CHAPTER IV - LAW REFORM AGENCIES: GROUP TWO

This Chapter is subdivided into three parts. In the first part, the law reform agencies of Group Two (United States, Africa, Other Jurisdictions) are discussed. Secondly, there is a comparison with European Ministries of Justice. In the third part, some observations are made on particular topics which arise from the discussion of law reform agencies.

UNITED STATES

(1) American Law Institute

The American Law Institute\(^1\) was established in 1923 by members of the Association of American Law Schools, and its constitution declares its objects are "to promote the clarification and simplification of the law and its better adaptation to social needs, and to encourage and carry on scholarly and scientific legal work." It began to produce "restatements" of areas of the law, which could be viewed as authoritative sources, making it unnecessary for each individual researcher to induce a rule from the increasingly unwieldy mass of case material.

The restatements are more precise than civil law codes. The drafting committees come up with an agreed formulation of the principles and rules applicable to a particular area. The rules are mainly deduced from case-law, but can also be innovative and strike out in new directions. Examples of such reforming provisions are Sections 90 and 45 of the Restatement of Contracts.\(^2\)

Once a Restatement is eventually agreed, it is not adopted as a statute by any legislature, but can often be highly authoritative in court and is a useful research tool.

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\(^2\) Gray, ibid., p.120.
The Restatements have been criticised on various grounds. Farrar complains of their "excessive caution and their predominantly legalistic outlook".3 Vanderbilt says that the choice of subjects for the Restatements "reflects the preoccupation of the profession with private substantive law".4 Professor Lawrence Friedman is the most critical of all: He says that the drafters of the Restatements

took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones .... The Restatements were almost virgin of any notion that rules had social or economic consequences.... [The drafters] expended their enormous talents on an enterprise which, today, seems singularly fruitless. Incredibly, the work of restating (and rerestating) is still going on.5

Whitmore Gray believes that Friedman is "too severe",6 citing the example of the reforms brought about by the Restatement of Contracts as significant contributions to American law.7

(2) National Conference of Commissioners on Uniform State Laws

This Conference was formed in 1892 as a result of an initiative by the Alabama Bar Association and the American Bar Association.8 Its membership consists of several appointees from each state, and representatives from state legislative drafting bureaus are associate members. The major portion of its financial support comes from state appropriations. Commissioners receive no salary. The Conference meets annually for a convention of six days at which it considers legislation drafted by subcommittees. Legislation falls into two categories -- Uniform and Model Acts.

3 Farrar, supra n.1, p.94.
7 Ibid., pp.120-121.
Uniform Acts are promulgated in areas of law where the Conference feels that uniformity among the jurisdictions is desirable. Model Acts are drafted for areas of law where although there is no pressing need for uniformity, there seems to be a demand for legislation in a substantial number of states. Uniform acts are recommended for all jurisdictions to adopt. Model Acts are prepared merely for the convenience of such legislative bodies as may be interested.

The Conference has drafted over two hundred laws on a wide range of subjects. Many of its laws are projects of law reform rather than simple unification or harmonization. Its most significant undertaking has been the Uniform Commercial Code (UCC), a joint project with the American Law Institute. The Code was first drafted by Professor Karl Llewellyn, who left his mark on its structure, scope and methods. It has been adopted in all states, except only in part in Louisiana. Thus essentially the same rules apply today in all of the United States to sale, transactions involving negotiable instruments, cheques, warehouse receipts, bills of lading, certificates of deposit, etc.

Lawrence Friedman describes the UCC as "curiously old-fashioned", attacking strictly "legal" problems, with no real explorations of business needs or the interests of labour and the consumer. However, he concedes that later Model Acts (eg the Model Penal Code) were more sophisticated, the drafters being aware of the wider implications of their work. Gray believes that present efforts by the Commissioners are achieving a great deal of significant reform. For example, the vigorous opposition which the Model Probate Code encountered indicates that the

9 See the detailed chart of laws and their enactment given in National Conference of Commissioners on Uniform State Laws, 1985-86 Reference Book (1985); reproduced in Gray, supra n.1, pp.160-165.


11 Friedman, supra n.5, pp.581-582.

12 Ibid., p.583.
Commissioners have been willing to undertake reform in a sensitive area.\textsuperscript{13}

(3) State Agencies

In its comments for the survey, the Arkansas Code Revision Commission began by saying "Law reform in the United States is different from law reform in other countries ..." The ten United States replies to the survey illustrate this graphically. One difficulty is that the state agencies can differ so much from each other in powers, structure, size and effectiveness. Another is that it is uncertain which (if any) state bodies can be classed as law reform agencies. All members of the state agencies of the USA are part-time. Unlike agencies outside the USA, they tend to include elected officials from the legislature as part of their membership. Hurlburt explains that while this greatly assists the implementation of their proposals, such a membership structure is only suitable for agencies which deal with technical and non-controversial law; broader social questions are likely to prove divisive if elected officials are present.\textsuperscript{14} The state agencies are mainly concerned with technical law. Most of them limit their work to codification, compilation, recodification and recompilation of the statute law of their state.

Little has been written on the state agencies in the United States. There is no comparative study available. One interesting item discovered through correspondence with the Connecticut Law Revision Commission is an unpublished summary of Law Revision Commissions by Susan E. Goranson (hereinafter referred to as "the Goranson Report").\textsuperscript{15} Goranson and others examined state statutes and spoke with the National Conference of Commissioners on Uniform State Laws, etc., to determine which states have law revision commissions similar to Connecticut's.

\textsuperscript{13} Gray, supra n.1, p.157.

\textsuperscript{14} William H. Hurlburt, \textit{Law Reform Commissions in the United Kingdom, Australia and Canada} (Juriliber, Edmonton, Canada 1986), p.298.

\textsuperscript{15} The six-page report is dated July 30, 1987. The heading reads: Connecticut General Assembly: Joint Committee of Legislative Research; reference number 87-R-0550; To: Honourable John Larson; From: Office of Legislative Research -- Susan E. Goranson, Research Analyst; Re: Law Revision Commissions.
She came up with a total of 16 bodies. Goranson's criteria for inclusion of agencies in her list are unclear. There are reasons to believe that her list is not entirely satisfactory, including some agencies which should not have been included and excluding others which should have been included. However, her report serves as a useful structure for the examination of the state agencies. What is more, she had the advantage of examining the state statutes and talking to personnel from the agencies. Reservations as to her list will be expressed below in describing what is known of the agencies.

The Goranson Report conveniently groups fifteen of the agencies into four groups. Those four groups will now be examined in detail.

**Group A - New York and others**

For Group A, Goranson gives a brief description of the New York Law Revision Commission and adds that the agencies in California, New Jersey, Oregon and Washington are similar to New York's.

Even though the New York Law Revision Commission did not reply to the survey, information on its activities is not scarce as it is the oldest and best-known of the state agencies of the USA. It was established in 1934 as a result of Cardozo's call for a "Ministry of Justice... to watch the law in action, observe the manner of its functioning, and report the changes needed

16 Unfortunately, the statutes of the individual states of the U.S.A. are not available on LEXIS. The unavailability of these texts in Ireland has hampered investigation of the state agencies. For example, even basic facts such as the names of the agencies are uncertain. Goranson lists the statutes governing the agencies, but not their names. She provides a printed list of addresses of agencies responsible for statute and code revision, but it was not specifically prepared for her report and is of little assistance for many states, except as a means of making contact with the legislative agencies, hoping that mail will be conscientiously redirected.

when function is deranged.¹⁸ The Commission was created a few months after the establishment of the Law Revision Committee in England, but is not limited to topics referred to it. It can recommend any change to bring the law into harmony with modern conditions, but it deliberately stays away from matters of policy. It also confines itself to matters of substantive private law only. It prides itself on a high standard of independent research. For instance, it spent three years from 1954 to 1956, exclusively examining the Uniform Commercial Code and proposing modifications before it would be enacted in New York. Many of its modifications were later embodied in the 1957 Official Edition of the UCC.¹⁹ The LRC normally has about twenty to twenty-five projects being studied at one time, and submits about fifteen Bills a year. Members of the public are apparently entitled to attend public hearings on its proposals.²⁰ Like all the state agencies, its implementation rate is high. Of the 327 Bills recommended between 1935 and 1962, 243 were enacted into law.²¹

The statute governing the LRC²² establishes a Commission of five members appointed by the Governor and four ex officio members. The four ex officio members are the Chairmen of the Judiciary and Code Committees of the House and the Senate. At least two of the five appointed by the Governor must be members of New York law faculties and at least four of them must be attorneys admitted to practice in the New York courts. Thus, one non-lawyer may be appointed. However, by 1963, only one member had been appointed who had not been admitted to practice, and he was not a non-lawyer since he had a Columbia law degree.²³ The Commission has always

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¹⁸ Cardozo, 'A Ministry of Justice' (1921) 35 Harv. LR 113 at 114. Cardozo did not mean a Ministry of Justice of the continental European sort.

¹⁹ MacDonald (1963), supra n.17, p.452.

²⁰ MacDonald (1965), supra n.17, pp.14-15; (1963), supra n.17, p.437.

²¹ MacDonald (1965), supra n.17, p.10.


²³ MacDonald (1963), supra n.17, p.414, n.40. The member was Mr. Bruce Smith, member from
had its headquarters at Cornell Law School. Its members are paid $17,000 to $18,000 compensation for their part-time work. They are appointed for five-year terms, and there is a remarkable continuity of membership.\textsuperscript{24} In 1987, the Executive Director told Goranson that the LRC was staffed by five lawyers and three clerical staff. Two of the lawyers, the director and the associate attorney are full-time, while the other three lawyers are in a one or two year clerkship arrangement. There also is a position (vacant at the time) for a lawyer to do administrative and legislative liaison work. The Commission has several student interns who are not paid, but earn school credit. The budget of the LRC is not given. In 1963, it was $139,250.

The California Law Revision Commission is quite similar to the New York LRC. The Goranson Report points out that the major difference is that it must have its topics of study approved in advance by the legislature. Its statute\textsuperscript{25} establishes a Commission of ten members, seven appointed by the Governor with the advice and consent of the Senate, one Senate member, one Assembly member and the Legislative Counsel. Its budget is $525,000 (£308,800 sterling), which ranks tenth in Appendix 1. By December 1987, it had produced 212 reports and 92\% of them had been implemented in whole or in substantial part. At that time it had a calendar of 24 topics, ranging from Family Law to Evidence to Probate. However, it is currently concentrating exclusively on Probate.\textsuperscript{26}

In New Jersey, the Commission on Statutes was created in 1939 and replaced by the Law Revision and Bill Drafting Commission in 1944. This had two further changes of name, first becoming the Law Revision and Legislative Services Commission, and then the Legislative Ser-

\textsuperscript{24} In 1963, the average length of service of the members appointed by the Governor was ten years -- MacDonald (1963), supra n.17, p.443; From 1934 to 1984, the Commission had only seven different chairpersons -- Gentile, supra n.17, pp.105-106.


services Commission. In 1986, the law reform functions of the Legislative Services Commission were transferred to the New Jersey Law Revision Commission.27 The LRC has an unfettered initiative of projects. It was not funded or staffed until summer 1987 and its first report was due in February 1988. It has a part-time Chairman and eight part-time members. In December 1987, its budget was $400,000 (£235,000 sterling), but it was not yet fully staffed.

As regards Washington, a detailed reply to the survey was received from the Statute Law Committee, which is the body charged with technical changes for the sake of clarification and uniformity in publication. However, this is not a law reform agency by any definition, and the agency of interest is the Law Revision Commission established in 1982.28 The legislature has not appropriated funding for the LRC. As a result, only one proposal (recommending changes in the notary public statute) has been submitted since its creation. The Washington LRC exists primarily in name alone. As such, it hardly merits inclusion in the list of law reform agencies. However, for the sake of completeness, the address of the current Chairman is given in Appendix 3 below.29

No reply to the survey was received from Oregon. In 1982, Zaphirou referred to the Oregon Law Improvement Committee as an institution similar to the New York LRC.30 A survey was therefore sent to the "Oregon Law Improvement Committee" at the State Capitol. The agency is governed by Section 173.315 of Oregon Revised Statutes Annotated.

27 New Jersey Stat. Ann. Section 1: 12A-1 et seq. In reply to Question 20 of the survey, the Executive Director of the LRC indicated that he was enclosing a copy of the statute. However, the statute was not in fact received.

28 Revised Code of Washington, Chapter 1.30

29 The address of the Statute Law Committee is also given, as it is a more permanent means of contacting future Chairmen of the LRC.

30 George A. Zaphirou, 'Use of Comparative Law by the Legislator' (1982) 30 AJCL (Supp.) 71 at 85.
Group B - Vermont and others

This group includes Vermont, Georgia, Idaho, Indiana, South Dakota and Virginia. The Goranson Report only provides information about the Vermont Statutory Revision Commission. The Commission is governed by Vermont Statutes Annotated Title 1, Chapter 1. It consists of five members -- the Chief Justice of the Supreme Court or designee, the administrative judge or designee, the court administrator, and two persons appointed by the Governor. The Commission publishes the Vermont Statutes, including technical revisions. It also recommends revision of redundant or obsolete statutes. The only staff of the Commission is the Deputy Clerk of the Supreme Court. It is submitted that this Commission has less powers than are necessary to deserve to be classified as a law reform agency on any reasonable construction. Its address is included in Appendix 3 as a source of reference only.

The Goranson Report states that the other agencies in this group generally have broader technical revision authority. Replies to the survey were only received from Georgia and South Dakota, but it would seem that their powers are still not broad enough to allow them to be classed as law reform agencies.

No direct reply was received from the Georgia Code Revision Commission. As with Washington, a detailed reply was received from the Legislative Services Committee but certain facts are given for the Code Revision Commission. The CRC is governed by Title 28, Chapter 9 of Georgia Code Annotated (1986). It was established in 1977 and has 15 members. Its budget is $34,000 (£20,000 sterling). It is empowered, inter alia, to codify and recodify the laws of Georgia, and to effectuate Code Revision. In practice, its broadest function seems to be to “correct errors in the laws” 31

31 See Appendix 5 below, Georgia, covering letter.
The South Dakota Code Commission was established in 1966 and is currently governed by Chapter 2-16 of South Dakota Codified Laws 1985. It has powers of technical revision only, apart from a power to undertake substantive revisions which is not used.32

Presumably, the agencies of Idaho, Indiana and Virginia have similarly restricted powers. The Virginia Code Commission is governed by Section 9-77.4 of the Virginia Code. The titles of the agencies in Idaho and Indiana are uncertain, but they can probably be contacted at the addresses given in Appendix 3. They are governed by Section 73-201 of the Idaho Code and Section 2-5-1.1-10 of the Indiana Code Annotated respectively.

**Group C - Michigan only**

The Michigan Law Revision Commission was established in 1966, and is governed by Sections 4.1401-4.1403 of Michigan Compiled Laws. The Commission consists of four members appointed by the Legislative Council, four legislative members and an ex officio member of the Legislative Service Bureau. It initiates its own projects. Its functions are similar to those of the New York LRC, but it operates on a much smaller scale. It is located at the University of Michigan Law School, Ann Arbor.32a Its sole staff is an Executive Secretary (a Professor of Law) who conducts research one day a week. Its budget is $60,000 to $70,000 (£35,000 to £41,000 sterling). It has produced roughly 100 reports and roughly 75 of them have been enacted. The topics range from Revision of Grounds for Divorce (1970) to the Rule against Perpetuities (1986).

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32 The power to make substantive revisions is included in Section 2-16-10.1(2). In reply to Question 22 of the survey, the Code Commission said that it did not have the staff or the budget to make recommendations for revisions of law.

32a The University of Michigan also publishes the University of Michigan Journal of Law Reform. (This periodical was originally known as "Prospectus", until 1970).
Group D - Alabama and others

This group consists of the Alabama Law Institute, the Louisiana State Law Institute and the North Carolina General Statutes Commission.

The Louisiana State Law Institute was set up in 1938, four years after the New York LRC. It is located at the Louisiana State University, expressly "organized under authority of the Board of Supervisors" of that University and described as "an official advisory law revision commission, law reform agency and legal research agency of the State of Louisiana" (S.201). Its Council consists of 17 categories of ex officio members plus 31 elected members. In addition, it has a large general membership. Council members are not compensated for their work, but receive expenses for attendance at meetings. It has six full-time staff attorneys, including the Coordinator of Research, and its 1987-88 budget was $650,138 (£380,000 sterling).

The Institute can initiate its own projects, but the legislature, by concurrent resolution, may direct a report or special projects (as has been done for products liability and the Code of Evidence). Its functions (set out in S.204) are similar to those of the New York LRC. Louisiana is a "mixed" jurisdiction, whose laws have civil law and common law elements (see Chapter II above). The Institute must make available translations of civil law materials and provide materials for the better understanding of the civil law of Louisiana and the philosophy upon which it is based (S.204(7)). In reply to Question 14 of the survey, the Institute stated that it reviewed the law in other civil law jurisdictions throughout the world in making its proposals.

The Institute does not publish reports, but all its documents are public documents available upon request. (In addition, all its meetings are open to the public and representatives of special interest groups may participate in them, apart from any votes taken.) Its recommendations are

currently submitted as a draft Bill (Joint Rule 10, Rules of Order), and the reporter who coordinated the project will explain and defend it to the legislative committee which considers it. Occasionally, a special printed pamphlet is produced.\textsuperscript{34} The Institute's Biennial Reports list its Bills (and legislative action on them) for the legislative sessions under review. 80% to 90% of Bills are enacted. The Institute's major revisions have been the Louisiana Revised Statutes 1950, the Criminal Code 1942, the Code of Criminal Procedure 1966, the Code of Civil Procedure 1960, the Mineral Code 1974, the Trust Code 1964 and the Projet of the Constitution for Louisiana 1951.

Information on the Alabama Law Institute is supplied by the Goranson Report and by publications received in reply to the survey.\textsuperscript{35} It was created in 1967 (Act No.249) and commenced operations in 1969. It is now governed by Sections 28-9-1 to 29-8-5 of the Alabama Code. It basically adopted the same organisation and objectives as the Louisiana State Law Institute. It receives its projects form members of the Legislature, state government, from the Bar or may initiate the study itself. The Council of the Institute is composed of 19 categories of ex officio members and three categories of elected members (two elected from the faculty of the University of Alabama School of Law, two elected from the faculty of the Cumberland Law School of Samford University and 42 practising attorneys, six from each district in the state). The Institute also has a large general membership. It is staffed by two lawyers (the director and assistant director) and two clerical staff, and also uses law students as clerks. Its interim committees have sometimes included non-lawyers (e.g. in its studies of medicaid and child abuse).\textsuperscript{36} From 1975 to 1984, it


\textsuperscript{35} The Institute's Director, Mr. Bob McCurley, did not complete the questionnaire but instead forwarded the \textit{Handbook 1984} and the \textit{Report to the Alabama Legislature and Institute Membership 1986-87}. See also R.L. McCurley Jr., 'Alabama Law Institute' (1975) 36 Alabama Lawyer 398-402; L. Vastine Stabler, 'The Alabama Law Institute -- A Legal Adviser to the Legislature' (1969) 30 Alabama Lawyer 134.

\textsuperscript{36} \textit{Annual Report 1986-87}, p.8. See \textit{Alabama Project on Medicaid} (1977), \textit{Child Abuse and Neglect} (1978). Its study of medicaid became a national model, and was received by over forty states as well as the U.S. Department of Health and Human Services.
was responsible for twelve major revisions. In 1987, it presented five Bills to the legislature and had eight projects in progress. Detailed implementation rates are not available but the Director has said that the Legislature passed "every major completed project presented to it by the Institute".

As regards North Carolina, the North Carolina Commission for Improvement of Laws was created in 1931 (N.C. Laws 1931, ch.98) and abolished in 1943 (1943, ch.746). It was succeeded by the General Statutes Commission in 1945 (c.157), which was assigned the task of substantive law revision in 1951 (c.761). The Commission consists of 12 part-time members, appointed by deans of law schools (5), the Governor (2), the Speaker of the House of Representatives, the President of the Senate, the President of the State Bar, the President of the Bar Association and one by the Commission itself. The Commission has a staff of 2 and a half attorneys and one administrative/secretarial staff member. In reply to Question 18 of the survey, the Commission stated it had submitted 315 proposals to the legislature by December 1987. Approximately 254 of these had been implemented (127 in whole, 127 in part). The Biennial Report for 1985-87 lists 15 Bills enacted by the 1985 General Assembly as a result of Commission recommendations. At that time, the Commission's major projects in progress were Trusts, Condominium Statutes, the Non-profit Corporation Act and the Business Corporation Act.

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39 See now North Carolina General Statutes, Sections 164-12 to 164-19. Also article on General Statutes Commission at (1968) 46 N.C.L.Rev. 469.

Arkansas

The Goranson Report lists the Arkansas Code Revision Commission as an agency similar to the Connecticut LRC, but does not place it in any group and does not describe its activities. A completed questionnaire was received in May 1988, along with a lengthy page of comments. The Code Revision Commission was originally established as the Statutory Revision Commission in 1945 (Acts 1945, No.50) to revise and prepare the General Statutes of Arkansas. In 1955 (Act 246), it was empowered to recommend modifications or deletions of antiquated, inequitable or inconsistent rules. Various other amendments followed, and in 1987 (Act 334) its name became the Code Revision Commission. The Commission is currently governed by Sections 1-2-301 to 1-2-306 of the Arkansas Code of 1987 Annotated. It has six voting members (2 Deans of Law Schools, a representative of the Attorney General, 3 members of the Bar) and two non-voting observer members from the House and the Senate. It has a full-time Executive Director, four legal staff and three administrative/secretarial staff. In reply to Question 22, the Commission said that it has not yet done any "real revision" work as it has only just completed the first complete codification of the statute law in Arkansas. In reply to Question 18, it said that it had produced three reports/recommendations, all of which had been enacted. No explanation was given as to why this figure is so small. Perhaps the Commission only counted Bills it had introduced since 1987, when it received its new name.

One very interesting feature of the Commission's statute is that part of its funding comes from the Arkansas Code Revision Fund (set up by Act 651, 1983), which comes from a 25 cent levy on the costs of all civil cases and on criminal cases with a conviction or a plea of guilty (Section 1-2-306). The Commission's budget is $271,356 (£160,000 sterling).

41 See 'Statute Revision Commission' (1956) 9 Ark.LR 414.
Connecticut

As the Goranson Report was prepared in Connecticut, it does not place the Connecticut Law Revision Commission in any group. This Commission was established in 1974 (P.A. 74-132) and is currently governed by Chapter 22 of the Connecticut General Statutes. The Commission can have up to 17 part-time members. It has four full-time staff (an Executive Director, two staff attorneys and an administrative assistant) and a budget of $148,904 (£87,600 sterling) for salaries. By the end of 1986, it had submitted 59 proposals (12 technical revisions, 37 substantive revisions and 10 proposals concerning unconstitutional statutes.) By January 1988, this figure had risen to 69 proposals, of which approximately 36 had been enacted (reply to Question 18). This implementation rate is extremely low for a state agency of the U.S.A., and the Commission complains of the lack of responsiveness of the legislature in its reply to Question 22.

Other States

It has already been submitted that the Goranson Report lists some agencies which should not be classed as law reform agencies. For example, the powers of the Vermont Statutory Revision Commission are too narrow, and the Washington Law Revision Commission has not been funded. There is also some evidence that the Report omits some states which have agencies which could be classed as law reform agencies. That evidence is briefly set out below.

Firstly, it seems that Tennessee may have a "Law Revision Commission" of some sort. There are three references to such a Commission in law journals, and the mailing list of the Australian LRC includes "Law Reform Commission, Tennessee". This address is given in Appendix 3. A survey was sent there, but no reply was received.

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42 Reply to Question 4 of the survey. This contradicts Section 2-86 of the version of the statute received (which provides for eleven members), but presumably that version was slightly out-of-date.

43 Val Sanford, 'Work of the Law Revision Commission' (1964) 32 Tenn. LR 11 (The author was at that time Chairman of the Tennessee LRC, and stated that the LRC had "made no decisions as yet" -- p.13); D.J. Gifford, 'Report on Administrative Law to the Tennessee LRC' (1967) 20 Vanderbilt LR 777; Zaphirou, supra n.30, p.85.
Secondly, there is evidence that the District of Columbia may have a Law Revision Commission. One reference to such a body states that it was established on 21 August 1974 by P.L. 93-379 and is a Presidential Advisory Committee. A letter to the D.C. Office of General Counsel enquiring about this agency was not acknowledged. Another reference is found in Carolyn Gentile's 1984 speech on the occasion of the 50th anniversary of the New York LRC. She says that the New York LRC presented testimony before Congress which led to the creation of a reform commission in the District of Columbia. Further evidence of a Commission's existence, including a specific address, was found in an annual index to U.S.A. Government publications. A survey was sent to this address (see Appendix 3 below) but no reply was received.

Thirdly, the Texas Legislative Council appears to be engaged in a complete overhaul of the Texas laws, including substantive reforms preceded by hearings. Although the Legislative Council is said to be "supervised and directed by the Texas Legislature", more would need to be known about its structure before the possibility that it can be classed as a law reform agency could be discounted.

AFRICA

Only two African agencies (LRC of the Gambia and LRC of Tanzania) replied to the survey. It is difficult to find information about the African agencies, but eleven addresses are given in Appendix 3 and a brief summary is provided below of what is known of those eleven agencies, taking them in chronological order of their dates of establishment.


45 Gentile, supra n.17, p.114.


47 Appendix 5 below, Arkansas, Q.22 (Comments), para.3.
The Law Reform Commission of Ghana was established in 1968,\textsuperscript{48} issued its first Working Paper in 1969 and had issued 17 Reports to 1978.\textsuperscript{49} The Commission is obviously still active, as its Chairman addressed a Commonwealth conference in 1986.\textsuperscript{50} He reported that the Ghana LRC always consulted widely in the preparation of its reports, by placing advertisements, organising seminars and participating in radio discussions. The Commission was responsible for a new code of Evidence adopted in 1975 (Evidence Decree 1975, NRCD 323). In preparing the code, the LRC consulted the American Law Institute Model Code of Evidence, the Californian Code of Evidence, the Nigerian Evidence Ordinance and the Israel Evidence Act.

The South African Law Commission was established circa 1973/74,\textsuperscript{51} and has issued at least 19 Working Papers and dealt with at least 57 Projects.\textsuperscript{52}

The Zambian Law Development Commission was established by the Law Development Commission and Institute of Legislative Drafting Act 1974. An unusual feature of the Act is that it provides for the appointment of ten Commissioners, five legally qualified and five lay members.\textsuperscript{53} It issued its first Working Paper in 1976 and had issued two Discussion Papers, some


\textsuperscript{52} WP 19 is listed at [1988] Reform 112. Project 57 is listed at [1986] Reform 214.

\textsuperscript{53} 'Memorandum by the Zambian Law Development Commission on its Functions and Current Programme' in Commonwealth Secretariat, \textit{Law Reform in the Commonwealth: 1977 Meeting
Draft Bills and four Reports by the end of 1982. It was reported in 1983 that the Commission was seriously understaffed.


As regards Zimbabwe, the Advisory Committee on Law Reform issued its first Working Paper in 1981 and had issued three Working Papers and one Report by the end of 1982. In 1987, a Bill was introduced to create a new Law Development Commission.

Kenya's Law Reform Commission Act was passed and its first members were appointed in 1982. The Act provides for a Chairman and four other Commissioners (s.2(1)). That number may be increased by the appointment, on the recommendation of the Chairman, of additional Commissioners for specific projects (s.2(3)). Non-lawyers may not be appointed. The Attorney General can veto items in the LRC's programme (s.3). The Commission was still extant circa 1986/87.

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54 Commonwealth Secretariat, supra n.49, pp.118-9.


56 Commonwealth Secretariat, supra n.49, pp.99-100.

57 Ibid., p.120.

58 'Law Development Commission Bill 1987' (1987) 13 Cwth. L. Bull. 1382-3. In Appendix 3, the address of the Advisory Committee on Law Reform is given, as the address of the new Law Development Commission is not yet known.


The Law Reform Commission of the Gambia was established by the Law Reform Commission Act 1983 (No.3 of 1983). The Act is similar to the U.K. Act. The Commission has a full-time Chairman and four part-time members, two of whom need not be lawyers. At present, there is a sociologist member, Mrs. Safieyatou Singhateh. It has three research staff and seven other staff. The Commission prepares programmes for law reform and it may not prepare draft Bills on a topic unless the Attorney General and Minister of Justice (these offices are performed by one person) approves the topic. The Commission's answer to Question 10 of the survey must be read in this light.61

The Commission's budget of 221,800 Dalasis (£18,500 sterling) is extremely low, and it is supplemented by donations of equipment, etc. from the U.S. Embassy, the U.K. High Commission and the Ford Foundation. In answer to Question 18 of the survey, the Commission stated that it had produced 24 Reports. It is impossible to calculate an implementation rate due to the inadequacy of information in the Annual Reports.62 On 2 June 1987, the Commission inaugurated a project on the codification of customary law, with the assistance of an annual grant of $17,500 from the Ford Foundation.63

Although the Law Reform Commission of Tanzania Act was passed in 1980 (No.11), the first members of the LRC were not appointed until October 1983.64 The Commission is given a clear power to initiate projects itself (s.9). It may also prepare programmes (s.4(c)). Otherwise,

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61 The Attorney General and Minister of Justice's control over the LRC's programme can be seen by the fact that he could walk in and make a surprise visit to the members of the Commission on 11 June 1987, and "direct [them] on some future projects." During the meeting, he referred at least six new topics to them (Third "Annual" Report 1985-87 (1987), pp.15-16).

62 The first annual report was not received. The second annual report states that four bills and memoranda were submitted on 10 July 1985. In the third "annual" report, there is a confusing chart which for some reason includes two of the 1985 projects but excludes two others. It also adds that a report on the law of treason was noted in the 2nd annual report, but this is not so.


64 Salter and Ojwang, supra n.59.
the Attorney General may refer a specific question to it. Section 13 lists the matters the Commission must take into account in the performance of its functions, e.g. "the need for having in Tanzania laws which are in accord with, and which facilitate the policy of Ujamaa and Self-reliance", and "to promote and secure the decolonisation of the law of Tanzania by the refinement and adaptation of the customs, traditional values and beliefs of the people of Tanzania which are suitable for application in conjunction with modern progressive ideas."

The Commission currently has a full-time Chairman, one full-time Commissioner and five part-time Commissioners. Non-lawyers may be appointed (s.5(1)(e)). There is a legal staff of five, and fifteen other staff. The Commission had a budget of 5.2 million Tanzanian Shillings for 1987-88, i.e. £48,400 sterling. By April 1988, the Commission had issued three Working Papers and four Reports, two of which had been implemented in part. This is an extremely low output. The subjects of those documents are not known, except that one of them was a Discussion Paper on "Delays in the Disposal of Civil Suits". The Commission attributes its lack of activity to budgetary constraints and apathy amongst the legal profession and the public. In April 1988, it stated that it was "about to publish" the first issue of a Law Reform Bulletin.


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65 In reply to the survey, Mr. Pius Msweka was given Code "5" i.e. Sociologist. However, in the Third Annual Report 1985-86, p.3, he is referred to as "Principal Secretary, Prime Minister's Office".

66 This figure is obtained using an exchange rate of 112 T.Sh. to the pound, referred to as the "Middle Rate, 15 Sept. 1987" in Whitaker's Almanack 1988, p.81.

67 Reply to Q.22 of the survey (Appendix 5 below).

68 The evidence of its existence in 1983 is the listing of its address in Commonwealth Secretariat, supra n.49, p.92.

entitled *Review of Pre-1900 Statutes in Force in Nigeria: Applicable Laws* and twenty Working Papers on specific Acts.\(^{70}\)

The Law Reform Commission of Sierra Leone existed in 1983\(^ {71}\) and on 15 September 1984, its Chairman, Mr. Justice S.J. Foster, visited the LRC of the Gambia.\(^ {72}\) Little else is known of this agency.

The address of the Zanzibar Law Reform Commission was received from the Law Commission for England & Wales in reply to Question 21 of the survey. However, it is likely that the correct title of the agency is the Zanzibar Law Review Commission.\(^ {73}\) Little else is known of this agency.

**OTHER JURISDICTIONS**

Fourteen addresses of law reform agencies in other jurisdictions are given in Appendix 3. Only two jurisdictions under this heading (Hong Kong and Sri Lanka) returned completed questionnaires. Replies by letter were received from the Bahamas and from Antigua & Barbuda.\(^ {72a}\) Nothing is known of the agencies in five of the jurisdictions, apart from their addresses.\(^ {74}\) There fol-

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\(^{71}\) Commonwealth Secretariat, supra n.49, p.94.


\(^{73}\) In LRC of Tanzania, *Third Annual Report 1985-86*, p.10, it is reported that Mr. A. Borafia, Chairman of the Zanzibar Law Review Commission, visited the LRC of Tanzania on 21st April 1986.

\(^{72a}\) The reply from Antigua & Barbuda was that its Law Reform Advisory Committee "is at present non-functional", so the address is not given in Appendix 3. The letter, dated 27 July 1988, was from: Permanent Secretary, Ministry of Legal Affairs, Office of the Attorney General, St. John's, Antigua, W.I.

\(^{74}\) The jurisdictions are: Cyprus, Malaysia, Nepal, Pakistan and Tonga. (However, it is known that the Law Reform Committee of Tonga existed in 1983, except that no references had yet been made -- Commonwealth Secretariat, supra n.49, p.95.) The Bermuda Law Reform Committee is not listed as its reports are not published but are submitted direct to the Government (supra n.49, pp.41-42.)
allows a summary of what is known of the other nine agencies, taken in chronological order of their dates of establishment. Some information is then given about the Indonesian Law Development Centre (established 1974).

The first Law Commission of India was appointed in August 1955. It is not governed by any statute, but instead is reconstituted every few years by a cabinet decision. In the beginning, it had a mixture of full-time and part-time members, but it appears that the practice of having part-time members was discontinued in 1968. The Commissions have been mainly composed of retired justices of the Supreme Court and the High Courts. Academic lawyers have rarely been appointed. The average age of the Law Commissioners would be above 60 years. The only element of continuity to the L.C.I. is provided by the institution of the Member-Secretary. He/she and his/her five law officers prepare the draft reports. Its reports have dealt mainly with technical law. Successive commissioners have taken the view that law reform must be confined to lawyers' law.

Upendra Baxi is extremely critical of the Law Commission on several counts. He says that political considerations in its composition are clearly noticeable. He found that there was no systematic approach to data collection -- the reports give only the information that the Commission wishes to give and not all the information that it collects, whatever be its quality. The Commission's reports avoid any reference to scholarly literature by Indian jurists, the Commission feeling that it does not have much to learn from the academics, but that the latter may well be enlightened by the former's reports. He says that the Law Commission "assumes almost an oracular mission", some of its recommendations being of the "Do it because we say so" type. The Commission appears to support its proposals in a casual way. While some of its reports are of high quality, 77


76 Baxi, ibid., pp.266-7.

Baxi says others are based on half-hearted research and presentation in a clumsy manner.

The present members of the Law Commission were appointed on 1st September 1985 and the Commission has issued at least 115 reports. In 1982, Baxi found that 41% of reports had been legislatively implemented. The establishment of the Indian Law Institute in December 1956 has made available high-quality research on Indian law. This research is of assistance to the government in reforming the law, and presumably is useful to the Law Commission as well.

The Law Reform Committee of Jamaica was established before 1969, and had issued 55 reports by 1977. Interestingly, one of its reports (Report 19), studied the question of establishment of a Law Reform Commission in Jamaica, but no such Commission has been established (either the report decided against a Commission, or the government did not implement its recommendation to establish one).

The Law Commission of Sri Lanka (originally known as the Ceylon Law Commission) was established in 1969. It was reconstituted in 1978 and worked on 17 projects from 1979 to 1982. It must obtain Cabinet approval before it can work on a project. There is a specific section in its statute charging it to review the system of legal education in Sri Lanka in consultation

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78a Baxi, sura n.75, loc.cit. He lists the 77 Reports to the end of 1978, discards 18 for various reasons (which reasons are difficult to follow) and finds that of the 59 remaining, 25 had been implemented in whole or in part, 23 were not implemented and 11 still awaited publication. This statistic has not been included in Appendix 2 below, as it is out of date and as it does not allow two years for implementation.

79 Rajeev Dhavan, 'Legal Research in India: The Role of the Indian Law Institute' (1986) 34 AJCL 527. The Institute publishes the Journal of the Indian Law Institute, the Annual Survey of Indian Law, and an Index to Legal Periodicals.

80 Commonwealth Secretariat, supra n.49, pp.74-78. See also S.I. Miller, 'Development of Law Reform in Jamaica and Current Work of the Legal Reform Commission (sic)' in Commonwealth Secretariat, supra n.53, pp.211-235.


82 Commonwealth Secretariat, supra n.49, pp.94-95.
with the Council of Legal Education. It has a full-time Chairman, fourteen part-time Commissioners, three legal staff and fifteen other staff. Its budget is 1.6 million Sri Lankan Rupees (£36,300 sterling). In reply to the survey, the Commission stated that it had produced 15 Working Papers and 20 Reports. It stated that five Reports had been implemented (3 in full, 2 in part). (No implementation rate has been calculated due to the inadequacy of information available). The Commission now also publishes a Law Bulletin. In reply to Question 22 of the survey, it complained of a shortage of funds, shortage of staff and lack of professional training for research.

The Law Reform and Revision Commission of the Bahamas is governed by the Law Reform and Revision Act 1975. The Commission consists of lawyers only (s.3(2)) and has law reform functions almost identical to those of the U.K. Law Commissions (s.4). However, it is also under a duty to prepare revised editions of the statute law from time to time, a function which is similar to that of many of the U.S.A. agencies. The Act specifies in precise detail the Commission's role in this regard (sections 6 to 20). According to the Commonwealth Secretariat, the Commission worked on thirteen projects up to 1979.

The Law Reform Commission of Papua New Guinea produced its first Report in 1975. By the end of 1982, it had produced 16 "Occasional Papers", 17 Working Papers and 11 Reports. This Commission enjoys a special status, being mentioned in the Papua New Guinea constitution and having particular responsibility for adapting the inherited common law of England to

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83 This figure is obtained using an exchange rate of 41.70 Rs. to the pound, referred to as the "Middle Rate, 15 Sept. 1986" in *Whitaker's Almanack 1987*, p.81. (The Sri Lankan Rupee exchange rate is not given in the 1988 edition.)


84 Commonwealth Secretariat, supra n.49, p.41.


85a Papua New Guinea Constitution (1975), Sch. 2.13 and Sch. 2.14.
the common law and customary needs of the country.  

The Law Commission of Trinidad and Tobago also issued its first report in 1975. By the end of 1982, its work included 25 listings of various kinds, including unpublished Working Papers.  

The Law Reform Commission of Hong Kong was established in 1980 by an order of the Governor in Council. It has three ex officio members (the Attorney General, the Chief Justice and the Law Draftsman) and five lawyer members appointed by the Governor. The Governor also appoints two unofficial members of the Legislative or Executive Councils and two or more other members. The last two categories allow for the inclusion of non-lawyers as members. At present, there are five non-lawyers -- a sociologist, a paediatrician, a businessman and a commodity broker. All the members serve part-time. Research is carried out by the Secretariat of seven full-time staff (Secretary and six Assistants). There are five other staff.

References are received either from the Attorney General or from the Chief Justice. (Originally, references came from them jointly, but now each can make separate references). Topics for reference are normally suggested by the Secretary. The subjects range from contempt of court to insurance to laws governing homosexual conduct. The Commissioners meet only once a month for about one and a half hours. Subcommittees are appointed to deal with each reference, and a substantial proportion of non-lawyer members are appointed to these. These subcommittees consult as widely as resources will permit. The Commission has produced 23 Working Papers, 12 Working Paper/ Interim Reports and 13 Reports. Five reports have been implemented in full. It is not possible to calculate an implementation rate due to the inadequacy of information received.

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87 Commonwealth Secretariat, supra n.49, pp.95-6.

88 These are a Judge of the High Court or a Justice of Appeal, a member of the Hong Kong Bar Association, a member of the Hong Kong Law Society and two members of the Faculty of Law of Hong Kong University.
The Law Reform Commission of Fiji existed in 1982 and had already produced two discussion papers and two informal papers by the end of that year.\textsuperscript{90} Since then, it has produced at least nine reports.\textsuperscript{91} It is not known what effect the coup of September (CHECK) 1987 has had on the Commission.

The Law Revision Commission of Dominica was established in 1987 and its first Chairman is Mr. Francis Otho Coleridge Harris, QC. The Commission is to prepare, publish and maintain a revised edition of the written laws of Dominica in looseleaf form as well as reforming the laws found to be in need of reform.\textsuperscript{92}

Mention should also be made of the National Law Development Centre of Indonesia. In an article published in 1978, June S. Katz and Ronald S. Katz described this Centre in detail.\textsuperscript{93} It had a staff of 165 and a budget of $4.8 million per year. As part of its functions, it systematically prepared drafts of proposed laws for discussion and future implementation. It was established in 1974 with the same rank as a Directorate General within the Department of Justice. It is not known if this Centre still exists.

\textsuperscript{89} It is impossible to tell from the list of references given in Introduction to the LRC of Hong Kong (August 1987) when the Reports on references 1 and 6 were published. Therefore, an implementation rate allowing two years for implementation cannot be calculated.

\textsuperscript{90} Commonwealth Secretariat, supra n.49, p.72.

\textsuperscript{91} Reports 5 and 6 are listed at [1984] Reform 163; Reports 8 and 9 are listed at [1987] Reform 214.


COMPARISON WITH EUROPEAN MINISTRIES OF JUSTICE

In Chapter II, the preparation of legislation in civil law countries was examined and contrasted with the common law process. It is unnecessary to repeat here the descriptions given there of parliamentary committees, special commissions/committees, scrutiny by bodies such as the Conseil d'Etat, and drafting procedures in civil law countries. The present chapter and Chapter III concern law reform agencies, and it is submitted that the institution in civil law countries which is relevant for comparison is the ministry of justice. As was mentioned before, the ministries of justice in civil law countries were examined by Professor Andrew Martin when he was involved in the preparation of the U.K. Law Commissions Act. The 1965 Act, (and subsequent legislation in other common law jurisdictions), was inspired by the ministries of justice, not by other institutions of law reform in civil law countries. Hence, it is fitting in examining common law law reform agencies to offer some comparative observations on the civil law ministries of justice by which they were inspired.

The European ministries of justice cannot be classed as law reform agencies. Hurlburt has identified four distinctive characteristics of law reform commissions:

(1) They are separate from the ordinary machinery of government
(2) They are to some extent independent of government control
(3) They and their expert staffs are mostly or entirely composed of lawyers
(4) They are small in size, whether considered as legal institutions or in comparison with government institutions.

The ministries of justice do not satisfy these criteria. They are quite large and are composed of civil servants/administrators and lawyers. They are also part of the ordinary machinery of government and under government control. The lack of independence has been referred to by Pro-

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95 Farrar takes a different approach, barely mentioning the ministries of justice and focusing on the codification projects in France and Germany (Farrar, supra n.1, pp.97-102).

96 Hurlburt, supra n.14, p.454.
fessor Martin as the "price to pay in political terms" for the advantages of the ministries:

The judgement of officials can be overruled by the political head of the department concerned; in the last resort, it is for him to decide, on his own, or in consultation with ministerial colleagues, on what subjects, and when and how, the law is to be reformed.... [I]nitiatives are politically controlled by ministers. 97

For this reason, the Law Commissions were established outside the Civil Service. Professor Martin saw this as a step beyond the continental system. He mentioned it to senior officials of the five ministries of justice which he visited in 1964 and their reaction was uniformly positive. 98

Information on the operation of the European ministries of Justice is scarce. A letter to the French ministry of justice was not acknowledged. 99 A guide published by that ministry is of little assistance. 100 Professor Martin's summary of his visits to five of the ministries, although written in 1964, is the most useful item available.

Professor Martin emphasised three points about the situation in the ministries:

(1) There was a movement towards making law reform the concern of a specialised body bearing no responsibility for 'servicing' the courts and the other organs of the administration of justice
(2) Permanent and ad hoc committees had ceased to be the principal agencies of law reform
(3) The ministries of justice were responsible for making sure that legislation initiated in other departments would not run counter to the overall direction in which the legal system was intended to develop. 101

In France, he found that there were five Main Divisions ("Directions") in the Ministry of Justice, of which only two (Civil Law and Criminal Law) were concerned with the general law (including commercial law). 102 The other three departments were purely administrative depart-

98 Martin (1964), supra n.94, p.iv.
99 The letter, in French, was sent on 27 June 1988.
100 Ministère de la Justice, Guide Pratique de la Justice (Editions Gallimard, 1984).
101 Martin (1964), supra n.94, pp.iii-iv.
Decisions on law reform fell to be taken at one of three different levels:

(a) by the Minister and members of his "cabinet"
(b) by the Council of Ministers
(c) by a committee of the Council of Ministers, composed of the heads of the interested government departments.

Commissions and committees are appointed for major projects, but to research the details of reform only. Generally speaking, the decision as to whether and on what lines the law requires to be reformed will have been taken before any commission or committee is appointed.\textsuperscript{103} The personnel of the Department ("Administration Centrale") numbered 400, of whom 150 were members of the judiciary (including its prosecuting branch). Of the rest, the majority were non-professional executive and clerical officers, and only 10 or 20 were civil servants of the professional class. The principal safeguard against defects in the law was the expertise of the professional staff at the Ministry. However, the Ministry of Justice only kept "a watchful and expert eye" on civil and criminal law, the public law concerned with the administration of justice (including the legal profession) and questions of nationality. In the remaining vast fields of public and administrative law, the system relied on the expertises and watchfulness of officials in the immediately interested administrative departments. There was no Law Reform Card Index System as in Germany (see below), but it was possible that one would be installed in the near future.

Prof. Martin found that there were, in the Directorate of Civil Law, three distinct units designed to assist in the task of keeping the law constantly under review: The "Service du Fichier Central de Jurisprudence" kept an up-to-date record of case-law; the "Service de Législation Étrangère"\textsuperscript{104} collected and classified foreign material of general interest and the "5e Bureau: Ques-

\textsuperscript{102} The Guide (supra n.100) now lists six "Directions" at p.14.


\textsuperscript{104} See Chapter V below.
In West Germany, he found that the total staff of the Federal Ministry of Justice numbered 120 highly qualified lawyers and 280 executive and clerical officers. Approximately 30/40 lawyers and a corresponding number of executive and clerical officers were engaged exclusively on law reform projects. The Ministry was divided into five Main Divisions. The Administration Division was the least directly concerned with changes in the law, but it did collect the whole body of federal law for "Materielle Rechtsbereinigung" (ironing out of inconsistencies and weeding out of obsolete material). The Heads of the five Main Divisions were always available to act under the chairmanship of the Minister or the Permanent Under-Secretary. If ad hoc bodies were appointed, they merely worked out the details of a project. The decision as to the necessity of law reform would already have been taken. The merits would have been decided by the Government in advance. He said that the Germans started from the proposition that it is the government's business to discover defects and obsolescence in the law long before these had led to the piling up of unsatisfactory judicial or administrative decisions. The experts ("Referents") were expected to be familiar with particular segments of the law and all literature on the subject in law journals and in newspapers (press cuttings were supplied by the Press Section). The Ministry was starting to establish an automatic "early warning system". There was already in existence a Law Reform Card Index System ("Reform-Kartei") in the area of criminal law. Proposals for change in the law, and comments on Bills from all sources, were card-indexed.

105 These were: Administration; Civil Law and Procedure; Criminal Law and Procedure; Mercantile and Economic Law; and Public Law.

106 He contrasted this with the prevailing view in England, which was that only when dissatisfaction with the state of the law had led to a forceful demand for reform made by a large number of people and organisations was it proper for the government and Parliament to act (p.4).
In Sweden, he found that the Ministry of Justice was relatively small. It had two main divisions (Administration Division and Legal Division). The Legal Division had five sections. All government departments had a legal division of their own, with a highly qualified legal staff. The Swedish system of law reform relied to a very large extent on the work of committees. In April 1964 about 50 committees were actively at work. Major Bills went to the Law Council (see Chapter II) and certain Bills were referred to the Chancellor of Justice (one of Sweden's three Ombudsmen). The judiciary were consulted on many projects. There was also a Standing Committee on law revision ("Lagberedningen"). It consisted of a retired judge of the Supreme Court and two judges of Courts of Appeal. They served on a full-time basis and worked on one project at a time. Since 1960, the Committee had been engaged in preparing a complete overhaul of land law. There was no Law Reform Card Index System in operation, but it was considered unnecessary in such a small country. Review of the law was assisted by three Standing Joint Committees of both Houses of Parliament, which scrutinised the whole legal system every year.

Professor Martin also visited the Netherlands and Denmark. In the Netherlands, there was a permanent "Legislation Division" specially concerned with law reform attached to the Ministry of Justice. It was subdivided into a Private Law section and a Public Law section. The Division was headed by the Secretary-General himself and its principal officials had direct access to the Minister, a privilege not shared with any other Division. The staff all had high academic qualifications in law. There was an Advisory Committee on Civil Law which commented on Bills having an impact on general civil law. Each government department also had a legislative section of its own. There was no Law Reform Card Index System in operation, but it was not considered necessary. In Denmark, the Ministry of Justice had a special Legislation Division. The Division was

107 A more up-to-date summary of the work of the "drafting commissions" will be found in Dale, supra n.103, pp.98-99.

108 Every Minister had to present an annual report to Parliament and each such report had to pass through the appropriate standing committees. Thus, the whole legal system came under review every year (p.21).
very small, consisting of 6 senior legal officers and a secretarial pool. The planners of law reform were the three Chiefs of Section of the Legislation Division. Priorities were, to some extent, determined by the international planning done in the Nordic Council. The Legislation Division was also responsible for drafting. (90% of the 150 Government Bills introduced in 1962-63 had passed through the Division). Defects in the law came to light very quickly in a small country like the Netherlands. The Ombudsman and the Nordic Council were frequent sources of reform proposals.

**OBSERVATIONS**

Law reform agencies have always given rise to heated debates and discussions and will continue to do so in the future. Everyone has their own ideas as to what the law reform agencies should be doing. The diversity in the machinery of law reform created in different jurisdictions reflects the diversity of opinion as to the role of law reform agencies. It is appropriate to conclude the rather lengthy discussion of the world's law reform agencies which has been given in this chapter and the previous chapter by making some general observations on some of the most interesting topics.

Five specific topics have been selected:

(a) Lawyers' Law vs. Social-Policy Law
(b) Non-lawyer Members
(c) The Consultation Process
(d) Implementation Rates
(e) Finance

These topics will be briefly discussed below.

**(a) Lawyers' Law vs. Social-Policy Law**

Law Reform is often subdivided into two categories -- "lawyers' law" (alternatively, technical law, adjectival law, law with minimal policy considerations) and "social-policy law" (alternatively, political law, administrators' law, social-economic law). The existence of such a subdivision has been disputed by Lord Scarman in his forceful remark:

I challenge anyone to identify an issue of law reform so technical that it raises no
While Scarman's statement that all law embodies social policy is true,\textsuperscript{109} this does not mean that a lawyers' law/social-policy law distinction cannot be made. It simply means that the distinction must be made on some other basis. It is submitted that the subdivision can be made along the lines proposed by Hurlburt. He uses the term 'technical law' (i.e. lawyers' law) to denote law which society at any given moment leaves to lawyers and which is comparatively 'rule-bound' or which is 'encapsulated in propositions' in a system within which the law proceeds by propositional logic in its attempted achievement of social purpose.\textsuperscript{111} He uses the term 'social-policy law' to denote law which society at any given moment reserves for development by Parliament and by the ordinary machinery of government and which is comparatively free in its attempted achievement of social purpose.\textsuperscript{112}

He recognises that the distinction is artificial, misleading and subjective. However, some such distinction is necessary for an intelligible discussion of the law reform process.

The importance of this distinction is that there is much debate as to whether and to what extent law reform agencies may go beyond the boundaries of lawyers' law and examine questions of social-policy law. Certain writers believe that the agencies should confine themselves to technical legal issues and that they are not qualified to address areas of social-policy law. It is submitted that this is too narrow an approach. As Lord Wedderburn has said,

\begin{quote}
the Law Commissioners will operate best if they are allowed to take as panoramic a view as possible of the law, civil and criminal.\textsuperscript{113}
\end{quote}

\begin{footnotesize}

\textsuperscript{110} As Hurlburt says, even the rule against perpetuities embodies a profound social policy (supra n.14, p.11).

\textsuperscript{111} Hurlburt, supra n.14, p.13.

\textsuperscript{112} Ibid., loc. cit.

\textsuperscript{113} Wedderburn, 'Reflections on Law Reform', \textit{The Listener}, May 6 1965, 655 at 656.
\end{footnotesize}
Reference has already been made to Kirby’s view that it is precisely in areas of social controversy that a law reform commission can be of the greatest help to its government and to its public.\(^\text{114}\) Hurlburt emphasises that the law reform agencies are not decision-makers but are investigators, analysts and advisers.\(^\text{115}\) They are qualified to contribute to the resolution of social issues since they have resources of time and money, they are interested in ensuring that current law suits current conditions and they come from a profession which is used to trying to be objective. Provided they call attention to the value assumptions they have made and consult experts in other disciplines, they are entitled to investigate social-policy questions. However, they should avoid questions of partisan politics, chiefly because they would alienate large sections of the community and cause unnecessary hostility towards their work in general. For instance, the study of abortion laws would be dangerous as an agency would lose credibility with pro-life or pro-choice people.\(^\text{115a}\)

(b) Non-lawyer Members

As can be seen from the information above, only a minority of agencies have consistently had non-lawyer members. There has been a fair deal of scepticism in certain quarters as to the advisability of appointing such members. In 1971, Lord Scarman and Norman S. Marsh believed that the case for appointing laymen or members of other allied disciplines to a law reform agency is not yet made out.\(^\text{116}\) They said that the day-to-day work of a law reform agency is largely a research and drafting routine. The non-lawyers have to "play a waiting game" until the initial research is completed. After that, they have a "vital part to play" in the consultation process. Furthermore, they stated that the only constant factor in law reform was its legal character. Different non-lawyers would be need-

\(^{114}\) Above, Chapter III, Australia (1) Federal.

\(^{115}\) Hurlburt, supra n.14, p.466. See generally ibid., pp.461-469.

\(^{115a}\) It would seem, therefore, that the Canadian LRC is treading on dangerous ground in its current study of options for abortion policy reform.

ed to assist on different branches of the law.

Seventeen years later, these arguments have been disproved time and time again. In all the jurisdictions where non-lawyer members are regularly appointed, they have been extremely helpful at all stages of the law reform process. As Mr. Justice W.F. Ryan said:

There is a vital difference between taking an opinion from a consultant and continuously being reminded by a colleague who is not a lawyer of the forces other than law that affect legal change. What is significant is that a colleague, as colleague, is bringing to bear the insights of another discipline; or, to put it another way, issues are being placed in a broader frame of reference by a person who is not a lawyer but is to share responsibility for the decision to be taken. For this there is no substitute.\(^{117}\)

With respect, Scarman and Marsh missed the point of having a permanent non-legal presence on an agency. The non-lawyer members have caused their legal colleagues to question their own premises and attitudes more critically to see if they are justified. The lawyer members have had to use plainer language in explaining their conclusions.\(^ {118}\) As Hurlburt says,

There is force in the argument that lawyers live so close to the law that they miss obvious problems which the more detached view of a non-lawyer of good intelligence can perceive, and in the argument that it is precisely in the throes of decision making that that more detached view can make itself more effectively felt.\(^ {119}\)

As regards Scarman and Marsh's second argument (that different non-lawyers are needed to assist on different branches of the law), this has not been a problem in those agencies on which non-lawyers have served. Often, a non-lawyer will be appointed because his/her area of expertise is relevant to the current programme of the agency. However, his/her input remains of great assistance on all projects of the agency for the reasons given above.


\(^{118}\) Hurlburt, supra n.14, p.313.

\(^{119}\) Ibid., p.314.
There is a lot to be said for Hurlburt's view that two non-lawyer members should be the minimum in any law reform agency, if they are not to be overawed by the legal majority. He also argues that non-lawyers should remain in the minority in the agencies. However, it is submitted that it is dangerous for a lawyer to defend his own profession so strongly. There is no evidence that any harm would result from allowing agencies to consist of an equal proportion of lawyers and non-lawyers (as is required in the case of the Zambian Law Development Commission). Indeed, if this were to happen, law reform proposals could stand a better chance of being implemented and might also benefit from such a high input from the non-lawyers. The common assertion that "law reform is too important to be left to lawyers" is a warning which should not be ignored.

(c) The Consultation Process

Mention has already been made in Chapter III of disillusionment in Britain with the consultation process, particularly with lengthy working papers. It is submitted that the trend away from lengthy working papers is to be welcomed. It is usually more useful to produce a discussion paper of limited circulation and to involve as many interested persons as possible in subcommittees and seminars of various sorts. It is strange that the U.K. Law Commission has adhered to the working paper procedure. However, perhaps it is justified in so doing given its relatively vast resources and the large population for which it caters.

It is difficult to decide whether Australian-style public hearings should be used in other jurisdictions. Kirby certainly paints a glowing picture of their usefulness and their value. On the other hand, critics have found them to be largely a waste of time and energy, yielding few arguments of interest. Since the hearings appear to be working in Australia, what is needed is for delegates from outside Australia to observe at first hand how those hearings are organised and how they function. Then, an attempt should be made to stage similar hearings in those other jurisdictions.

So far, other countries have only dabbled in the area of public hearings. It would be interesting to see a conscious effort on their part to reach the individual members of the public who will be most affected by their decisions.

**(d) Implementation Rates**

In discussing implementation rates, it is well to remember that the implementation rate is not the sole criterion of success of a law reform agency. Firstly, an agency can have an important influence on the legal system without actually getting many of its reports implemented. Secondly, its reports which are implemented may be far more important than the unimplemented ones. Thirdly, a low implementation rate may be due to the fact that the agency's suggestions are way ahead of its time.

A problem which often arises is whether law reform agencies should formulate proposals bearing in mind their prospects of implementation. On the one hand, some believe that an agency should suggest what it considers to be the most suitable solution to a problem of law reform, regardless of whether it would ever be implemented by any government or legislature. On the other hand, there are those who say that it is better to offer three quarters of a loaf which can be eaten than to offer a whole loaf and in fact starve.\(^{121}\) One solution to this problem is for the agency to propose an ideal solution and also offer alternative solutions in case the ideal solution is not adopted.

Appendix 2 is a comparative table of implementation rates of 11 law reform agencies. The U.S.A. agencies have not been included, and it was not possible to calculate rates for many of the other agencies. The implementation rates vary enormously, from 94% in the case of Scotland to 30% in the case of Ireland.

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\(^{121}\) The analogy comes from Peter North, 'Law Reform: Processes and Problems' (1985) 101 LQR 338 at 348.
There has been concern in all jurisdictions (even those with high implementation rates) as to why certain reports remain unimplemented. That concern is aggravated when agencies find that their reports do not receive any response, good or bad, from the government. As Hurlburt says:

The greatest problem of machinery is the lack of linkage to the machinery of governments and legislatures, the lack of gearing mechanisms.122

Hurlburt suggests five possible improvements to facilitate implementation of law reform agency reports.123 Firstly, the agencies could be given some form of delegated legislative power. Secondly, law reform proposals could be processed by standing committees of legislatures. Thirdly, several law reform proposals could be included in one omnibus Bill. Fourthly, perhaps a government should be required to respond to a law reform commission’s proposal within a prescribed period of time. Fifthly, the device of the private members’ Bill could be used. Hurlburt concludes that the second option is the most promising. It is interesting in the Irish context that Mr. Justice Keane has come to a similar conclusion but the Taoiseach is against such a measure.

(e) Finances

Appendix 1 is a comparative table of the annual budgets of 25 of the world’s law reform agencies. The budgets range from CAN$4,799,000 (\stg 2,323,500 sterling) in the case of the LRC of Canada to 221,800 Dalasis (£18,500 sterling) in the case of the LRC of the Gambia. Kirby has referred to the lack of resources as the second of the "seven deadly constraints" on law reform.124 By way of contrast, Hurlburt believes that there is no need for a substantial augmentation of resources of law reform agencies as there are limitations implicit in the law reform process which would restrict at least the larger commissions from increasing their size indefinitely.125

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122 Hurlburt, supra n.14, p.488.
123 Ibid., pp.389ff.
124 Kirby, supra n.86, p.13.
125 Hurlburt, supra n.14, p.459.
Some agencies in Canada and Australia have increased their resources by funding from Law Foundations, which are themselves funded by the interest paid on lawyers' mixed trust accounts. It is suggested that such a practice might usefully be followed in other jurisdictions too. Another idea worth considering is Arkansas's Code Revision Fund, whereby 25 cents is levied on all legal costs.

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