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COMMENT

UNIFORM LAW REFORM: WILL WE LIVE TO SEE IT?

*THE HONOURABLE MR. JUSTICE M. D. KIRBY**

Two Thorny Problems for Law Reformers

Two problems of the greatest significance confront law reformers in Australia. Of course other difficulties abound. They include the resources made available, the multiplicity of laws warranting review, the uneven quality and availability of legal data, the sheer size of the country and so on. But there are two problems to which those engaged in law reform keep returning. The first is the mechanism of processing law reform reports. To the despair of law reformers, the products of their labours often gather dust, commanding no attention from the legislators or ministers who commission them. The law meanwhile goes unreformed. Parliaments, busy with headier stuff, leave unattended the renewal of large areas of the law.[1] Not too many votes can be found in reforming the Rule against Perpetuities. Votes may even be lost in liberalizing the criminal law. Proposals are put forward from time to time to overcome this impasse. Lately, a number of writers have urged a limited delegation of legislative authority to law reform bodies. Commission recommendations might, in appropriate areas, pass automatically into law, unless disallowed.[2] These proposals, designed to break the bottle-neck of unread reports, fall on deaf ears. The present Commonwealth Attorney, Mr. Ellicott, was not

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1 Lord Devlin "Judges and Lawmakers" (1976) 39 *M.L.R.* 1 at 16.

2 Sir Anthony Mason "Where Now?" (1975) 49 *A.L.J.* 570 at 573; F. G. Brennan, *ibid.*, 672 at 673.

optimistic that such a solution would be accepted in our democracy. He recognized, however, that parliaments, unwilling to delegate such authority must themselves perform their task.[3] Law reformers cannot demand enactment of their proposals. They may in fairness expect parliamentary consideration of them.

It is the second great issue facing law reform in Australia that I wish to develop. No mechanism has been found in our federation, adequately to achieve the uniform reform of our laws. We struggle manfully, from jurisdiction to jurisdiction separately and in isolation up-dating the laws referred by our respective law ministers. No procedure has been devised to secure a truly national approach to law reform. I propose to explore briefly the reasons for and urgency of discovering a mechanism for uniform law reform in Australia. I will take the reader to models developed in other outposts of the common law, in this post-imperial era. I then propose to recount the lamentable history of efforts to promote a mechanism for uniform law reform in this country. Take heart. My prognosis is optimistic and I will even suggest a solution or two.

Why Uniform Law?

It is orthodox, at this point, to say a few words of reassurance that are nonetheless true for being cliches. First, no one in Australia seriously argues for "uniformity for uniformity sake". A positive case must be made out for disturbing the federal compact by which limited areas of power only are afforded to a Parliament, competent to enact national laws.[4] Furthermore, no one doubts that a dull blanket of uniformity in a large, scattered country such as Australia would pose a threat to experimentation and could actually hamper the cause of law reform. Who can doubt that progress has been made in this country by the imaginative experiments advanced in one jurisdiction, subsequently (often with few modifications) finding their way into other States? One has only to call to mind advances recently made in the lot of illegitimate children, protection of the environment and historical buildings, consumer protection against door to door salesmen, the provision of small claims tribunals and so on.[5] An idea for law reform originates in one jurisdiction. It is tested and found to work. It gradually gains acceptance throughout the country. Nothing I say, as an officer of the Commonwealth, implies any lack of respect for State sovereignty in matters reposed by the Constitution in the parliaments of the States. There are, however, some areas where reason, efficacy and economy would suggest the value of a uniform law reform approach. I am heartened to believe that this is not an aberration of my own. It is a view shared by other law reformers, as I shall show.

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[3] R. J. Ellicott, Q.C., M.P., *Law Reform—the Challenge for Governments*, mimeo, speech to the Women Lawyers' Association of N.S.W., 11 June, 1976, pp. 2-3. Hereafter referred to as R. J. Ellicott, 11 June, 1976.

[4] *Cf.* Windeyer J. in *Skelton* v. *Collins* (1965-66) 115 C.L.R. 94 at 136.

[5] (1974) 48 *A.L.J.* 457 at 458; but *cf.* Professor Baxt's comment (1973) 47 *A.L.J.* 209 at 210.

Furthermore, one can scarcely open a law review today or even a newspaper, without seeing the call for national action to promote uniform change in the law throughout Australia. The last word on this may have been said by Sir Owen Dixon commenting on a paper by a past Dean of this Law School, reflecting on the problems of law reform:

> In all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia. Local conditions have nothing to do with it. Is it not unworthy of Australia as a nation to have varying laws affecting the relations between man and man? Is it beyond us to make some attempt to obtain a uniform system of private law in Australia?[6]

The inference which the late Chief Justice drew from this, and the answer he suggested was the establishment of a Federal Committee for law reform:

> Is it not possible to place law reform on an Australia-wide basis? Might not there be a Federal Committee for law reform? In spite of the absence of constitutional power to enact the reforms as law, it is open to the federal legislature to authorize the formation of a body for enquiry into law reform. Such a body might prepare and promulgate draft reforms which would merely await adoption.[7]

Unhappily, it took a time for this call to be heeded. When law reform bodies were established, they were established by individual parliaments in Australia. The national Commission was the last to be established.[8] Its statute calls attention to a duty "to consider proposals for uniformity between laws of the Territories and laws of the States".[9] However, of necessity, its jurisdiction is limited to matters falling within Commonwealth power. The consequence of this is that today there are at least eleven law reform bodies in Australia. Victoria has three such bodies.[10] They are differently constituted. They are established, organized and funded in quite different ways. They vary from the Parliamentary Committee in Victoria, through the part-time Committee of Judges and others in that State to statutory Commissions with a limited number of full-time staff.[11] At the end of the spectrum is the N.S.W. Commission and the Australian Commission with full-time Commissioners and a significant research staff. Sir Anthony Mason asked, many years ago, whether we could afford the luxury of so many different bodies, given the problems

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[6] Sir Owen Dixon's comment on the paper by Professor K. O. Shatwell "Some Reflections on the Problems of Law Reform" (1957) 31 *A.L.J.* 325 at 342.

[7] *Ibid.*

[8] Law Reform Commission Act, 1973 (Cth.).

[9] *Id.* s. 6(1)(d).

[10] The Victorian Law Reform Commissioner, constituted pursuant to the Law Reform Act, 1973; the Victorian Statute Law Revision Committee, constituted pursuant to the Parliamentary Committees Act, 1968, and the Victorian Chief Justice's Law Reform Committee, established in August 1944.

[11] A review of these bodies is found in the first *Annual Report, 1975*, of the Law Reform Commission p. 13; hereafter called *Annual Report*.

to be tackled and the legal resources that could be realistically devoted to those problems in Australia.[12] His question remains apt to-day.

Practical considerations such as these constitute the basic reason for finding a mechanism for uniform law reform. It is not feasible to expect of the smaller States that they should be able to devote the resources that can be found in more populous parts of the country. Yet it is unacceptable that the law in these States should suffer less scrutiny, for the purposes of modernization and simplification. Rationalization of effort is the principal argument for uniform law reform. The removal of antiquities, injustices or confusion in the law is just as important to citizens in Tasmania as it is to those who live in Darwin or in Perth. This issue takes on a new light when the actual subjects under study in the eleven law reform agencies around Australia are scrutinized. The Australian Commission now performs certain clearing house functions for these agencies.[13] Amongst other things, this involves the collection and analysis of just what is going on. I leave aside entirely the past. The remarkable identity of subjects under study in law reform bodies not only in Australia but overseas, would itself provide material for a handsome comment. We should, perhaps, not be surprised by the fact that inadequacies or injustices of the common law are found equally intolerable in jurisdictions on opposite sides of the world.

If one simply looks at current reports and matters under study, the remarkable similarity of law reform projects throughout Australia can be vividly demonstrated. Take the reform of the law of rape and rape trial procedures.[14] The Victorian Law Reform Commissioner has published a working paper on this, now followed by a report.[15] The Tasmanian Law Reform Commission has recently published a report.[16] The South Australian Criminal Law and Penal Methods Reform Committee in May put out a special report on this subject.[17] The Queensland Law Reform Commission is now turning its attention to the issue. The New South Wales Women's Advisory Board also produced a report during 1976.[18] There may well be others. Each of these reports attempts to deal with the problem in the law common throughout Australia: the reduction of the harassment of the prosecutrix in a rape trial without endangering the fair trial of the accused. Each of the reports poses a solution to submissions for the reform of the law commonly made in this area. Each deals with cross examination of the prosecutrix, corroboration and complaint, open or closed trials and so on. None of these is an issue

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[12] A. F. Mason "Law Reform in Australia" (1971) 4 *Fed. L. Rev.* 197 at 212.
[13] *Annual Report*, p. 36.
[14] *Cf.* (1975) 49 *A.L.J.* 259.
[15] Victorian Law Reform Commissioner, Working Paper 4 and Report No. 5, ***Rape Prosecution (Court Procedures and Rules of Evidence)***, 1976.
[16] Tasmania Law Reform Commission, *Report and Recommendations for Reducing Harassment and Embarrassment of Complainants in Rape Cases* 1976 (No. 3 of 1976).
[17] *Special Report on Rape and Other Sexual Offences*, 1976.
[18] See Report (1976) 2 *Legal Service Bulletin* 26.

requiring geographical distinctions to be drawn in the solutions proposed for different parts of our federation. But this is only one illustration. There are many others. In the lawyers' lexicon, from "Arbitration" to "Wills", identical law reform projects predominate. On commercial arbitration, the Queensland Law Reform Commission has published a working paper and report;[19] the N.S.W. Commission in 1973 published its working paper.[20] The Western Australian Commission published a report in 1974.[21] That same year, the A.C.T. Law Reform Commission published its report on commercial arbitration.[22] The Victorian Chief Justices Committee[23] and the South Australian Law Reform Committee[24] have dealt with the same subject and the Tasmanian Law Reform Commission currently has a project in hand on arbitration clauses in insurance contracts. A New Zealand Committee put out a report on this subject in 1975.[25] Examples of this kind run into hundreds. In some, no doubt, there are good reasons for local variations in the law. It is not too bold to say that in other cases, no overwhelming case for the "local product" is immediately apparent.

But whether one starts from Dixon's position that "in all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia" or from the more pragmatic stance that, given our federal system, a positive case must always be made out for a uniform approach, there are several considerations which justify a new look at uniform law reform in Australia. I mention four only. First, there is the very proliferation of law reform bodies, the duplication of their endeavour and the diseconomy of this lack of rationalized effort. Law reform is a highly expensive business, requiring talented, well paid, experienced lawyers and (usually) the skills of overworked legislative draftsmen, for whose time there are many competitors. In times of restraint especially, the arguments for co-ordinated effort seem unanswerable. The uneven resources devoted to the practical business of law reform throughout the country, suggest the value of some form of integrated effort.

A second consideration is the growing role of legislation and the diminishing importance of judge-made law.[26] Previously, in our legal

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[19] Queensland Law Reform Commission 4, *On a Bill to Consolidate the Law Relating to Arbitration,* 1970.

[20] Law Reform Commission, N.S.W. *Working Paper on Commercial Arbitration* 1973 (2 Vols.).

[21] Law Reform Commission of Western Australia, *Report on Commercial Arbitration and Commercial Causes* (Project 18), 1974.

[22] Law Reform Commission of the A.C.T., *Report on the Law Relating to Commercial Arbitration,* 1974.

[23] Chief Justice's Law Reform Committee (Victoria), *Arbitration,* 1974.

[24] Law Reform Committee of South Australia, *Fifth Report, Arbitration Act, 1891-1935,* 1969.

[25] New Zealand Contracts and Commercial Law Reform Committee, *Aspects of Insurance Law,* 1975, p. 10.

[26] N. Marsh, "Law Reform in the United Kingdom: A New Institutional Approach" (1971) 13 *Wm. & M. L. Rev.* 253 at 267-8.

system, we could look to the inventiveness of the common law to deal with new problems requiring social control. Solutions would be discovered in the bosom of the judges. Alternatively modifications of the common law would be suggested at Westminster and adopted throughout the Empire. The first Tasmanian Law Reform Committee and New Zealand Law Reform bodies were created with the specific charter of considering the applicability there of law reform legislation originating in England.[27] There is no need to elaborate the jest about Tasmanian legislation expressed in terms "not to apply to Scotland". The days of this form of legal renewal have gone forever. We may secure ideas for the orderly change of our inherited legal system from law reform bodies in England and elsewhere. We may even continue to secure ideas from the Palace of Westminster. The uniform adoption throughout Australia of English legislation will rarely, if ever, occur. Other sources of uniform legal renewal have been closed off. The Judicial Committee of the Privy Council has a significantly diminishing part in the Australian judicial hierarchy.[28] The decisions of the House of Lords and of other English courts no longer enjoy the authority they formerly had in Australia.[29] The likely harmonization of the law of England with the laws of the European communities is likely to continue apace the separation of Australian common law from its historical source.

A third consideration flows from the diminishing importance of judge-made law. It is the growing importance of legislation in our legal system.[30] This movement began in the nineteenth century and continues today. Judges, once the fountain of novel and inventive legal developments of principle, become more and more the interpreters of statute. This has a special significance in a federation. Our Constitution made one significant contribution to uniformity of laws in Australia by reposing in the High Court of Australia a jurisdiction in general law matters. It is in the High Court that uniform principles of law can be developed and established. But this mechanism is bound to have diminishing importance when decisions rest more and more upon the interpretation of statutes and increasingly less upon principles of common law and equity. The forces that promote legal renewal by State legislation are bound to diminish somewhat the capacity of the High Court to promote uniform laws in Australia. If the rights of illegitimate children are to be found in a forest of Acts, the pronouncements of our judicial apex upon the language of, say, a South Australian Act may have but limited relevance

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[27] *Annual Report*, 20.

[28] Privy Council (Limitation of Appeals) Act 1968 (Cth.); Privy Council (Appeals from the High Court) Act 1975 (Cth.); *Kitano* v. *The Commonwealth* (1974) 48 A.L.J.R. 343.

[29] *Cf.* Dixon, C.J. in *Parker* v. *The Queen* (1963) 111 C.L.R. 610 at 632. See also *Australian Consolidated Press Ltd.* v. *Uren* (1967) 117 CL.R. 221 at 235 (Privy Council).

[30] Lord Hailsham "Commemoration of Sesquicentenary of Proclamation of Charter of Justice of N.S.W." (1974) 48 *A.L.J.* 351 at 355.

for different language in the legislation of another State. Yet another source of uniform laws in Australia would appear to be curtailed.[31]

Fourthly, *pace* the Founding Fathers, there are matters today, falling outside the Commonwealth's Constitutional warrant, which justify or even demand a uniform approach throughout the scattered communities of Australia. Not a month goes by but somebody, lawyer or layman, calls attention to serious injustices or inconvenience caused by disparate laws. In some cases, the need for a uniform approach is itself the product of modern advances. How could the Founding Fathers possibly have foreseen the speed of communication that renders national distribution of daily newspapers a reality and the complication of different defamation laws a positive burden? How could they have predicted the integration of business and commerce, itself the product of airlines, telephones, telefacsimile, telex and so on? Different defamation laws positively burden our society. The prudent editor, harassed by the urgencies of his job, frequently sacrifices free and forceful expression for respect to the lowest common denominator of defamation law. Alternatively, a plaintiff picks his jurisdiction to sue for damages which, in another place, may not be recoverable. Recognition of such matters led the present Commonwealth Attorney-General to tell a recent meeting of the N.S.W. Women Lawyers' Association that he intended to seek the approval of the Standing Committee of Attorneys-General for a project by which the Law Reform Commission of Australia would seek to develop a uniform defamation law.[32] Many other suggestions for uniform laws have been made. The latest issue of *Reform*, a bulletin of the Australian Commission, lists a few of those made in the second quarter of 1976.[33] The President of the Victorian Law Institute, for example, urged the need for national thinking in the legal profession. "Why should there not be a common code of ethics, a common system of costing and a common professional indemnity scheme?", he asked.[34] A step in this direction is now taken by the amendments to the Judiciary Act designed to afford practitioners from all parts of Australia the right to appear before courts exercising federal jurisdiction.[35]

The need for urgent attention to the adoption of a uniform choice of law rule in Australia was urged, in the interstate context, by Mr. K. Pose.[36] In this area, federalism produces injustice and pitfalls, to say nothing of forum shopping. It is the business community which is most strident in the calls for uniform laws. A statement by the Minister for Business and Consumer Affairs in April 1976 drew attention to the support of the Government for "national" regulation of the securities industry. He said that there was considerable support in the community

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[31] *Annual Report*, 48.
[32] R. J. Ellicott 11 June, 1976, 4.
[33] Australian Law Reform Commission, [1976] *Reform*, 44-5.
[34] (1976) 50 *Law Inst. Jo.* 105.
[35] R. J. Ellicott, 11 June 1976, 9-10.
[36] (1976) 50 *A.L.J.* 110 at 117.

for the development and maintenance of laws in the corporate area having uniform application throughout Australia.[37] One could list a great many proposals of this kind coming from the Bench and the community generally and proposing uniformity in matters as far apart as land title registration[38] and gun control.[39]

What are others doing about it?

The problems recounted above do not harass the developed unitary state. They may exist in developing countries of Africa and Asia where tribal and customary law still have a special, local role.[40] Essentially, the problem is the product of jurisdictional division of power, characteristic of a federation. The United States and Canadian Federations have developed procedures to promote uniformity of laws. In the United States the National Conference of Commissioners on Uniform State Laws has operated since 1892. All States have participated since 1912. Commissioners are appointed from each State. Some have statutory appointments, others are appointed pursuant to Executive order. Most States appoint three Commissioners, usually for a term of three years. The persons chosen generally enjoy the highest eminence in the legal profession. They comprise members of the judiciary, academics and practising attorneys.

This Conference meets annually. Because it works closely with the American Bar Association, the practice has developed that the annual meeting is held for the five or six days previous to the Annual Meeting of the A.B.A. There is an Executive Secretary, usually a professor of law. The Conference has a number of committees, including an Executive Committee and a Committee on Scope and Program. Suggestions for uniform laws are processed by the Executive Committee which appoints a special group having the responsibility of investigating the subject and drafting legislation. A Reporter is appointed, usually an academic and with the aid of an advisory committee and a team of draftsmen. A report with draft legislation is prepared. This report is channelled through one of seven sections of the National Conference to the full Conference. No proposal is adopted until it has secured the approval of two full meetings of the Conference.

Following adoption, each State Commissioner is expected to give personal attention to the introduction of the recommended laws into the legislature of his particular State. This obligation is taken seriously.

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[37] Mr. J. W. Howard, M.P., reported in *The Australian Financial Review*, 1 April 1976, p. 14.

[38] Barwick, C.J. in *Breskvar* v. *Wall* (1971) 126 C.L.R. 376 at 386: "It is I think a matter for regret that complete uniformity of this legislation has not been achieved, particularly as Australians now deal with each other in land transactions from State to State".

[39] Reported proposal of State Police Forces, *The Australian*, 27 March 1976, p. 3.

[40] G. Woodman, "A Basis for a Theory for Law Reform" (1975) 12 *Uni. Ghana L.J.* 1 at 6.

Intense lobbying occurs within the States in support of draft Acts. The Conference has enjoyed a remarkable success in achieving uniformity of laws in a number of critical areas. Its greatest success is the Uniform Commercial Code. This originated as an idea in 1940. It was finally formulated and approved in 1952. It now operates, with various modifications in all States of the Union except Louisiana which has, of course, a civil law tradition.[41]

Canada has had a Conference of Commissioners on Uniformity of Legislation since 1918. The Federal Government has participated since 1935. Three Commissioners are appointed by the Attorney-General of each Province. They also meet annually for the five days preceding the Canadian Bar Association Conference. It is usual to have one Commissioner a Deputy Attorney-General, one Parliamentary Counsel and the third a practitioner or academic of note. This Conference concentrates on removing unnecessary differences that arise between existing legislation in the Provinces. No pressure is put upon any Province to implement the recommendations of Commissioners.[42] In the result, the Canadian Conference has not proved as successful as its United States counterpart. The point is, however, that the mechanism exists and has continuing achievements to its credit.

Other federations and groups of communities have also developed procedures to harmonize appropriate areas of law. Mention has already been made of the European efforts in this direction. I recently learned of machinery provided in the Caribbean Community. The Treaty of Chaguaramas contains procedures for co-operation in the harmonization of the law and legal systems of member States. The Treaty establishes a Common Market and Article 40 binds member States to undertake to harmonize as soon as practicable legal provisions or administrative practices affecting a number of areas of the law. These include companies, trademarks, patents, designs and copyright, labelling of food and drugs, restrictive business practices and so on. The obligation to act is imposed upon the Council.[43] Apart from regional and federal endeavours of this kind, the attempts to achieve uniform international trade laws continue through agencies of the United Nations.[44] The rationale for uniformity is common. It is the recognition of the injustice, uncertainty and diseconomy caused by different laws governing conduct, particularly conduct which throws people in different legal jurisdictions together.

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[41] D. B. Owles, "The Risk of Loss in the Sale of Goods in America" (1976) 73 *Law Soc. Gazette* 191.

[42] "Historical Note" in *Proceedings of the Fifty-third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada,* 1971, p. 10.

[43] C. A. Kelsick, *Law Reform: (The Need for and its Role in Change)*, mimeo, Speech to the Commonwealth Caribbean-Canada Law Conference, Jamaica, 1 March 1976, pp. 7-9.

[44] On Unidroit, Unctad and Uncitral: See (1973) 47 *A.L.J.* 103 (1974) 48 *A.L.J.* 155 at 269 and (1975) 49 *A.L.J.* 290.

What is Australia doing?

In the face of the needs and urgencies stated and the developments in comparable countries elsewhere what has Australia done to promote and maintain laws in appropriate areas having uniform application throughout the country? Three procedures have been adopted, with varying success, since the Imperial model went out of vogue. Most successful has been the Commonwealth's push into legal areas formerly left to superintendence by State Laws or the Common Law. The Matrimonial Causes Act 1959, the Family Law Act 1975 and the forerunners to the Trade Practices Act 1974 are cases in point.[45] Such extensions of Commonwealth power are likely to increase rather than diminish. The demands of the business community in particular may well ensure the adoption, in the next generation, of uniform laws suitable for the Australian context in matters of private law affecting companies, banking and insurance. These are substantially matters assigned by the Constitution to the Commonwealth and as yet relatively unexplored by federal legislation.

Although the Law Council of Australia has not played the part in this country equivalent to the American Bar Association or Canadian Bar Association, a contribution to uniform laws in areas outside Commonwealth competence has certainly been made. The Law Council played an active and successive part in connection with the design of the Family Law Act 1975. Its contribution towards the achievement of uniform laws on consumer credit should be noted. Although it has not yet borne fruit, we may yet see the extensive work on a criminal code for the Australian Capital Territory translated into law. The appointment of a full-time Secretary-General and the revival of a number of specialist committees working in harmony with law reform bodies promises new vitality in the contribution by the organized profession in Australia to the promotion of uniform laws.[46]

The primary instrument, Commonwealth power apart, by which uniform laws in this country have been secured is the Standing Committee of Commonwealth and State Attorneys-General. In 1965, not long after the establishment of that Committee, Sir John Kerr predicted its special role and responsibility in promoting uniform law reform.

> Probably it would be too expensive for each State to have a separate and properly staffed law reform commission, but all the States and the Commonwealth together could provide a very sound organization to investigate problems of law reform on a full-time basis. In other words, the Standing Committee of Attorneys-General could be the top level policy committee with help from their departmental officers and legal and other professions, but with a permanent organization working under them to evolve recommendations and to carry out

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[45] *Annual Report*, 21, 48.

[46] *Annual Report*, 21; R. D. Nicholson "Lawyers and Legal Renewal" 1976 *Oracle* (Monash) 14.

> decisions and draft proposals and legislation. The future developments of the Standing Committee along these lines, with a staff of its own, would ensure it a permanent role of the most important and constructive kind in legal evolution in Australia. And, in the outcome, we would get much more real law reform done. The Attorneys, committed by their agreement with one another, would feel impelled to find time in the legislative programme for law reform measures.[47]

Unfortunately these prognostications have not yet come to pass. Each State and Territory and the Commonwealth itself has a law reform mechanism. The Standing Committee has no permanent Secretariat or staff of its own. The uniform laws promoted by the Standing Committee have not been without significance.[48] The *magnum opus* is undoubtedly the Companies Act but the agreement on a virtual uniform hire purchase code and the encouragement of complementary legislation in matters of adoption, maintenance, crimes on aircraft, reproduction of documents for use in evidence, foreign judgments and sale of human blood should all be recognized. The limitations of the Committee, as presently organized, have been noted by many writers and need not be repeated here.[49] Suffice it to say that, bereft of a permanent staff and faced with the political tensions of recent years, not a great deal has been achieved. When a uniform law is achieved, no mechanism exists for its maintenance. Ongoing reform drags at the pace of the tardiest State. The result is often a compromise rather than a reform:

> No fundamental national program for renewing the law would seem possible in the present circumstances using these mechanisms. The gestation period is frequently prohibitive and no regular mechanism for ready amendment of legislation, once secured, has been worked out.[50]

Writing in 1971, Mr. Justice Meares, Chairman of the N.S.W. Law Reform Commission addressed himself to the need for a mechanism in Australia to promote uniform law reform:

> The establishment of a Federal law reform body is long overdue not only to overhaul and keep up to date Federal laws but to co-ordinate, so far as practicable, the work of State law reform agencies and to undertake historical and comparative studies on subjects of law reform in which a number of States are interested and in which uniformity is being aimed at.[51]

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[47] J. R. Kerr, *Uniformity in the Law — Trends and Techniques,* the Robert Garran Memorial Oration, 11 November 1964, p. 9. The same view is expressed by Mr. Ellicott in a speech delivered at Launceston on 13 June 1976, mimeo, pp. 5-6. This speech is hereafter called R. J. Ellicott, 13 June 1976.

[48] *Annual Report,* 22, 49; R. Cranston, "Uniform Laws in Australia" in (1970) 30 *Journal of Public Administration* 229 at 234; R. J. Ellicott, 13 June, 1976, 7.

[49] Cranston, 242.

[50] *Annual Report,* 23.

[51] C. L. D. Meares, "Law Reform in Australia", *Record of the Fourth Commonwealth Law Conference, New Delhi,* 1971, 247 at 258.

In default of government initiatives, Mr. Justice Meares organized two Conferences of Australian Law Reform Agencies. These were held in Sydney in 1973 and 1975. The second was attended by the Australian Commission. Although the Law Reform Commission Act 1973 (Cth) received the Royal Assent in December 1973, no Members were appointed until early 1975. No full-time Members, other than the Chairman, were appointed until July 1976. The Second Conference of Australian Law Reform Agencies reached a unanimity remarkable for the divergent groups represented at the table. Convinced of the need to develop a mechanism for uniform law reform in Australia, motions were unanimously passed and transmitted to the Standing Committee of Attorneys-General for consideration. One motion, which requested that the Australian Commission should take over the function of clearing house was subsequently approved by the Standing Committee. The National Commission now produces a Digest of law reform material, a bulletin *Reform*, promotes certain library exchanges and other work of co-ordination. It also organized the Third Law Reform Conference at which some twelve representatives of overseas Commonwealth countries attended. This work of co-ordination and information exchange itself, in a modest way, may reduce duplicated effort and promote, by the exchange of ideas, uniform approaches to the task of law reform.[52]

Three other resolutions of the Second Conference did not find favour in the Standing Committee. Put briefly, these suggested that a role could be assigned to the Conference of Law Reform Agencies to assist the busy Attorneys-General by putting forward proposed areas suitable for uniform law reform and suggesting law reform agencies which might, either alone or in concert, share the task of drawing up uniform legislation. The Second Conference went further and proposed the assignment of a number of subjects to particular agencies. For example, it was proposed that a uniformity project for a national Sale of Goods Act should be assigned to the N.S.W. Law Reform Commission. A proposal for a uniform law on commercial arbitration should be assigned to that Commission and the Victorian Chief Justices Law Reform Committee. A proposal for a uniform law on Defamation was suggested for the Law Reform Commission of Australia. Numerous other assignments were proposed in a number of limited areas, usually having regard to current programmes before the agencies in question.[53]

The rejection of these resolutions provoked disappointment which was expressed by various agencies to their respective Ministers and by the Australian Commission to the Parliament in its *Annual Report 1975*.[54] The whole question was scrutinized afresh at the Third Conference

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[52] The resolutions are set out in the *Annual Report*, 51.

[53] *Ibid.*

[54] *Annual Report*, viii, 52.

held in Canberra in 1976. A paper for that Conference by Mr. D. K. Malcolm, Chairman of the Western Australian Commission, reproduced the letter received from his Minister in August 1975.[55] This letter makes it plain that the objection of the Standing Committee to the law reform resolutions was essentially to the suggestion that such references should be made upon recommendations of the agencies "acting together".[56] Instead, a procedure is suggested by which each individual agency may refer suggestions to its Attorney-General. It is then up to him to decide whether to propose the matter at the table of the Standing Committee. If he does, and if the project is agreed upon, the law reform bodies "should be able to obtain information for local research from other law reform bodies".[57] It was suggested that the new procedure would not inhibit the discussion amongst Commissioners or co-operation between agencies. The Western Australian Commission proposed to prepare terms of reference on the law relating to oaths, declarations and attestation of documents. These would be considered in consultation with the Queensland Commission and submitted to the Attorney-General with a view to sponsoring the proposal before the Standing Committee. The proposal would come, then, not from the Conference but from an individual agency speaking to the Standing Committee through its responsible Minister.[58]

The Third Conference of Australian Law Reform Agencies, no doubt mindful of the significant change of personnel in the Standing Committee, decided simply to mark time and see what, if anything, came from the Western Australian proposal. That proposal is now proceeding.

The Standing Committee is a body which issues no minutes and its deliberations are confidential to participants. Mr. Ellicott announced before the Meeting in Adelaide on 16 June 1976, his intention to seek agreement for reference to the Australian Commission of a project for a national law on defamation.[59] A reference on defamation calling specific attention to the desirability of a uniform law for Australia has now been signed. The Standing Committee has lacked, to date, the assistance of a well funded expert, non-political organization that can develop its ideas for uniform laws and maintain them, once developed. If a successful project could be secured, with State participation on the way, by which the national law reform agency developed a uniform law at the request of the Standing Committee, the prognostication of Sir John Kerr in 1965 will have come to pass. A single swallow does not, of course, make a summer. Delegations to other law reform agencies in the past

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[55] D. K. Malcolm, "The Pathway to Uniform Law Reform: Co-operation and Co-ordination within the Federation", *Conference Papers, Third Conference of Australian Law Reform Agencies,* 1976, 57 at 65.

[56] *Id.* 66.

[57] *Ibid.*

[58] *Id.* 70.

[59] R. J. Ellicott, 11 June 1976, 2; *cf.* R. J. Ellicott, 13 June 1976, 8.

have all too frequently come to nothing.[60] The rejection in July 1975 of the proposals unanimously advanced by the law reform commissioners certainly engendered pessimism. But since then, all persons engaged in law reform have come a long way. A National Commission with full-time officers and a large research staff has been established, with a significant programme. The point of view of the Attorneys-General and their officers is better understood amongst law reform bodies. The need is keenly felt in Australia that Ministers should keep control of the initiations of law reform projects. Once initiated, they pass beyond the control of the elected government. They can bring forth results that serve to harass and embarrass Ministers. In a system of responsible government, there is more justification for ministerial control of the initiation of law reform projects than exists, say, in the United States, where much legislation originates from outside the Executive.

The new development with the decision following a Standing Committee meeting to refer a defamation project to the Australian Commission may be the turning of a corner. Our Federation lags seriously behind others in developing an indigenous mechanism for promoting, in an orderly fashion, the uniform reform of areas of the law outside Commonwealth competence. The instruments to achieve this mechanism are plain. They exist in the law reform bodies and the Standing Committee of Attorneys-General. The precise relationship between those bodies and their respective roles have still to be worked out. The exchange of information between and regular meetings of, the law reform agencies in Australia provide the catalyst. By the temperate, restrained efforts of Australian law reformers, this country is being nudged gently in the direction of a new constitutional mechanism that will promote the uniform renewal of its laws. Let the Commonwealth Attorney-General have the last word:

> There is a need . . . to consider the machinery of law reform, particularly the role of the law reform commissions. In promoting uniformity they have a distinctive role to play. One task of the Standing Committee of Attorneys-General is to ensure that their efforts are co-ordinated and that maximum use is made of their expertise. This is a matter to which, I believe, the Standing Committee must give careful and constant attention.[61]

Amen to that.

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[60] *Annual Report*, p. 22.
[61] R. J. Ellicott, 13 June 1976, 15-16.