HISTORICAL TRENDS IN AUSTRALIAN LAW REFORM*

Law reform[1] and centenary celebrations are fashionable. In 1970 a century passed since the appointment of the first official Law Reform Commission of New South Wales[2]—seemingly the progenitor of its kind in Australia. The occasion deserves some historical retrospect, not only to retrace the course of Australian law reform and discover its trends, but also to use the historical experience in assessing the present and prospective success of law reform movements.

For this purpose the discussion will be based on reforms of the adjectival law. They illustrate most effectively the areas in which prolonged common interest existed amongst the States. They also support the conclusion that, under modern conditions, a thoroughgoing reform of procedure and practice should have priority over all but the most urgent of substantive reforms.

I. EARLY REFORM PROJECTS

LAW REFORMERS

It has been suggested that the first three Chief Justices of New South Wales, supporting the school of Bentham, consciously applied the fruits of English reform movements to the colonial environment.[3] That seems an excessive appraisal of Forbes and Dowling C.JJ., who were innovators rather than reformers. It is more truly applied to Stephen C.J., but even his grand policy of law reform sprang more from his own genius than from studied discipleship of theorists in Britain. There was nothing doctrinaire about Stephen. His interest in

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1 Commentators on law reform usually do not define the terms as such, taking them to be largely self-explanatory. The inadequate and objectionable distinction between "lawyer's law" and "political law" is still made for want of a better description—FRIEDMANN, LAW IN A CHANGING SOCIETY (BERKELEY, 1959), 14; Keeton, *Law Reform after the War*, 58 L.Q.R. 247, 249.

2 On 14 July 1870—N.S.W. [1870-1871] 2 VOTES AND PROCEEDINGS OF PARLIAMENT 117.

3 Currey, *The Influence of the English Law Reformers of the Early 19th Century on the Law of New South Wales*, 23 ROYAL AUSTRALIAN HISTORICAL SOCIETY JOURNAL 227.

reform was entirely practical. He had already shown that as Attorney-General of Tasmania and as a puisne judge of the New South Wales Supreme Court. During the latter appointment he had published a notable practice book[4] and had done much to revise and regularize the rules of Court.[5] The Chief Justiceship enhanced, rather than reduced, his opportunities for further reform but he did even greater work after his retirement from the bench.[6]

Stephen's achievements reflected the general pattern of law reform in contemporary Australia. Individuals took the initiative, but only those of commanding authority or relentless persistence prevailed against parliamentary apathy and legal conservatism. It was commonplace for Australian politicians to dislike and distrust lawyers and legal matters.[7] Without political parties in the modern sense[8] it was the more difficult to recruit parliamentary sympathy for legal reforms which, through technicality, had no public support. Some of the obvious names amongst the individual reformers were Higinbotham C.J. in Victoria,[9] Lilley and Griffith C.JJ. in Queensland,[10] Way C.J. and Torrens in South Australia[11] and Burt C.J. in Western Australia.[12] There were others whose contributions will be noticed later. But it must be emphasized here that the overwhelming majority of the

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4 THE CONSTITUTION, RULES, AND PRACTICE OF THE SUPREME COURT OF NEW SOUTH WALES (SYDNEY, 1843-1845).

5 Currey, *The First Three Chief Justices of the Supreme Court of New South Wales,* 19 ROYAL AUSTRALIAN HISTORICAL SOCIETY JOURNAL 73, 108.

6 BENNETT (ED.), A HISTORY OF THE NEW SOUTH WALES BAR (SYDNEY, 1969), 87-88. (Reviewed in this Number.)

7 A typical example is: 'If in cramming this measure down their throats we choked a few of the lawyers, it would be no loss whatever to the country. In fact it would be a blessing, for, taken as a whole, a more useless class does not exist on the face of the earth', 57 VICTORIAN PARL. DEB. 443, cf. 2 N.S.W. PARL. DEB. 2136 and 102 QUEENSLAND PARL. DEB. 691 as random instances.

8 See, for instance, LOVEDAY AND MARTIN, PARLIAMENT FACTIONS AND PARTIES (MELBOURNE, 1966).

9 MORRIS, A MEMOIR OF GEORGE HIGINBOTHAM (LONDON, 1895), especially CH. XXVIII.

10 Morrison, *Charles Lilley,* 45 ROYAL AUSTRALIAN HISTORICAL SOCIETY JOURNAL 1. It is surprising that no comprehensive biography of Griffith has ever been published, nor has there been any detailed analysis of his extensive reforming work; but see FORWARD, SAMUEL GRIFFITH, (MELBOURNE, 1964) and 'Further Reading' therein.

11 HANNAN, THE LIFE OF CHIEF JUSTICE WAY (SYDNEY, 1960); Pike, *Introduction of the Real Property Act in South Australia,* 1 ADELAIDE L. REV. 169.

12 McClemans, *Archibald Paull Burt,* (1966) 6 JOURNAL AND PROCEEDINGS OF THE ROYAL W.A. HISTORICAL SOCIETY, Pt. v, 65.

individual reformers were or had been practising lawyers whose approach to reform was usually empirical, not comprehensive.

N.S.W. LAW REFORM COMMISSION—1870

The Commission owed its being to the pressure of a legal pamphleteer, the enthusiasm of a layman politician, and an unusually cooperative mood of Parliament. T. J. Fisher of the Bar had been an inveterate press advocate of law reform. In 1869 he embodied his views in a pamphlet, "Colonial Law Reform",[13] wherein he spoke of a 'Draft Law Reform Act of 1869' which had been prepared 'to show the practicability of the proposed Reform, and to get a measure for the Reform of the Civil Procedure of the Supreme Court speedily passed into Law, so that it may be the forerunner of other Law Reforms equally important'.[14] John Stewart of the Legislative Assembly, a veterinary surgeon who dabbled in the law's defects, took up the cause, pressing Parliament for a thorough overhaul of the legal system.[15] The Law Reform Commission was the upshot. Constituted by Letters Patent of 14 July 1870[16] it comprised five distinguished lawyers under the chairmanship of Stephen C.J. Its functions were

> to inquire into the state of the Statute Law of this Colony, and submit proposals for its revision, consolidation, and amendment; and also to make a like inquiry into the Practice and Procedure of the Colonial Courts, and propose amendments therein with a view to the simplification and improvement of the same, and to the removal of the inconveniences arising from the separation of jurisdictions at Law and in Equity.[17]

The Commission could not cope part-time with the necessary research and investigation, the burden of which fell upon Stephen himself. He produced one Bill to consolidate the criminal law which, in substance, was later enacted. Otherwise the Commission merely pointed to an urgent need for consolidation of lunacy, insolvency and criminal laws and those affecting jury trial and procedure before justices. The inevitably slow process of reform had meanwhile been criticized by the public and ridiculed in Parliament.[18] Interest in the project was dampened, the initiative (through no fault of the Commission) was lost, and the subject was allowed quietly to lapse.

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13 Twenty-seven pages published by J. Reading and Co., Sydney, 1869.
14 Id. at 13.
15 N.S.W. [1869] 1 VOTES AND PROCEEDINGS 71.
16 And Supplementary Commission of 16 December 1870.
17 N.S.W. [1870-1871] 2 VOTES AND PROCEEDINGS 117.
18 The Sydney Morning Herald, 13 May 1871, 4.

UNIVERSITY CONTRIBUTIONS

Until the second World War, the role of academic lawyers in the cause of law reform was generally insignificant and markedly unsuccessful.[19] However, the small number of full-time legal academics at that time were preoccupied with teaching. In South Australia Professor Pennefather, apparently at the Government's request, drew a Bill in 1902 to consolidate the criminal law, but no use seems to have been made of it.[20] In New South Wales Professor Peden was constituted Commissioner of Law Reform in 1920 and held the post until 1931.[21] He was to inquire into and report upon the reform of the law in force, and to suggest steps for its improvement and modernization

> by the revision, amendment, consolidation, and codification of such parts as may seem advisable, whether of the substantive law or of procedure, pleading and evidence, and including the jurisdiction and organization of the various Courts.[22]

His object was to make, and keep, the law as simple, clear, certain, and orderly as possible: but governments suppressed his 'valuable proposals' and, as T. R. Bavin has observed: 'If all of these are not embodied in the law today, that is not the fault of Sir John Peden'.[23]

The most outstanding academic contribution to law reform during the period was Professor Hearn's attempt to codify Victoria's substantive law. He commenced that work in about 1870.[24] By 1884 he introduced into the Legislative Council, of which he was a member, a Substantive Law Consolidation Bill.[25] As drawn, it was not favoured, but Hearn was invited to revise and develop his ideas with the assistance of experts in special fields from the legal profession, for which a grant of money was allocated. As result a Bill intituled "The General Code 1885" was laid before Parliament in that year but was deemed to require yet further revision.

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19 See 15 A.L.J. 70 and 31 A.L.J. 325, 330-1.

20 [1926] 1 SOUTH AUSTRALIAN PARL. DEB. 1101.

21 153 N.S.W. PARL. DEB. (2nd series) 2660; N.S.W. [1930-1932] VOTES AND PROCEEDINGS 115.

22 N.S.W. [1921] 1 VOTES AND PROCEEDINGS 7.

23 THE JUBILEE BOOK OF THE LAW SCHOOL (SYDNEY, 1940), 32. None of Peden's reports seem to have been published or even tabled in Parliament.

24 57 VICTORIAN PARL. DEB. 432.

25 46 VICTORIAN PARL. DEB. 1310.

The Code was based on a number of world precedents and on Hearn's jurisprudential classification of law.[26] He explained that 'I hit upon the principle of duty as the basis of legal classification. I do not know whether I was the first who did it or not. I believe much about the same time that it occurred to me, the present Mr Justice Holmes, in America, stated the principle'.[27] The classification proceeded in seventeen parts, most having divisions and subdivisions, all intended to set forth the whole of the common and statute law, excepting procedure and matters affecting particular classes of persons.[28] The emphasis on duties, rather than on Austinian rights, was evident from such titles to various of the parts as "Absolute Private Duties", "Absolute Public Duties" and "Relative General Duties".

In 1887 a joint parliamentary Select Committee was appointed to report on codification. Hearn was chairman and also one of several witnesses, including Higinbotham C.J.. Hearn vigorously upheld the merits of his system and insisted that it was 'not a question for practical lawyers; it is not one with which they are competent to deal, or ever have dealt; it belongs to theoretical jurisprudence, and is the most advanced branch of that subject'.[29] He had the satisfaction of the favourable response of the witnesses and of the Committee to the adoption of the Code. However, he died before Attorney-General Wrixon in July 1888 moved the second reading of the General Code Bill.[30] With extraordinary naïveté Wrixon asserted that the great blessing of the Code would be that 'Parliament will lay down definitely, one way or the other, what is the law upon a particular point, and the law will remain settled, instead of depending upon a great number of fluctuating decisions'.[31] Lawyers in the House derided that proposal, J. Gavan Duffy remarking that '[a] team and six can be driven through any Act of Parliament, but through this code, if it were passed, I believe that a team of fifty elephants abreast could be driven'.[32] The Code was shunted off to another Committee. There

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26 HEARN, THE THEORY OF LEGAL DUTIES AND RIGHTS (MELBOURNE, 1883), especially CH. XVII: for one of several summaries of his approach to classification see (1879) 4 MELBOURNE REVIEW 19.

27 VICTORIA [1887] 1 VOTES AND PROCEEDINGS D7, 20.

28 The General Code 1885, Prefatory Note. See also correspondence between Hearn and Attorney-General Kerferd, Victorian State Archives, Crown Law Department papers, 83/1446.

29 See n. 27 above.

30 57 VICTORIAN PARL. DEB. 429.

31 Id. at 430.

32 Id. at 440.

Higinbotham C.J. stood by his support for the reform,[33] but most of the other witnesses were hostile. A'Beckett J., as if in answer to the Professor's jibe at practising lawyers, summarized the common attitude, saying that:

> the Code was bad, that it was untrustworthy and misleading, that it put in an attempted scientific shape matters which while intelligible in the source from which they were taken, were unintelligible in the shape in which they find themselves in the Code.[34]

The Committee acknowledged the 'vast learning' of the Code but condemned its inaccuracies and reported that it could not be safely adopted.[35] Their suggestion that an eminent counsel might further review it came to nothing and Australia's most interesting experiment in applied jurisprudence at last proved a failure.

II. STATUTE LAW REFORM

Over the course of Australian legal history the one continuous and common strand of reform has been the periodical revision[36] and, in some cases, consolidation[37] of the statutes. By the end of the nineteenth century some of the Australian Colonies had attempted to tidy up their statute books. Those which had not done so laboured under great disadvantages. It was difficult to find which Acts were in force and which repealed, which Acts had been amended and when, and what the current legislation on any topic really was.

Although a fair degree of uniformity in the States' statutory revisions was at length achieved, the progress to that goal was aimless and unconcerted. The attitudes of the several governments were variable and unpredictable. Only since Federation has there been any significant attempt by the States to keep pace, and sometimes to compete, with one another in statute reform.

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33 VICTORIA [1888] 1 VOTES AND PROCEEDINGS D5, 13.

34 Id. at 34.

35 Id., Report of 9 October 1888.

36 'Statute law revision is the process of repeal of obsolete or obsolescent or unnecessary statutory provisions', SCARMAN, LAW REFORM—THE NEW PATTERN (LONDON, 1968), 20.

37 'Consolidation is the process of modernizing statute law which it is desired to retain in force. . . . [It] is not codification; it is the process whereby the provisions of many statutes, dealing with one branch of the law, are reduced into the compass of one modern statutory statement of the law', ibid.

VICTORIA

Reform of Victoria's statute law demonstrates in historical perspective several remarkable features. Although gaps occur, the process has been largely continuous since the 1860s. Throughout it has enjoyed much parliamentary sympathy and, in latter years, parliamentary initiative. The early imprimatur of Parliament set an Australian precedent for converting many lawyers from complacent contentment with the old and familiar order. The accomplishment of reform was, however, due principally to the leadership and ability of individuals.

So far there have been five major consolidations of Victorian legislation, each leading to a complete republication of the statutes. With the attainment of a simpler programme to incorporate amendments the hope was expressed that the wholesale consolidation of 1958 would be the last.[38]

The first two consolidations, of 1864-1865 and 1890, were chiefly the work of George Higinbotham. Proposals to remedy imperfections in the statute book had been raised in Parliament before he became Attorney-General in 1863.[39] He turned them into reality by undertaking the consolidation himself, thinking it cheaper and easier to do so than to appoint a Commission as in England. His major task was to classify existing legislation, for which there was little precedent. He was not a brilliant lawyer, but he was practical and industrious. His classification, he conceded, was not very orderly nor scientific,[40] but it was expedient. His more mechanical labours of checking the consolidated material attained 'wonderful accuracy'.[41]

Higinbotham became Chief Justice. He had the support of his judicial colleagues in recommending a new consolidation in 1888.[42] Parliament agreed. Two draftsmen were recruited from the Bar and Higinbotham superintended their work. A new edition of consolidated statutes, published in 1890, followed a policy of arrangement and compression. No attempt was made nor intended to rectify statutory imperfections, ambiguities or anomalies. The design was one of 'pure consolidation' so that 'even merely verbal alterations [were] as a rule avoided' and the original language of the statutes was scrupulously preserved.[43]

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38 VICTORIA [1958-1959] 1 VOTES AND PROCEEDINGS D1, 8.
39 7 VICTORIAN PARL. DEB. 92.
40 10 VICTORIAN PARL. DEB. 20.
41 Opinion of Cussen J., VICTORIA [1914] 1 VOTES AND PROCEEDINGS 399.
42 VICTORIA [1888] 3 VOTES AND PROCEEDINGS No. 54.
43 THE VICTORIAN STATUTES (MELBOURNE, 1890), Explanatory Paper, ix.

There the matter rested until, in 1907, Cabinet was persuaded that consolidation, to be effective, must be current.[44] Cussen J. agreed to revise the statutes. His object was to modernize and simplify them, making any necessary substantive alterations to avoid obscurities, without affecting proprietary rights.[45] The work, though partly delegated, was not completed until 1914. A Select Committee's report, recommending its adoption and the future annual appointment of a joint committee to investigate legislative anomalies and defects, was received in June 1915.[46] The statutes were then reissued. Cussen J., at the request of that committee, performed similar duties some years later, leading to the general consolidation of 1929.[47]

Over the next twenty years eleven revision Acts were passed to correct slips and minor errors.[48] They were not the work of the Parliamentary committee, a member of which complained in 1938 that it had held no meetings for about ten years, despite the growing need for a further consolidation.[49] Its revival in the mid 1940s was due largely to references to it by a law reform committee convened by the Chief Justice.[50] The Statute Law Revision Committee Act of 1948 put the parliamentary committee on a better foundation.[51] That was strengthened the more and the committee's powers widened by the Constitution Act Amendment Act of 1956.[52]

In 1952 R. C. Normand, parliamentary draftsman, had been requested to investigate English and Continental systems for statutory consolidation and compilation,[53] following which he submitted a plan for further such action in Victoria. In 1955 he was appointed Director of Statutory Consolidation to put the plan into effect.[54] It included provision for the future progressive incorporated reprinting of amendments. The Statute Law Revision Committee laid down further procedural requirements in 1958 in which year the new set of consolidated statutes was published.

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44 By Mackey, a member of the Government to whom the organization of the matter was entrusted—136 VICTORIAN PARL. DEB. 1190-1; cf. 31 A.L.J. 342.

45 VICTORIA [1914] 1 VOTES AND PROCEEDINGS 399. As to the progress of the work, see 125 VICTORIAN PARL. DEB. 2137, and 127 VICTORIAN PARL. DEB. 773.

46 VICTORIA [1914] 1 VOTES AND PROCEEDINGS 391-3.

47 VICTORIA [1928] 1 VOTES AND PROCEEDINGS D3, and see THE GENERAL PUBLIC ACTS OF VICTORIA (MELBOURNE, 1929) VOL. 1, Preface.

48 235 VICTORIAN PARL. DEB. 3507.

49 224 VICTORIAN PARL. DEB. 5815.

50 226 VICTORIAN PARL. DEB. 1199.

51 Cf. 242 VICTORIAN PARL. DEB. 2359.

52 Debates on the second reading in 249 VICTORIAN PARL. DEB. 3829 ff.

53 Id. at 3829.

54 Id. at 3829-30, and VICTORIA [1955-1956] 1 VOTES AND PROCEEDINGS D12.

QUEENSLAND

Consolidation of Queensland's statutes, although begun almost as early as the Victorian work, was a largely piecemeal project. Particular subjects of legislation were consolidated, and sometimes codified, as the opportunity occasionally arose.[55] Complete overhauls of the law on the Victorian pattern were not common, although some substantial consolidating work was usually undertaken when clearing the way for periodical reprintings of the full set of Acts. This somewhat artless process which, by 1937, was being spoken of as a tradition,[56] secured a practical revision and compilation of the statutes. It differed most significantly from the Victorian experience in that, after 1867, Parliament was largely by-passed, much of the work being undertaken in a relatively informal way.[57]

The source of the "tradition" was Pring's edition of the statutes in 1862. The arrangement under alphabetical subject headings was his —the publication was official. It formed a model for revisions by Handy in 1874 and Cooper in 1881. Pain and Woolcock reviewed it again in 1887 but, apart from modernizing the language and sentence structure of old Acts, they thought it wise 'not to depart more than seemed necessary from the alphabetical plan adopted in all previous editions. They therefore adhered to the scheme of casting the statutes, upon the same or a kindred subject, into groups'.[58] In 1911 Woolcock supervised the further reprinting of the statutes, work for which was begun by Wilson and Power in 1903.[59] He felt constrained to adhere to the traditional arrangement because its familiarity 'would render injudicious any marked departure therefrom'.[60]

All of these compilations were popularly spoken of as consolidations,[61] but there had really been only one substantial consolidation in the strict sense. In 1866, on the initiative of Attorney-General Lilley, a Commission, comprising Cockle C.J., Lutwyche J. and the Attorney-General for the time being, had been appointed by Parliament to undertake statutory 'revision and consolidation'.[62] By 1867 Lilley

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55 Most notably, consolidation of specific statutes was undertaken in 1867 on the recommendation of a Commission—20 QUEENSLAND PARL. DEB. 630.

56 THE PUBLIC ACTS OF QUEENSLAND (REPRINT) 1828-1936 (BRISBANE, 1937), xi.

57 THE QUEENSLAND STATUTES (BRISBANE, 1889), Explanatory Note in Vol. V.

58 Ibid.

59 91 QUEENSLAND PARL. DEB. 1081.

60 THE QUEENSLAND STATUTES (BRISBANE, 1911), Editor's Explanatory Note in VOL. VII.

61 91 QUEENSLAND PARL. DEB. 1081; 102 QUEENSLAND PARL. DEB. 481; 170 QUEENSLAND PARL. DEB. 1745.

62 3 QUEENSLAND PARL. DEB. 106-7.

stated that the work of consolidation had been completed after the 'very arduous' labours of the Commission, and particularly of the Chief Justice and his clerical assistant.[63] One of the set of consolidating statutes passed by Parliament on the Commission's recommendation was the Acts Shortening Act of 1867, which was amended in 1903[64] when the important "Government Printer clause", enabling progressive incorporation of amendments, was introduced.

The work of Wilson and Power was prolonged in seeking a more scientific compilation than had been attempted before. At their instigation, Parliament passed the Statute Law Revision Act of 1908 authorizing the deletion of obsolete or defunct laws, and the abandonment of long preambles or archaisms. So far all of the reprints had been official publications but, by 1936, the Government called in the aid of a private law publisher. That required an authorizing Act, the Statutes Reprint Act, to give the volumes official status so that judicial notice could be taken of them.[65] It provided for an editorial board which was to report to the Attorney-General whether the reprint correctly expressed the statutory law. On a favourable report the Attorney-General would certify the reprint, his certificate being conclusive, subject to contrary proof, of the accuracy thereof. *The Public Acts of Queensland 1828-1936,* when published in 1937, was expressed to be the 'continuation of a long tradition'.[66] The compilers thought that the long-standing arrangement of the statutes was so rationally classified and had become so familiar by use that there could be 'no question of departure from it'.[67]

Once again the foundation so well laid by Pring in 1862 was acknowledged in the latest reprint pursuant to the Queensland Statutes (1962 Reprint) Act. Although it was complained that the Government should give an assurance not to amend substantially any reprinted Act within a reasonable time after reprinting,[68] it was generally agreed that no Parliament could so bind itself and that, although it might be hoped that the reprint would be little mutilated by amendments, natural progress made changes inevitable.

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63 5 QUEENSLAND PARL. DEB. 543.

64 See debate in 91 QUEENSLAND PARL. DEB. 1079. As this Act was used as a model by the Commonwealth, Griffith's approval of it is interesting—id. at 1170.

65 170 QUEENSLAND PARL. DEB. 1745.

66 See n. 56 above.

67 Id. at xii.

68 232 QUEENSLAND PARL. DEB. 2181. The justification for the Bill is elaborated at 2179.

NEW SOUTH WALES

Until 1893, with the exception of a few heads of legislation, no attempt had been made to consolidate the statutes. There had been editions of Acts in which some arrangement had been attempted[69] and Acts Shortening Acts had been passed.[70] Notwithstanding these, the accumulation of statute law had produced a 'condition of confusion and entanglement, which gave endless trouble to the Courts, and was a daily source of irritation and expense to all classes of the community'.[71] In 1893 R. E. O'Connor, then Minister of Justice, later a foundation Justice of the High Court, set up a Royal Commission to inquire into the problem and to submit Bills for the general consolidation of the law. The mistake was made of appointing too many members to the Commission and placing it under the presidency of Darley C.J., who was too burdened with judicial work to direct its activities. When he resigned from its number the Commission's fate was already sealed. It collapsed in 1896 after reporting that a smaller functional body was needed for the task.[72]

All hope of consolidation probably would have died had not Heydon of the Bar volunteered to do the work if assisted by draftsmen. His offer was readily accepted and the task was substantially concluded by the turn of the century, even though Heydon was elevated meanwhile to the District Court Bench of the Colony's northern district. More than 700 obsolete Acts were repealed and the remainder were radically overhauled. Preambles were omitted, repetitions avoided, prolix clauses simplified, inaccuracies removed and inconsistencies reconciled. The only disadvantages which Judge Heydon discerned in the exercise were the unfamiliarity of the new Acts, (outweighed by their greater utility), and the risk of altering the law in the course of the reform.[73]

Nearly 1400 Acts were dealt with by the Commission and consolidated, producing a system under which the progressive incorporation of amendments could in the future be secured. That work was later to some extent brought up to date by Blacket K.C.,[74] who had been secretary to Heydon's Commission. In 1924 and 1937 Statute Law Revision Acts were passed to dispose of anomalous and obsolete matter.

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69 By Callaghan (1844), Carey (1861) and Oliver (1879).
70 N.S.W. 16 Vic. No. 1 and 22 Vic. No. 12.
71 N.S.W. [1902] VOTES AND PROCEEDINGS 39.
72 Ibid.
73 Id. at 40.
74 99 N.S.W. PARL. DEB. (2nd series) 3928.

Reprints of the statutes in alphabetical order were produced in 1938 and 1958.

WESTERN AUSTRALIA

Before 1895 Western Australia had an alphabetical arrangement of its statutes but, in that year, a revision was made of the statute book by J. C. H. James, Commissioner of Land Titles. In 1896 there were published pursuant to his work three volumes of the statutes and an index. For reasons which Parliament itself soon found inexplicable, James' arrangement was chronological and therefore most inconvenient of reference.[75] The idea of complete statutory consolidation had been raised in 1894 when the Government was asked what effort would be made, and when, to achieve that benefit. Attorney-General Burt replied that 'no effort would be made, so far as he was able to say, in this direction'.[76]

That philosophy and the erroneous policy of 1895 seem to have blighted the course of compendious printing of the State's Acts. After the turn of the century the difficulties of the system were constantly apparent. There had been passed, for example, thirty-four statutes on evidence between 1839 and 1890, and thirty-seven statutes on real property between 1832 and 1902.[77] The search for every piece of legislation on a given topic could be most laborious. It was decided, copying New Zealand precedent, to introduce a Statutes Compilation Bill in 1905. The Government's policy was to attain compilation 'only in homeopathic doses' spread out over a period of years, 'perhaps five or six'.[78] That was wishful thinking. By 1938 it appeared that the Act had been only twice used and then with dissatisfaction because of the inconvenience of approaching both Houses of Parliament.[79]

In 1920 it was suggested, by whom does not appear, that the Crown Law Officers might be willing to undertake consolidation of the statutes 'in their spare time'. On assessing that commodity the Officers demurred.[80] In 1922 a private member's Bill in the Legislative Council called for 'revision and consolidation forthwith' of the State's Acts. The mover complained that a similar proposal had been made 'for

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75 28 WESTERN AUSTRALIAN PARL. DEB. (N.S.) 144. Of 2,000 copies printed only 300 were sold in the first three succeeding years—66 WESTERN AUSTRALIAN PARL. DEB. (N.S.) 779.

76 6 WESTERN AUSTRALIAN PARL. DEB. (N.S.) 236.

77 28 WESTERN AUSTRALIAN PARL. DEB. (N.S.) 144.

78 Id. at 145.

79 102 WESTERN AUSTRALIAN PARL. DEB. (N.S.) 2021. But note its use in respect of the Criminal Code Act Compilation Act 1913.

80 66 WESTERN AUSTRALIAN PARL. DEB. (N.S.) 779.

years past on the Estimates', but Parliament had always resisted the expense.[81] It continued to do so. Representatives of the Government stated that the work contemplated would cost up to £5000, a sum regarded as astronomical despite the advantages it could secure. Enthusiasm for consolidated Acts at once waned.

Review of legislation was achieved without other parliamentary intervention under the Amendments Incorporation Acts of 1923 and 1938. They adopted the Commonwealth practice for progressive incorporation of amendments in reprinted Acts, thereby overcoming some long-standing difficulties. In 1953 a Reprinting of Acts Authorizing Bill was passed, but dealt only with the publication of unamended Acts of which the Government Printer's supplies had been exhausted. Between 1964 and 1970 six Statute Law Revision Acts were passed to repeal certain 'spent unnecessary or superseded enactments'.

Consolidation and, in some cases, codification of individual legislative topics have occurred in Western Australia over a prolonged period. A set of re-printed Acts was commenced in 1939 and now exceeds twenty volumes. However, the legislative topics were set out lexicographically only within each individual volume so that there was no alphabetical or chronological consistency over the entire set. Although comprehensible when used with the annual index, the arrangement seemed little more convenient than that of 1895. In recognition of this, and to effect improvement, provision was made by the Statute Law Revision Act 1970 for a reprinting of statutes of general application in loose-leaf form with a comprehensive index.

SOUTH AUSTRALIA

Legislative reform long remained a subject of parliamentary inertia. Although there had been some consolidations of individual topics of legislation over the years, South Australia's Parliament gave virtually no attention to the state of the statute book in the nineteenth century. In 1914 Attorney-General Homburg claimed that he had introduced a parliamentary measure in 1910 for a comprehensive consolidation,[82] but no official record of it seems to have survived, and it achieved nothing. In 1913, when asked in the House if the Government would publish a revised edition of the statutes, he replied that it would be very expensive.[83] But he agreed to consider the matter and, in the

81 Ibid.

82 [1914] SOUTH AUSTRALIAN PARL. DEB. 274.

83 [1913] SOUTH AUSTRALIAN PARL. DEB. 1173. For earlier proposals for consolidation see S.A. Archives GRG 24/4/25/T at 948, Finniss to Cooper C.J., 10 November 1852: 'A consolidation or codification of the laws of the

following year, brought in an Amendments Incorporation Bill which was passed. Some speakers criticized the Government for not undertaking systematic consolidation, and Homburg himself conceded that the time was ripe for it.[84] However, fear of incurring expense was to defer such an undertaking then and for many years afterwards.

By 1926 a private member's Bill was introduced on the subject, the mover protesting that South Australia was lagging behind the other States in such reform and that obsolete or superseded Acts had piled up to 'an almost inconceivable extent'.[85] The then Attorney-General denied that his State was lagging, but had to admit that the amendments incorporation system could not work properly under local conditions because 'in the past numerous amendments have been made which are not of such a character that they can be incorporated in reprints, but require consolidation [first]'.[86] The motion recommending consolidation was carried, but the Government did not act on it.

There the matter rested until, in 1934, it was decided to accept the assistance of a private publisher to reprint the statutes, and the Acts Republication Act was then passed. For greater efficiency a Statute Law Revision Bill was enacted which contemplated consolidation of some areas of law and the facilitating of future incorporations of amendments. Up to 1936 seventy-two consolidating Acts were passed, some with amendments, absorbing the substance of over 500 prior statutes. Some 700 further obsolete or expired Acts were repealed and the usual rectification made of verbal inaccuracies and archaisms. As a complete consolidation had not been attempted, those measures which remained unconsolidated were reprinted 'in the form of a single Act consisting of the principal Act with all the amendments incorporated'.[87] Only annual volumes of the statutes have been published since.

TASMANIA

Over a century elapsed before any interest was taken in reducing to order Tasmania's statute book. By that time many annual volumes

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Province may perhaps be opportunely entered on after report from your Honour'; and Hague, *History of Law in South Australia* (typescript, n.d.), S.A. Archives, 1051, 360-4.

84 [1914] SOUTH AUSTRALIAN PARL. DEB. 274 and [1926] 1 SOUTH AUSTRALIAN PARL. DEB. 1100.

85 [1926] 1 SOUTH AUSTRALIAN PARL. DEB. 1099.

86 [1926] 2 SOUTH AUSTRALIAN PARL. DEB. 1371.

87 THE PUBLIC AND GENERAL ACTS OF THE PARLIAMENT OF SOUTH AUSTRALIA (ADELAIDE, 1937), Explanatory Foreword, v.

were long out of print and could be bought, if at all, only at prohibitive cost.[88] Reprints of Acts were made in 1885 and 1904, while an Amendments Incorporation Act was passed in 1906. None of these effected any consolidation or general revision of the law. Accordingly a 'welter of legislative activity' of the early twentieth century 'inevitably resulted in a bewildering mass of Statute law, much of which was so confused by successive alterations and amendments that the task of applying it necessitated tedious study and laborious research, and was, only too frequently, attended by dangerous uncertainty'.[89]

The matter may have remained so for a much longer time had not a law publisher proposed a scheme of reprinting the Acts to the Government in 1933.[90] The proposal was accepted and an editorial board set up. The idea of thorough statutory consolidation was raised but rejected.[91] The project was to be completed urgently, so only those Acts which could not otherwise be satisfactorily reprinted were to be consolidated. The work was therefore directed chiefly to modernizing the form of old operative laws. Two Statute Law Revision Acts were passed in 1934 to effect repeals or amendments. A Statutes Reprint Act of 1935 enabled judicial notice to be taken of the republication on the Attorney-General's certifying its correctness. The reprinted Acts appeared in 1937 and were commended by the Chief Justice who hoped that a systematic 'revision and consolidation' would follow.[92]

Despite the 'exceedingly costly'[93] nature of the reprint its advantages were apparent and Parliament resolved to bring its benefits up to date by passing the Reprint of Statutes Act of 1954. The Attorney-General was thereby authorized to cause to be made and to publish a reprint having uniformity of style secured by directions which he should give.[94] Attorney-General Fagan described the object of the work as a consolidation and felt that Parliament 'could look forward to a minimum of amendments thereafter'.[95] A Statute Law Revision Act was passed in 1958 repealing many Acts and amending others in

88 THE PUBLIC GENERAL ACTS OF TASMANIA (REPRINT) 1826-1936 (SYDNEY, 1936), ix.
89 Id. at xvii.
90 Id. at xi-xii.
91 Id. at xvii.
92 Id. at ix-x.
93 The Mercury, 3 September 1954.
94 Directions were promulgated in The Tasmanian Government Gazette, 16 July 1958.
95 The Mercury, 3 September 1954.

specific respects. The reprinted volumes took the law up to 31 December 1959 but the Attorney-General did not certify their correctness until one year later.

Although a substantial benefit was at length secured, in no other State over the period under review, up to the second World War, was parliamentary interest in such reforms so delayed and so slender, and the voice of lawyers so ineffectual in seeking to remedy statutory chaos.

THE COMMONWEALTH

The usual policy of the Commonwealth has been that appropriate agencies of government should, so far as possible, be responsible to maintain the orderly state of the statute book. But even with a constant and effective revision of that kind, the periodical influence of Parliament remained essential. After an experimental trial[96] of the Queensland Acts Shortening Act Amendment Act of 1903, the Commonwealth passed a similar measure in 1905 styled the Amendments Incorporation Act. It was slightly modified in 1918. Meanwhile a compilation of Commonwealth Statutes was published in 1911.

In 1934 a Bill presented by Attorney-General Latham was passed as the Statute Law Revision Act. Latham summarized its purpose by saying that 'there is an obligation resting upon . . . this Parliament to present the statute law of the Commonwealth in a convenient, accessible and readily intelligible form'.[97] In spite of the usual government policy, many obsolete Acts had unavoidably accumulated and some statutory errors had been uncovered. The Bill was said to embody the results of several years' research and was intended to clear the way for a republication of current statutes in 1935. Some Opposition criticism was raised that the Government had not undertaken a complete consolidation.[98]

Similar legislation was brought down in 1950 with a view to reprinting the Acts in 1951. This time the Opposition of the day commended the measure as one rendering the form of legislation more convenient and enabling 'the new Commonwealth statute book [to] start afresh as from the fiftieth anniversary of Federation'.[99]

A special problem of statutory consolidation arose in respect of the Australian Capital Territory at the time of its physical establishment

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96 28 COMMONWEALTH PARL. DEB. 4646.
97 144 COMMONWEALTH PARL. DEB. 1073-4.
98 Id. at 1114.
99 211 COMMONWEALTH PARL. DEB. 4058.

as the seat of government. In 1925 the Federal Capital Commission drew attention to the fact that much of the Territory's law, not covered by Ordinance, relied on New South Wales Acts some of which had been repealed or amended or lacked machinery for their operation.[100] No sweeping remedy was offered at that time and the matter rested until 1931 when the Advisory Council unanimously adopted a resolution calling for consolidation of such New South Wales law as had been adopted in the Territory.[101] The mover pointed out that the reception of such statutes took effect at 31 December 1910 and excluded subsequent amendments, so the Territory had fallen 'virtually twenty years behind the laws of the States'.[102] The Attorney-General's Department agreed that a complete consolidation as suggested would be a great benefit 'legally and historically' but felt that, on account of the extent and variety of the laws involved, the project would be 'far too ambitious and costly'.[103] The Department of Home Affairs, influenced by the financial straits of the depression, needed no further persuasion to reject the consolidation idea. It was satisfied that:

> A less ambitious, but very useful, course has been pursued in taking specific subjects and consolidating the various statutes, with such modifications and adaptations as the conditions appertaining in the Territory require. This practice will be continued.[104]

III. THE JUDICATURE ACTS IN AUSTRALIA

The colonial approach to the English Judicature Acts of 1873 and 1875 demonstrates some peculiarities of Australian law reform attitudes at that time. Some colonies, being quite content to "follow the leader", took it for granted that all English reforms must be beneficial. Others had their own adaptations to make of the imperial precedent, while New South Wales distinguished itself by rejecting the judicature innovation as undesirable.

In *Queensland* the first English Judicature Act was to some extent foreshadowed by a Civil Procedure in Courts Reform Bill, introduced in 1872 by Lilley, formerly Premier and later Chief Justice. He wrote into the Bill's preamble his own assessment that existing practice and procedure were 'unnecessarily and vexatiously intricate, cumbrous,

100 Memoranda of 29 and 30 June 1925, Commonwealth Archives Office, CRS A1, Item No. 31/5501.

101 Id., "Consolidation of Ordinances—T. M. Shakespeare".

102 The Canberra Times, 23 June 1931.

103 Memorandum of 8 July 1931, Commonwealth Archives Office, see n. 100 above.

104 Id., memorandum of 13 July 1931.

dilatory, costly and oppressive'.[105] He sought the appointment of a Royal Commission to examine methods of reform. Although the measure passed, it remained in abeyance, except for the Commission's appointment.[106] Thereafter, largely influenced by Griffith, that Commission studied the Judicature Acts and drew up from their model a Bill 'to provide for the administration of a uniform system of law in all Courts of Justice, and to simplify and amend the practice of the Supreme Court'. It reflected no spontaneous parliamentary, professional or public awareness, but owed its creation to the individual enthusiasm of Lilley and Griffith. The latter, in piloting the Bill through Parliament, emphasized that there was no historical necessity for a Judicature Act in the Colony. The Supreme Court was founded as a single court with plenary jurisdiction: it needed no "fusion" of law and equity, for they were already fused. However, the court in practice operated in its various jurisdictions as though they were different courts and, blinded by the enlightenment of uniformity with England,[107] the colonial judges had customarily regarded the old separation of courts to apply. So entrenched was the custom that the Judicature system seemed an easy way of restoring the *status quo*. The Bill passed with little debate as 40 Vic. No. 6.

In *South Australia* the English reform was at once thought desirable. Attorney-General Bray in 1876 introduced a Supreme Court Bill which was criticized for copying the English Acts too literally without regard to special needs of the Colony.[108] Laymen thought that the measure was intended to benefit the incomes of lawyers, while legal members of the House objected on so many technical grounds that the Bill was withdrawn.[109] So was a rival Supreme Court Procedure Bill of the same session.[110] In the following Parliament the Government had not sufficiently revised the work to be able to proceed,[111] but in 1878 Bray's Bill with a few amendments, (which Bray thought not to be improvements),[112] was introduced by Attorney-General

105 14 QUEENSLAND PARL. DEB. 891.

106 20 QUEENSLAND PARL. DEB. 630.

107 The colonial courts should 'always follow in the footsteps of the English judges along those paths which they have indicated', Dickinson J. in R. v. Morley, (1847) 1 Legge's Reports 389, 391; and see Moore, *A Century of Victorian Law*, (1934) 16 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW (3rd series) 175, 182.

108 [1876] SOUTH AUSTRALIAN PARL. DEB. 902.

109 Id. at 1844.

110 Id. at 1847.

111 [1877] SOUTH AUSTRALIAN PARL. DEB. 485.

112 [1878] SOUTH AUSTRALIAN PARL. DEB. 170.

Mann and passed, being known thereafter as the Supreme Court Act 1878. The local Chief Justice soon noted that the Act had benefited suitors, had introduced celerity and simplicity into judicial administration and had given a 'great impetus' to court business.[113] However, a local legal pamphleteer in 1880 insisted that the scheme of reform under the Judicature Acts was 'illusionary' and that in England, Queensland and South Australia the results were unsatisfactory:

> The costs of litigation have rather increased than diminished. The perplexity of the old procedure seems to be equalled by the perplexity of the new procedure. Greater speed in obtaining a judicial decision is undoubtedly attained, but this is as much due to the more frequent sittings of the Courts than to any peculiar excellencies of the new practice.[114]

The South Australian statute was substantially copied and applied in *Western Australia,* there becoming the Supreme Court Act of 1880. That State's decision was based on the premise that 'the procedure of our Supreme Court should as far as possible be kept assimilated to, and governed by, the rules and regulations of the English Courts'.[115] No concern at imperfection in the law or inconvenience of its administration prompted the decision, but simply the desire to keep "in step" with the mother country.

A much more critical attitude was adopted in *Victoria* where the merits of a Judicature system were debated for a decade. A decisive factor was the constituting of a Royal Commission headed by Stawell C.J. in 1880 to inquire into the operation and effect of the constitution of the Supreme Court. In that Commission's report reform of the Court's procedure was declared necessary, and the adoption of the Judicature system advantageous. The Commission urged that fusion of the common law and equity jurisdictions, and their future concurrent administration, were the only practical remedies for the ailing system.[116]

Meanwhile Parliament had toyed with legislation along those lines. Two such Bills had been introduced as early as 1873. Others followed in 1876 and 1877 and two each in 1878 and 1879. None was thought,

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113 5 WESTERN AUSTRALIAN PARL. DEB. 147.

114 SHERIDAN, FIRST IMPRESSIONS OF A LAW REFORMER (ADELAIDE, 1880), Preface.

115 5 WESTERN AUSTRALIAN PARL. DEB. 145. That this parliamentary opinion was not uniformly shared by the bench is shown in many public utterances of Hensman J., e.g. In re Haines & Co., 1 W.A.L.R. at 37; R. v. Wainscott, 1 W.A.L.R. at 89; Scott v. Ceruti, 3 W.A.L.R. at 155; Little v. Welsh, 4 W.A.L.R. at 4.

116 VICTORIA [1880-1881] 3 VOTES AND PROCEEDINGS No. 28, 7.

on later reflection, to have been likely to have commanded the attention of the House.[117] The 1880 Commission drafted a Bill which in 1881 and 1882 was introduced through the Legislative Council; but failed to make any progress. The Solicitor-General was then said to have taken charge of revising the Bill for resubmission 'shortly',[118] but it was 1883 before it was brought into the Assembly under the title of 'a Bill to improve the Jurisdiction and Procedure of the Supreme Court, and for other purposes connected therewith'. Reflecting again on the absurdity of English separation having been imposed on the Colony's single Supreme Court, one speaker lamented that 'nothing but the inveterate tendency of Englishmen to follow precedent would have allowed the splitting up of our Supreme Court' in such a way.[119] The Bill was enacted in spite of some judicial and professional opposition. Three weeks later one politician sought to defer its operation for twelve months because of deficiencies in the Rules of Court and prevailing public uncertainty,[120] but the motion lapsed for want of support.

By 1886 the judges, who kept the working of the Act under review, were able to report that, although there had been some introductory problems, the innovation constituted 'a real and an enduring improvement upon the twofold system which it has superseded'.[121] Two years later they reported that the principles of the Judicature system were sound, but its procedure needed overhaul, for which purpose the Rules had been entirely revised with great advantage.[122]

In *Tasmania* the effects of the Judicature Act were long delayed. In 1903 a Legal Procedure Act was passed to allow for the concurrent judicial administration of law and equity. However, the previously existing Common Law and Equity Procedure Acts were not repealed.[123] Not until 1931 was the matter further scrutinized by a Parliamentary Joint Select Committee appointed to consider 'measures for the reform of the system of civil procedure in force in the several jurisdictions of the Supreme Court'.[124] In 1932 it brought down a report[125] as result of which the Supreme Court Civil Procedure Act was

117 43 VICTORIAN PARL. DEB. 146.
118 39 VICTORIAN PARL. DEB. 17, 523, 630.
119 43 VICTORIAN PARL. DEB. 153.
120 45 VICTORIAN PARL. DEB. 581.
121 VICTORIA [1886] 3 VOTES AND PROCEEDINGS No. 51.
122 VICTORIA [1888] 3 VOTES AND PROCEEDINGS No. 54.
123 THE PUBLIC GENERAL ACTS OF TASMANIA (REPRINT) 1826-1936, VOL. 2, 12.
124 104 TASMANIAN PARLIAMENTARY PAPERS 61.
125 106 TASMANIAN PARLIAMENTARY PAPERS 239.

passed introducing a comprehensive reform similar to the English Judicature system.

New South Wales, which bore much of the responsibility for importing the English separation of common law and equity jurisdictions, remained loyal to its historical error. The Supreme Court of 1823 had found no difficulty in performing its role as a single court with "fused" jurisdictions until the troublesome J. W. Willis came out to serve as puisne judge. Willis was experienced in Chancery, his judicial brethren in Sydney were not. He fancied himself as the "Chief Baron" of a new colonial Equity Court[126] and pressed his claim with such vehemence and personal feeling as to destroy any hope of advancement.[127] But notice had been taken of some of his ideas, and the Administration of Justice Act, 4 Vic. No. 22, was undoubtedly founded on them. The Act made provision for the Supreme Court's equity branch to be administered by a Primary Judge in Equity. The court was not divided, but the fact that a specialist judge heard equity suits encouraged the growing numbers of practitioners arriving from England to assume the existence of a division between law and equity, as rigid as that to which they were accustomed. The judges seem to have regarded that strict allocation of functions as convenient and, before long, as was to be the case in the other Australian Colonies, the advantages of a unified Supreme Court had been forgotten.

In New South Wales, Fisher and Stewart voiced their conviction that the Judicature system should be adopted, but the legal profession in general were uninterested and Parliament almost immune from concern for law reform. The Law Reform Commission of 1870 had given the matter much thought and had favoured reforming the equity jurisdiction.[128] An Equity and Ecclesiastical Consolidation Bill was drafted by Owen,[129] but for some time it lacked a parliamentary sponsor. Not until 1879 was it taken up by Darley, then an influential Legislative Councillor—later to become Chief Justice, who saw it passed without difficulty through the Upper House. The Legislative Assembly resented such prodding and allowed the Bill to stand in the notice paper until the Session's expiry. In the next Session, later in that year, Darley reintroduced the Bill in the Council, emphasizing the unwholesome state of prevailing equity practice, and adding that, after careful study of the Judicature system, he was convinced that it

126 21 HISTORICAL RECORDS OF AUSTRALIA Series 1, 164.
127 Id. at 160.
128 N.S.W. [1870-1871] 2 VOTES AND PROCEEDINGS 117.
129 The Sydney Morning Herald, 25 April 1879, 4.

was working badly in England and the other Australian Colonies and would not be preferable to the existing procedure.[130] Stephen agreed that the Judicature Acts were 'a great bungle'.[131] Only one legal member of the Council expressed any support for the Judicature reforms,[132] but his opinion was disregarded and Darley's Bill was passed. The Assembly remained doubtful. A Select Committee was set up.[133] Most of the witnesses examined by it wanted a Judicature Act, but felt that its attainment would be protracted and uncertain. Without expressing great enthusiasm for Darley's Bill, they agreed that equity practice needed reform and that the Bill was uncontentious and could pass at once. The Committee found the equity branch of the Court 'dilatory, expensive, ruinous to suitors and not in accord with the judicial progress of the age'.[134] It favoured the Judicature system but recommended that Darley's Bill should have priority. Passed as the Equity Act of 1880, its provisions made irretrievable the simple unification of the Supreme Court as constituted in 1823.

No individual had the interest or political strength to further the cause of the Judicature Acts. At the critical time the powerful influence of Stephen and Darley, and the apathy of Parliament, outweighed all other forces. Darley exerted his authority in 1881 to crush a Reform in Administration of Law and Equity Bill introduced by a grazier MLC as a means to apply the Judicature system.[135] The decision of the Government was stated by Parkes:

> In view of the conflicting opinions held as to the beneficial working of the Judicature Acts of England, and the many points in which those Acts are considered defective as increasing the delays and expense of litigation, it is deemed advisable to await the result of further experience before adopting the legislation referred to.[136]

And so it is that, ninety years afterwards, New South Wales is still waiting.[137]

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130 1 N.S.W. PARL. DEB. 354.

131 Id. at 474.

132 W. J. Foster, id. at 476.

133 3 N.S.W. PARL. DEB. 3086 and N.S.W. [1879-1880] 1 VOTES AND PROCEEDINGS 74.

134 N.S.W. [1879-1880] 3 VOTES AND PROCEEDINGS 60.

135 6 N.S.W. PARL. DEB. 1872.

136 5 N.S.W. PARL. DEB. 437.

137 See 6 A.L.J. 157 and 9 A.L.J. 85. There have been several intervening attempts to introduce the judicature system, but all have failed. This paper was written before the passing of the Supreme Court Act, No. 52 of 1970, of New South Wales, Part IV of which provides for the concurrent administration of law and equity.

IV. PUBLIC LAW REFORM BODIES 1940-1970

Within this period lawyers have done much to stimulate and advance law reform measures in the several States. While acknowledging the importance of the sub-committees of professional associations and of various judicial sub-committees in furthering this, the present discussion must be confined mainly to the work of law reform bodies set up or sponsored by governments in those States where such bodies have been constituted. These developments have generally occurred as conspicuous responses to the creation of the English Law Revision Committee of 1934, "reincarnated" as the Law Reform Committee of 1952,[138] and Law Reform Commission of 1965.

The first of these in Australia, within the relevant period, was the Law Reform Committee of *Tasmania* which was set up by the Attorney-General in 1941. It consisted of the State Chief Justice, the Attorney-General, the Professor of Law at the University of Tasmania, two representatives each of the Northern and Southern Law Societies and, later, the Solicitor-General and the Parliamentary Draftsman. It was said to be modelled on the English Committee and on the New Zealand Law Reform Committee of 1937.[139] It was designed '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'. However, it was not concerned with political, economic and social reforms, but simply with the 'reform of the technical rules of law and their revision in the light of modern conditions'.[140] The need to intrude on matters of policy was thus substantially avoided.

Otherwise, the Committee was unfettered by government and could select fields of reference and make recommendations at discretion. The Committee's Report of June 1946 listed twelve proposals for law reform which, on its submission to the Government, had been adopted by Parliament. Twelve other proposals had either been rejected, or were still under consideration, by Parliament. The Committee showed obvious signs of dispiritment, and felt that in contemporary conditions little scope for reform existed in the face of indifferent legislatures, apathetic public opinion, and a conservative—even hostile—legal profession.[141] Moreover, the Committee plainly had not the manpower to conduct the research necessary for major projects of reform. Yet,

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138 HARDING, A SOCIAL HISTORY OF ENGLISH LAW (LONDON, 1966), 394; generally for the English background see CHS. 13 and 14.

139 Report of June 1946, 1, 20.

140 Id. at 2.

141 Id. at 28.

in spite of its difficulties, it felt confident that, being established on a sound basis with an authoritative membership, its work would not be in vain.

In *New South Wales* the idea of comprehensive law reform, attempted unsuccessfully in 1870 and the early 1920s, did not completely die. In 1932 the Government had appointed a retired judge to prepare a report on law reform, particularly as regards procedure,[142] but seems not to have pursued the matter. By 1941 it was protested that the cause of law reform had 'languished for years past' in that State.[143] It was also emphasized that government support for general law reform was essential, as there was then virtually no public interest in the matter and whatever concern had been shown was said to be confined to the legal profession.

In the same year Attorney-General C. E. Martin applied himself to the problem, setting up 'a number of research projects' to improve the statute law,[144] and appointing a Law Reform Committee which included representatives of the legal professions.[145] Although Martin was able in 1942 to introduce a Law Reform (Torts) Bill as 'but a preliminary instalment of the government's plans to revise the Law',[146] the Committee seems to have been unsuccessful and to have surrendered its tasks to the professional associations.

By 1959 it had been decided to make a further official attempt at legal review. A Law Reform Committee was appointed comprising three Supreme Court Judges, two District Court Judges, two representatives each of the two professional associations, two magistrates, and an academic lawyer from Sydney University. Its instructions went chiefly to reviewing practice and procedure in the courts and recommending reforms to ensure greater efficiency in disposing of cases. It was also to inquire into and report on any general law reform matters referred to it by the Attorney-General.[147] Naturally a body composed of so many men with such heavy demands on their time could not be expected to have found much opportunity to undertake far-reaching law reform recommendations.

No repercussions from the English Committee's appointment were felt in *Victoria* where the parliamentary Statute Law Revision Com-

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142 6 A.L.J. 157.
143 15 A.L.J. 41.
144 166 N.S.W. PARL. DEB. (2nd series) 1498; and 15 A.L.J. 41, 70.
145 A HISTORY OF THE NEW SOUTH WALES BAR, *op. cit.* n. 6 above, 172-3.
146 169 N.S.W. PARL. DEB. (2nd series) 1497.
147 A HISTORY OF THE NEW SOUTH WALES BAR, *op. cit.* n. 6 above, 174-5.

mittee, and the Chief Justice's Law Reform Committee on more technical matters, continued to function, receiving much assistance from the professional associations. Nor did the English precedent have much influence in *Western Australia* where a Law Reform Committee of the Law Society almost expired with its parent body during the war. It was revived in 1945 and, five years later, its work, although unofficial, was commended on the grounds that 'the duty of the judges is to administer the law, not to reform it; therefore, if the practising lawyers do not take an active interest in the matter, the law tends to lag behind the needs of the community'.[148] By 1967 a Law Reform Committee was set up with representatives of the Law Society, University Law School and Crown Law Department. It was not a statutory body, but it had a permanent secretary and some members obliged to devote substantial time to its activities. It could receive proposals for reform from any source and report its recommendations to the Minister for Justice.[149]

The first impact of the English Law Reform Commission of 1965 was felt in *New South Wales.* There public interest in law reform seemed active enough to justify an electoral promise to create a similar Commission.[150] That promise was fulfilled in 1966; the new and permanent body, which had full-time members, was thought by

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148 (1948-1950) 1 U. WEST. AUST. ANN. L. REV. 112. The assertion that the judges have no duty to reform the law must be challenged. Historically, judicial reform has been essential to legal progress in Australia.

149 The Executive Officer of the Western Australian Law Reform Committee has kindly supplied the following further note concerning it—

> The Committee was established pursuant to a Cabinet decision in September, 1967. It consists of three members appointed by the Minister for Justice. . . . The Committee is aided by a full-time research staff of four legally qualified persons, headed by an executive officer. The Committee's programme must be approved by the Minister for Justice, although it may (and does) suggest topics to him as suitable for study. Nineteen projects have so far been approved covering a wide range of topics. Usually the Committee issues a working paper on the project to interested persons and organisations inviting comments, drawing attention to possible solutions and giving the Committee's tentative views based on its investigation and research. The Committee then submits a report to the Minister, taking into account the comments on the working paper and the results of any further investigation. The Committee has issued working papers on ten projects, and ten reports have been submitted. Although the working papers are publicly available, the reports themselves are confidential to the Minister.

150 See generally the debates on the Bill, 56-58 N.S.W. PARL. DEB. (3rd series) *passim.*

the Government to be 'long overdue'.[151] It was first appointed by administrative act, but by the end of 1966 a Law Reform Commission Bill was introduced.[152] When enacted it enabled that body, on reference to it by the appropriate Minister, to consider the elimination of defects and anachronisms in the law, the repealing of obsolete or unnecessary enactments, the consolidating, codifying or revising of the law, the simplifying or modernizing of the law 'by bringing it into accord with current conditions', the adopting of 'new or more effective methods for the administration of the law and the dispensation of justice' and 'systematically developing and reforming the law'.

The reaction elsewhere in Australia to that body was varied. In *Queensland* the Minister for Justice in 1967 told Parliament that a permanent Law Reform Commission, though desirable, could not then claim any priority and 'the question will be resolved when adequate funds become available'.[153] In the following year that financial difficulty was overcome. The Law Reform Commission Act constituted a permanent body, having part-time members.[154] The Commission was to take and keep under review the State's laws with a view to their systematic development and reform, including codification, repeal of superseded enactments, consolidation, and general simplification and modernization of the law.[155]

This Commission was given considerable independence, being able itself to prepare a programme of reform, including the priority with which subjects should be considered, and submit it to the Attorney-General for approval. The Commission could have regard to representations for law reform made to it from any source and could, at its discretion, include them in its programme. However the Commission's role was advisory only and was not to 'take the place of the Legislature in framing laws'.[156]

In *South Australia* the Government of 1967 expressed reservations about permanent law reform bodies.[157] The then Premier asserted that *ad hoc* committees on specific problems, as had been customarily appointed in that State, were flexible and practical. Permanent commissions, he felt, became so preoccupied with long-term issues that

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151 McCaw, *Some Aspects of Law Reform in New South Wales,* address to Sydney University Law Graduates Association on 22 July 1965, 2.
152 65 N.S.W. PARL. DEB. (3rd series) 3177; Act No. 39 of 1967.
153 247 QUEENSLAND PARL. DEB. 1787.
154 43 A.L.J. 299.
155 [1968] QUEENSLAND PARL. DEB. 352.
156 Ibid.
157 See [1969] N.Z.L.J. 365.

immediate needs were by-passed.[158] A succeeding government had other ideas and appointed "The Law Reform Committee of South Australia" by proclamation. It was described as 'a professional body of experts operating as an official government organ',[159] its work being carried out part-time. It could make inquiries into, or give advice on, matters of law reform either at the Attorney-General's request or on its own motion. It was authorized as well to submit to the government draft provisions to implement any of its proposals for change.

The *Commonwealth* has habitually regarded law reform matters as internal and capable of supervision by Government Departments. Some relaxation of that policy occurred on its participation in the Standing Committee of Attorneys-General, a national body which grew out of discussions between the Commonwealth and the States in 1959 over proposed uniformity of company legislation.[160] In this way the Commonwealth, generally acting for its Territories, has continued to join in common and "uniform" legislative reforms. In May 1970 the Commonwealth announced its intention to appoint a Law Reform Commission for the *Capital Territory,* having a full-time chairman and confining itself to the reform of 'those areas of the law which did not involve significant policy—these [being] more appropriately handled by the departments responsible for the policy'.[161]

V. SOME CONCLUSIONS

The Australian States have not managed so far over the course of their several histories to perfect any adequate system of adjectival law reform. Prevailing forms of practice, procedure, pleading and the law of evidence, in greater or less degree, are inefficient and unsuited to the speedy, cheap and effective administration of justice. That is because reforms have been infrequent and made only haphazardly, without method. Defective procedural law, when attempted to be remedied in a patchwork way, usually remains defective.

Australian law reform attitudes have changed greatly from those of the nineteenth century. Largely through the endeavours of the professional associations, some public awareness has been aroused, leading to greater government recognition. It is only a half-truth to say that 'the reason why so much of our law is out of date . . . is that

158 [1967] SOUTH AUSTRALIAN PARL. DEB. 993.
159 43 A.L.J. 94.
160 Kerr, *Law Reform Machinery,* (1965) 1 THE LAW COUNCIL NEWSLETTER 15.
161 The Canberra Times, 20 May 1970.

nobody has ever been entrusted with the job of looking after it'.[162] It is for Parliament to keep the law current, but in England, as in Australia, Parliament has generally shirked its responsibility. Reforms have been bred of necessity and not of scientific perception. The emergence of a public conscience on the matter has been the greatest advance in a century of law reform.

It is still true, at least at the political level, that reform of a specific law is most likely to be achieved if promoted by an influential individual. Although on a weaker scale than that evident in the single-handed reforms won by great public figures in the nineteenth century, the power of personality remains important. The modern institutional approach to reform may gradually weaken that power, while the determination between States not to be outdone in the field of reform provides some protection against the hiatuses which in the past fell between the work of one reformer and the next.

The first concern of the present law reform bodies in Australia might well, with the prompting of historical experience, be the reform of the adjectival law. That is the key to the success of all reform[163] and, as its area is relatively limited, could be carried to completion promptly. The wider issues of reform—whether for the long or short term—could afterwards be put in hand with greater assurance of practical success. For a small work commitment, the adjectival law could then be kept under systematic review to prevent mechanical failures.

It will be interesting to see whether the institutional approach to law reform can make for greater adventure and experiment in Australia. Since the latter nineteenth century the pattern of reform in this country has been generally moved by the spirit of tested experiments in England, America or New Zealand. Having regard to the arrears to be caught up, it seems likely that, in major reforms, Australia will continue to follow rather than to lead, at least during the remainder of this century.

When properly developed, law reform operates in response to the expressed policy of a government. But it is often difficult for a government to know, or even to understand, what policy to adopt, especially in technical cases—of which the adjectival law is a good exemplar. Law reform bodies can serve very usefully to point out the available

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162 WILLIAMS (ED.), THE REFORM OF THE LAW, (LONDON, 1951), 9.

163 'It is the procedure of the law which itself introduces the greatest uncertainty', Goodhart in 33 A.L.J. 137.

policy alternatives,[164] but they should express no preference. Specialists in fields other than law could give valuable assistance in that way, but it is inconceivable that they could also, as is sometimes suggested, participate in the strictly legal work of implementing an expressed policy.[165]

If policy and implementation of law reform are not separated, curious results follow. For instance, Mr Justice Scarman takes the view that:

> Contemporary society requires that it be given the opportunity to test its laws by its own criteria; it insists that laws are either to serve the needs of society or to be rejected. In other words, our fellows in society require first to understand, and then to evaluate the laws that govern them.[166]

If applicable to the *policy* of the substantive law that view is cogent, but it surely cannot apply to the implementation of law reform, nor to the adjectival law. If accepted literally it would require the legislative process to return to the simplicity of the Dooms. A mature society requires mature laws: difficulty of comprehension increasing in proportion to maturity. Especially is that true of the fundamental communal laws of modern society—taxation, public services, local government, and so forth. The public have a right to comprehend the principles of the laws which govern them: but that they should 'understand' and 'evaluate' matters of interpretation, procedure and myriads of technical details would be unworkable and absurd.

Australia may come under the influence of present English reform trends towards a general codification of the law. That process, understood as a reduction, to one or more statutes, of the whole law on a particular subject,[167] is admitted to be costly and slow, and to require expensive reforms as a condition precedent. The proposal finds strength in the weakened state of the common law which, it has been suggested, will be consistently reduced in area as its principles are absorbed by

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164 For comment on a notable example see Sawer, *The Legal Theory of Law Reform*, (1970) 20 UNI. OF TORONTO L.J. 183, 193.

165 'Generally speaking only those who have successfully devoted themselves to the active practice of the law are qualified to formulate with the requisite detail and precision the improvements in our system which are practicable', HART, THE WAY TO JUSTICE (LONDON, 1941), 7. Deleting the words 'the active practice of', the proposition still seems pertinent.

166 SCARMAN, *op. cit.* n. 36 above, 7.

167 GARDINER AND MARTIN (ED.), LAW REFORM NOW (LONDON, 1963), 11. The distinction between codification, so defined, and consolidation (see n. 37 above) is very nebulous.

legislation.[168] The merits of a change to a code require more informed research and discussion than they have received so far in England.[169] The advocates of codification argue for its certainty, clarity and economy of time, labour and costs.[170] The opponents rely on the continuity and flexibility of the common law, and denial of codification's alleged certainty.[171] No legal system is perfect and there would be little advantage in adopting a new system merely for a short term benefit. In the long term it seems likely that many of the common law's most serious deficiencies may be overcome by technological aids.[172] Meanwhile Australia will doubtless continue its historical policy of "wait and see" in the light of English developments.

It might be hoped that, in the future, major law reforms will be examined in Australia on a national basis.[173] There is a great potential for a Federal Law Reform Commission which might take over from the Standing Committee of Attorneys-General on a permanent and full-time footing the liaison between Commonwealth and States on law reforms of mutual interest. Uniformity is not an end in itself, but it can often be a means to economy and better understanding. The "uniformity" attempted so far in selected legislative fields has failed in several of its objects because of the independent views of some Parliaments at the outset and the lack of co-ordination of subsequent amendments. With a full-time Federal Commission working in conjunction with comparable State institutions the load of reform could be lightened and much more rapid and consistent progress would be likely.

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For the past century Australian law reform has generally been a random and fortuitous process. It is only over the last two decades

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168 SCARMAN, *op. cit.* n. 36 above, 47-9.

169 Much of the debate hitherto has rested on assertion and speculation. Zeal for reform has also produced some extravagant remarks. Hart, (*op. cit.* n. 165 above, 34) considered codification the *sine qua non* of any satisfactory legal system. Once adopted, he declared that 'law would cease to be obscure, mysterious, and repellent, and become an object of pleasant and satisfactory study to lawyers and laymen alike' (at 35). Cf. 39 A.L.J. 218.

170 See particularly THE REFORM OF THE LAW (n. 162 above) and LAW REFORM NOW (n. 167 above).

171 'The law is not static. It is developing continually. Those who emphasize the paramount importance of certainty in the law delude themselves. It is not certain and it is a mistake to think that it can be made certain', DENNING, THE CHANGING LAW (LONDON, 1953), 78.

172 Pope, *The Lawyer and the Computer*, 43 A.L.J. 463.

173 See the suggestion of Sir Owen Dixon in 31 A.L.J. 342.

that some public sympathy has been won and governments effectively aroused to pursue the matter. This retrospect can at least claim that secure foundations have been laid. The greater work of building a reformed legal system to apply reformed laws will be the contribution of the next century. The building process may require much divination, but it will be the weaker if it does not also draw upon the past. The lessons of legal history should guide the reformer. To adopt the words of Sir Owen Dixon:

> Before the reform of the law can be done, it is essential that its doctrines should be understood and that may mean an investigation of the foundation of those that are to be reformed. It seems strange that where the study and writing of legal history has recently flourished, the influence of legal history should be weak. . . . Is it not curious that legal history should now be considered as something which need not be considered when the law is to be reformed?[174]

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[174] Id. at 340.

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