VOLUME TO HONOUR PROFESSOR JULIUS STONE

LAW REFORM AS 'MINISTERING TO JUSTICE'

The Hon. Mr. Justice M.D. Kirby
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STONE'S REALMS OF GOLD

The effect upon impressionable young minds of Stone's The Province and Function of Law[1] is still being felt in the law and public life of Australia. Generations of lawyers in training were required to dip into its pages and later the pages of its successor volumes.[2] For some at least, exposure to the compressed exposition of jurisprudence, legal history, political argument and practical case law produced emotions not dissimilar to those of Keats when a kindly friend gave him Chapman's Homer. Certainly, in their scale and the optimism of their coverage, Stone's jurisprudential writings were of epic proportions.

When Roscoe Pound reviewed Province in 1948, he declared that he found the book 'so thoroughly worthwhile' that he 'read every word of text and notes most attentively'.[3] Pound's influence on Stone was profound. It was handsomely acknowledged. Through Stone, Pound's practical and realistic approach to jurisprudence, entirely compatible with the spirit of the English common law, found acceptance amongst the young lawyers of Australia and New Zealand in the 1940s, 1950s, 1960s and beyond. Those young lawyers in time came to positions of influence in the law and its institutions in the Antipodes. It is only now that the impact of Stone's jurisprudential teachings upon the lawyers of Australia is coming to full flower.

In the same book review, Roscoe Pound exhibited a concern to turn a thorough understanding of the science of the law to practical account:

> '... I have always doubted whether the science of law can wait for ... ultimate theoretical problems to be settled, in the meantime holding up its practical task of finding how to adjust relations and order conduct in view of the conflicts and overlappings of interests presented to it in controversies demanding speedy settlement'.[4]

Thirty-six years earlier, when Julius Stone was five years old, Pound wrote a celebrated essay on the 'Scope and Purpose of Sociological Jurisprudence'.[5] In it he listed a number of practical objectives for a sociological jurisprudence in common law countries. When Stone wrote Province in 1946, he asserted that these objectives remained 'urgent and, regrettably, for the most part unexecuted'.[6]

How fresh and relevant these objectives remain today, nearly 70 years on. Amongst them was the call for a study of the actual social effects of the legal institutions, legal precepts and legal doctrines of the 'law in action', as distinct from the 'law in the books'.[7] Pound's programme also called for sociological study as an essential preliminary step in preparation for law making. Stone explained it in words that are still apt:

> 'A mere guess of politicians combined with the skills of a legal draftsman, was not an adequate basis of law reform, nor was a mere armchair analytical legal study of existing or alternatives rules. The kind of preliminary exploration of social facts made by Departmental Committees and Royal Commissions in British countries on special occasions ought in this view to be a regular part of the legislative process'.[8]

There were other items in Pound's catalogue, given fresh voice in Province. The study of how rules can be made effective in the existing conditions of social life was one. The study of judicial methods and modes of thought, so important in common law countries, was another. The study of legal history in terms of then existing social conditions was yet another. For the purpose of this contribution, it was Pound's seventh and eighth items which are of the greatest importance. They called for the establishment of a government department with functions and expert personnel adequate to take a full share in the programme of law improvement and for a jurisdic study directed at the more effective achievements of the identified purposes of law. This was the notion of a 'Ministry of Justice'. Stone explained that the proposal:

> 'was related in particular to the need for adequate social inquiries prior to legislation, and to the evil effects of one-sided lobbying in the absence of such machinery. It would provide not only a body of experts for long-range investigation, but a clearing house for day-to-day grievances concerning the actual operation of law, and for proposals for its improvement'.[9]

MINISTERING TO JUSTICE

The successor volumes to the Province were published between 1964 and 1966, coinciding with the creation of permanent law reform institutions in Britain[10] and Australia.[11] In Social Dimensions of Law and Justice, Stone expanded the discussion of Ministries of Justice into a chapter analysis of 'Institutional Arrangements for Ministering to Justice'.[12] The notion of establishing a Ministry, with the function of consciously, systematically and comprehensively serving the reconciliation of the law and the perceived needs of justice, had been proposed long before Pound's essay, as Stone points out. Indeed, calls for new institutional arrangements for the systematic reform of the law of England antedates the 19th century debate about an English Ministry of Justice, recounted in Social Dimensions. At the end of the 16th century, Bacon urged the appointment of six Commissioners to investigate obsolete and contradictory laws and to report regularly to Parliament.[13] During the Commonwealth, there were systematic moves for reform. But it was the writings of Jeremy Bentham which provoked the moves in the middle of the 19th century for the establishment of a permanent full-time body, charged with the duty of revising the whole body of the law of England and reducing it to accessible codes. The moves led to the establishment of the Common Law Commissioners, the Real Property Commissioners and the first Ecclesiastical Court Commissioners. Their reports led to the Common Law Procedure Act of 1854 and, according to Sir Owen Dixon, showed:

> 'a tremendous body of learning, industrious inquiry and careful consideration and the reports themselves are legal works of the greatest erudition, exact information and, at the same time, of great wisdom'.[14]

The same Benthamite spirit led to the codifications which marked the turn of the century. Their effect is still felt today in the four corners of the world where the English law flourishes. I refer to the Bills of Exchange Act 1882, the Partnership Act 1890, the Sale of Goods Act 1893 and the Marine Insurance Act 1906.[15] In India, it led to codification of the criminal law, the law of defamation, civil procedure and evidence. The codes adopted in that sub-continent profoundly affected the law of other parts of the Empire, including Australia.

Stone points out that in the middle of the 19th century it was Lord Westbury, later to be Lord Chancellor, who most clearly expressed the need for a Ministry of Public Justice.[16] Lord Westbury's call is worthy of recollection today, for it played an important part in the creation of the sympathetic intellectual environment for permanent agencies of law reform throughout the common law world:

> 'The first thing ... that strikes every member of our profession who directs his mind beyond the daily practical necessity of the cases which come before him is that 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. ... Take any particular development of the common law — take, if you please, any particular statute. 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'.[17]

Lord Westbury's call for such a 'body of men' found reflection in various developments, including, for example, the creation of the first law reform commission in New South Wales, under the chairmanship of Chief Justice Stephen.[18] However, the proposal for a comprehensive Ministry of Justice did not, as Stone points out, make 'serious progress'.[19] True it is, Lord Haldane's report on the Machinery of Government reaffirmed the lack of time and machinery in available administrative arrangements for systematic oversight and reform of the law. To be the government's chief legal adviser was one thing. But it was 'quite another to possess the powers which a Minister of Justice ought to have'.[20]

Although part-time law reform bodies were created in Britain[21] and Australia[22], some of which are still functioning,[23] it was not until the mid 1960s, coinciding with the publication of Social Dimensions, that permanent machinery was established to fulfil Lord Haldane's call for continuous vigilance over the laws, and his demand that:

> 'some agency must be found to mediate between the legislature and the courts. Some body must be found to act as messenger from the courts to legislature and from legislature to courts'.[24]

The immediate inspiration for a full-time agency of this kind was the book which Mr. Gerald Gardiner co-authored in 1963, 'Law Reform Now'.[25] Upon his accession to the Woolsack in 1964, the first Bill which Lord Chancellor Gardiner introduced was one for the constitution of the two Law Commissions of Great Britain. In 1965 in New South Wales, an election promise was made to establish 'a permanent full-time law reform commission composed of a Supreme Court judge, a practising solicitor and an academic'.[26] The establishment of the New South Wales Law Reform Commission in 1966, even in advance of the Law Reform Commission Act 1967 (N.S.W.) set

a pattern which has now, substantially, been followed in most parts of Australia.[27] A federal agency for the reform of Commonwealth laws was almost the last on the scene, with the establishment of the Australian Law Reform Commission in 1975.[28]

Writing before these developments, first in 1946 and later in 1966, Stone accurately catalogued the problems and opportunities of permanent law reforming agencies. What he wrote then remains a useful intellectual framework for those whose responsibility it is to nurture and develop the fledgling institutions for the orderly development of the law in a way that will respond to the needs of justice and cure injustice where it comes to notice.

STONE AND INSTITUTIONAL LAW REFORM

Over the years of his career as a law teacher, legal writer and public figure, Julius Stone cultivated not only the cloistered virtues of learning and scholarship, but the attribute of the modern scholar in the social sciencies to call to occasional attention needs for reform and improvement. The scope of his written calls for particular reforms was ample and varied, ranging from reform of particular rules of the law of evidence[29], of the approach of the courts to statutory interpretation[30], reform of rules of private international law[31], of Crown privilege,[32] of 'political' offences[33], of privacy and reputation[34], of freedom of information[35], patent law[36], consumer protection[37], the secularisation of the law of marriage and divorce[38], and what we would nowadays call antidiscrimination law.[39] Years before these matters came under the study of law reforming agencies or the widespread consideration of the community, he was writing about ecology, conservation and environmental aesthetics[40], the 'administrative explosion'[41], the recognition of plural civilisations[42], tax avoidance[43], control of economic institutions[44] and the legal problems arising from advances in technology.[45]

For the purposes of this note, Stone's relevant contributions were addressed to the shape and function of permanent institutions to harmonise the law and justice, and assistance in clarifying the criteria by which justice would be recognised and the harmonisation achieved. In Social Dimensions, after recounting the history of the calls for a Ministry of Justice, with the comprehensive tasks set out above, Stone both recognised the failure of these calls to lead to action by the time of writing (1966) and the urgency of providing without delay institutions which could minister to law and justice:

> 'The functions demanding fulfilment have, if anything, become clearer as the unsolved problems of the past are compounded with emergent new problems. Adequate organisation and personnel are necessary to keep under review, on its professional, judicial and administrative sides, the working of the legal order towards community-approved ends; to conduct adequate research prior to legislative action, ... to build up expertise for these tasks and also for more long-range continuing investigations; and to provide a clearing house for day-to-day grievances of the citizen affecting the actual operation of law, which may in turn reveal defects calling for reform'.[46]

The language of 1946 had become more insistent and urgent. The themes remained the same. There was a need to study the actual operations of the law in action and to collect instances of injustice. But there was also a need for a body which could generalise, in a detached way, and after adequate research, so that legislative reforms proposed would be well balanced, well informed and based upon an understanding of the actual operation of the system and people's perceptions of it as it measured up to notions of justice. In footnotes, Stone referred to the problem created by the sheer bulk of reports and statutes, a matter also taken up in Legal System and Lawyers' Reasoning.[47] The possible use of public opinion polls to discern grievances and citizen perceptions was specifically allowed.[48] Stone concluded that the 'ever increasing range and complexity of the legal order' made it increasingly less likely that a single Ministry of Justice, after the Westbury or Haldane conception, would be created in common law countries. It was not feasible because of the number and variety of the problems. It was unacceptable because of the cherished independence of the courts and the resistance to the notion of a Minister, being a party politician, who would have such comprehensive functions.[49]

For all that, Stone pointed the way to the development which shortly occurred. Apart from research activity in law schools, the establishment of the Ombudsman[50] and the creation of public and private research institutions, Stone noted the incipient development of law reforming agencies throughout the English-speaking world:

> 'A different kind of organ, the full-time standing law revision commission, has sometimes been charged with continuing overhaul of legislative output, not necessarily limited to pruning and consolidation. The New York Commission has a most notable record. That such tasks can no longer be left, as formerly, to secular (or even millennial) purges seems clear enough'.[51]

But he then noted the importance of expanding law reforming agencies by reference to the tenets of the realistic and sociological jurisprudence which was his hallmark:

> 'A variety of Law Revision or Law Reform Committees in British countries has been charged with making recommendations as to changes in the law on particular matters. Consisting of Judges, practitioners and an occasional academic lawyer, such committees, though in a sense standing bodies for law reform, remain essentially part-time and ad hoc in their efforts, and only legal in expertise. The notable series of legal amendments which they have promoted has been on matters which mainly trouble the lawyers or which lawyers think worry businessmen, making less impact on general problems of law reform. Functionally, indeed, there may be a real distinction between legal deficiencies in the former sense, and social deficiencies of law which are of more general (sometimes called 'political') concerns'.[52]

Expanding this notion, Stone reminded the readers of Social Dimensions of Pound's call for a dialogue between lawyers and social scientists if lasting and effective law reform were ever to be achieved. The tasks of law reform as conceived by Stone called for the lawyers' resort to the social sciences as well as to ethics and law. In Holmes' words, the constructive lawyer of the future would be 'the man of statistics and the master of economics'.[53] Stone's conclusion was that all-embracing Ministries of Justice would not be created. Yet piecemeal institutional fulfilment would achieve reform in particular areas. And such institutions as were created would require attention to 'far-ranging non-legal expertises and complexities still often beyond the reach of the personnel and time available for handling them'.

In short, Stone's vision for institutional law reform in common law countries, as written in 1966, was that it would not take on the form of a permanent comprehensive Ministry of Justice. Rather, it would involve institutions looking at particular problems. These institutions would, together with the Ombudsmen, receive complaints about perceived unfairness and injustice in the operation of current laws and practices. It would generalise these complaints to achieve directions for reform and improvement. It would, however, search for improvement by the light shed not simply by a study of the verbal analyses of ethics and the law. It would also search out facts concerning the current operation of the law 'in action' and it would do so with the benefit of statistical, economic and other knowledge gleaned from the social sciences. It would seek to be released from the perceptions and priorities fixed by lawyers alone, not contented by a study only of the 'law in the books' but determined also to find about 'the law in action'.[54]

Pockets of 'last-ditch resistance' to the 'invasion of extra-legal concerns' are listed by Stone.[55] But 'even in British countries', he asserted, 'we have at least passed well beyond the stage when the concern of lawyers with social purposes and social effects was largely dismissed as "too allusive"'.[56] Stone's vision of institutional law reform in 1964 was, then, a mixture of ad hoc improvision, practical concern with remedying wrongs, institutionally avoiding the 'omnibus solution', yet generalising its activity beyond a mere short-term solution to particular and immediate problems. Above all, he preached Pound's doctrine that law reform, if it was to last, would be grounded not merely in the ruminations of a 'body of experts' and moreover of legal experts only, but in the activities of institutions alive to the need for adequate social inquiries as a basis for determining, in the first place, what, if any, was the problem, and in the second place, what, if anything, could be done worthy of the name of 'reform'.

This conception of institutional law reform has profoundly affected the direction of institutional law reform in Australia. As the Australian model differs in significant respects from institutional developments overseas, the impact of Stone's teachings must, for good or ill, be cited as an important reason why law reform in Australia has taken a particular course.

THE LAW REFORM EXPLOSION

Stone's prediction that a comprehensive Ministry of Justice would not be created in common law countries remains fully vindicated. True it is, ministries of that name have been established in some of the Australian States. But their functions fall far short of the vision of Westbury and Haldane and the notions of Pound, Cardozo[57] and the other optimists.[58] Generally, they are concerned with aspects of the criminal law, prisons and related services. Even when combined (as in New South Wales) with the office of the Attorney-General, they do not pretend to a comprehensive obligation to synthesise notions of justice and current legal prescriptions.

Shortly after the publication of Social Dimensions, occurred a development which is nothing short of remarkable. Throughout the Commonwealth of Nations, and specifically in all jurisdictions of Australia, permanent and usually full time law reforming institutions were created. The establishment of the permanent New South Wales Law Reform Commission in 1965, was followed by the creation of permanent law reforming agencies in Queensland in 1968[59], in South Australia in the same year[60], in the Australian Capital Territory in 1971[61], in Western Australia in 1972[62], in Victoria in 1973[63], in Tasmania in 1974[64] and in the Northern Territory of Australia in 1976.[65] The Commonwealth Act to establish a federal law reform commission was approved by the Australian Parliament in 1973, although the first members of the Australian Law Reform Commission were not appointed until 1975.

The developments in Australia and Britain had been reflected by similar developments in all parts of the Commonwealth of Nations. Law commissions have been created in most jurisdictions of Canada, in India and Sri Lanka, in the islands of the West Indies, in Papua New Guinea, Fiji and Tonga, and throughout the continent of Africa. In part, this explosion of law reform may reflect nothing more than the pursuit of the fashionable. In part it may even follow realisation by some politicians that difficult issues can occasionally be defused for a time by the ready availability of a permanent law reform institution. In part, it may represent political tokenism: the creation of a small ill-funded, under-staffed body almost as a placebo for citizen complaints about defects in the law's rules and procedures.[66]

Another interpretation of the 'booming industry'[67] of law reform institutions is that law makers recognised the proliferation in number and complexity of the problems of adjusting the law to a time of rapid change. Coinciding with this realisation is an appreciation of the incompetence or unwillingness of present law making institutions (the parliament, the Executive government and the courts) adequately to meet the needs of legal modernisation and revision. The permanent law reform agencies have been created to fill the resultant institutional vacuum.[68] This is not the occasion to review the failure of the other institutions: the distraction of parliament and the Executive by a 'continuous and elementary election campaign'[69] and the inability or disinclination of judges to adapt the forensic medium to the needs for radical legal change and modernisation. It is sufficient to note that parliament and the Executive government, unaided, are not attending to the many needs for law reform. Moreover, a series of decisions of the High Court of Australia during the past two years has underlined the view of the majority that the courts are not well adapted, nor the judges necessarily the right persons, to effect comprehensive legal reforms:

> '[T]here are more 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, preliminaries 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'.[70]

These words of Mr. Justice Mason, himself a graduate of Julius Stone's instruction, reflect Stone's view that law reform, and indeed, so far as possible, legislation generally, should be based upon thorough investigations, a consideration of citizen and other complaints and wide-ranging inquiries directed to the current and proposed operation of the law. They also reflect, and indeed it is later spelt out in terms, Stone's 'open eyed' recognition of the judicial role in law making.[71] The fact remains that in this case, as in other Australian cases, the High Court has asserted the limited function of the Court in developing new rules, even of the common law, in the face of well-established authority.[72] The assertion has been repeated in recent cases involving prisoners' rights[73], the widening of standing to sue[74], the alleged right to legal aid in serious criminal cases[75], tax avoidance[76] and voluntary intoxication as a defence to otherwise criminal conduct.[77] In each of these cases, the High Court majority, expressly or by implication, has noted the need for reform. But that need was held to be a matter for the elected parliament, possibly aided by permanent law reform bodies[78], not for unelected judges operating within the constraints of courtroom procedures and inter partes litigation.[79]

THE SOCIOLOGY OF LAW REFORM

The 'wide ranging inquiries and assessments' to which Mr. Justice Mason referred in the passage just cited, have been the hallmark of law reform technique as developed in Australia. From the outset of its work, the Australian Law Reform Commission has sought to broaden the procedures of consultation traditionally adopted by committees of inquiry. Its efforts have taken it beyond the 'working paper': the special contribution of the English Law Commission to law reform technique.[80] Lord Scarman, the first Chairman of the English Law Commission, has described the advantages and problems of this procedure of consultation:

> [It] is a lengthy and time-consuming business. Though it imposes delay, it is the key to quality and acceptability. Consultation, wide enough to embrace all interests and deep enough to expose all the problems, may take a long time: but it can and usually does mean a swift passage through Parliament of a non-controversial Bill to give effect to a law reform proposal. At the very least, it will ensure that controversy is limited to genuine issues upon which a policy decision has to be taken'.[81]

In addition to this form of consultation, all law reform bodies engage in private discussion with interested groups, particularly with lawyers.[82] It has been conceded, however, that these procedures are not very effective ways of communicating 'with the public at large':

> 'Working papers are clearly aimed largely at a legal audience, and although we try to circulate copies to non-legal recipients, and they are often summarised in newspapers, we ought not to be suprised that many of them do not make much of an impact on the mass of the population. ... Communication with the public is neither easy nor cheap'.[83]

In these comments, made by tested institutional law reformers, are reflected the problems portrayed by Stone in Social Dimensions. The tasks of law reform involve 'far ranging non-legal expertises and complexities still often beyond the reach of the personnel and time available for handling them'.[84] In Australia, new initiatives have been taken in the attempt to cope with the problems of multi-disciplinary expertise, the complexity of the tasks of modern law reform and the need to resort to the social sciences, all of which Stone stressed at the outset of the new law reform era. Some of the initatives have proved controversial. All of them, at this stage, must be counted experimental. Behind them all is the aim of achieving law reform based on a 'fundamental and persistent examination of the administration of justice' but directed towards practical improvement, within a time frame that is socially acceptable.

The first procedure to fulfil Holmes' prognostication about the constructive lawyer of the future is to be found in the appointment, in each task of the Australian Law Reform Commission, of a number of consultants from differing disciplines (most of them outside the law). Because all, save one, of the Commissioners of the Australian Law Reform Commission are lawyers, and because many of the projects referred to the Commission for report involve non-legal expertise, an effort is made at the outset of every project to secure as consultants persons, lawyers and non-lawyers, who will have relevant expertise to offer as the project develops. In choosing consultants, the

Commission has looked to a number of criteria. The first consideration is the possession of special related knowledge and information. Another is the desirability of securing consultants from different parts of the country. The Commission has also sought to balance competing attitudes and interests. Thus, in the project on introduction of class actions in Australia, the president of the Australian Consumers Association sits down with representatives of business and industry. In the project of improvement of debt recovery laws, the executive director of the Australian Finance Conference takes part, with persons experienced in helping and counselling poor debtors. In the project on the laws governing human tissue transplantation, medical experts of differing surgical disciplines were joined by a professor of philosophy, a Catholic theologian and the Dean of a Protestant College of Divinity. In the reform of police procedures, legal academics and civil liberties spokesmen debate with senior police officers and other Crown representatives. For the reform of defamation laws, no fewer than 30 consultants were appointed, including journalists in the printed media, radio and television, newspaper editors and managers, legal academics, experienced barristers, lecturers in journalism and an Anglican divine.

The end result of these procedures is a remarkable collection of interdisciplinary expertise which has greatly enriched the thinking of the law commissioners. Consultants attend meetings with commissioners, review in-house publications and generally add their knowledge and perspectives to the development of law reform proposals. They are in the nature of a chorus, cajoling, reminding, insisting and usually, finally, harmonising in the development of reform proposals. On some points, consensus cannot be achieved. Reports of the Commission make it plain that the responsibility for recommendations is that of the commissioners only. However, there is no doubt that this interdisciplinary team has profoundly affected the reports of the Australian Law Reform Commission. The biases of lawyers, their perceptions of law reform proposals — and what Stone calls 'what lawyers think' are the problems of law reform — are exposed to a constant process of interdisciplinary exchange. The needs for such exchange are readily apparent in many of the tasks given to the Australian Law Reform Commission. A large proportion of these, chosen by responsive politicians[85] have been addressed to controversial social questions upon which lawyers, plainly, do not have a special claim to expertise. Reform of child welfare laws, for example, requires the participation of medical practitioners, psychiatrists, police and other expertise.[86] Development of a law on privacy requires, nowadays, the close participation of computer and communications experts.[87] The issue of whether Aboriginal customary laws should be recognised in Australia requires anthropological and philosophical expertise as much as

it does legal.[88] But even in a task so apparently one of 'lawyers' law' as reform of the rules of evidence in federal courts, it has been thought appropriate to appoint as a consultant, in addition to judges and practitioners, a psychologist who will look at evidence law from the perspective of memory and perception, and others who will draw to attention the litigant's perception of a trial or the statistician's approach to probability theory.

The second development aimed to secure the involvement of non-lawyers in the process of law reform in Australia has been the development of the brief discussion paper. Brevity is a discipline that does not always come easily to lawyers, including law reformers. The traditional working paper was often too long, too complex and too boring to secure the very aim in target, namely widespread consultation. For this reason, the Australian Law Reform Commission, and lately some of the state commissions in Australia, have produced, in addition to detailed papers, short discussion papers and pamphlet summaries of interim proposals. These state briefly the policy issues being posed for professional and public comment. By arrangements with law publishers, the Australian Law Reform Commission's discussion papers are now distributed with the Australian Law Journal and other periodicals, thereby reaching most of the lawyers of Australia. The result has not always been the desired flood of professional comment and experience. However, there has been some 'feedback' from lawyers in all parts of the country, in a way that would simply not occur in response to a detailed working paper of limited distribution.

Discussion papers of the Australian Law Reform Commission are now widely distributed to other interested groups outside the law. Copies of summary pamphlets are reprinted in or distributed with professional journals of disciplines related to the issues under consideration. In the case of the discussion paper on Aboriginal customary laws, a new procedure has been adopted, involving the distribution of cassette tapes, summarising in simple language the problems and proposals. Translations into principal Aboriginal languages have been concluded. These cassettes are now being circulated for use in the far-flung Aboriginal communities of Australia. They will permit and indeed promote discussion and response in a way that no printed pamphlet could ever do.

The third innovation to escape the dangerous concentration on what 'lawyers think worry' citizens, has been the public hearing. Before any report of the Australian Law Reform Commission is written, public hearings are held in all capital cities of the country. Lately they are also being held in provincial centres. In connection with the inquiry into Aboriginal customary laws, they will be held in outback towns and Aboriginal communities. Public hearings have not been held in England.[89]

A fear has been expressed that they might descend into 'many irrelevant time-wasting suggestions'.[90] This fear reflects the lawyer's assurance that he can always accurately judge what is relevant. Although it is true that in the public hearings of the Australian Law Reform Commission, time is occasionally lost by reason of irrelevant submissions, the overwhelming majority of participants in public hearings have proved helpful, thoughtful and constructive. In addition to public advertisement, specific letters of invitation are now sent to all those who have made submissions during the course of the inquiry up to the date of the hearing. Although hearings had a shaky start, for Australians are not accustomed to such participation in law making, they are now increasingly successful, if success is judged by utility in the provision of information and opinion. Many of the hearings proceed late into the night. Evidence and submissions are taken by the commissioners, usually required by an inexorable airline timetable, to join an early morning flight to another centre.

The notion of conducting public hearings was suggested many years ago by Professor Geoffrey Sawer. He drew attention to the legislative committees of the United States of America and the utility in gathering information and opinion, involving the community, as well as the expert, in the process of legislative change.[91] The hearings have several uses. They bring forward the lobby groups and those with special interests, including the legal profession itself. They require an open presentation and justification of arguments about the future of the law under study. They encourage ordinary citizens to come forward and to 'personalise' the problems which hitherto may have been seen in abstract only. In a number of inquiries of the Australian Law Reform Commission, notably those on human tissue transplants[92] and compulsory land acquisition[93], the personal case histories help the Commission to identify the lacunae or injustices in the law needing correction. Quite frequently, problems are called to attention which have simply not been considered. Defects in tentative proposals come to notice and can then be attended to. The media attention which typically accompanies the series of public hearings and the companion industry of professional seminars, has itself a utility which cannot be under-estimated. It raises community expectations of reform action. It placates those community groups which rightly insist on having their say. It ensures that when politicans receive the report proposing law reform, it has been put through a filter of argumentation in the community to which they are electorally responsible. There is also a point of principle. Both in Province and in Social Dimensions, Stone cautioned about the danger of 'one side lobbying' in the absence of adequate social inquiries prior to legislation.[94] The public hearings of the Australian Law Reform Commission, as they have developed, provide a forum for the articulate business interest and the well briefed government administrator.

But they also provide the opportunity for the poor, the deprived, the under-privileged and the disaffected to come forward and, in informal circumstances, to offer their perception of the law in operation and their notion of relevant injustice and unfairness. In point of principle, it is important that ordinary citizens should be encouraged to have their say in the review of important laws that affect them. There is an increasing awareness that the theoretical 'say' through the ballot box is not always adequate. New machinery is needed which at the one time acknowledges realistically the impossibility of hearing everybody's opinion, but encourages those who wish to voice their grievances and to share their knowledge to come forward and to do so in a setting that is not over-formal or intimidating.

A fourth relevant innovation of the Australian Law Reform Commission has been the use of the public media: the newspapers, radio stations and television, to raise awareness of law reform issues in a far greater community than would ever be achieved by the cold print of legal publications. The public media have attendant dangers. They tend to sensationalise, to personalise and trivialise information. A five minute television interview, or even a half hour 'talk back' radio programme, scarcely provides the perfect forum for identifying the problems which law reformers are tackling. For all this, a serious attempt to involve society in the process of law improvement must involve a utilisation of the modern mass media of communication. In Australia, the technique of discussing law reform projects in the media is now a commonplace, both at a federal and state level. The Prime Minister[95] has described the process in terms of approbation as 'participatory law reform'. The Governor-General has referred to the important mix of 'great intellectual capacity with a flair for publicising the issues of law reform' and attracting 'public interest to a degree unparallelled'.[96]

The need to face up to the reality that a good idea needs more than to be put forward to be acted upon and to reject the 'intellectual snobbery' of the retreat to lawyers only or to experts only was lately stressed in Britain by Professor Michael Zander.[97] But years before, it was underlined by Stone in his warning that lawyers were not always the best people to identify the problems of law reform, particularly the social deficiencies of the law which are of general community concern.[98]

A fifth innovation of law reform technique is specifically relevant to Stone's call for the involvement of non-legal expertise in the business of law reform.[99] This is the utilisation of surveys and questionnaires in the development of law reform proposals. The idea of using surveys for the purposes of law reform consultation is not new. Calls for the greater use of surveys in England[100] and elsewhere tended to fall on deaf ears. By and large, lawyers have a well developed aversion to the social sciences generally and

empirical research and statistics in particular.[101] The English Law Commission resorted to a social survey in developing its proposals on matrimonial property. They are expensive and take a lot of time. But they represent a practical endeavour to 'harness the social sciences to law reform'.[102] A recent report by the Joint Select Committee on the Family Law Act in Australia urged a review of the law relating to matrimonial property by the Australian Law Reform Commission.[103] Significantly, it proposed, as a prerequisite, the conduct of a social survey to gauge community opinion.[104]

Already, the work of Australian law reform bodies has involved the use of surveys of opinion, the assistance of social science techniques and the utilisation of the analysis only possible because of the development of computers. For example, in a project on the reform of debt recovery laws, the Australian Law Reform Commission is collaborating with colleagues in the states. Specifically, with the assistance of the New South Wales Law Reform Commission, it is scrutinising, with the aid of computers, returns on a survey conducted concerning all debt recovery process in New South Wales courts over a period of a year. Both the Australian and New South Wales Commissions came to the conclusion that sound law reform in this area could only be proposed upon a thorough appreciation of the actual operation of current laws. This required a detailed study of the way in which the debt recovery process was currently operating. That study is now drawing to its conclusion and will form the basis of the reform reports. It is significant that the Scottish Law Commission, in its work on a related topic, also conducted a survey of a similar kind.[105]

In the Australian Law Reform Commission's project on the reform of child welfare laws, a survey was administered to police in respect of all matters involving children and young persons over a given period. The aim was to isolate the considerations that lead to some children being charged and others being cautioned or warned. Examination of court files over a period of a year and questionnaires administered to children in institutions and those coming before the courts sought out the perceptions of the child welfare process as seen by the 'consumers'. Such persons are unlikely to attend public hearings or seminars, whatever efforts may be made to make them informal and congenial. Yet their perceptions may be vitally important for identifying elements of injustice and for pointing the way to reforms which will actually address the problems of 'the law on the ground', as distinct from verbal speculation about the 'law in the books'.[106] Statistics and social surveys can provide a means by which inarticulate and disadvantaged groups can speak to law makers. The gathering of facts by surveys is not now very controversial. Holmes' prediction has come about: the constructive lawyer is already the 'man of statistics'. More controversial is the collection of opinion by

procedures of surveys. The extent of the controversy was discovered by the Australian Law Reform Commission when it conducted a unique national survey of judges and magistrates involved in the sentencing of federal offenders. The details of the survey, its purposes, methodology and findings are to be found in the Commission's interim report of that title.[107] The survey was voluntary and anonymous. Its completion would have taken, on average, about an hour and a half of the time of extremely busy and supposedly conservative professionals. Notwithstanding scepticism about the value of surveys generally and the usefulness of the sentencing survey in particular, it is reassuring, and perhaps a sign of the times, that the response rate was equivalent to 74% of the judicial officers sampled. In a vigorous defence of basing law reform on empirical findings, the officers who conducted it pointed out, in language reminiscent of Pound and Stone, that legal research in Australia, in the traditional of English jurisprudence, had been 'predominantly positivist and analytical rather than purposive or sociological'.[108] Resistance to an analysis of sentencing by the techniques (and partly in the language) of sociology, was evident in some quarters, especially in the judiciary in Victoria. The participation of the latter was much lower than the national average.[109] Reporting on this, the commentators on the survey responded in terms which, one suspects, would have quickened Pound's heart:

> 'The original aim of establishing Law Reform Commissions included the provision of a bridge between the judiciary and other arms of government by which the Judges could, without compromising their independence, bring to the attention of other law makers the defects in the laws they administered. From the point of view of the Australian Law Reform Commission, this approach to the judiciary was entirely orthodox. With regard to the criticism that the survey deals with matters of sociology ... the individual sentencer plays a crucial role in the sentencing process. Sentencing is not simply the application of abstract rules and principles to specific situations. It is an inherently dynamic and essentially personal process. If this observation is a mere 'matter of sociology', then it would appear to be shared by other lawyers, defendants and by a number of judicial officers as well. The process of sentencing is not exclusively one of syllogistic legal reasoning. That is why some of the questions raise issues which have fairly been described as sociological and others seek to identify relevant personal values of judicial officers'.[110]

In addition to the survey of the judiciary, the Law Reform Commission conducted surveys of federal prosecutors[111], prisoners[112] and public opinion. As well, with the assistance of newspapers and others engaged in public opinion sampling, the Commission has been able to include questions relating to public perceptions in national surveys of public opinion. In every case, the questions are designed by properly qualified specialists in public opinion sampling. So far, it has been possible to submit the questions, on issues such as criminal punishment and privacy, without cost to the Commission. Although we are a long way from surrendering recommendations and action on law reform to the vagaries of transient opinion polls, suggestions for reform, particularly in a volatile political climate, are better made against a clear understanding of public opinion, as scientifically shown by the procedures now available for its discovery. This is yet another procedure foreshadowed by Stone.[113]

There are other initiatives which could be described to demonstrate the way in which institutional law reform today is seeking out a thorough understanding of legal problems as perceived by consumers and participants, as well as by lawyers. For example, in the project on child welfare laws, care has been taken to conduct informal discussion at schools and at children's shelters, with the young people of the relevant jurisdiction. The discussions are conducted in an unstructured way and at public, private and church schools, schools in richer and poorer suburbs and schools run according to unorthodox as well as orthodox teaching traditions. The results may not be particularly scientific. But it provides a corrective to an adults-only perception of children's involvement with the law. Likewise, a large minority in Australian society, migrants, non English-speaking residents, are consulted in every project. Through ethnic newspapers, radio and television, and through representatives and institutional spokesmen, efforts are made to secure the special perceptions they have of the operation of a legal order which in so many of its institutions, rules and procedures, is profoundly different from those of their countries of origin. To heed Holmes' warning that the constructive lawyer should be a 'master of economics' care is being taken in a number of projects to weigh and express the competing costs and benefits of a particular reform. In the past this equation has been unexpressed and ill-defined. In the future we are sure to see more of it in judicial reform[114], in administrative reform[115] and in the work of permanent law reform bodies. In the inquiry into class actions, for example, the Australian Law Reform Commission has initiated discussions with the Centre for Policy Studies at Monash University, specifically to identify the criteria that should be weighed in judging whether a class action procedure could be warranted in Australia on orthodox cost/benefit analysis. Consideration of the costs of alternatives was a major factor identified to justify the Commission's recent proposals concerning the regulation of insurance intermediaries.[116]

A 'CLEARING HOUSE' OF GRIEVANCES

In Social Dimensions, Stone foreshadowed the development, then in its most rudimentary phase, of the office of the Ombudsman. From the adaptation of the Swedish Ombudsman of 1809 by the New Zealand Act of 1962[117], the Ombudsman idea has now been adopted throughout the English-speaking world. He ministers to justice by procedures of investigation, persuasion and ultimate report to Parliament. He collects grievances and may generalise from them. But his operations do not relate solely to the legal order and indeed are typically concerned with bad public administration. In the nature of his function, he was not apt to become a 'clearing house for day-to-day grievances concerning the actual operation of the law and proposals for its improvement'.[118]

In an open society suggestions for reform of the law to deal with particular grievances emanate from many quarters. Judges giving their reasons for judgment, academics writing in law journals, editors in their column, politicians in the Parliament, citizens in correspondence, all may advance from time to time valuable ideas for the renovation of the legal system. Until now, Australian society has been wasteful in the way in which these criticisms, often from highly talented and knowledgeable and relevant people, have been dealt with. One of the reasons for the establishment of law reform bodies was precisely the absence of a regular procedure by which judicial suggestions for law reform could be converted into action. The control of the Executive Government upon the programme of most law reform bodies has limited the extent to which the permanent agencies of law reform, as developed, could tend to and actually follow up the worthwhile suggestions for law reform coming to their notice.

This lack of system was called to attention in 1948 by the editor of the Law Quarterly Review. He complained that:

> 'There have been a considerable number of cases in recent years in which the Judges have called attention to desirable changes in the law but as things are at present, there can be little hope that their authoritative recommendations will be put into effect'.[119]

Particular judges in Australia pointed with dismay to the lack of legislative attention to their urgent suggestions.[120] Proposals for the establishment of permanent machinery at an appropriate official level to collect and process the suggestions of law reform made from time to time by the judges secured the support of the Australian Law Journal in 1974.[121] Although some action was taken, no centralised, well known and

well accepted procedure was initiated. In its second Annual Report, the Australian Law Reform Commission complained about the waste involved in this failure to mobilise and co-ordinate knowledgeable criticism of the law:

> '[M]any worthwhile suggestions for reform made by Judges, academic lawyers, professional bodies and the like simply disappear into the ether. No organised, national attempt is made to collect these ideas. All too frequently, they are simply ignored and remain hidden in the law books. A more wasteful use of highly paid legal talent could not be imagined. A system better designed to promote lawyers' indifference to the inequities and injustices of the legal system could scarcely be designed'.[122]

The Commission initiated an informal collection of suggestions coming to notice 'as a blight to haunt those who have the responsibility of renewing the legal system'.[123] The attention paid to this problem ultimately caught the notice of the Australian Senate. In April 1977 it resolved to refer to the Senate Standing Committee on Constitutional and Legal Affairs, amongst other matters relevant to the processing of law reform proposals, the 'adequacy of existing machinery for the collection and assessment of proposals for law reform put forward by Judges, commissions, committees and organisations or individuals'.[124] Pursuant to the reference, the Committee produced an important report, Reforming the Law.[125] The report listed the many sources of law reform proposals: judges sitting in courts or delivering learned addresses, practising and academic lawyers, parliamentarians and parliamentary committees, reports of public authorities, Royal Commissions and special committees, political pressure groups, newspapers and ordinary laymen.[126] The machinery of improvisation adopted to collect some at least of these pronouncements is listed, including arrangements in the Office of Parliamentary Counsel and in the Commonwealth Attorney-General's Department. But the Committee concluded that there was presently no effective machinery for the systematic collection of proposals for law reform. The Committee concluded that there was a need for centralised collection. It proposed that it be undertaken as a clearing house function by the Australian Law Reform Commission.[127] It recommended that as part of its dissemination of law reform suggestions, the Commission should 'report annually to Parliament on the suggestions it has received, or at least such of them as it considers significant or worthwhile'.[128]

Responding to this proposal, the Commonwealth Attorney-General agreed that it had merit:

> 'The government accepts the Committee's recommendation that the Law Reform Commission report annually to the Parliament on the most significant of the law reform suggestions it has received. It would not, of course, be appropriate for the Commission to become involved in a major consideration of law reform suggestions for the purpose of determining the most significant suggestions for inclusion in its reports'.[129]

Coinciding with this statement of government policy, the Chief Justice of Australia, Sir Garfield Barwick, addressing an International Conference of Judges in May 1980, suggested that time should be taken:

> 'in examining available methods by which a judiciary can properly influence a legislature towards what, for want of a better and more specific term, I shall call, though inadequately, law reform. ... The pressing need for change is so often only disclosed by the circumstances of a particular case in the experience of the Judge. That he should be alerted to observe and identify that need is part of his pursuit of justice. Merely to call attention to the deficiencies in the course of a delivered judgment may be felt to be insufficient. What is a desirable course for a Judge who has perceived need for ameliorating change? May it not be that some positive means of formalised apparatus should be available to the initiatives of the judiciary whereby the legislature can directly be apprised of the observed defects and inadequacies of the substantive law or of the procedural law, and perhaps the Executive be furnished by the Judge with ideas as to the likely ways of its amendment?'[130]

The suggestion of the Chief Justice and the agreement of the government has now led to a development which is unique. The 1980 Annual Report of the Australian Law Reform Commission contains, for the first time, a schedule of law reform suggestions emanating from the judiciary, members of parliament, legal academics, citizens' groups, national conferences and so on.[131] Commenting on the innovation, the Annual Report of the Commission concluded:

> 'The Commission will be able to collect and aggregate the proposals for reform and from time to time to monitor the attention being given to them. ... In due course it may be anticipated that suggestions for law reform will be collected in a computerised format immediately available to Commonwealth and State colleagues considering the reform of a particular area of the law. A community alive to its responsibility to be sensitive to injustice or unsuitability in the law is more likely to develop where there is an established and effective means of co-ordinating and following up the proposals made for the law's improvement.

> 'The new function of the Commission could prove, in time, to be one most useful for improvement of the administration of justice and official and community participation in reform of the law in Australia'.[132]

The notion of a 'clearing house' for proposals for law improvement can be traced to Stone's writing in 1946. Although countries of the civil law tradition have for many years enjoyed a facility by which the courts in particular could report to parliament annually upon needs for reform identified in their operations of the year past, no such facility has developed in countries of the common law tradition. Many judges of our tradition would resist such an arrangement, Sir Garfield Barwick's suggestion notwithstanding. Many would consider it an inappropriate diminution of judicial independence so directly to speak to parliament on matters of policy. Some would regard it as irrelevant to the judiciary's role to consider the policy of legislation and to assume a routine function to comment upon it and to make suggestions for reform. The inclination of individual judges to do so will vary. The provision of an annual cataglogue of important law reform suggestions by the national law commission may be a practical means of marshalling, in a country of limited resources, the best available advice. Moreover, it may do so in a way traditional for the English-speaking people, namely by the implementation of routine procedure. Moreover, so far as the judiciary is concerned, it may do so in a way that is acceptably respectful of the independence of the judicial from the other arms of government. If ever there was a case of an institution fulfilling a long-predicted need of ministering between the various arms of government, this is it. The Law Reform Commission provides, in this facility, a bridge by which useful proposals of the judiciary and others can be brought systematically to the notice of the law makers. Suggestions for law reform could also provide an ample source of future projects for law reform agencies and other appropriate inquiries, anterior to legislation.

CONCLUSIONS

This essay has addressed one tiny facet only of the writings of Julius Stone. Its aim was simple. It was to show how Stone's contribution in The Province and Function of Law in 1946, as elaborated in Social Dimensions of Law and Justice in 1966, accurately forecast the special way in which institutional law reform would develop in Australia, particularly at a federal level.

Starting from Roscoe Pound's 1912 propositions, written from a sociological viewpoint, Stone concluded, accurately, that a comprehensive, omnibus Ministry of Justice to attend to all of the disharmony between the law and perceptions of fairness and justice would not be accepted. In this conclusion he was right and probably for the reasons he proposed. There is a suspicion in the tradition of the English legal order of anything approaching such a 'grand design'. There is merit and indeed there is protection in decentralisation of the sources of legislation and law reform. So it was in 1946. So it remains today.

Yet Stone was right to foreshadow the need for permanent institutional arrangements to 'minister to justice' and to attend to the multiplying needs of legal reform which accompany times of rapid change, not least rapid scientific and technological change. He was right to call attention to the distinction between lawyers' perceptions of deficiencies in the law and 'social deficiencies' of more general concern. This distinction, reflected in the debate about whether institutional law reform should address solely the so-called 'lawyers' law' issues or should also be concerned with issues of great public policy, has been solved, in Australia at least, by Attorneys-General, minded to call upon their law reform agencies to report upon controversial, pressing and, in a wide sense 'political' topics. Whether it is the Australian Commission inquiring into class actions or Aboriginal customary laws, the New South Wales Commission inquiring into the reforms of the legal profession, the Tasmanian Commission inquiring into rape and other sexual offences, and so on, once the institutions of law reform receive a reference, it is their plain statutory duty to get on with the job and supply their report.

The price of a focus of law reform upon 'social deficiencies' of 'more general concern' is undoubtedly, as Stone asserted, the need to go beyond the verbal skills and the disciplines of ethics and the law, and to have resort to the social sciences, economics, statistics, surveys and 'far ranging non-legal expertise'. In Australia, against occasional 'last-ditch' resistance, the permanent law reforming agencies, particularly the Australian Law Reform Commission, have sought out these additional perspectives before venturing proposals of reform. Certainly, the Australian Law Reform Commission has virtually accepted the 'practical objectives for sociological jurisprudence' propounded in 1912 by Roscoe Pound and taught by Stone to succeeding generations of Australian lawyers. In 1948 Pound commented on the Province and Function of Law. He said it represented an outstanding contribution to the science of law, principally because it involved 'a radical departure from the dominantly analytical English writing on jurisprudence'.[133]

The effort to study 'the law in action' and to do so in a scholarly way, but within the constraints of time and manpower and the practical needs to achieve results, has been the history of institutional law reform in Australia, since the establishment of the permanent full-time commissions after 1965. The influence of the Pound-Stone jurisprudence can be seen in some of the procedures they have adopted, particularly at a federal level: interdisciplinary consultants, consultative papers of sufficient brevity to invite lay as well as expert involvement, the conduct of informal public hearings to which laymen with a grievance as well as established interest groups can come for an equal hearing, the use of the public media of communication to involve a wider community and experimentation with new social surveys, questionnaires and public opinion polls. All of these demonstrate acceptance of the thesis that the preparation for law making, designed to achieve actual reform, must go beyond 'a mere armchair analytical legal study of existing or alternative rules'[134], political hunches or playing with legislative words. Stone's contribution to the theory of law reform in Australia, and to its institutional practice, can best be considered by comparing his writings, years before institutional law reform became a reality, and matching them against what transpired. Doubtless the result presents many defects. But for these the pupils, and not the teacher, must be held responsible.

FOOTNOTES

1. J. Stone, 'The Province and Function of Law', Sydney, 1946 (hereafter 'Province').

2. ibid.; Legal System and Lawyers' Reasonings, Sydney, 1964; Human Law and Human Justice, Sydney, 1965; Social Dimensions of Law and Justice, Sydney, 1966 (hereafter 'Social Dimensions').

3. 61 Harvard L.Rev 725, 737 (1948).

4. id. 737.

5. 25 Harvard L.Rev 513 (1912).

6. Province, 406.

7. ibid. This distinction is referred to in a number of the reports of the Australian Law Reform Commission. For example, as to the fiction of 'helping police with their inquiries'. See Australian Law Reform Commission, Criminal Investigation (ALRC 2) (Interim) 1975, xiv.

8. Province, 408-9.

9. id., 412.

10. The Law Commissions Act 1965 (UK). See Australian Law Reform Commission, Annual Report 1975 (ALRC 3, 7).

11. Law Reform Commission Act 1967 (NSW). See ALRC 3, 14.

12. Social Dimensions, 71.

13. ALRC 3, 5.

14. (1957) 31 ALJ 340.

15. R.G. Reynolds, 'Some Aspects of Law Reform', mimeo, 2. See ALRC 3, 5.

16. Social Dimensions, 72.

17. Lord Westbury (1859) 2 Juridical Society Papers, 129, 132. See J.W. MacDonald, 'The New York Law Revision Commission' (1965) 28 Modern L.Rev 1, 2. Cf. ALRC 3, 6.

18. (1870-71) 2 Votes and Proceedings of Parliament (NSW) 117. Cited in J.M. Bennett, 'Historical Trends in Australian Law Reform' [1969-70] West Aust L.Rev. 211, 213.

19. Social Dimensions, 73.

20. Cd. 9230, 1918, 4. Cf. Social Dimensions, 73.

21. The English Law Revision Committee was established in 1934. In 1952 it was revived as the Law Reform Committee. In 1959 the Home Secretary established the Criminal Law Revision Committee. See ALRC 3, 6.

22. The Property Law Revision Committee (NSW); The Victorian Chief Justice's Committee and the Statute Law Revision Committee of Victoria and the law reform committees of Western Australia and Tasmania are examples. See ALRC 3, 14-6.

23. Those still functioning include the Criminal Law Revision Committee (England), the Law Reform Committee (England), the Victorian Chief Justice's Committee and the Victorian Statute Law Revision Committee.

24. Lord Haldane, Address to the New York City Bar Association, cited in L. Scarman, 'Law Reform — Lessons From English Experience' (1967) 3 Manitoba LJ 47, 49.

25. G. Gardiner and A. Martin, 'Law Reform Now', London, 1963. See ALRC 3, 7.

26. D.G. Benjafield, 'Methods of Law Reform', Record of the Third Commonwealth and Empire Law Conference, Sydney, 1965, 393, 395-6.

27. See ALRC 3.

28. Pursuant to the Law Reform Commission Act 1973 (Cwlth).

29. Province, 174-6 and see 'Res Gesta Reagitata' (1939) 55 LQR 66; as to similar facts, see Province, 179 and articles in 46 Harvard L.Rev 954 (1933) and 51 Harvard L.Rev 988 (1938). As to burden of proof, see Province, 170-4 and (1944) 60 LQR 262.

30. Province, 193-5, 198-201.

31. See 71 Columbia L.Rev 1420 (1971).

32. Province, 573-7. Cf. 59 Columbia L.Rev 1162 (1969).

33. Province, 528.

34. Province, 514-5.

35. Province, 520, 571, 590-4.

36. Province, 548.

37. Province, 558, 597-9.

38. Province, 563-7.

39. Province, 526-7, 531-2, 563-7.

40. Province, 601-3.

41. Province, 589-593; Social Dimensions, 703-28. See also H. Whitmore, 'The Administrative Law Explosion' in this volume.

42. Province, 365-6, 421-5; Social Dimensions, 133-41, 766-8. Cf. Human Law and Human Justice, 277-80, 284-5.

43. Province, 572-3.

44. Province, 578-90. The way in which legal control lagged behind economic institutions was described long before the passage of the Trade Practices Act 1974 (Cwlth) or its predecessors.

45. J. Stone, 'Knowledge and the Duties of Science', 23 American Univ L.Rev 231 (1973).

46. Social Dimensions, 73.

47. Chapter I, para. 10.

48. Social Dimensions, 73, n. 283.

49. id., 72.

50. id., 75-6.

51. id., 74.

52. loc cit., 74. Cf. H.E. Zelling (1969) 43 ALJ 526.

53. O.W. Holmes, 'Path of the Law', 461, cited in Social Dimensions, 78.

54. id., 62.

55. id., 71, n. 272.

56. id., 71.

57. D.N. Cardozo, 'A Ministry of Justice', 35 Harvard L.Rev 113 (1921). See ALRC 3, 9.

58. For a useful collection of relevant articles, see Social Dimensions, 71, n. 273.

59. Law Reform Commission Act 1968-72 (Qld). See ALRC 3, 16.

60. Proclamation, SA Government Gazette, 19 September 1968, 853 (clause 3). See ALRC 3, 17.

61. Law Reform Commission Ordinance 1971 (ACT). See ALRC 3, 23.

62. Law Reform Commission Act 1972 (WA). See ALRC 3, 19.

63. Law Reform Act 1973 (Vic) (No. 8483). See ALRC 3, 16.

64. Law Reform Commission Act 1974 (Tas). See ALRC 3, 20.

65. The Northern Territory Law Review Committee was established on a part-time basis in April 1976. In May 1979 a full-time Executive Member was appointed. See [1980] Reform 28.

66. P. Wilenski, 'Political Problems of Administrative Responsibility and Reform', (1979) 38 Australian Journal of Public Administration, 347.

67. B. Shtein, 'Law Reform — A Booming Industry', (1970) 2 Australian Current Law

68. M.D. Kirby, 'Law Reform: Filling the Institutional Vacuum?', Investigator Lecture 1980, Flinders University (SA), mimeo, 24 July 1980.

69. G.S. Reid, 'The Changing Political Framework', Quadrant (Jan-Feb 1980), 7.

70. Mason J in 'State Government Insurance Commission v. Trigwell and Ors' (1979) 53 ALJR 656, 661; (1979) 26 ALR 67, 78. See to similar effect Scarman LJ (as he then was) in Farrell v. Alexander [1976] 1 QB 345, 371.

71. See Mason J in Trigwell, (1979) 53 ALJR 656, 659; (1979) 26 ALR 67, 75.

72. Barwick CJ in Trigwell, op cit, n.70, 70.

73. Dugan v. Mirror Newspapers (1979) 53 ALJR 166; (1978) 22 ALR 439.

74. Australian Conservation Foundation v. The Commonwealth (1980) 54 ALJR 176; (1979-80) 28 ALR 257.

75. McInnis v. The Queen (1980) 54 ALJR 122; (1979-80) 27 ALR 449.

76. Federal Commissioner of Taxation v. Westraders Pty Ltd (1980) 54 ALJR 460; (1979-80) 30 ALR 353.

77. The Queen v. O'Connor (1980) 54 ALJR 349; (1979-80) 29 ALR 449.

78. See Stephen J and Mason J in Australian Conservation Foundation v. The Commonwealth, 182 and 188.

79. Murphy J dissented in Dugan, The Australian Conservation Foundation, McInnis and Westraders.

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

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

82. Diamond, 400.

83. id., 405.

84. Social Dimensions, 78.

85. Under the Law Reform Commission Act 1973 (Cwlth), the Australian Law Reform Commission is confined to work 'in pursuance of references to the Commission made by the Attorney-General, whether on the suggestion of the Commission or otherwise'. See s.6(1) of that Act.

86. Australian Law Reform Commission, Discussion Paper No. 9, 'Child Welfare -- Children in Trouble', 1979; Australian Law Reform Commission, Discussion Paper No. 12, 'Child Welfare: Child Abuse and Day Care', 1980.

87. Australian Law Reform Commission, Discussion Paper No. 13, Privacy and Intrusions, 1980; Australian Law Reform Commission, Discussion Paper No. 14, Privacy and Personal Information, 1980.

88. Australian Law Reform Commission, Discussion Paper No. 17, Aboriginal Customary Law — Recognition?, 1980.

89. Scarman, 4.

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

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

92. Australian Law Reform Commission, Human Tissue Transplants (ALRC 7), 1977.

93. Australian Law Reform Commission, Lands Acquisition and Compensation (ALRC 14), 1979.

94. Province, 412; Social Dimensions, 73.

95. J.M. Fraser, Speech at the Opening of the Australian Legal Convention, (1977) 51 ALJ 343.

96. Sir Zelman Cowen, Speech at the Opening of the International Bar Association Meeting, Sydney, September 1978, cited [1978] Reform 63.

97. M. Zander, 'Promoting Change in the Legal System', (1979) 42 Modern L.Rev 489.

98. Social Dimensions, 74.

99. id., 78.

100. J.H. Farrar, 'Law Reform and the Law Commission', 1974, 125.

101. Cf. the writings of J. Baldwin and M. McConville, e.g. 'Allegations against Lawyers' [1978] Crim LR 741. See also M.D. Kirby, 'Sentencing Reform: Help in the 'Most Painful' and 'Unrewarding' of Judicial Tasks' (1980) 54 ALJ 732, 735, citing J. Hogarth, 'Sentencing as a Human Process', 1971 ('Until recently a student of the judicial process could roam freely through the literature and only an occasional statistic would mar an otherwise serene landscape of rhetoric. He now faces a very different situation. ...')

102. Diamond, 46. The reference to harnessing the social sciences is from the 7th Annual Report of the Law Commission of England and Wales, 1971-2, para. 2; Cf. 11th Annual Report of the Law Commission, 1975-6, para. 6-8.

103. Australian Parliament, Report of the Joint Select Committee on the Family Law Act, 1980, Vol. 1, para. 5.155.

104. ibid.

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

106. Social Dimensions, 62.

107. ALRC 15, 1980. See especially Appendix B, (A National Survey of Judges and Magistrates: Preliminary Report), id., 341-503.

108. id., 502.

109. id., 483 (Table 15A).

110. Preliminary Report, op cit, n.107, 499.

111. id., 504, Appendix C, (Federal Prosecutor Survey).

112. id., 509, Appendix D, (National Survey of Offenders).

113. Social Dimensions, 73, n. 283.

114. See e.g. Mathews v. Eldridge, 424 US 319 (1976). Cf. J.L. Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication', 44 Uni of Chicago Law Rev 28 (1976).

115. Administrative Review Council, Second Annual Report 1978, para.9; Fourth Annual Report, 1980, para.43.

116. Australian Law Reform Commission, Insurance Agents and Brokers (ALRC 16) 1980, 82.

117. Parliamentary Commissioner (Ombudsman) Act 1962 (N.Z.). See Social Dimensions, 77.

118. Province, 412.

119. [1948] 64 LQR 171.

120. See e.g., Fox J, reported in the Canberra Times, 26 August 1974.

121. (1974) 48 ALJ 416.

122. ALRC 5, 33.

123. id., 34.

124. Commonwealth Parliamentary Debates (Senate), 21 April 1977, 887.

125. Australian Parliament, Senate Standing Committee on Constitutional and Legal Affairs, Reforming the Law, 1979.

126. id., 58ff.

127. id., 68 (para.3.37), Recommendations (a) and (b).

128. loc cit, Recommendation (c).

130. Sir Garfield Barwick, speech at opening of Second International Conference of Appellate Judges, Sydney 19 May 1980, mimeo 13—14, cited Australian Law Reform Commission Annual Report 1980 (ALRC 17), 6.

131. ALRC 17, Appendix A 'Law Reform Suggestions'.

132. id., 7.

133. R. Pound, Book Review, 'The Province and Function of Law', 61 Harvard L.Rev. 724, 727 (1948).

134. Province, 408.