. Report of the Commission of Inquiry of the Federal German Parliament on Questions of Constitutional Reform, 1973, cited in Powles, 524.
20. See, eg Report of the Study Committee on Bankruptcy and Insolvency legislation 1970 (Canada); Australian Law Reform Commission, 'Insolvency: The Regular Payment of Debts' (ALRC6) 1977.
21. See consultative documents cited in note 2 above.
22. Australian Law Reform Commission, 'Alcohol, Drugs & Driving' (ALRC4) 1976.

23. Australian Law Reform Commission, 'Criminal Investigation' (ALRC2) (Interim) 1975, 71.
24. As was shown in R v. Potter, unreported [1973] Criminal Law Review 529 where an accused charged with manslaughter asserted that the death of the victim had been 'caused' not by his act but by the termination of life supporting mechanical ventilation. See Australian Law Reform Commission, 'Human Tissue Transplants' (ALRC7) 1977, 58.
25. Report of the Committee on Privacy (Younger Committee) 1972, Cmnd. 5012; Report of the Committee on Data Protection (Lindop Committee) 1978, Cmnd. 7341 (United Kingdom); Report of the Task Force on Privacy and Computers (1972). (Canada); Australian Law Reform Commission, Discussion Paper No. 13, Information Privacy, 1980 (forthcoming). Cf Privacy Protection Study Commission, Personal Privacy in an Information Society, 1977 (United States)
26. G.S. Reid, 'The Changing Political Framework', Address to the 1978 Summer School of the Australian Institute of Political Science, Quadrant (Jan-Feb 1980) 5.
27. *ibid*, 6.
28. *ibid*, 7.
29. A. Diamond, 'Law Reform and the Legal Profession' (1977) 51 Australian L.J. 396, 398.
30. Lord Scarman, *op cit* n.9, cited [1979] Reform 40.
31. Dugan v. Mirror Newspapers Limited (1978) 22 Australian L.R. 439.
32. [1947] A.C. 341
33. State Government Insurance Commission v. Trigwell & Ors., (1979) 26 ALR 67 at 70. See to similar effect Scarman LJ in Farrell v. Alexander [1976] 1 Q.B. 345, 371.

34. Mason J in Trigwell, 78.
35. Australian Conservation Foundation Incorporated v. Commonwealth of Australia, unreported, High Court of Australia, 13 February 1980.
36. M.D. Kirby, 'Reforming the Law' in A.E.S. Tay and E. Kamenka (Eds), 'Law Making in Australia', 1980, 39, 64.
37. Australian Law Reform Commission, Annual Report 1979 (ALRC13) 1979, 16.
38. New Nigerian, 14 January 1980, 1, 19. ('Lack of fund hampers law body's work').
39. 'Law Reform in Action' (1976) 126 New LJ 1.
40. J. Levin in New Society, 11 January 1979, 13.
41. Lord Scarman, op cit note 9; [1979] Reform 40. Similar observations were made by the second Chairman of the Law Commission, Sir Samuel Cooke, 'The Law Commission : The First Ten years' (1975) 125 New LJ 1036.
42. Law Reform Commission of Canada, 7th Annual Report, 1978, 6.
43. *ibid*, Appendix B, 30f.
44. See eg Police Regulation (Allegations of Misconduct) Act 1978 (NSW) based on Australian Law Reform Commission, 'Complaints Against Police' (ALRC1) 1975. Similarly see Repayment of Debts Act 1978 (SA) based in part on Australian Law Reform Commission, 'Insolvency : The Regular Payment of Debts' (ALRC 6) 1977.
45. For example, the Lands Acquisition Act 1978 (Northern Territory) implemented many proposals contained in the Australian Law Reform Commission, Discussion Paper 5, 'Lands Acquisition Law : Reform Proposals'. The final report of the Commission, Lands Acquisition and Compensation (ALRC14) 1980, was recently tabled in the Australian Parliament.

46. Legislation for defamation law reform has been introduced in Barbados based on Australian Law Reform Commission, 'Unfair Publication : Defamation and Privacy' (ALRC 11) 1979. In Australia, the report is still under the consideration of the Standing Committee of Commonwealth and State Attorneys-General.
47. Australian Parliament, Senate Standing Committee on Constitutional and Legal Affairs, 'Reforming the Law', 1979.
48. G.S. Reid, Address to the Fifth Australian Law Reform Agencies Conference, Perth, Western Australian, June 1979, cited [1979] Reform 83.
49. Alvin Toffler, 'The Third Wave', William Coldlins, 1980.
50. As reported in Nigerian Herald, 6 March 1980, 10.