The New Principle of Law Reform in Australia

Alex. C. Castles

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Until comparatively recent times, continuous, systematic law reform has not been favoured with strong support in those countries nurtured in the common law tradition. In particular, many lawyers in Australia, as elsewhere in the common law world, have tended, for the most part, to be suspicious and perhaps, subconsciously, more than a little fearful of legal evolution through legislative action rather than judge-made law. This state of mind has belied the realities of the twentieth century life of the law and in many ways as well, the thrust of the law as it evolved in common law countries in the nineteenth century. From the first half of the nineteenth century, through to the present, increasingly law has come to mean statute law and the subordinate legislation which has followed in its wake. Concomitant with this, the development of the doctrine of precedent in the past one hundred and fifty years and the frequent acceptance of Benthamite thinking has, on the surface at least, progressively constrained the law creating role of the judiciary. But the influences of older common law traditions have often remained strongly entrenched despite developments like these. While judicial decision-making has loomed much less importantly as an instrument of legal evolution, the common law methodology of moving in a piecemeal, case by case fashion, has often found its expression in a

*Professor of Law, University of Adelaide, South Australia; Commissioner (Part-time), Australian Law Reform Commission. It should be pointed out that this article is written wholly in a personal capacity. It is in no way intended to reflect the policies or views of the Australian Law Reform Commission. At the same time, thanks are due to Mr. Roy Jordan, Librarian of the Australian Law Reform Commission, for the collection of information and material which he provided to the author on law reform activities in Australia.


similar style of approach to law reform. For the most part, nineteenth century law reform in England, Australia and elsewhere in the common law world was a paradigm in this regard.3

Many of the great substantial changes of the nineteenth century were the product of responses to immediate political and other pressures. There were those like Bentham and his disciples who sought to renew the law in a much more systematic way. For the most part, however, their success in such endeavours was generally in direct proportion to the extent that such changes were necessary to foster the growth of commercial life in the nineteenth century. Some, like Stephen, in his monumental work in the field of criminal law, demonstrated the ineptness and injustice which would continue to exist until major, systematic changes were made in at least some areas of the law. But law reform remained through the nineteenth century, and well into the twentieth, harnessed largely to a traditional methodology of law-making which had been developed in a pre-industrial society. Even then it had not been immune from cogent attack from notable legal thinkers such as Francis Bacon. At times, no doubt, the case by case style of law reform has not been without its virtues. It may still enable changes to be made with a minimum of social disruption. It can sometimes provide a more politically acceptable means of instituting reform when wholesale change would not be acceptable within the body politic. Certainly it is in keeping with the style of conservative reform, once lauded by Holdsworth as a feature of the English legal system and one which he affirmed had made English law “great”.4 But increasingly, albeit slowly at times, in Australia, as elsewhere in the common law world, there has been a growing recognition, as Sawer has described it, that a “new principle” should be adopted in pursuing law reform; a principle qualitatively different from past practice in which the whole body of law stands potentially in need of reform and there should be standing bodies of professional experts to consider reforms continuously.5

3. As G. Sawer states in The Legal Theory of Law Reform (1970), 20 U.T.L.J. 183 at 183: “The great Victorian commissions were all in principle appointed for a limited period to do a specific job . . . .” See also: D. Benjafield, Methods of Law Reform, Record of the Third Commonwealth and Empire Law Conference, Sydney, 1965, 393 at 393-94. Professor Benjafield argues that the results of ad hoc enquiries were “sporadic and of limited scope and progressive reports have been ignored by Parliament”.


5. Sawer, supra, note 3 at 183
In Australia, the adoption of this "new principle", as described by Sawer, has so far tended to follow in general terms the pattern of development in England. English thinking has provided one starting point, an element of justification and some of the guidelines for the development of law reform along these lines. Sawer views the appointment of the Law Reform Committee by Lord Sankey in 1934 as beginning a distinctive period in law reform in England, moving in the direction of adopting the new principle of law reform, as he describes it. He sees the appointment of the Law Commission in 1965 as "the logical culmination of this development". In Australia, the direct influence of these developments can be seen at work in the Australian context in varying degrees. In Tasmania, for example, the establishment of a Law Reform Committee in 1941 can be viewed as local response to English thinking. In Victoria, the establishment of a Chief Justice's Law Reform Committee in 1944 was "roughly modelled" upon England's Lord Chancellor's Committee. Chief Justice Herring, who was the guiding spirit in the establishment of this body, had been "greatly impressed by the law reform work carried out in England before the war". So, too, as a strong movement for establishing law reform agencies grew in Australia in the decades of the 1950s and 1960s, the changing attitudes to law reform in England became a point of substance to support similar developments in this country.

Not surprisingly, however, given the federal nature of the Australian governmental system, the methods adopted for establishing the "new principle" of law reform have not always followed precisely the same pattern. Australia, excluding its external

6. Id.
7. In January, 1942, a statement on its functions made after the Committee's inaugural meeting affirmed: "The functions of the Committee, following the example of the English Law Revision Committee upon which it is modelled, are to consider the reform of the law in Tasmania . . . ." In Tasmanian Law Reform Committee, Report Prepared for Consideration of the Committee (Mimeo), June 30, 1946 at 1-2
9. Id. See also E. Coghil, *Law Reform in Victoria* (1946), 3 Res Judicatae 69 at 70
10. As the present Governor-General, Sir John Kerr, then Chief Justice of New South Wales, stated in 1972, in dealing with Australian law reform developments: "The pattern emerging for the creation of law reform institutions is that adopted in the United Kingdom . . . ." In *Law Reform and the Legal Profession* (Mimeo), 1972 Sydney, at 8. For discussions of proposals for law reform bodies in Australia after the Second World War, see K. Shatwell, *Some Reflections on the Problems of Law Reform* (1957-58), 31 Aust. L.J. 325
territories, has nine separate legal regimes. These consist of the Commonwealth, six States and two internal territories, the Australian Capital Territory and the Northern Territory, governed by the Commonwealth. In each, with the exception of the Northern Territory, continuing law reform bodies have been established and sometimes more than one. One State, Victoria, has three officially recognised bodies concerned with general law reform. South Australia at present has two; one concerned with law reform generally and another dealing with Criminal Law and Penal Methods. In no case, however, can these law reform agencies be considered as the sole or necessarily the chief instruments for law reform activities, in all circumstances. The common law style methodology of law reform remains more muted perhaps, in the light of these developments. But the Australian penchant for Royal Commissions of Inquiry, supplemented by the appointment of special committees and working groups, created by government Fiat, remains as an alternative and still viable means of pursuing law reform activities. Indeed, law reform agencies in Australia generally are still very much in the hands of the executive branches of government which can determine the roles they may be called upon to play in developing law reform programmes. At times these agencies may be permitted to suggest appropriate fields for law reform activities. But their basic authority to inquire and report on legal change is dependent upon references made by the executive branches of government.

The federal nature of the governmental system adds a complex, further dimension to the working of law reform activities in Australia, which has its parallels in Canada and the United States. Thus, the need to consider pressures for uniform law reform. As

11. Australia claims sovereignty over seven external territories, not all of which are inhabited permanently. These are: The Ashmore and Cartier Islands, The Australian Antarctic Territory, the Coral Sea Islands Territory, Christmas Island, The Cocos (Keeling) Islands, Heard and McDonald Islands, Norfolk Island. Legislative power with respect to each of these territories is exercised by the Commonwealth Parliament.

12. For general discussions on moves for uniform law reform in Australia and problems relating to this see: R. Leach, Interstate Relations in Australia (Lexington: Univ. of Kentucky Press, 1965) Ch. 6; R. Cranston, Uniform Laws in Australia (1971), 30 Public Administration (Australia) 229; Kerr, Uniformity in the Law — Trends and Techniques, Robert Garran Memorial Oration, Canberra, 1965; The Law Reform Commission (Australia), Annual Report 1975, supra, note 1 at 22-23. For a plea by one of Australia's most distinguished jurists, the late Sir Owen Dixon, Chief Justice of the High Court, calling for attempts to establish uniform
yet no mechanisms for pursuing uniform law reform have been devised along the lines of the Conference of Commissioners on Uniformity of Legislation in Canada. The Law Reform Commission Act, 1973 which established the Australian Law Reform Commission, a Commonwealth agency, basically concerned with Commonwealth law, does authorise this body to "consider proposals for uniformity between the laws of the Territories and the laws of the States". The Standing Committee of Commonwealth and State Attorneys-General, which is essentially regular meetings of law Ministers, has at times played a role in stimulating uniform law reform. A notable instance of this was in relation to the introduction of uniform company laws in the 1960s. From time to time, various other agencies concerned with co-operation and collaboration between governments within the federation have helped to establish uniform approaches to legislation. The organised legal profession, too, through the Law Council of Australia, has taken an active, purposeful interest in helping to develop national responses to law reform.

Overall, however, the development of uniform approaches to law reform has been often affected by the cut and thrust of Commonwealth-State rivalry and the interplay of political factors, arising from this and for other reasons, which have so far often made any quest for uniform law reform difficult and problematical. One major political grouping, the Australian Labour Party, has tended towards centralism in its policies when it

private law in Australia see: comment on paper by Shatwell, (1957-58), 31 Aust. L.J. 340

13. Law Reform Commission Act 1973, s.6(1) (d) (Cth.)


15. Leach, supra, note 12 at 139-141

16. The forms of collaboration and co-operation which can lead to this are many and various. See A. Castles, "Responsibility Sharing in a Federal System" in R. Mathews, ed., Fiscal Federalism, Retrospect and Prospect (Canberra: Australian National University, 1974) at 83. For examples of uniform laws established in a variety of ways, see: Cranston, supra, note 12 at 246-47 (Appendix).  

17. One aim of the Law Council of Australia, which is made up from the organized bodies of the legal profession around Australia is to mobilize "the resources of the legal profession to comment on Federal bills, uniform laws and matters of inter-state legal concern": Nicholson (Secretary-General of the Law Council of Australia), Lawyers and Legal Renewal (Mimeo), 1976 at 2. The Law Council presently operates through a series of Committees which are "the principal means of harnessing the views of professional lawyers on matters of legal renewal, including law reform". Id. at 4

18. For a discussion of some of these problems see: Leach, supra, note 12 at
has been in office nationally. As a consequence, it has seemed often to favour the full exploitation of national constitutional powers over matters such as company law and in other areas which may, although not necessarily, be within the ambit of power of the central government. In these circumstances, uniformity has been sought through the exercise of central government power alone, where this has seemed constitutionally possible. On the other hand, the Liberal Party, and its political partner the National Country Party, have generally, although not entirely, followed a national policy in which less emphasis has been placed on centralising power within the federation. As a result, uniformity, where it has been sought, has been encouraged, normally through uniform Commonwealth-State action so that the existing power balances between the Commonwealth and States may not be unduly impaired. Further exacerbating the situation at times, however, have been States-rightist viewpoints which have attempted to eschew as far as possible Commonwealth involvement in some law reform moves.  

In a situation like this, law reform in Australia obviously is still very much the sum of many parts. The structures and methodology adopted for law reform vary from jurisdiction to jurisdiction and sometimes even within a political unit. Political considerations, particularly as they relate to moves concerned with uniformity, can and do play at times, a significant and perhaps a decisive role in determining the direction of law reform activities. Not surprisingly, too, population size, the relative affluence and other factors like this, affecting one political unit, compared to another, have influenced the way in which law reform activities have evolved. New South Wales, the State with the largest population has a strong complement of full-time Law Reform Commissioners, backed by a research staff which is large by Australian standards. In contrast, in South Australia, for example, the “new principle” has been instituted through bodies established basically through executive order, backed by small research resources, with the members of these bodies acting in a part-time capacity only in their involvement in law reform activities.

132-34; Cranston, supra, note 12 at 238-41. Even so, Cranston suggests, at 237: “Compared with the United States and Canada the record of uniform laws in Australia is quite impressive”.

19. Cranston asserts, supra, note 12 at 240: “Even if a matter appears non-controversial, it seems that the States will not agree to uniform legislation if this involves departing from entrenched practices”.

The transition in Australia from what has been described as law reform by the "inspired amateur" to more professionally organised continuous law reform activities is well epitomized by developments in New South Wales. There were fitful and at times promising efforts to establish regular law reform programmes in the State, going back to the nineteenth century. It was not until 1959, however, that foundations began to be laid for the present institutionalised approach to law reform in the State. A Committee broadly representative of the legal profession, including judges and an academic, began working in 1961 under the Chairmanship of the Chief Justice of New South Wales. In the mid-1960s executive action established a "permanent" Commission and this action was confirmed with the enactment of the Law Reform Commission Act, 1967. The New South Wales Commission is the oldest full-time Commission in the country. It was described in the first report of the Australian Law Reform Commission as "the largest in establishment and output".

The Commission as constituted under the 1967 Act consists of from three to six Commissioners, acting under the chairmanship of a judge or retired judge of the Supreme Court of New South Wales. The others qualified for appointment are additional members of the judiciary, the legal profession and university teachers of law. The Commission's work is activated by references from the Attorney-General. The broad purposes of the Commission are set out in the Act. It is enjoined to eliminate defects and anachronisms in the law; simplify or modernise the law by bringing it into accord with current conditions, adopt new or more effective methods for the administration of the law and the dispensation of justice and to systematically develop and reform the

20. The Law Reform Commission (Australia), Annual Report 1975, supra, note 1 at 14
21. A Law Reform Commission was established in New South Wales by Letters Patent on July 14, 1870 but it was shortlived and seems to have had little impact. Bennett, supra, note 1 at 211-13. For a summary of later moves to institute law reform activities on a regular basis in New South Wales see: The Law Reform Commission (Australia), Annual Report 1975, supra, note 1 at 13-14.
22. Id. at 14. For an examination of the first years of the Commission's work see J. Bennett, Law Reform: Work of the Law Reform Commission of New South Wales 1966-75 (1975), 49 Aust. L.J. 489
23. Law Reform Commission Act, 1967, s.3(2) (N.S.W.)
24. Id., s.3(2) (a)
25. Id., s.3(2) (b)
26. Id., s.10(1)
law. It is urged also to work for the repeal of obsolete or unnecessary enactments. Express mention is made in the enactment to the possibility of codifying the law in the State, in addition to the more regularly accepted processes of consolidating or revising the law.\textsuperscript{27} The Act envisages the possibility of public enquiries being carried out in the course of the Commission's work. To this end, the Commission is given the powers and immunities of Royal Commissions established by the State.\textsuperscript{28} The legislation on Royal Commissions, which applies by reference to the Commission, basically gives to these bodies many of the powers, privileges and immunities relating to judicial proceedings, reversing the common law position in which Royal Commissions of Inquiry had virtually no protection at law with respect to their proceedings.\textsuperscript{29} This situation is confirmed by a further provision in the 1967 Act which accords to the Commission privilege for its reports and proceedings.\textsuperscript{30}

In Victoria, institutionalised law reform has a longer, continuous history through one of the three bodies in the State which work in this area. This body is a Parliamentary Committee, the Statute Law Revision Commission, which was first formally recognized in 1916.\textsuperscript{31} Its recognition followed the third consolidation of Victorian Statutes, which had first been carried out in 1865. By then Victoria had long enjoyed an enviable reputation for consolidating and updating its law. In 1922, Victoria led the way in Australia in a fashion which was not to be emulated elsewhere for almost 50 years,\textsuperscript{32} in legislating on the application of British statutes which

\textsuperscript{27} Id., s.10(1) (a)
\textsuperscript{28} Id., s.10(2)
\textsuperscript{29} The New South Wales Act is the Royal Commissions Act, 1923. It has counterparts in each of the Australian States and under Commonwealth law.
\textsuperscript{30} Law Reform Commission Act, 1967, s.11 (N.S.W.)
\textsuperscript{31} Australian Law Reform Commission, \textit{Annual Report 1975, supra}, note 1 at 14-15. The Committee's instructions were to examine anomalies in the existing statute law, consider proposals for consolidation and to examine bills referred to it by Parliament. See also: A. Mason, \textit{Law Reform in Australia} (1970-71) 4 Federal L. Rev. 197 at 201; C. Meares, \textit{Law Reform in Australia}, Record of the Fourth Commonwealth Law Conference (Delhi: National Publishing House, 1971) 247 at 249
had become part of its foundation statutory law on the State's separation from New South Wales in 1851. The repeal or re-enactment of such British statutes under local legislation could well be considered a fundamental task of law reform, and in many ways an essential precursor to developing a modern statute book where British statutes, some dating back to the dawn of English Parliamentary history, may still be operative, as in the Australian States. The mammoth task of working to this end was undertaken by Sir Leo Cussen, one of Victoria's most distinguished judges, in what can only be described as one of the most exacting and important pieces of law reform in Australia in the first half of the twentieth century and beyond. Cussen's work found statutory expression in the *Imperial Acts Application Act, 1922*. With this task completed, the 1928 Victorian consolidation provided the most ordered statute book in the Australian states at the time. It was with this background, that the Statute Law Revision Committee was established. With representatives from all parties and both houses of the State legislature, the Committee was enjoined to oversee the continued updating of statute law in the State.

The working of the Committee is regulated now by the *Parliamentary Committees Act, 1968*. It consists of 12 members, six coming from each of the houses of the legislature. It remains in operation during Parliamentary recesses. The Committee is authorised expressly to sit anywhere in Victoria or elsewhere in carrying out its activities. Formally, at least, the Committee's functions do not extend to considering the codification of Victorian law. Its brief, as set out in the empowering legislation, requires the Committee to examine anomalies in statute law, consider proposals for the consolidation of statutes and to deal with proposals in bills involving technical alterations in the existing law, referred to it by either house of Parliament. The Committee is also authorised, "if it thinks fit", to consider proposals for the

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34. The provisions on the Committee are contained in Part IV of the Act.
35. Parliamentary Committees Act, 1968, s.37(2) (Vict.)
36. Id., s. 37(4)
37. Id., s. 39(2)
38. Id., s. 39(3)
39. Id., s. 38(1) (a)
40. Id., s. 38(1) (b)
41. Id., s.38(1) (c)
reform of the law put to it by the Attorney-General.\textsuperscript{42}

The second of Victoria's law reform agencies is the Chief Justice's Law Reform Committee. This was established in 1944 without legislative or executive fiat, by the then Chief Justice of Victoria, Sir Edmund Herring. Sir Edmund Herring outlined the purpose of the Committee as being to consider "reforms which required the action of Parliament, but which were not of a contentious nature, and which it could be hoped that Parliament would accept if recommended to it by some qualified non-partisan body".\textsuperscript{43} The broad areas of reform to be considered by the Committee, as he viewed it, were to be concerned with "the abolition of obsolete and useless rules and amendments to improve existing laws".\textsuperscript{44} In terms of membership, the Committee has consisted of members of the judiciary, the separate Bar of Victoria, the Law Institute which represents Solicitors, academics from Victorian Law Schools and for most of its existence government law officers.\textsuperscript{45} All serve on the Committee in a voluntary capacity. As one comment on the Committee has pointed out, although it is not a government agency "successive State governments have co-operated with it by referring matters to it for consideration and by enacting many of its recommendations".\textsuperscript{46} In addition, although it has no formally based official status, it has been recognised as one of the agencies regularly engaged in law reform activities.\textsuperscript{47} The initiation of proposals for consideration by the Committee has come not only from members of the Committee but also, and importantly, from the State's Law Department, its Attorneys-General and others outside these categories.\textsuperscript{48} Since 1954, the Committee has also developed working relationships with the Statute Law Revision Committee. The greatest number of proposals for work by the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{42} Id., s.38(2)
  \item \textsuperscript{43} Quotation from original record cited in O’Brien, \textit{supra}, note 8 at 442
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id. at 454-59
  \item \textsuperscript{46} Australian Law Reform Commission, \textit{Annual Report 1975}, \textit{supra}, note 1 at 15
  \item \textsuperscript{47} The Committee has been a fully recognized participant in the Conferences of Australian Law Reform Agencies. See Minutes of Conferences, Australian Law Reform Agencies Conference, 1976 at 1-26. Its reports have been included in a Directory published by the Conference of Australian and New Zealand Law Ministers. This was titled: \textit{Official Law Reform Work in Australia and New Zealand}, 1970. A record of its activities is included in the Law Reform Digest prepared by the Australian Law Reform Commission as part of its clearing house function for Australian law reform agencies. See infra
  \item \textsuperscript{48} O’Brien, \textit{supra}, note 8 at 461
\end{itemize}
\end{footnotesize}
The New Principle of Law Reform in Australia

Committee, since then, have actually come from the Parliamentary Committee which seems to have relied increasingly on the advice of the Chief Justice’s Committee as an important element in the conduct of its own law reform activities. 49

Victoria’s most recent development with respect to law reform has been under the terms of the Law Reform Act, 1973. With this Act, Victoria, for the first time, has provided for a full-time element for promoting ongoing law reform activities. The Act provides for the appointment of a full-time Law Reform Commissioner, 50 assisted by other staff. 51 The Commissioner is aided by a Law Reform Advisory Council. This consists of the Commissioner as Chairman, and part-time members made up by a representative of the Bar, another from the Solicitor’s branch of the profession, a law teacher and two persons representing the interests of the “community generally”. 52 The Commissioner’s role, essentially, is to act in an advisory capacity to the Attorney-General on law reform matters. 53 He is required to investigate and report on matters referred to him by the Attorney-General. 54 The only requirement for regular Parliamentary scrutiny is that annual reports by the Commissioner are to be tabled in both houses of the Victorian Parliament. 55 Financial support for the work authorised by the Act is not limited to funds appropriated from government revenues. Provision is made also for financial support from the Victorian Law Foundation, 56 which is funded by interest accruing from trust funds held by Victorian Solicitors.

Australia’s first official response to growth of the law reform movement in Britain in the 1930s came in Tasmania in 1941. In that

49. Id.
50. Law Reform Act, 1973, s.3(1) (Vic.)
51. Id., s. 7(1)
52. Id., s.5
53. Id., s. 8(a)
54. Id., s.8(b). Section 8(a) provides that in advising the Attorney-General consideration will be given to:

(i) the simplification and modernization of the law, having regard to the needs of the community;
(ii) generally making the administration of justice more economical and efficient;
(iii) the elimination of anomalies, defects and anachronisms;
(iv) the repeal of obsolete or unnecessary enactments; and
(v) the consolidation, codification and revision of the law.
55. Id., s.12(4). This is only after submission to the Attorney-General: s.12(3).
56. Id., ss.11(4), 14(c)
year a Law Reform Committee was established by the Attorney-General. Its membership consisted of the Chief Justice, Attorney-General, an academic lawyer and representatives from the Northern and Southern Law Societies, representing the practising legal profession. Later, the Solicitor-General and the Parliamentary Draftsman were added to the Committee. Briefly stated, the Committee’s task, as set out in the warrant which established it, was to consider “the reform of the law in Tasmania in order to remove anomalies and to keep abreast of the reform effected in other States and in England”. At its inaugural meeting the Committee agreed that it would not limit itself to receiving suggestions from the groups represented on the Committee. As it stated, it will be competent for “any member of the legal profession and any layman to place recommendations before the Committee”. By 1946 the Committee had already undertaken an impressive programme. A total of twelve proposals had been enacted into law, while twelve others had been rejected or postponed. In 1969, changes were made in the Committee’s mode of operation. It came to consist of two permanent members, the Chairman, who was a Supreme Court Judge and a Secretary, together with others appointed to the Committee for the purposes of dealing with specific projects. This change, however, was relatively shortlived. In 1974, the Tasmanian legislature established a new seven-member Law Reform Commission which consists of part-time members and a full-time Executive Director who is also Deputy Chairman of the Commission. The Chairman is a judge of the Supreme Court. There are two representatives of the legal profession, an academic lawyer and two persons, “other than practitioners, who the Attorney-General is satisfied are interested in law reform generally”. Like its predecessor, the Law Reform Commission is authorised to initiate its own studies and inquiries on law reform

57. Tasmanian Law Reform Commission, Report Prepared for Consideration of the Law Reform Committee, supra, note 7 at 1
58. Id.
59. Id. at 2
60. Id.
61. Id. at 3-9
63. Law Reform Commission Act, 1974 (Tasmania)
64. Id., s.5
65. Id., s.3(2) (b) (ii)
66. Id., s.3(2)
proposals as well as receiving requests for this from the Attorney-General.\textsuperscript{67} The Commission’s power of independent initiative is circumscribed, however, by a further requirement that “before settling a programme or undertaking a practical study of law reform” it must seek the approval of the Attorney-General so that its programmes or projects are subject to the “approval and degree of priority” decided upon by the Attorney-General.\textsuperscript{68} The Commission’s brief\textsuperscript{69} extends to seeking and considering “representations and suggestions” and doing such things “as are necessary or desirable” with a view to the “systematic development, reform and revision of the law applicable to this State”.\textsuperscript{70}

Until the mid-1960s ad hoc bodies complemented by law reform activities by the organised legal profession, were the mainstays of law reform activities in Queensland, South Australia and Western Australia. In part, as once expressed in the Queensland Parliament as late as 1968, this may have been due to priorities with respect to State funding.\textsuperscript{71} Certainly, the limited funds made available in South Australia even when a law reform body was established in that State in 1969,\textsuperscript{72} suggests that funding was not necessarily available easily for law reform purposes or governments had a reluctance to accept the “new principle”. In South Australia at least, there is evidence of reluctance as late as 1967\textsuperscript{73} to adopt the “new principle”. The fact that South Australia alone still has no statutory provision for the working of law reform agencies is probably further confirmation of the continuance of this attitude in some political circles.

\begin{itemize}
\item \textsuperscript{67} Id., s. 7(1)
\item \textsuperscript{68} Id., s.7(2)
\item \textsuperscript{69} The Commission’s basic functions as set out in s.7(3) of the Act are to work for:
\begin{itemize}
\item (a) the simplification and modernization of the law, having regard to the needs of the public so that the law may be more easily understood by persons without legal knowledge or experience;
\item (b) making the administration of justice more economical and efficient, and reducing the costs of legal services to the public; and
\item (c) where considered necessary or desirable, the consolidation, codification, revision or restatement of the law.
\end{itemize}
\item \textsuperscript{70} Law Reform Commission Act, 1974 (Tasmania)
\item \textsuperscript{71} (1968) Queensland Parliamentary Debates at 352
\item \textsuperscript{72} D. Kelly, \textit{The South Australian Law Reform Committee} (1967-1970), 3 Adel. L. Rev. 481 at 484-85
\item \textsuperscript{73} An opinion of the author, based on discussions at the time the creation of the Committee was mooted. See also Bennett, \textit{supra}, note 1 at 236
\end{itemize}
Of these three States, Western Australia moved first to lay a foundation for institutionalising its law reform activities. It did this initially through executive action alone when a Law Reform Committee was established in 1967. The Committee itself consisted of three part-time members, one member from the practising legal profession, another from the Law School at the University of Western Australia with the third from the Crown Law Office. At the same time, the government of the day showed a strong commitment to supporting law reform activities by the steps it sanctioned to provide a full-time professional research staff for the Commission, together with a full-time executive office. Subject to ministerial approval the Committee was empowered to suggest its own programme. The Commission itself showed quickly a concern for establishing community involvement in its work. It distributed its working papers publicly and actively sought public comment on these. In 1972, building on the foundation work of the Committee in the previous five years, the Western Australian Parliament enacted The Law Reform Commission Act, 1972. The Act continues the practice of having three part-time Commissioners, one from the practising profession, an academic lawyer from the University of Western Australia with the third from the Crown Law Department. The Commission has the authority like the Committee it succeeded, to make its own proposals for law reform. But its authority to make a formal report rests on a reference made to the Commissioner by the Attorney-General.

74. Id. at 235
75. Id. at 235 n. 149, quotes from a note from the Executive Officer of the Western Australian Law Reform Commission setting out details of the establishment of the Committee and its membership.
76. Id.
77. Id.
78. The Law Reform Commission Act, 1972, s.6 (West. Aust.). One or more of the Commissioners could be appointed full-time for up to the maximum three year period of appointment permitted by s.7(1) of the Act. This is implicit in s.9(1) which provides that a "member shall be paid such remuneration as the Governor may from time to time decide".
79. Id., s. 11
80. Id., s.11(3). On references made by the Attorney-General, s.11(3) (a) of the Act provides that the Commission shall "examine critically the law with respect to the matter mentioned in the reference". In addition, the Commission is enjoined (s.11(4)) to report whether the law which is the subject of the reference:
(a) is obsolete, unnecessary, incomplete or otherwise defective;
(b) ought to be changed so as to accord with modern conditions;
(c) contains anomalies; or
who is not limited in making these to proposals initiated by the Commission itself. The Commission is required to deal with references from the Attorney-General in the order of priority he approves. Proposals and reports of the Commission, including its Annual Report, are required to be presented to each House of Parliament as soon as practicable after they have been submitted to the Attorney-General.

Queensland’s move into institutionalising law reform came with the passing of the Law Reform Commission Act, 1968. This provided for a Commission of part-time members. But the Act was later amended to make it possible to have full-time members as well. The Commission consists of from three to five members who shall be “suitably qualified by the holding of judicial office or by experience as a barrister or as a solicitor or as a teacher of law in a University”. As in Western Australia, the Queensland Commission is authorised to receive and consider any proposals for law reform. At the same time, however, like its Western Australian counterpart, the Queensland body is ultimately in the hands of the executive branch of government in the determination of the substantial law reform work it carries out. Its programme must be submitted from time to time to the Minister responsible for the administration of the Act. The programme is then carried out pursuant to the Minister’s fiat in accord with an approved order of priority. At the same time, the Commission’s recommendations are not required to be placed automatically before the Queensland

(d) ought to be simplified, consolidated, codified, repealed or revised and, if appropriate, whether new or more effective methods for the administration of that law should be developed.

81. Id., s.11(2)
82. Id., s.11(5)
83. Id., s.11(1)
84. Law Reform Commission Act 1968, s.4 (Queensland)
85. Law Reform Commission Act Amendment Act 1972 (Queensland)
86. Law Reform Commission Act 1968, s.4(a) (Queensland)
87. Id., s. 10(2) (a)
88. Id., s. 10(2) (b)
89. Id., s. 10(2) (c). Under s.10(a) the Commission is directed to work for the systematic development of the law of Queensland, including in particular —

(a) the codification of such law;
(b) the elimination of anomalies;
(c) the repeal of obsolete and unnecessary enactments;
(d) the reduction of the number of separate enactments; and
(e) generally the simplification and modernization of the law.
legislature. They are laid before the single house legislature only when approved by the Governor-in-Council.\textsuperscript{90} As in New South Wales, the Commission has the privileges and immunities of Commissions of Inquiry.\textsuperscript{91} One other feature of the Queensland Act which is of more than passing interest is the provision made for the appointment of experts to carry out projects for the Commission, along the lines often adopted in North America. This is achieved through a procedure laid down in the Act in which such appointments, and the remuneration for the work, is to be approved by the Governor-in-Council.\textsuperscript{92} Like the Commissions in the United Kingdom, New South Wales and Western Australia, the Queensland body began early to circulate working papers among interested bodies and individuals.\textsuperscript{93} However, the Commission found it desirable to obtain the approval of the Minister for this. Somewhat surprisingly, as a Chairman of the Commission pointed out in an article in 1971, such approval was granted but only "on the basis that the material is to be treated as confidential".\textsuperscript{94}

Alone of the Australian States, South Australia has shown a reluctance to institute the full-scale, statutorily recognised adoption of the "new principle" of law reform. This is epitomised by the fact that it remains the only State without any direct legislative recognition of institutionalised law reform. The Law Reform Committee was created by proclamation in 1968\textsuperscript{95} with the only statutory acknowledgement of this to be found in one line in the State budget making financial provision for the Commission's operation. In composition, the constitution of the Committee breaks ground in provision being made for a nominee of the Leader of the

\textsuperscript{90} Id., s.10(3)  
\textsuperscript{91} Id., s.11  
\textsuperscript{92} Id., s.9. The Chairman of the National Commission under the terms of the \textit{Law Reform Commission Act}, 1973 (Cth.) is also authorized to engage consultants (s.23(1)). The terms and conditions of their engagement are determined by the Chairman with the approval of the Attorney-General (s.23(2)).  
\textsuperscript{93} W. Campbell, \textit{Law Reform in Queensland} (1971), 7 U.Qld. L. J. 221  
\textsuperscript{94} Id. As Mr. Justice Campbell comments:  

Because of the need to obtain informed criticisms of our proposals it is my opinion that neither the working papers nor the reports should be treated as secret or confidential, although confidence should be respected should the Executive Government consult with members of the Commission, after the making of the report, in relation to the preparation of the Bill for presentation to the Legislature.

\textsuperscript{95} S. A. Government Gazette, September 19, 1968 at 853
Opposition in the State Parliament being a member of this body. Other members have come from nominees of the Attorney-General, who have included members of the judiciary and the Crown Law Department, a member nominated by the Law Society, representing South Australia's largely amalgamated legal profession and a full-time law teacher nominated by the Faculty of Law at the University of Adelaide, South Australia's only University Law School. All posts are part-time. The Committee acts on references from the Attorney-General. It may itself also initiate law reform proposals but is subject to any direction by the Attorney-General in this regard. As a creature of the executive branch of government the Committee has no direct access to Parliament. Nor is there any guarantee that the Committee's reports will be made available publicly. In addition to this body, a specialised committee known as the Criminal Law and Penal Methods Committee was established by the executive order of the South Australian government in 1971. Again, the members of this body serve in a part-time capacity. The Committee is expressly required to report and make recommendations to the State Attorney-General. Its brief is wide-ranging. It is to make proposals on the reform of the substantive law, criminal investigation and procedures, court procedures, rules of evidence and penal methods. Like the State's Law Reform Committee, the Criminal Law and Penal Methods Committee has participated in the Law Reform Agencies Conference.

At the national level, the Commonwealth has two basic responsibilities for the development of the law. First, it is concerned

96. Id., cl.3
97. Clause 7 of the Proclamation states:

The Committee shall, at the request of the Attorney-General, and may of his own motion, but subject to any direction by the Attorney-General —

(a) enquire into and make reports (including, in cases where the Committee considers it appropriate or where they are requested by the Attorney-General, interim reports) or recommendations, or give advice, to the Attorney-General, on any matter of or concerning existing law or on any suggestions or the implications of suggestions for any alteration to or change in existing law; and

(b) where it makes recommendations for any alteration to or change in existing law, submit for consideration of the Attorney-General such draft provisions as it thinks fit for giving effect to that alteration or change . . .

98. Criminal Law and Penal Methods Reform Committee of South Australia, Second Report, Criminal Investigations, 1974 at iv
99. Id.
100. Australian Law Reform Agencies Conference, 1976, Minutes of Third Conference at 16
with the matters which come within the sphere of federal legislative power under the Commonwealth Constitution. Secondly, it has a general legislative authority over Australia’s territories, including the Australian Capital Territory and the Northern Territory. The two internal territories have separate legislative organs of their own. In the case of the Australian Capital Territory, a Legislative Assembly has powers which are basically advisory only. The Northern Territory Legislative Assembly is, on the face of it, a more powerful body. But in the last analysis, in the case of each Territory, the ultimate legislative power with respect to each rests still with the Commonwealth Parliament.\textsuperscript{101}

In addition to these basic responsibilities, there are two other chief ways in which there may be active Commonwealth involvement in law reform. On the one hand, the Commonwealth may be concerned with the development of uniform law programmes. This can arise because of its general legislative powers with respect to the internal territories, even though the subject matter may be one in which it otherwise has no recognised power under the Constitution. Concern with the development of uniform law in this context may also be fostered when it may be that uniformity could only be pursued effectively with complementary or interacting laws passed by the Commonwealth and the States acting within their respective spheres of constitutional authority.\textsuperscript{102}

On the other hand, the Commonwealth can become involved in law reform activities which also concern the States as part of the national government’s responsibility for the conduct of Australia’s


\textsuperscript{102} A typical example in this regard is with respect to the law of defamation. The Commonwealth licenses the electronic media under the terms of s.51(v) of the Commonwealth Constitution. Wynes asserts (\textit{id.} at 140) that: “Parliament has power . . . to direct in what manner, at what times and subject to what conditions, the transmission and reception of messages by either medium (radio broadcasting and television) are to be permitted.” It has been assumed from conclusions like this that the Commonwealth can control defamation as it relates to the electronic media although it has not done this as yet in any direct form. On the other hand, the States retain control of the printed media, except insofar as they may be engaged in interstate trade, where the Commonwealth could presumably exercise limited power, under s.51(1) of the Constitution, the trade and commerce power, subject to the limits imposed by s.92, which provides that trade and commerce between the states shall be absolutely free.
foreign relations. To date, the case-law on the Constitution is unclear on the extent to which the national government may use this power to trench on the powers of the States in the process of applying international agreements within Australia when the subject-matter does not come within the ambit of the central government's legislative authority in other ways. Normally, where the Commonwealth has not had clear internal legislative authority in its own right over the subject-matter of international agreements, the practice has been followed, although not without exception, of the Commonwealth entering into negotiations with the States to achieve uniformity of laws in accordance with these international agreements before ratification takes place. With new fields being opened up for the development of international standards this seems likely to be a growing and potentially important area for uniformity discussions in Australia. Sir Anthony Mason, now of the High Court, and a former Solicitor-General of the Commonwealth, has, in this regard, referred to the possibilities which could open up for federal law to expand in this way, even in fields of private law, hitherto the preserve of the States. As he points out, the development of international conventions on such topics as commercial arbitration, the international sale of goods and conflict of laws means that "there is, for example, an expanding area of commercial law, largely private law, which is of federal interest to the Commonwealth".

Despite its wide-ranging responsibilities, however, it has not been until recently that the national government has moved to institutionalise its law reform activities. Until the 1970s, it relied on its own administrative resources, Royal Commissions, and increasingly, expert ad hoc Committees to deal with specific areas where law reform was contemplated. There was at least one

103. Section 51(xxix) of the Constitution gives the Commonwealth Parliament power to make laws with respect to "external affairs". As to this power generally see: Wynes, supra, note 101 at 296-301
104. R. v. Burgess, ex parte Henry (1936), 55 C.L.R. 608; R. v. Poole, ex parte Henry (No. 2) (1939), 61 C.L.R. 634; Airlines of New South Wales v. New South Wales (1965), 113 C.L.R. 54
106. A. Mason, supra, note 31 at 210
107. Id. at 211
108. The Law Reform Commission (Australia), Annual Report 1975, supra, note 1 at 20-21
occasion when it also enlisted the aid of the Law Council of Australia which led to an abortive attempt to introduce a criminal code for Commonwealth territories. In 1971, however, the Commonwealth made its first essay into institutionalising law reform with the creation of a Law Reform Commission for the Australian Capital Territory. This was followed by the enactment of the Law Reform Commission Act, 1973. This made provision for the establishment of the Australian Law Reform Commission. This body began its work only in the first half of 1975, following the appointment of its first members, all originally on a part-time basis, on December 31, 1974. The Australian Law Reform Commission did not replace immediately the Commission established previously for the Australian Capital Territory. But the 1973 Act clearly envisages the possibility that special territorial representation might be provided for on the national Commission.

Officially, its empowering statute describes the national Commission as "The Law Reform Commission". In practice, however, to mark it off from similar bodies, it has tended to be described in the press and elsewhere as "The Australian Law Commission". The Commission itself has indirectly given some support to the use of this nomenclature by the way it has described its own publications with the letters "ALRC". For the most part, the statutory formula describing the Commission's functions follows along much the same lines as other law reform bodies in Australia. It is enjoined to modernise the law "by bringing it into accord with current conditions", to eliminate defects in the law, simplify the law and to work for the "adoption of new or more effective methods for the administration of the law and the dispensation of justice." Unlike some other Australian enactments on law reform, no express mention is made of codification. Reference is made, however, to the Commission considering proposals for the "consolidation of laws" and the repeal of laws that are obsolete or unnecessary. Basically the work of the Commission is activated, in much the same way as elsewhere in Australia, through references made by the Attorney-General of the

109. Id. at 20-21
110. Law Reform Commission Ordinance, 1971, s.6(1) (a) (A.C.T.)
111. See, infra
112. Law Reform Commission Act, 1973, s.6(1) (a) (Cth.)
113. Id., s.6(1) (c) (i)
114. Id., s.6(1) (c) (ii)
Commonwealth. The Commission is empowered to make its own suggestions for law reform work. But its detailed activities are, in the last analysis, basically dependent on references made by the Attorney-General. There is one major difference, however, marking it off from the State law reform agencies. The question of establishing uniform laws in Australia, for example, has long been a matter of discussion. In 1957, the late Chief Justice of the High Court of Australia, Sir Owen Dixon, referred to the need for development of systematic programmes of law reform, with national uniformity in mind. He asked rhetorically: "Is it beyond us to make some attempt to obtain a uniform system of private law in Australia?" With views like these as a background, the 1973 Act expressly provides that the Commission can "consider proposals for uniformity between laws of the Territories and laws of the States".

Members of the Commission may be full or part-time, with terms of office up to seven years. There are four basic membership categories, with an additional one which may be used to obtain special territorial representation on the Commission. The basic membership can be selected from judges of Federal, State or Territorial courts, legal practitioners, law graduates who have been members of the academic staff of a tertiary educational institution or persons who are considered eligible by reason of "special qualifications, training or experience". The provision for special territorial representation limits this to legal practitioners of Commonwealth territories. Where such a person is designated as a territorial member, he takes part "in the proceedings of the Commission in respect of such references only as the Chairman determines to be of special significance in relation to that Territory". As far as the Commission's relationship to the national Parliament is concerned, the Attorney-General is required

115. Section 6(1) of the Act in setting out the functions of the Commission states by way of preamble; "The functions of the Commission are, in pursuance of references to the Commission, made by the Attorney-General, whether at the suggestion of the Commission or otherwise . . . ."
116. O. Dixon, Comment on paper by Shatwell, 31 Aust. L.J. 340 at 342
117. Law Reform Commission Act, 1973, s.6(1) (d) (Cth.)
118. Id., s.12(4)
119. Id., s.12(1) (c)
120. Id., s.12(1) (d)
121. Id., s.12(1) (e)
122. Id., s.12(1) (f)
123. Id., s.12(8)
to lay the Commission’s reports before each House of Parliament within fifteen days after their receipt.\textsuperscript{124} It makes an annual report,\textsuperscript{125} presentable to Parliament in this way. The Act also expressly requires that it shall comply with requests of either or both Houses of Parliament or of their Committees to furnish information on expenditure, the performance of its functions and the exercise of its powers.\textsuperscript{126}

Section 7 of the \textit{Law Reform Commission Act} calls for special attention. It is unique in Australia, and probably elsewhere. This section provides:

In the performance of its functions, the Commission shall review laws to which this Act applies, and consider proposals, with a view to ensuring —

(a) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and

(b) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights.

The clause was not in the original draft of the Act. It was added at the request of the Opposition in the Senate and accepted readily by the government.\textsuperscript{127} To a marked degree Australia has so far tended to eschew general provisions on the protection of human rights, whether along the lines of the United States Bill of Rights or the Canadian Bill of Rights. Aside from a handful of provisions in the Commonwealth Constitution\textsuperscript{128} which touch on human rights questions, civil liberties matters have been dealt with in the context

\textsuperscript{124} \textit{Id.}, s.37
\textsuperscript{125} \textit{Id.}, s.35(1)
\textsuperscript{126} \textit{Id.}, s.9
\textsuperscript{127} \textit{Parliamentary Debates (Senate)}, December 6, 1973 at 2603-04. In commenting upon the proposal made by the late Senator I. Greenwood, the then A.L.P. Attorney-General, Senator L. K. Murphy, now a Justice of the High Court, stated:

The suggestion in relation to the articles of the International Covenant on Civil and Political Rights is a very welcome one. It would be good to have these articles in the Bill and constantly before the commissioners in their review of the law.

\textsuperscript{128} There are four clauses, perhaps five, in the Commonwealth Constitution which can be regarded as being equivalent to provisions in a Bill of Rights. These are section 116 (forbidding the establishment of religion and religious tests for holding Commonwealth offices), section 117 (discrimination in laws against
of particular pieces of legislation or through the establishment of institutions such as Ombudsmen or other special bodies such as the Commonwealth’s Administrative Appeals Tribunal. On the face of it, section 7 might seem therefore to be something of an aberration. But its inclusion with the support of all parties in the national legislature is best understood when it is placed in the context of a national debate which was taking place at the time that the legislation was before Parliament.\textsuperscript{129} The ALP government had introduced a Human Rights Bill. This was aimed at ratifying and applying within Australia the International Covenant on Civil and Political Rights.\textsuperscript{130} To the Opposition, which retained a majority in the Senate, the Bill posed a possible threat to State authority, if the Bill was valid as an exercise of Commonwealth power under section 51(xxix) of the Constitution, the external affairs power. Beyond this, however, there was opposition in principle to judicially enforceable human rights standards. This seems to have been based in part at least on a traditional Diceyan style attitude towards the protection of civil liberties. This has, over the years, had strong support from national leaders such as Sir Robert Menzies.\textsuperscript{131} Perhaps just as importantly, while the Opposition was prepared to support the general concepts of the principles laid down in the International Covenant, there seems to have been a strain of thinking which argued that the implementation of these would be best achieved by detailed implementation in legislative forms, in particular contexts. It would seem that it was with factors like these in mind, and in the knowledge that the Human Rights Bill would not be enacted (at least in the foreseeable future) that section 7 was included in the \textit{Law Reform Commission Act}. At one and the same time, this clause both acknowledges the relevance of the International Covenant in the context of federal law-making and provides a mechanism for its application through the work of the Commission in dealing with particular references made to it.

The Commission itself has recognised the importance of section 7

\begin{itemize}
  \item British subjects resident in different States), section 53(31) (acquisition of property on “just terms” by the Commonwealth), section 80 (jury trial) and perhaps section 92 (freedom of interstate trade).
  \item Senator Greenwood referred to this in his speech in Committee concerning the inclusion of section 7. \textit{Parliamentary Debates (Senate)}, December 6, 1973 at 2603
  \item \textit{Human Rights Bill}, 1973 (Cth.)
\end{itemize}
and the consequences which flow from this. It has considered the possibility of recommending to the Commonwealth that an on-going, long-term programme be established to examine the existing Commonwealth statute book in the light of the provisions of the International Covenant. In the meantime, references to the Commission have acknowledged firmly the relevance of the section to the Commission’s deliberations. In references on Criminal Investigations, and on Privacy, for example, successive Attorneys-General already have expressly reinforced section 7 by directing the Commission to consider the relevance of human rights matters in the course of its investigations. In its recommendations responding to references, the Commission itself already has clearly taken into account provisions in the Covenant in assisting it to formulate its proposals. Even without any general reference to examine the statute book in the light of the Covenant, a process which would clearly require a heavy commitment in terms of research staff and time, clearly a beginning has been made in developing what seems to be a unique approach in working towards the application of international standards on the protection of human rights.

The differences between these bodies illustrate the degrees of ambivalence and often the uncertainty which has marked also the situation elsewhere as law reform has moved in the direction of operating under the “new principle”. Clearly there is a trend in Australia, as elsewhere, to recognise that so-called “lawyer’s law” is largely, if not entirely a myth, as Lord Justice Scarman has affirmed so potently when he challenged “anyone to identify an issue of law reform so technical that it raises no social, political or

132. In his reference of May 16, 1975, for example, dealing with Criminal Investigations and Complaints Against the Police the Attorney-General referred to the need for the Commission to take account of “the policy of the Australian Government to provide for human rights and civil liberties and the need to maintain a proper balance between protection for individual rights on the one hand and the community’s need for practical and effective law enforcement on the other”.

133. In its report on Criminal Investigations, for example, in dealing with the treatment of persons in custody, the Commission refers expressly to Article 7 of the International Covenant on Civil and Political Rights and the importance of giving effect to this in its recommendations in this context. The Law Reform Commission (Australia), Criminal Investigation (Interim Report) (Canberra: Australian Government Publishing Service, 1975) at 59. In its report on Alcohol, Drugs and Driving (Canberra: Australian Government Publishing Service, 1976) at 109, the Commission adverts to section 7 which “casts a special duty on this Commission which at present other Commissions and legislators need not necessarily observe”. The Commission goes on: “We must do so”.

The Dalhousie Law Journal
economic issue." The influence of this style of thinking is to be seen in the opening up of the Tasmanian Commission to non-legal membership, the possibility for this recognised in the case of the Australian Commission and the establishment of the Advisory Council for the Victorian Law Reform Commission. At the same time, there remains, as in Victoria, with its Chief Justice's Committee, a body dedicated to the reform of "lawyer's law" and which has, over the years, clearly played a major role in updating the statute book in that state. It seems clear, however, that this Committee has in practice not always found it easy to make a clear distinction between so-called "lawyers-law" and that which seemingly raises no social, political or economic issue.

The possible use of other community experts, not necessarily of a legal character, is also acknowledged either in empowering legislation or in the practice of some of these law reform bodies. The existence in some States of authorising legislation giving law reform bodies the power and authority of Royal Commissions of Inquiry, attracts to these particular agencies extensive compulsive powers of inquiry, which may be utilised to undertake public inquiries. On the other hand, Senate rejected a similar plan for the Australian Commission. Nevertheless, this Commission, since its establishment, has followed an accepted practice of holding public enquiries around Australia in furtherance of its activities. It has also adopted from the outset, a firm practice of preparing and widely publicising working papers with tentative proposals prior to its public hearing, to enable as wide a public debate as possible on the matters it has under consideration.

Differing provisions on security of tenure for members of these bodies, the extent and nature of their access to legislative bodies and other attributes of independence, or otherwise, demonstrate, too,

134. L. Scarman, *Law Reform* (London: Routledge and Kegan Paul, 1968) at 28. For a strong affirmation of this position in the Australian context see Mason, *supra*, note 31 at 215. Sir Anthony Mason states, *inter alia*: "There is no field of law making which can remain the exclusive province of the lawyer . . . . In truth policy decisions, great and small, are involved in the making of all laws . . . ."

135. O'Brien, *supra*, note 8 at 215

136. Mason, *supra*, note 31 at 215 suggests that while lawyers cannot escape from participating in policy decisions "they must ensure that they do not do so to the exclusion of others having a different background in learning and experience".

137. *Parliamentary Debates (Senate)*, December 6, 1973 at 2597


139. *Id.*
legislative and executive fears, and sometimes a combination of these, towards the working of Australian law reform agencies. At one extreme, the South Australian Law Reform Committee is a creature of the Executive. Its existence and membership depends upon executive fiat. It is essentially an advisory body to the State Attorney-General with no direct access to Parliament. In contrast, in the case of the Australian Commission, the Attorney-General of the Commonwealth has a statutory direction to present its Reports to Parliament within a specified time. The Commission is bound to present an Annual Report to Parliament. Commissioners, both full and part-time, have security of tenure for stated periods, up to seven years, with dismissal provisions which do not seem to fall far short of those applying to the judiciary.140 At the same time, all of the statutory Commissions, as well as the South Australian law reform bodies, are dependent, in the last analysis, upon executive action to enable them to undertake detailed enquiries and to make formal proposals for law reform.

This interdependence between law reform agencies and government is, in some ways no doubt, an element which may constrain the effectiveness of law reform work. By being so dependent upon executive direction, law reform agencies may not, in practice, be able to develop as fully as they might with the programmes they consider to be best-fitted to carrying out the functions assigned to them. The exigencies of government legislative programmes may also lead to demands for rapid enquiry and report which will not always be in the best interests of producing recommendations made only after adequate study and reflection. But against this, there are important matters of principle and practice with regard to the role of statutory law reform agencies within the working of the governmental system generally which often make it desirable, if not essential, that law reform bodies should be closely related to the working of both Parliament and the Executive. The chief function of statutory law reform agencies is to act in an advisory capacity to legislatures, generally through the Executive. As such, like any government agency supported with public funds they should be

140. *Law Reform Commission Act*, 1973, s.17 (Cth.) Appointments may be terminated by reason of misbehaviour, physical or mental incapacity, bankruptcy, or in the case of full-time members only, by engaging in paid employment outside the duties of office, except with the approval of the Attorney-General. The provisions do not apply to holders of judicial office who are appointed to the Commission. *Id.*, s.17(3)
subject to ultimate public scrutiny and control. If they are to carry out their prime tasks of reforming and renewing the statute book their programmes must be developed within a climate where Executive and Parliamentary priorities and attitudes cannot be ignored, given that it is Parliament finally, and often the Executive, with its practical control of Parliament, which will dictate the extent, if any, to which law reform proposals will be implemented.

This is not to say that law reform bodies should sacrifice independence of thought and action in carrying out their work. One of the greatest values intrinsic in the adoption of the "new principle" in many places is that proposals for legislative reform are made as far as possible without regard to the particular predilections of any party or government, and this is often recognised by the special tenure accorded to members of law reform bodies. A law reform agency which is given a marked degree of statutorily-recognised independence, in this and other ways, rightly would forfeit support and respect if it tailored its recommendations deliberately to suit one set of political values, simply to ensure that its proposals were implemented. Similarly, making recommendations to ensure a good "track record" in terms of legislative acceptance, even without political considerations, would soon tend to raise doubts on the intellectual standards and related integrity of a law reform body. In some cases there may in fact be real value in making a report even though, in the short term, it is well understood that it may not be implemented. Such a report can play an important and perhaps crucial longer term role in the education of Parliamentary and public opinion on desirable reforms to the law. A good example of a situation like this is to be seen in the long term impact of the Report of the British Committee on Ministers Powers.\textsuperscript{140a} Even today, not all of its proposals have received full recognition in the law. But it is hard to deny that the proposals of this body have had a notable impact on the thinking and attitudes of generations of lawyers and legislators since it was published in 1932.

When all this is said, however, it must be recognised that unless due regard is given to the general priorities of the legislature and executive in terms of reforming the statute book, then law reform bodies may find their reports simply gathering mould and dust in forgotten shelves of government archives and law libraries. As far

\textsuperscript{140a}. Cmd. 4060 (1932) (The Donoughmore Committee)
as the existing statutory law reform agencies in Australia are concerned, the provisions on consultation with government on law reform programmes mostly provide a basic framework within which balances can be evolved between the needs and demands of government and the independent views of law reform bodies. Where provision exists for regular reporting to Parliament, there is the further safeguard that the executive can be made subject to public, Parliamentary scrutiny if a law reform body suggests that attempts have been made to trespass on its independent functioning. Setting balances between Parliamentary and particularly Executive pressures, on the one hand, and the independent role of law reform bodies, on the other, is a continuing and often a delicate process. But it is, nevertheless, an essential concomitant of law reform work if it is to be carried out successfully in reaching its primary aim of actually achieving a reasonable measure of legislative reform.

One development in Australia which could assist, in the long term, in the evolution of recognised standards in relationships between law reform agencies and governments, as well as playing a significant role in other ways in improving the effectiveness of law reform in the Australian context, has been the establishment of regular Conferences of the law reform bodies. The first of these was convened by the New South Wales Commission in 1973.\textsuperscript{141} These meetings have served already the useful purpose of raising for debate important matters of principle on such questions as the problems of getting law reform proposals enacted\textsuperscript{142} and whether law reform agencies should draft their own legislation.\textsuperscript{143} These Conferences have no formal status but they have their parallels in many other areas of the working of federalism in Australia and experience in other fields suggests that meetings like this can often play a significant role in the development of accepted patterns of action around Australia.\textsuperscript{144}

In the shorter term, these meetings have helped also to systematise important developments in the improvement of law reform activities in this country. One of the great problems facing law reform agencies in Australia is the limited resources that some in particular can call upon to undertake the research efforts which

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\textsuperscript{141} The Minutes of this and the two subsequent Conferences of the Australian law reform agencies are contained in \textit{Australian Law Reform Agencies}, 1976.
\textsuperscript{142} \textit{Id.} at 96-106 (Record of Third Conference)
\textsuperscript{143} \textit{Id.} at 73-74, 80-82, 110-14
\textsuperscript{144} Castles, \textit{supra}, note 16 at 84-86
\end{flushleft}
they believe to be necessary to carry out their work effectively. This is a theme which understandably has been adverted to on a number of occasions. In South Australia, for example, the Law Reform Committee was hampered at the outset by the "limited typing and research assistance available to it".\(^{145}\) It has been recorded that the most serious defect flowing from lack of funds as far as the Chief Justice’s Committee in Victoria is concerned has been the inability to obtain even "multiple copies of the working papers and reports of other law reform agencies for the use of subcommittees".\(^ {146}\) In its first *Annual Report* in 1975, the Australian Law Reform Commission, which is clearly better endowed than some other agencies, made special mention of its situation in this regard. Referring to possible limits on the recruitment of staff by government economies, it claimed that unless it could obtain "proper research staff and library facilities" its ability "to do national tasks of law reform will be severely stunted from the outset and its effectiveness crippled, perhaps permanently".\(^ {147}\) Problems like this have been one reason why suggestions have been mooted at times for pooling national resources in relation to law reform activities in some form or another.\(^ {148}\) There are constant risks, too, that parallel work could be undertaken, and perhaps unnecessarily, unless effective forms of communication and co-operation are established between the various agencies.\(^ {149}\) As an Attorney General of the Commonwealth rightly has pointed out, there is a need to "promote economy of effort and the maximisation of the talent available to law reform".\(^ {150}\) The Conference of Law Reform Agencies already seems to have made an important start in working toward this end. It has established a clearing house function for Law Reform Agencies which was first carried on by the Western Australian Law Reform Commission. Since January 1976, this has been placed in the hands of the Australian Commission.\(^ {151}\) Through this, there is a constant, centralised updating of information on the

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145. Kelly, *supra*, note 72 at 485
146. O’Brien, *supra*, note 8 at 459-60
147. The Law Reform Commission (Australia), *Annual Report 1975* at 34
148. For examples, see Kerr, *supra*, note 12 at 9
149. O’Brien, *supra*, note 8 at 460
151. See *id.* at 14, 35
current work of the law reform agencies. One of the most important developments in this regard has been the preparation of an *Australasian Law Reform Digest* which was the subject of detailed discussion and planning at the Third Conference. A small periodical has been instituted to inform regularly other interested parties, as well as the agencies themselves, of current developments and discussions on law reform.

The meetings of this Conference have demonstrated, too, the possibility that co-operation could be followed at times by collaboration between the agencies as these bodies may be called upon to become involved in moves for the development of uniform laws in Australia, in some areas. The Attorney-General of the Commonwealth referred approvingly to discussions on this issue when he told the Third Conference of Law Reform Agencies in 1976 that it would be particularly useful for "this Conference to explore overseas experience on this matter in an attempt to discover the most appropriate and constitutionally acceptable way of promoting uniformity of laws (in suitable areas) in this country". The problem of establishing workable mechanisms, within the particular constitutional and political necessities affecting the development of uniform laws, has in fact been a matter of considerable debate at each of the first three Conferences of the agencies. At the Second Conference, a resolution was agreed upon, which, *inter alia*, suggested that the Standing Committee of Attorneys-General, which has so far played a key role in moves for uniform laws, should be asked to approve a proposal that the agencies collectively be permitted to suggest to this body subjects thought appropriate for uniform law reform. The resolution went on to argue that "where appropriate the agencies also suggest what law reform agency or agencies should on a co-operative basis formulate proposals for uniform laws". The Standing Committee did not

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152. *Id.* at 87-91. The Digest, which it is proposed should be updated regularly, is planned to contain digests of Reports of Australian Law Reform Agencies, those of Papua-New Guinea and New Zealand, if this is agreeable to law reform bodies in these countries, together with indexed information on overseas law reform activities, references to statutes, articles and other material concerned with law reform. The preliminary work on this large project has been carried out by the Australian Law Reform Commission in collaboration with the other agencies.

153. The journal is titled *Reform*.

154. *Supra*, note 141 at 34

155. *Id.* at 4, 12, 18, 106

156. *Id.* at 12. Referred to as A.L.R.C.1. In two further resolutions (A.L.R.C.2 and 3) the Conference proposed that particular agencies, separately or in
The New Principle of Law Reform in Australia

agree fully with this proposal. As the Chairman of the Western Australian Law Reform Commission told the Third Conference, however, the disagreement between the Standing Committee and Law Reform Agencies seems to have been at the level of procedure rather than in terms of substance. Given the complex history of efforts to develop uniform laws in Australia and the deep seated political problems involved in this it is not surprising that the original proposals of the Law Reform Agencies have been the subject of a measure of disagreement. As the position stands, however, there is clearly some likelihood that the existing Agencies will be drawn progressively into officially sponsored moves for establishing uniform laws in some fields.

It should not be expected, however, that demands for uniformity will dominate the course of law reform activities in Australia, at least in the foreseeable future. There are some fields where the need for uniformity already has been recognised by many, and others where there seems to be a growing consensus that uniformity is clearly desirable. At the same time, Australia, in practice, is still very much of a federal organism in political terms. Uniformity for uniformity's sake is not a demand which is likely to gain strong support, and certainly not unanimous support, and often for understandable reasons. One great value of the existing division of powers is to be seen in the opportunities it provides for regional "experiments" in the development of new approaches to the law. Uniformity can grow from "experiments" like this. But the opportunities for experiment which are available under the existing federal system could well be lost if uniformity for uniformity's sake became a basic premise in the working of law reform in this

157. Id. at 65. The essence of the position of the Standing Committee is set out in a letter from the Minister of Justice of Western Australia to the State Commission, extracted in part at this page. The Standing Committee indicated, inter alia, that it would not act on recommendations made directly by the Law Reform Agencies acting together. It suggested that proposals for uniform law activities should be made by individual agencies through the Attorneys-General or other Ministers responsible for each body.

158. Id. at 63

159. A.L.R.C. 2 and 3, supra, note 156 refer to a number of these fields. These were: Sale of Goods, Defamation, Commercial Arbitration, the Formalities of Oaths, Declarations and Attestation of Documents, Consumer Protection, the Recognition of Interstate and Foreign Grants of Probate, Uniform Traffic Code and Bail for Interstate Accused.
country. Agreement on such moves, even through the well-established Standing Committee of Attorneys-General has, at least in the past, often been hard to achieve. Where uniformity is sought it is clearly difficult to accommodate the various political and other interests which must be satisfied if uniformity is to be achieved. There is the attendant risk that if too great an emphasis is placed upon uniformity, desirable as this may be in many cases, when there are not obvious practical reasons for this, not only might valuable experimentation prove to be impossible but other constructive moves to reform the law could founder in the wake of political conflict.

Viewed in this light, and for other reasons, the fact that law reform in Australia is presently the sum of many parts can clearly be regarded as a valuable feature of law reform activity in this country. Provided resources are not spread too thinly and effective co-operation and collaboration between agencies can help to offset problems like these, there is much to be said for developments continuing to take place within the style of federalist framework which has so far marked this work in Australia. Importantly in this regard, the adoption of the "new principle" is still very much in the formative stage of its evolution. There is as yet no clearly-accepted pattern, whether in Australia, or elsewhere in the common law world, which provides a generally-accepted means of applying the "new principle" successfully. Indeed there will probably not be one for a long time, if at all. In circumstances like this, the variety of approaches to law reform in different parts of Australia, and sometimes within the same jurisdiction, provides a gathering store of experience which should help to provide future guidance on the most effective ways of developing these activities. The impressive success rate of the part-time Victorian Chief Justice's Law Reform Committee in terms of legislative action implementing its recommendations, for example, cannot be ignored as one possible model for law reform of a seemingly less contentious nature. At the same time, the work of the full-time New South Wales Law Reform Commission demonstrates another approach which has established high standards of achievement for other law reform agencies to emulate. On the other hand, the longevity of the Victorian Statute Law Revision Committee raises the issue of the working of Parliaments in relation to law reform and the extent to which such an all party body, whether separately or in conjunction with non-Parliamentary agencies, might become a model for similar
developments elsewhere.

In the Australian context at least, these differences and unanswered questions help to emphasise the essentially experimental phase which still marks the adoption of the "new principle" in this country. The "new principle" is clearly not accepted fully in all jurisdictions, as exemplified in South Australia. It has yet to prove its long term value and importantly its acceptability to legislatures and executive branches of government. As far as the legislative and executive organs of government are concerned, there are understandable fears that institutionalised law reform could lead to some seeming usurpation of their powers. In historical terms, there is the risk, too, that the present enthusiasm for the "new principle" may simply be another example of the cyclic phenomenon which has existed in the common law tradition in which periods of energetic reformative zeal have been followed by decades and even longer periods of lassitude and inaction. Certainly, the present upsurge in concern for law reform in Australia, as elsewhere, is largely a phenomenon of the years since the Second World War. Many of the reforms which have been achieved by law reform bodies in the past twenty years have often been little more than long overdue adjustments to the law after a period of one hundred years or more since nineteenth century law reformers lost their enthusiasm for change.

There are, however, important differences between our present condition and those of past centuries. Hopefully, these will minimise the risk that the present growth in law reform activities is simply another example of an age-old cyclic phenomenon. In past centuries it was sometimes possible, as through the innovations in the common law by Lord Mansfield in the eighteenth century, to rely on judge-made law as a viable alternative to legislation as a means of changing the law. Today, however, this method of change is largely and justifiably precluded as an acceptable means of legal development. It is not compatible with basic democratic principles. Nor is it necessarily responsive to valid political, economic and social aspirations within the body politic. The accepted alternative, in the past one hundred years or so has been the legislature, aided and perhaps too often dominated by the Executive. These institutions in their turn, however, have often been found wanting when it has come to law reform. Sometimes this may have been due to lack of interest. More often, perhaps, time constraints, the complexities of the task and a lack of expertise have been important
contributing factors in this. The "new principle" seeks to help overcome problems like this and to aid the legislature and the Executive in carrying out this work. It aims to provide constant, systematic scrutiny of the statute book combined with recommendations for its renewal. But developing new institutions to do this is no mean task, particularly when law reform bodies are created in governmental systems where they may be regarded in some senses at least as being competitive with other instruments of government. To be successful in the long term then, there is a strong likelihood that these agencies must evolve within schemes of government in which they are capable of coming to terms with a variety of pressures which are partially but not entirely represented by the existing legislative and executive branches of government. At the same time, these bodies must seek to maintain their independence of thought and action. Australia has made an important start in this direction. Vitally, the diversity of the institutional forms which have so far been established for law reform in this country should provide, not only for Australia, but for other countries as well, valuable evidence of the ways in which the "new principle" may in time become a fully accepted, recognised part of the ordering of governmental affairs.