LAW REFORM

The University of Melbourne Law School Law Reform Project

> *The reasonable man adapts himself to the world; the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man.*
>
> G. Bernard Shaw, *Man and Superman*

> *The system will always be defended by those countless people who have enough intellect to defend but not quite enough to innovate.*
>
> Edward de Bono, *I am Right, You are Wrong*

Somewhere between these views lies the role of law reform. In November 1989 work commenced at this Law School on an Australian Research Council funded project to evaluate the 'success' of law reform activities in Victoria between 1980 and 1990. Conducted in conjunction with Professor Sandford Clark, Professor Peter Sallmann and Mr Greg Craven, it is anticipated that the project will take two years to complete, during which time a series of issues papers will be produced. At the end of the study we will publish a report which we hope will be of interest to law reform bodies themselves, law schools, the Attorneys-General, and, with any luck, lay readers.

The original statement of purpose was the following:

> Law reform activities intended to produce legislative change are variously entrusted to parliamentary committees, law reform commissions and *ad hoc* enquiries. The study will propose criteria for measuring the comparative success of such bodies; compare their records by reference to those criteria, and suggest guidelines for deciding what types of issues are most effectively dealt with by each type of body.

To date we have been trying to define the scope of the project more clearly. This has proved to be a task which is not clear cut. As with all scholarship and research, the questions one asks frame and to some extent create the body of knowledge under investigation, and thus the work produced. Knowing that the limits of the project will be somewhat arbitrary, we have attempted to delineate them as clearly as possible. Where should we draw the line in choosing bodies for assessment? This issue is crucial because it marks the cut-off point between those factors or bodies which are considered to exercise some degree of legally measurable influence on changes in the law, and those which are not. Bodies which have law reform as their *raison d'être* such as the Victorian Law Reform Commission, the Legal and Constitutional Committee of the Victorian Parliament, and the Chief Justice's Law Reform Committee pose no problem. However, should we include other bodies which regularly recommend changes to Victorian law, for instance the Australian Institute of Criminology? What of the Australian Conservation Foundation, or even the Victorian Women's Legal Resource Group? And how can one assess the impact of changes to administrative directives, of judge-made law, or indeed of heightened public awareness of the need for changes?

Second, what definition of law reform should we use against which to measure the effects produced by the bodies chosen? It would seem clear that not all change constitutes 'reform'. The term 'reform' has connotations of advancement, improvement, or movement forward. Definitions of reform vary because from one angle or set of interests a measure may be perceived as reform, whereas from another it may amount to regression. This definition depends then, in the case of particular law reform measures, upon the articulation of the interests involved; and in the case of a broad definition of law reform, upon a more general conception of the role of legal change in society. Allan Fels has described the differing outcomes of two inquiries with similar terms of reference as reflecting the different philosophies of the bodies by which they were undertaken.[1] Such an observation may have a range of apparently conflicting meanings; among them that the committees use evidence presented to them to support their already established conclusions, and that empirical enquiry, rather than being a 'safeguard' against this, is in fact part of the problem. Alternatively, it could mean that the committees, in the spirit of the responsiveness of the law itself to social conditions, react to the varying needs and assumptions of their times. Reform then, is not a step towards a definable utopia, but an adaptation of the legal system to perceived social needs at a particular time.

Mr Justice Kirby has written that

> There is no doubt that an important task lying ahead includes the identification of the guiding philosophy or fundamental values, so that law reform can be judged as something more that the idiosyncratic recommendations of people who happen currently to be the law reform Commissioners.[2]

The issues of the assessment of law reform and the 'guiding philosophy' are connected; it is not surprising that both are thin on the ground. In order to evaluate law reform, the values or criteria against which the assessment is made must be identified. These criteria to a large extent constitute a philosophy of law reform, or, as it is sometimes put, the articulation of a set of fundamental values. Law reform bodies themselves, of course, do not generally need to articulate these assumptions. They recommend the adoption of particular practical measures, ranging from the establishment of community services to changes in statutes. In fact, were it necessary to establish a consensus among their members before making such recommendations, it is possible that fundamentally antipathetic values would inhibit agreement on the practical measures. Indeed, any discussion of values generally takes place in the dissenting reports of such bodies.

This reticence is part of the common law tradition of deciding individual cases on their merits until, over time, a pattern of decisions can be seen to yield a principle. The process of law making, rather than the content of the law, guarantees its legitimacy. This contrasts with the civil law tradition in which

[1] Fels, A., 'Notes on the Process of Law Reform', unpublished paper, Monash University. Two of the inquiries he considered were the 1979 Campbell Committee on the Australian Financial System, and the Royal Commission on Banking of 1936.

[2] Kirby, M., 'Change and Reform or Change and Renewal?' in *Reform the Law: Essays on the Renewal of the Australian Legal System*, (1983) 22.

guiding principles are more clearly articulated. The practice of law reform in common law countries, being a part of that system, is similarly constituted. References are usually made to particular bodies about specific issues or areas of law, and the reports rarely identify the values according to which the recommendations are made. Although like the English Commission[3] many law reform commissions have a broad charter of reform, they mainly depend on references from the government. These structures and relationships vary, of course, according to the nature of the body and its place in our version of parliamentary democracy.

We have already re-thought the initial emphasis of the project on legislative change as an indicator of the success of a law reform body. Although it is perhaps one of the easiest results to measure, legislative change is by no means a comprehensive way of measuring the effect of law reform activity in this state. Law reform by any other name may be just as sweet: changes in court rules, for instance, or administrative orders on the implementation of an Act. Law reform bodies also perform important functions such as increasing public awareness of proposed changes to the law, and, in a time of distracted and overcommitted representative politicians, of enabling people to respond to these initiatives.

In a sense, Mr Justice Kirby's definition of law reform as that which reforms the existing system so that it functions more smoothly is echoed already by the terms of this enquiry into the *existing* system, with a view to improving it.[4] It is not an inquiry into all the facets of legislative change, but into the institutional arrangements in Victoria for 'law reform'. The facility with which these institutions take account of a broad spectrum of interests in law reform (for instance their methods of consultation, and their accountability) is perhaps one measure of their effectiveness. This role of law reform institutions is obviously only part of a much more intricate picture of the evolution of legislation and legal reform.

I have been fortunate to have the opportunity to discuss the project with people involved in a wide range of law reform activities in this country. Although my opening quotations might imply that the 'reasonable man' is necessarily lacking in intellect, this is certainly not one of our operative assumptions. We would be happy to receive inquiries, submissions and suggestions regarding the project.

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[3] According to section 3 of the British Law Commissions Act 1965 it is 'the duty' of the two Law Commissions (England and Wales; Scotland), 'to take and keep under review all the law with a view to its systematic development and reform'.

[4] Kirby, M. *Reform the Law* (1983) 8.

Fair Shares for All: Insider Trading in Australia (Standing Committee on Legal and Constitutional Affairs Report to the House of Representatives, October 1989)

The Committee's terms of reference called for an inquiry into the adequacy of existing legislative controls over insider trading and other forms of market manipulation, with particular reference to —

(1) the extent of insider trading and other forms of market manipulation, and steps necessary to safe-guard public and investor confidence and market efficiency;
(2) the adequacy of existing or proposed legislation; and
(3) the role and effectiveness of the National Companies and Securities Commission and its State delegates in implementing the relevant sections of the Securities Industry Act 1980 and the Companies Act 1981.

It was seen as relevant to the establishment of the inquiry that proving insider trading cases under the existing legislation was a matter of extraordinary difficulty and improbability; no such prosecution in Australia has been successful at this time.

The principal recommendation was that the existing insider trading provisions be redrafted and simplified, with clear and practical definitions of the offence of insider trading. Further specific recommendations included the following:

1. That the definition of an insider be extended to include a person (including a corporation) who is in possession of inside information, and who knows or ought reasonably to know that it is inside information. The use of information, rather than the connection between a person and a corporation, would be the basis for determining whether insider trading has occurred.
2. There should be a statutory definition of inside information, to clarify the concepts of 'materiality' and 'general availability'. The definition should provide that inside information is information which is not generally available, but that if it were, a reasonable person could expect it to have a material effect on the price or value of the securities issued by the company which is the subject of the information. Such information should be defined as generally available where it is disclosed in a manner which would, or would be, likely to bring it to the attention of a reasonable investor, and where a reasonable period of time for the dissemination of the information has elapsed.
3. The provisions should be amended to ensure that the prohibition on insider trading extends to unit trusts and other prescribed interests, exchange-traded options and convertible securities.
4. Tippees should be included in the definition of an insider. The need to demonstrate an association or arrangement between a tippee and an insider is an unnecessary and complicating factor.
5. Prohibitions on communications in the form of tipping by insiders should not be extended to cover dealings in all securities, rather than only listed securities.
6. The onus of proof should remain on the prosecution, as many of the recommendations already remove the more difficult elements of proof for the prosecution.

7. Existing penalties should be extended, in the case of a natural person, to the amount of profit realized or loss avoided, plus the additional penalty equivalent to that profit or loss, or $100,000, whichever is the greater, or five years imprisonment, or both; and in the case of a body corporate, to the amount of profit realised or loss avoided, plus an additional penalty equivalent to that profit or loss, or $500,000, whichever is the greater.
8. The current approach to civil remedies, which allows compensation for victims of insider trading but does not include an additional civil penalty, should be retained.
9. In relation to more effective enforcement, adequate resources should be made available to the National Companies and Securities Commission to allow the establishment of detailed computer systems for monitoring securities trading, along with adequate corporate databases and sufficient operations staff.

JAMES WEBSTER
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Law Reform Reports Received (since May 1989)

OVERSEAS

Canada
Law Reform Commission of Canada/Commission de réforme du droit du Canada:
Pour une cour criminelle unifiée (Working Paper 59, 1989)
A unified Criminal Court — An Answer to the Complexity and Confusion in the System (Embargo, 9 May 1989)
The Australian Administrative Appeals Tribunal (Study Paper, 19 May 1989)

Harare
Harare Declaration of Human Rights (22 April 1989)

New Zealand
Law Commission: *Hearsay Evidence* (Preliminary Paper No. 10, June 1989)

COMMONWEALTH

Australian Law Reform Commission: *Federal and Territory Choice of Law Rules* (Issues Paper No. 8, June 1989)
Commonwealth Grants Commission: *Report on General Revenue Grant Relativities 1990 Update*
Criminology Australia Volume 1 number 1 (June/July 1989)
Volume 1 number 2 (September/October 1989)

STATES

New South Wales
New South Wales Law Reform Commission:
Training and Accreditation of Mediators (Alternative Dispute Resolution Discussion Paper, October 1989)
Wills for Persons Lacking Will-Making Capacity (Community Law Reform Program Discussion Paper, August 1989)
Torrens Title: Compensation for Loss (Joint Discussion Paper with the Victorian Law Reform Commission, June 1989)
Torrens Title: Compensation for Loss (Issues Paper, December 1989)
Annual Report 1989

Western Australia
Law Reform Commission of Western Australia:
Police Act Offences (Discussion Paper, May 1989)
Police Act Offences: Summary (Discussion Paper, May 1989)
Effect of Marriage or Divorce on Wills (Discussion Paper, March 1990)
Evidence of Children and Other Vulnerable Witnesses (Discussion Paper, April 1990)
Annual Report 1988-89
Report on Payment of Witnesses in Civil Proceedings (July 1989)