

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA, CANADA

MONDAY, 2 JUNE 2008

LAW REFORM - PAST, PRESENT, FUTURE

The Hon Justice Michael Kirby AC CMG^{*}

REMEMBRANCE OF TIMES PAST

I have come across the Great Ocean, and over the mountains, the like of which we do not have in Australia, to join the celebrations of forty years of institutional law reform in Alberta.

My credentials for joining in the party are looking a little threadbare. Twenty-four years ago, in 1984, I concluded my term as inaugural Chairman of the Australian Law Reform Commission. Some say that one can take the person out of law reform but never law reform out of the person. However that may be, it is indisputably a very long time since I worked in institutional law reform.

^{*} Justice of the High Court of Australia 1996-; one-time Chairman of the Australian Law Reform Commission, 1975-84.

2.

Of course, for me, it only seems yesterday that I was sharing thoughts with the founders of the Alberta Institute, and learning from them ideas that we would implement in distant Australia, where we were creating a new national law reform agency.

Canada and Australia, the oldest Dominions of the British Empire, shared more in common with each other, in terms of law, than was generally recognised in those days. Developed countries of the common law tradition, and parliamentary democracies. Responsible government. Federal systems of divided power. Many links both in war and peace. Economic and social similarities. Important indigenous communities. An integrated judicature across continental nations. Highly similar court and professional traditions. Yet in 1975 we did not really know each other, legally speaking. We looked past each other to England, the centre of the Empire and the Commonwealth.

Over the intervening years we have learned to look directly at each other. No longer do we consider our legal links through the prism of an imperial power in Britain. After nearly twenty-five years of experience as an appellate judge I can say that the growth in the use of Canadian judicial authority has been amongst the most striking changes that have happened. So it also is with statutes, law reform reports, university writing and social research. Lawyers should reinforce these links. They are precious. Not many nations in this divided world share such commonalities. I hope that this visit will be a contribution to the dialogue.

I am grateful to the Alberta Law Reform Institute for bringing me to Alberta and Canada. Not long after the Institute was founded, it paid a similar tribute to a predecessor of mine in the High Court of Australia, Sir Victor Windeyer. He came in 1972 to give a series of lectures sponsored by the Institute¹. It is a privilege to walk in his footsteps. He had then just retired as a Justice of the High Court of Australia. At that time I was a young barrister, practising in Sydney. Now I am about to retire from the Court. Such is the cycle of life and of our profession. Yet considering the cycle makes me, in turn, nostalgic, realistic and optimistic. Those are the emotions that I feel as I consider the past, the present and the likely future of institutional law reform in both our countries.

Strange as it now seems, when I was asked to serve as first Chairman in the Australian Law Reform Commission (ALRC), I took a lot of persuading to leave the federal judicial office to which I had only recently been appointed, to enter what, for me, was the mysterious and somewhat arcane world of law reform. Only the charm of Lionel Murphy, then the Federal Attorney-General in Australia, and the professional urgings of my friend, Geoffrey Robertson (now a London QC and star of television, law courts and several international bodies) propelled me from the judicial seat into the challenges of law reform. It did not take

¹ One of these was published as "Some Aspects of Australian Constitutional Law" (1972).

long for me to realise the fascination of the new world that I had embraced.

Institutional law reform was not something new. In modern time it could perhaps be dated back to Napoleon's great codifiers at the beginning of the nineteenth century; to their English progeny throughout that century; and new initiatives taken by many governments to put law reform on a sound institutional bases after the 1950s.

A Law Commission for India was created in 1955, as that subcontinent realised the urgent need to re-express many of the laws bequeathed to it by the departed Imperial rulers. The English and Scottish Law Commissions were established in 1965. Between those dates, the Law Reform Commission of Ontario was created in 1964². It was, in a real sense, the brainchild of Chief Justice J C McRuer³. He became its first Chairman in 1964. Its mission and early work inspired imitations in far-away Australasia. So, in the manner of those post-Imperial days, did the example of Lord Scarman's Commission in London. The New South Wales Commission was created by statute in 1967⁴. Similar bodies soon followed in Queensland (1968)⁵, Western

² SO 1964, c 78. See RSO 1970 c 321.

³ W H Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada*, Jurilibert 1996 (Edmonton), 204.

⁴ *Law Reform Commission Act* 1967. See Hurlburt, 123.

⁵ *Ibid*, 151.

Australia (1972)⁶, Victoria (1973)⁷ and Tasmania (1974)⁸. In those days, everyone had to have a law reform institution.

Although the federal legislation, permitting the establishment of a national commission in Australia was enacted in 1973⁹, it was not brought into operation until 1975 when I was appointed. Rather beguilingly, Attorney-General Murphy said that the Commonwealth was waiting for me to turn up. In my realistic moments, I knew that the busy Government just had more pressing projects on its mind.

In the early days of the ALRC I naturally busied myself in a study of the history, problems and aspirations of law reform bodies that had gone before. These subjects were described in the first *Annual Report* of the ALRC in 1975¹⁰. Naturally too, I quickly made contact with the law reform bodies throughout Australasia and I then looked further afield for inspiration and example. This led to contacts with the Law Commissions in the United Kingdom and also with the new bodies that were springing up in Canada.

⁶ Hurlburt, 137.

⁷ *Ibid*, 159.

⁸ *Ibid*, 165.

⁹ *Law Reform Commission Act 1973 (Cth)*.

¹⁰ Australian Law Reform Commission, *Annual Report 1975 (ALRC 3)*, 1975.

6.

Amongst the latter, the Alberta Institute of Law Research and Reform had already secured a special place. In part, this was because, after the Ontario Commission, it was the oldest established of the Canadian agencies (1968). It was highly productive in its output and very practical in its projects. It had a North American "can-do" attitude, attractive to persons like me, impatient for reform and discontented with mere talk or more reports. At its helm were remarkable law reformers who became my close friends.

One of these was the redoubtable Wilbur F Bowker QC. He became the initial Director of the Alberta Institute. He had a face as craggy as the mountain peaks of the Rockies. Behind a disconcerting exterior of courtly old-world charm, he concealed a steely resolve to get things done. It was he who opened the doors of the Institute in 1968, just as he had reopened those of the Faculty of Law of the University of Alberta after the War in 1945. His professional style was described by the Institute as "unique, spare, clear and closely packed". Nowadays, we might call him a "minimalist". Yet his heart and mind were maximal in their approach to legal reform. His knowledge and scholarship over a lifetime had prepared him well for the journey through which he took the Institute in its first decade.

7.

Curiously enough, I am a direct link for Albertans to that important moment when the Institute was created¹¹. I am a living connection with the founding Director and the initial staff. Fortunate was the Institute and the community in the service of Wilbur Bowker and the inaugural team that launched this enterprise. The *Annual Report* for 1975 - the year that I embarked on my service in the ALRC - noted Dean Bowker's "official retirement" in August of that year¹². It recorded with apparent relief, that the "retirement is only official"¹³. Dean Bowker was to stay on the Board and to "exhibit his wonted activity" especially in a project concerning consent of minors to healthcare. A poem was composed by one of his old friends¹⁴:

"Of the career remarkable of a man
Remarkable tis yet too soon to sing
For an appraisal betimes will perish betimes
Absent maturity's ring

Too soon yet, then, to assess the role played
By this doughty performer
Whether as lawyer or soldier or Law
School dean
Or yet as law reformer".

¹¹ Alberta, Institute of Law Research and Reform, *Annual Report* 2975-6 (July 1976), 4.

¹² *Ibid*, 5.

¹³ *Ibid*, 6.

¹⁴ *Ibid*, 7.

Dean Bowker's achievements can now be more fully appreciated. His work, and that of the Institute, became highly regarded and admired in Australia as the State Law Reform Commissions were taking shape. It represented one of the foremost models that we studied closely when setting up the Australian Commission. So let us think back on those early days. In 1975, the Attorney-General of the Province was the Hon James L Foster QC, soon to be succeeded by William McLean QC. A young member of the Board was Mr W H Hurlburt QC. So was Mr R P Fraser QC, recorded as the only Board member resident in Calgary.

The record of the second conference of the Australian Law Reform Agencies in April 1975, the first that I attended, indicates that Mr Fraser also attended as an overseas guest. So did Mr W R Poole QC, a member of the Ontario Law Reform Commission. The family of Australasian, Canadian and other law reform agencies was beginning to explore their common links. At the third meeting of the Australian law reform agencies in May 1976, which I chaired, Mr Jean Côté, Secretary of the Law Reform Commission of Canada, took part. The minutes of the third meeting finished with an impassioned statement by the Secretary of Justice of Sri Lanka, Mr Nihal Jayawickrama, who was one of the overseas observers. He stated that, when he had received an invitation to a conference of law reform agencies, he had entertained a fear which had now been confirmed. He explained: "I find that I have

been completely overwhelmed and brain-washed by 'trade union activity' into restoring the Law Reform Commission of Sri Lanka"¹⁵.

Reading this statement in the minutes reminded me of the strong comradely bond that we shared in those days amongst all these new law reform agencies across the Commonwealth of Nations. The Law Reform Commission of Sri Lanka was indeed restored. A former Justice of the Supreme Court of Ceylon (Sir Victor Tennakoon QC) was appointed as its Chair. He attended meetings of the Australasian Law Reform Agencies Conference. We were a family. And Wilbur Bowker was the grandfather - I hesitate to call him the godfather. He seemed terribly old. Yet he was in truth a young man, as I am now, approaching the age of constitutional senility in Australia (70).

The familial links between the law reform agencies were reinforced by the exchange of reports; the publication by the ALRC of its quarterly magazine, *Reform*, which recorded the new reports from around the Commonwealth and listed the current projects on which we were all working; occasional initiatives of the Commonwealth Secretariat in London to arrange meetings of Commonwealth agencies at Marlborough House; individual visits relating to particular projects on which these bodies were working at the same time; and crisis

¹⁵ Australian Law Reform Agencies Conference, Minutes and Record, ALRC, Brisbane, 1976; 3 Conference 1876, 123.

exchanges that occurred when (as sometimes happened) a Commission was abolished or downsized.

The latter event was like a death in the family. Reports of the demise of a Commission reminded us all of our vulnerability and mortality. You in Canada have acquired a certain expertise in this respect. No other country has succeeded in abolishing a Commission twice. But Canada has. I recall the shared anxiety when the first Canadian Commission was abolished in the 1990s¹⁶. Not content with doing it once, following the revival of the Canadian federal Commission, the successor suffered a similar fate. The Law Commission of Canada, Mark 2, re-established in 1997 was decommissioned by a decision to deprive it of essential funds¹⁷.

Similar changes occurred in Australia. In Victoria and Tasmania, Commissions were abolished but in Victoria the Commission was re-established in 2001. Happily it continues to thrive. The famous old original, in Ontario, established in 1964, was abolished in 1996 but, in a different format, recommenced operations only recently. Yet for all this talk of abolition, a hopeful sign has occurred. I refer to the move to create law reform agencies in developing countries where the needs and

¹⁶ R Macdonald, "Continuity, Discontinuity, Stasis and Innovation" in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform*, Federation, 2005, Sydney 87 at 90.

¹⁷ M Sayers, "Co-operation Across Frontiers" in Opeskin and Weisbrot, above n 16, 243 at 241, 256.

urgencies of law reform are even greater than they are in Canada and Australia. Thus, an Indonesian body was established in 2000. In Northern Ireland, there are active discussions, even as we meet, about the creation as part of the current constitutional rejuvenation of a Law Reform Commission for that Province¹⁸. Through all these events, some agencies have just kept going on. These include the Law Commissions of the United Kingdom; the Australian Commission; the Irish Commission; lately the New Zealand Law Commission and the Alberta Institute.

No one owes a law reform agency a free lunch. Death, penury and bankruptcy have overtaken respected members of the family. If law reform bodies survive, it is generally because they are seen to be useful to government and to the communities they serve. Singularly useful to the interconnections of law reform was the special part that Bill Hurlburt of the Alberta Institute, was to play in the international family of law reform agencies in the twenty years or so after I returned to the bosom of the courts.

In a sense, Bill Hurlburt was a kind of human Internet before the mighty Internet was invented. He knew everyone engaged in institutional law reform. He knew them personally. He knew our strengths and weaknesses - and generally he let us know so. In 1986,

¹⁸ *Ibid*, 256.

two years after I had removed to the Court of Appeal of New South Wales, he published, at his own expense, a monograph *Law Reform Commissions in the United Kingdom, Australia and Canada*¹⁹. This book acknowledged conversations with hundreds of law reformers in all three countries - a kind of who's who of organised law reform, twenty years ago. A frontispiece recorded Bill Hurlburt's gratitude to Dean Wilbur Bowker for reading and criticising an earlier draft and to his wife who acted as his 'research assistant'.

If anyone in years to come desires a snapshot of what institutional law reform looked like in the mid-1980s, we are fortunate that, from the Law Centre of the University of Alberta in Edmonton and from the Alberta Institute, sprang Bill Hurlburt's unique history. Not only was it an unrivalled chronicle of the law reform bodies and personalities in each of the three countries chosen. A chapter examined the specific issue of the implementation of Law Reform Commission proposals (a subject always close to the heart of professional law reformers²⁰). Another chapter sought to evaluate the effect of the work of law reform bodies on substantive law, on legal institutions and procedures, on cooperation in the work of law reform and on work towards harmonisation and uniformity in the laws of countries with subordinate jurisdictions.

¹⁹ Hurlburt, above n 3.

²⁰ *Ibid*, 7.

Bill Hurlburt's book concluded with an apologia for law reform bodies; an attempt to identify the projects they seemed to do best; and an explanation of their legitimacy within the contemporary democratic debates. The closing chapter sought to predict the future of law reform. It was a pretty sobering essay because of its stated conclusion that societies such as ours have a profound lethargy about them. They are generally unwilling to tackle radical change of legal doctrine²¹. The last words in Bill Hurlburt's monograph were attributed to a very fine scholar turned judge in South Australia, the late Justice Howard Zelling²²:

"The thing ... which oppresses me most ... is that the whole history of seven centuries of law reform shows that there are only some times and some generations in which the whole community is receptive to law reform. We are passing through such a period at the moment. Unless we seize with both hands the opportunity that is given to us it may not recur again for many years ... Unless we make the best use of our energies in a coordinated fashion, the tide of public opinion will once more recede leaving our publications as dated, and as ineffective to our successes, as many of the nineteenth century Law Reform Commissions' Blue Books now look to us".

Bill Hurlburt was never one to give up. He had the staying power of Wilbur Bowker. Ten years ago he wrote "A Case for the Reinstatement of the Manitoba Law Reform Commission"²³. It may have

²¹ *Ibid*, 494-495.

²² H Zelling, "Law Reform in Retrospect - The Achievements" (1979) 53 *Australian Law Journal* 745 at 751.

²³ W Hurlburt, (1997) *Manitoba Law Journal* 215. See also P J M Lown, "Institute of Law Research and Reform Celebrates 20th Anniversary" (1998) 26 *Alberta Law Review* 399 at 401-402.

influenced the revival of the Canadian federal commission a year later; although, in all probability, other political forces may have carried that measure into effect. Bill Hurlburt knew better than most the weaknesses, as well as the strengths, of institutional law reform.

Reading the sombre closing words of Hurlburt's book in the cold light of 2008, I asked myself whether his conclusions were too grim, too excessively pessimistic? After all, the big players and also the tried and trusted performers, like the Alberta Institute, have remained in the game. They continue to demonstrate their utility by good implementation rates for many of their proposals. So was Howard Zelling right in advocating a greater sense of urgency and more creativity? Is it feasible to maintain a law reform body, of the kind with which we have become familiar, and to expect it to tackle the really important and urgent tasks of law reform in societies such as ours? In a world of so much technological and social change, can we really expect small, ill-funded, law reform bodies to continue the pretence that they can put in place effective machinery for the orderly reform, revision and renewal of the legal system? In short, is it time that we dropped altogether the pretence asserted in section 3 of the 1965 British Act, that established the Law Commission, propounding that it should²⁴:

"Take and keep under review *all the law* [of England and Wales] ... with a view to its systematic development and

²⁴ *Law Commission Act 1965 (UK), s 3. (emphasis added)*

reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally simplification and modernisation of the law"?

Bold ambitions. But do they have a Canadian snowflake's chance of being fulfilled in the current more sceptical age?

WHERE WE ARE AT?

In order to avoid excessive parochialism (to which every lawyer can so easily fall victim) I resolved to consider the position we have reached in law reform today by looking at some of the recent Canadian and English writings on the subject. It is, I suggest, a daunting agenda, overwhelming and even oppressive for those who take institutional law reform seriously.

Just to list some of the topics that have been debated in recent legal literature in Canada, relevant to law reform, is to demonstrate that institutional law reform is actually harder, not easier, than it was twenty, thirty and forty years ago. I will mention some of the features that have added to the difficulties. They include:

- In Canada, the context of the *Charter* with the many changes it has brought about in the law, evoking ripples throughout the entire legal system, demanding still further measures of reform²⁵.
- A constant challenge of societies like Canada (and Australia) is the necessity to live within constitutional limits. Yet perceptions of those limits are frequently undergoing change. Some of these changes came about as a result of decisions of the higher courts and of judges just like me²⁶;
- Whereas forty years ago, it was possible to engage in perfectly respectable tasks of law reform, substantially on a verbal or formalistic basis, dedicated to the analysis of judicial opinions and a few professorial commentaries upon those opinions, today evidence-based research is absolutely essential to law reform²⁷. The Chairman of the English Law Commission (Sir Terence Etherton) has stressed the importance of empirical research for reforms that have any chance of being of lasting value²⁸. Yet,

²⁵ B Billingsley, "Legislative Reform and Equal Access to the Justice System: An Examination of Alberta's New Minor Injury Cap in the Context of Section 15 of the *Canadian Charter of Rights and Freedoms*" (2005) 42 *Alberta Law Review* 711.

²⁶ T Caufield, "Clones, Controversy and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction" (2001) 39(2) *Alberta Law Review* 335; S Anand, "Clones, Controversy, Confusion, and Criminal Law: A Reply to Professor Caufield" (2002) 40 *Alberta Law Review* 493 at 497.

²⁷ L Gander, D Lowe and M Stratton, "The Civil Justice System and the Public: Highlights of the Alberta Pilot" (2005) 42 *Alberta Law Review* 803 at 817.

²⁸ T Etherton, "Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?" (Sir William Dale Lecture,

empirical research is costly and sometimes contentious. If politicians, departments and the community insist upon such data, the days of performing law reform on the cheap must surely be over;

- Likewise, the days when law reform could be undertaken solely by consultation with members of the legal profession have passed²⁹. Most questions of law, examined often and closely enough, will present policy choices upon which members of the public (or at least particular segments of the public) will have opinions - some of them useful, many of them assertive;
- There is a new and special problem here. It is that of "consultee weariness"³⁰. Bombarded by law reform bodies on topics of law reform research, public and academic commentators will eventually grow weary of the reformer's importunings. Yet reformers run a great risk if they do not afford appropriate opportunities to comment on proposals. In a modern age, interested groups may wish not to be pestered; but if they are not asked, they may do a little pestering of their own;
- The secret of modern institutional law reform, from the start, was that of widespread consultation. However, in the forty intervening

2007) (2008) 73 *Amicus Curiae* (Journal of the Society for Advanced Legal Studies), 3.

²⁹ P J M Lown, "Rules of Court Project" (2005) 42 *Alberta Law Review* 90.

³⁰ P North, "Law Reform: Problems and Pitfalls" (1999) 33 *UBC Law Review* 37 at 39, 42.

years, the proliferation of civil society organisations, the growth of talk-back radio and participatory television have made the processes of consultation much more diffuse, time consuming and exhausting³¹;

- The fact that many challenges for law reform derive from science and technology adds new complications. Most lawyers are not especially knowledgeable about such topics. They may even fail to see the problem or, when it is explained, they may not understand where the problem lies or how it might be solved³²;
- A further complication is the growing realisation of the complex economics of law reform, indeed of law and the courts. Thus, achievement of fairness, procedural justice and fundamental rights will often come with a very large price tag. For example, the invention of class actions or their equivalents, undoubtedly facilitates access to justice. Yet it certainly has an economic cost which any serious law reformer must address. Beyond doubt, the cost will be considered by politicians and those advising them when proposals for reforming legislation are made. The old thinking, that justice is beyond price, has little place in a modern economic setting³³;

³¹ Gander, et al, above n 27.

³² J de Beer, "The Rights and Responsibilities of Biotech Patent Owners" (2007) 40 *UBC Law Review* 343.

³³ M A Shone, "The Modern Class Action Comes to Alberta" (2005) 42 *Alberta Law Review* 913.

- In the "good old days" it was sometimes possible to ignore a debate about the policies that lay behind law reform, or at least to deal with them in a very short compass. Today, everyone is more candid about, and conscious of, the policy choices that lie behind statements concerning what the law is or ought to be. This is as much true of the higher courts as it is of law reform agencies and governmental advisers. Acknowledging, thinking through and explaining policy choices, and how they are to be resolved, can be very time consuming and intellectually taxing. Yet failing to do so can be fatally naïve. Often, the problem is that identifying diverse controversies can lead elected officials to run a mile rather than to buy into a vote losing slanging match³⁴;
- Sometimes, robust political decisions will severely affect vulnerable groups in society, reducing them to impotent silence. Yet the very practice in law reform agencies of consulting such groups may occasionally activate them so that they mobilise their efforts either to achieve, or to defeat, a particular proposal³⁵;
- Difficulties in law reform can occasionally derive from deeply held religious or moral viewpoints about which it may be impossible for combatants to argue, at least in the short run. In such circumstances (as in debates over embryonic stem cells or

³⁴ B Billingsley, above n 25.

³⁵ P B Michalyshyn, "The Diagnostic and Treatment Protocols Regulation and the Minor Injury Regulation: Review and Commentary" (2005) 42 *Alberta Law Review* (3) 923 at 940.

assisted human reproduction) notions of a democratic consensus about the direction of law reform may be a pipe-dream, unrealistic at least before exhaustion sets in³⁶;

- There are endless debates about particular techniques that assist, or impede, effective institutional law reform. Thus, the English Law Commission has generally asserted that the preparation of draft legislation is essential in order to focus the attention of the law reformer on the exact questions presented for decision and the precise changes to the law that are being advanced³⁷. On the other hand, legislative drafters are as scarce as hens' teeth. Governments are usually unwilling to release their hard pressed parliamentary counsel to assist law reform bodies in drafting legislation. Occasionally reform is better achieved by non-legislative, policy. Sometimes the best law reform is to do nothing at all;
- Law reformers are constantly torn between getting too close to politicians and the media, in order to attract interest in, and action on, their proposals. Or keeping too great a distance, in order to avoid seduction and so as to maintain product differentiation in the creation of reforming ideas³⁸. Democratic elections, depending on what happens, can either sink and resuscitate law reform

³⁶ T Caufield, above n 26.

³⁷ P North, above n 30, 50.

³⁸ *Ibid*, 45.

suggestions. A change of government is often a precious moment when a law reform body can procure more support to implement old proposals than tends to flow when the new government's own legislative programme is underway;

- A definite change from my time in institutional law reform lies in the growth of treaty law and its impact on the domestic legal system³⁹. Awareness of international legal developments, and of developments on like legal questions in other similar countries, has escalated enormously because of the advent of the Internet. Whilst it can sometimes be a source of useful ideas, there is an equal danger of paralysis in receiving too much information. That was a problem that rarely troubled us forty years ago. In those days, comparative law was largely confined to a knowledge of the latest decisions of the higher English courts. Now, no self-respecting law reform project can afford to be so confined⁴⁰;
- Traditions and local culture have always played a part in the design of law reform proposals. Sometimes, these considerations are a source of deadly resistance to law reform, even if the injustice of present arrangements can be fully, thoroughly and

³⁹ Jinyan Li, "Canadian Taxation of International Mobile Workers: A Case for Reform" (2007) 40 *UBC Law Review* 375 at 397; cf C Bate, "O What a Tangled World-Wide Web we Weave: An Analysis of Linking Under Canadian Copyright Law" (2002) *University of Toronto, Faculty of Law Review* 21 at 36.

⁴⁰ J Li, above n 39 at 397.

convincingly explained to the satisfaction of the law reformers⁴¹;

and

- It may occasionally be difficult to achieve change through the political process, simply because of the heat that such change may occasion. Many incompatible interests may be united in opposition to a change. Sometimes a reform proposal founders on the natural timidity of elected officials and their unwillingness to take any risks⁴². This point can be well illustrated by a reference to the developments affecting recognition of same-sex relationships in California. What could not be achieved through the legislative and executive branches, now appears to have been decided by the State Supreme Court⁴³. Upon that subject of law reform, the change is then brought about by a court decision. What has happened in this regard in Canada and South Africa stands as quite a contrast to the position reached in the United States of America and also in Australia.

If one ponders, even for a short time, upon the foregoing (and doubtless other) difficulties of achieving the kinds of bold legal reforms

⁴¹ R A Macdonald and Hoi Kong, "Patchwork Law Reform: Your Idea is Good in Practice, But It Won't Work in Theory" (2006) 44 *Osgoode Hall Law Journal* 11 at 47.

⁴² D Brenner and A Seckel, "Making Justice Affordable" (2007) *UBC Law Review* 745 at 748-749.

⁴³ *In re Marriages Cases*, Supreme Court of California, S147999 (2008) 08 CD05 5820; see also *Witt v United States Department of the Air Force* (USCA, 9th Circ) 2008 US App Lexis 10794.

called for by my erstwhile colleague, Justice Howard Zelling, it must be acknowledged that things have got more difficult for law reformers, not easier. The challenges facing law reform bodies such as the Alberta Institute and the Australian Law Reform Commission are even more daunting today than when Wilber Bowker, Bill Hurlburt, Grant Hammond and I were in the reforming driver's seat. The problems are more complex. The methodologies are more onerous and time consuming. The law-making institutions are more resistant. Many seem much less interested.

So should we just acknowledge that the brave idea of permanent law reform agencies is just another relic of the past? Should we quietly fold up the tents and accept that orderly reform of the law in our form of society can, at best, merely scratch the surface? Should we acknowledge that democratic communities, like ours are basically reactive? That getting a momentum behind orderly reform of the entire legal system depends hugely on chance factors like a change of government? A knowledgeable and enthusiastic law minister? A law reform body with a clever relationship with media or politicians?

A coincidence of all of the above, like Halley's comet, only appears once or twice in a lifetime. Then, fleetingly passing by, it disappears, in actuality and memory, for another 76 years. Does any of this matter? Do our institutional weaknesses cause much actual injustice? Do we need to worry about the imperfect arrangements we

seem to have in place for scrutinizing and updating the whole body of the law?

AN ONGOING INSTITUTIONAL PROBLEM

Another grandfather figure of law reform throughout the Commonwealth of Nations in the 1960s and 1970s was undoubtedly Leslie Scarman, the first Chairman of the English Commission. He had strong opinions on the questions I have mentioned. He considered that they mattered greatly. In the 1960s, he saw the deep institutional lethargy of law making in England. He witnessed the inevitable injustices that such institutional weaknesses occasioned to ordinary people caught up in the time warps of outdated laws and unable to secure effective reform from the elected parliaments because they were distracted with much more popular and vote-worthy activities or fearful of the slightest needless controversy.

It was Scarman, in England, who led a two-pronged attack on this institutional paralysis. His first drive was through institutional law reform. In the first decade of the English Law Commission, after 1965, there was a marvellous synergy between Scarman, Lord Chancellor Gardiner, Parliament, the bureaucracy and many members of the legal profession. Truly Halley's Comet was in the sky. The planets were aligned. It was a dazzling time. The result was a demonstration of what was possible and

what institutional law reform could do⁴⁴. In a sense, that demonstration has remained before the English Commission and also such of its progeny in Canada and Australia as have survived the intervening four decades.

But Scarman opened a second front. This was described in his Hamlyn Lectures, *English Law - The New Dimension*⁴⁵. He saw the courts, in an ongoing conversation with Parliament, as a new and revived means to revitalize the law in some areas and to gain the attention of parliament in others. Upon certain subjects, touching fundamental rights, Scarman foresaw the need to authorise effective law reform through judicial decisions. This second concept was bold and different. It was in some ways a huge challenge to the common law's traditional resistance to natural law notions of fundamental rights inhering in human beings as such. Yet gradually, the human rights idea gathered up more and more supporters. In part, this was precisely because the parliamentary institution would not, or could not, reform itself to deliver all the needed changes in the law. New institutional arrangements were needed. And they came about.

In Canada, this second idea produced the *Charter*. In the United Kingdom, Scarman's relentless lobbying eventually helped to produce

⁴⁴ T Etherton, above n 28, 4.

⁴⁵ Hamlyn Lectures, 26th Series, Stevens and Sons, London, 1974.

the *Human Rights Act* 1998 (UK) and the still ongoing debate about a new English law of rights and duties⁴⁶. Although New Zealand has a statutory Bill of Rights, South Africa has a new Constitutional Statement of Fundamental Rights and most other countries of the Commonwealth of Nations have long since adopted this idea, Australia lags far behind. Statutory measures, after the English model, have recently been introduced in the Australian Capital Territory and in the State of Victoria⁴⁷. The new Australian federal Government has indicated its willingness to examine the idea. But as Scarman and the other proponents were to discover in Britain, the concept has very strong and vocal opponents. They exist in the media, in some political circles and amongst many conservative lawyers.

Parliamentary attention to the reports of the English Law Commission has fallen radically since Scarman's day. Mr Justice Etherton recently put a brave face on the situation. However, he has acknowledged that changes in the office and responsibilities of the Lord Chancellor, political considerations, the burgeoning statute book, frequent official indifference and other developments represent, in combination, a potentially serious obstacle for institutional reform in the United Kingdom.

⁴⁶ T Etherton, above n 28, 8-9.

⁴⁷ *Human Rights Act* 2000 (ACT); Victorian *Charter of Human Rights and Responsibilities*, 2006 (Vic). See G Williams, "The Victorian *Charter of Human Rights and Responsibilities: Origins and Scope* (2006) 20 *Melbourne Uni L Rev* 880.

Two years ago, a proposal to allow a partly-automatic implementation of some English law reform reports won an affirmation vote in the House of Commons. However, it was defeated in the House of Lords⁴⁸. The notion of a better legislative procedure for law reform is not quite dead in Britain. Yet, it does not look very alive either. Some politicians, as they walk across the stage of public life, promise that they will give a reaction to each and every law reform report, one way or the other, within a given time (usually six months). Yet when governments become busy with their own initiatives and distracted by political urgencies, the hard work of institutional law reformers is all too easily returned to the bottom drawer. Especially so, if the report is large and takes time to master. Smaller projects, on the other hand, get cast aside precisely because they are small – and therefore seen as unimportant, undeserving of parliamentary attention.

If a time and motion expert were to examine the political system as it now operates, in countries like Canada, the United Kingdom and Australia, they would surely identify a long list of serious and endemic institutional weaknesses and logjams:

- The fleeting encounter of citizens, as electors, with their own governance, is generally reduced to little more than a visit to an

⁴⁸ T Etherton, above n 28, 9, referring to *Legislative and Regulatory Reform Bill 2006* cl 3.

electoral booth every few years and then to considering passively the daily media and perhaps reacting through opinion polls in between elections;

- The dominance of the legislature by the Executive Government and the seduction of legislators by that dominance because of their own aspirations to join the dominant group;
- The increasing tendency of the head of government to prevail over the executive government; commonly a product of the way contemporary media presents political issues as focussed on the leader not the group;
- The increasing ability of media to impose its own priorities and agendas upon political discourse, within which priorities legal questions generally, and law reform in particular, have an extremely low, if not invisible, part to play;
- The declining role of mass political parties, now quite often funded, and therefore influenced, by large corporate donors in the place of the enthusiastic and idealistic party members of the past; and
- The severe filters through which democracy operates in the present age; the capacity of the majority sometimes to get their voice heard; and the frequent incapacity of minorities (especially unpopular or suspected minorities) to gain the attention of lawmakers in order to redress their perceived injustices.

It is because institutional law reform is a partial antidote to these weaknesses in Westminster democracy, as it is now practised, that we,

as citizens, and lawyers of Canada and Australia, need to sustain and support such bodies. It is because the decisions of courts, applying human rights norms, seek to stimulate and engage the political process, that such norms, in their different aspects, are so important in our societies. It is why, in my opinion, you are fortunate in Canada with your *Charter* and we, in Australia, still have a long journey to make in this regard.

The Olympian aspirations of forty, thirty and twenty years ago in institutional law reform have now given way, virtually everywhere, to more humble and modest expectations⁴⁹. This does not mean that law reform bodies are less important. They remain valuable institutions and particularly so because of the growing recognition of the weaknesses of our political law-making institutions as they now actually operate⁵⁰.

If institutional law reformers no longer think they can climb Olympus, still less Everest, they remain significant in practical ways. World-wide, about half of their proposals get implemented. That is a whole lot better than none. Moreover, permanent law reform bodies

⁴⁹ M D Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 *Australian Law Journal* 299 at 308.

⁵⁰ Lord Hailsham, "Elected Dictatorship" (1997) 30 *Parliamentary Affairs* 324; Paul Kelly, *Rethinking Australian Governance - The Howard Legacy*, Cunningham Lecture for the Academy of Social Sciences in Australia, 6 November 2004, in M D Kirby, above n 49 at 311.

keep the flame of ideas alight. They continue to nurture the notion that it is not beyond our institutions of government to provide effective regular mechanisms for reviewing, renewing and reforming the law. The flame of law reform affirms a central concept of the rule of law itself: legal renewal. As I repeatedly saw in Cambodia in work I did there for the United Nations, one of the greatest causes of corruption in the world is the absence of regular machinery to modernise and change the law to accord with contemporary values and needs. Where there is no law reform, corruption grows up because it may be the only way of getting things done.

With Sir Terence Etherton in Britain, we can say in Canada and in Australia⁵¹:

"The dream is not at all shattered. Its prospects are better than they have ever been, provided that the Government and Parliamentarians are prepared ... to take steps necessary to meet the challenges thrown up by the political and governmental changes since 1965. I believe that [we] will continue to play a vital role in the constitutional life of this country, and to be a beacon to other democracies throughout the world".

Thinking on Wilbur Bowker, Bill Hurlburt, Grant Hammond and all the many others who have laboured and still work in a cause of law reform here in Canada, thinking of their colleagues in Australia and elsewhere in the world, I pay this antipodean tribute to the contribution of

⁵¹ T Etherton, above n 28, 10.

institutional law reform. The fundamental aim is to make democracy and the rule of law more than a semi-empty fiction. Law reform today operates on a sometimes discouraging landscape. Yet it is because, in both our countries, the work of institutional law reform is so important for the actuality of the rule of law and real democratic accountability for the state of the law, that I have crossed the Ocean and the mountains to bring a message of praise and encouragement.

From its beginning, the Alberta Law Reform Institute has been unique. Unique in history; in organisation; in funding; in tripartite participation; and in the high level of its success and the implementation of its reports and recommendations. Law reformers should not be discouraged whatever the passing disappointments. By fine work they still afford an example to others, until, in due course, our societies recognise the serious institutional failings of our constitutional arrangements and take effective measures to repair those failings.

When that happens, our governmental institutions will provide better ways and means of reviewing the detailed nooks and crannies of the law and also examining law's broad canvas, so as to ensure that rules that are unjust, out of date, irrelevant, inadequate, over-complicated, unclear or mean-spirited, parochial and unkind can be changed and reformed in a systematic and not a chancy and haphazard way, as now. This is the dream of law reform. It is not an unreal dream. Nor is it an unreasonable dream. It is not the dreamers who have lost their senses. As citizens we have the right to insist that the dream

should become an actuality. We need more plain speaking and loud insistence. Law reform and respect for basic rights are not luxuries graciously granted by rulers to their grateful subjects. They are the precious entitlements of citizens who are entitled to insist on them and to enjoy their fruits.

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA, CANADA

MONDAY, 2 JUNE 2008

LAW REFORM - PAST, PRESENT, FUTURE

The Hon Justice Michael Kirby AC CMG