Recent years have witnessed a surge of activity in the field of law reform, a phenomenon paralleled by the rise of interest in the social sciences and accompanied by a greater realization on the part of the public that institutions and systems can be changed to suit its needs. The new urge to reform has taken advantage of the tendency, first apparent in the late nineteenth century, for legislation to regulate ever greater areas of human behaviour, with the result that the scope of law reform is wider than ever before. The rise in interest and a change in emphasis in law reform is especially marked in the Commonwealth countries. In the United States, on the other hand, new law reform commissions have been set up but, by and large, they have followed in the traditional pattern of American law reform agencies and have based themselves on New York's Law Revision Commission. In some American states and, more particularly, in France, law reform has centred on revision of codes and thus the problems encountered and the methods used are different to those employed in countries where the law is largely uncodified. French revision of the Code Napoleon has progressed slowly because the task is enormous and has been neglected for too long. With the successful completion of the Code Napoleon the French gave no thought to the technique of reform until faced, a century later, by the overwhelming success of the new German Civil Code. The French, even now, have not learned that code revision can only practicably be undertaken by a permanent revision commission working continuously on the code.

*Ruth L. Deech, of the Faculty of Law, University of Windsor, Ontario.

1 The Code Reform Commissions have completed drafts on private international law, the family and matrimonial regimes, an introduction to the civil code and a part on succession. A new law of matrimonial property was enacted on July 13th, 1965. A new company law was enacted in 1966. Partial reforms have been made to the code of criminal procedure.
The shift in emphasis referred to above is apparent in the attention now given to the method of reform as well as to the content. A deliberate, scientific approach to law reform is not a new idea: it has been urged, certainly in England, for a century and a half. The eventual wide acceptance of the idea that there should be a long term programme of continuous law reform and that it should be carried out by a permanent commission of experts has come about in the mid-twentieth century for one of two reasons. It may be that the setting up of law reform commissions is a result of a definite shifting of the responsibility for law reform from the judges to the legislature. Alternatively, it may be that the creation of law reform commissions is simply the eventual success of the efforts which have long been made to assist Parliament without depriving the judges of their rôle in law reform, even though the limitations to judge-made law reform have been recognised. In any case, the creation of law reform commissions is attributable to a happy combination of individuals and circumstances.

It is proposed to examine four of the most recently-established commissions in order to clarify the differences between them and the reasons for such differences. The success of the New York formula has obscured the fact that there are other equally successful types of law reform commission. A study of the factors affecting the nature of the law reform agency chosen by any particular state may assist future reformers to realize that there is a choice of method and to pick the kind of commission best suited to the state.

I. England.

The idea of a permanent law reform commission is of respectable antiquity. Indeed, the history of the attempts to systematize law reform in England shows that the present Law Commissions do not signify the final handing over to Parliament of responsibility for reform; their creation and their structure are the outcome of past failures. The forces which shaped the British Law Commissions are those of past years and the historical evolution is plain to see in the details of their organization.

During the Commonwealth period a law reform committee made proposals for reform. It was a temporary committee, but it was headed by the future Chief Justice, Matthew Hale, and sat for five years (1652-1657). As has come to be expected of

---

today's committees, no action was taken on its many and varied recommendations. In the nineteenth century, in keeping with the developments in the technique of government, the call was more often for a Ministry of Justice than for a permanent commission of experts to reform the law. John Austin, however, was one of the first to be aware of the need for a standing Law Commission, whose main function would be to create a Code and keep it up to date. Lord Cranworth (Lord Chancellor 1852-1858, 1865-1866) was deeply concerned with methods of revising the law and in that sense was a decidedly progressive Lord Chancellor. In 1853 he wrote to the Chancellor of the Exchequer to suggest the appointment of five law commissioners who would be responsible for drawing up a "Code Victoria" of English law. This plan fell through, but Lord Cranworth might have been consoled by the comparative success of his plan for statute law revision, which was carried out by a commission.

The views of Lord Westbury (Lord Chancellor 1861-1865) are particularly interesting in their foreshadowing of the close relationship, in terms of function, that can now be seen between a Ministry of Justice and a law reform commission. In a speech to the Juridical Society in 1859 the future Lord Chancellor urged the appointment of a body to collect judicial statistics, to test the law for defects, to make suggestions for reform and to express in compact form the results of case law. In 1863, in his speech on the Statute Revision Bill of that year, Lord Westbury amplified his ideas and, in terminology at least, seemed to turn away from the concept of a law reform commission to that of a Ministry of Justice. He urged the creation of a Department of Justice to be composed of young barristers working, under the supervision of distinguished lawyers, on a digest of the law with a view to eventual codification; he envisaged an annual revision of reported cases in order to determine which ones were to retain binding authority. The proposed Department was also to superintend the courts and public prosecutions. With the exception of this last-mentioned requirement, it seems from his speeches that Lord Westbury had in mind a body more closely akin to what we today call a law reform commission than to a department of government under a minister. His seeming confusion of the two remedies for

---

5 Hansard (3rd ser.), vol. 171, col. 775.
bad law was echoed sixty years later by Benjamin Cardozo in his 1921 speech on a Ministry of Justice⁶ and in the 1934 Report preceding the establishment of the New York Law Revision Commission.⁷ The realization that either a Ministry of Justice or a law reform commission could equally well solve the problems of law reform persisted in England without a clear decision being taken in one direction or another until the rejection of the Haldane Committee’s recommendation of a Ministry in 1918.⁸ While the simultaneous existence of the two institutions is possible and often desirable, it is bound to result in some overlapping of functions and extra complexity of procedure, as is shown by the case of New Zealand.

After 1918 English proposals, at first rather unspecific, were directed rather to the establishment of a pure law reform commission. After the end of the second world war the proposals became more detailed. In 1951 for example, it was suggested that there should be Commissioners of the Great Seal over whom the Lord Chancellor would exercise supervisory powers; one of the Commissioners would have a seat in the House of Commons.⁹ In 1952 Professor A. L. Goodhart suggested a permanent official and staff within the Lord Chancellor’s Office to deal with law reform.¹⁰ In 1953 the future Lord Gardiner called for the appointment of a Vice-Chancellor in the House of Commons with a permanent secretary and staff to deal with law reform.¹¹

The most significant proposals appeared in Law Reform NOW¹² in 1963. The weaknesses of the existing machinery were described and it was suggested that it be replaced by a unit within the Lord Chancellor’s Office which would undertake codification. The proposed unit was to be headed by a Vice-Chancellor with the rank of Minister of State and a seat in the House of Commons,
presiding over a committee of five full-time salaried commissioners. The commissioners were to be appointed for terms of at least three years and would have an independence and position comparable to those of the chairmen and members of a statutory tribunal exercising quasi-judicial functions. The duties of the proposed Law Commissioners would be the reform of the general law and the statute law that did not already fall within the province of a government department; the consideration of judicial comments on the state of the law, and of concrete proposals coming from representative organizations of industry, commerce, the professions, voluntary organizations, the universities, writers and the press. The planning and research would be concentrated in the Lord Chancellor’s Office and the assistance of draftsmen would be made available.

Fortunately for law reform, Gerald Gardiner, an editor of Law Reform NOW and the most influential and diligent law reformer of his generation, became Lord Chancellor in 1964 and was thus in a position to implement his ideas. However, the English Law Commission, as established by the Law Commissions Act of 1965, does not entirely follow the outline drawn by Lord Gardiner and his co-editor, Andrew Martin, in 1963. To mention only a few differences: terms of appointment are of five years’ duration; the permanent law reform committees continue to function; and, most important, the Commission has no representative in Parliament and is entirely separate from any government department.

Two factors explain this final direction of the English Law Commission: one is the relation of the judges to law reform, and the other the defects of the existing permanent law reform committees.

It had been thought in recent years that judges should—if they had not already done so—abandon their law making powers to the legislature, as the representative and competent body. According to Lord Devlin, for example,

Parliament has of its own volition superseded judges as lawmakers and the judges have accepted the subordination.13

Even Lord Denning suggested, during the debate on the Law Commissions Bill, that those judges who had hitherto attempted to fill the gaps in the law would finally have to accept that their

function is to declare the law and to refer defects to the Law Commission. At the same time there has been a trend, since the office of Lord Kilmuir (Lord Chancellor 1954-1962) towards giving the courts more responsibility. Optimism concerning the part to be played by judges in the solution of today's problems has been justified, for the creation of the Law Commission seems to have stimulated judicial activism. Some recent creative decisions of the House of Lords, especially in the field of administrative law, seem to herald a new era of vigorous judicial lawmaking. Most striking of all is the 1966 modification of the rigidity of *stare decisis* in the House. This relaxation of precedent will enable the House of Lords to make allowance for Law Commission thinking in its judgments and could be of the greatest assistance in avoiding the danger that a particular area of law reform may become subject to two different influences — that of the House of Lords and that of the Law Commission. Thus it seems that judicial lawmaking will not necessarily be thrust into the background but will co-operate as an equal partner with the Law Commission and the efforts of Parliament in the law reforming process. In view of these possibilities it was clearly vital from the start to ensure good relations between the judges and the Law Commission.

This need probably explains the absence of any link with Parliament in the constitution of the Law Commission and the fact that it is chaired by a judge. The outward appearance of absolute judicial independence, as well as the reality, has always been of the utmost importance in England. Undoubtedly the likelihood of judicial co-operation would have been reduced if the Law Commission had included a Member of Parliament, because of the seeming impropriety. Recognising the value of judicial co-operation in the work of the Law Commission, the framers of the Act took steps to provide a positive link between judicial law making on the one hand, and Parliament and the Law Commission on the other, by appointing a judicial chairman. And it seems that the presence of a judge in the chair attracts the confidence of the judiciary. In this way the advantages obtained by the presence of a judicial chairman were paid for by abandoning the legislative and political advantages of having a spokesman of high rank in the legislature attached to the Commission.

The second factor which influenced the details of the constitu-

14 House of Lords Debs., vol. 264, col. 1212.
tion of the Law Commission was the weakness of the existing machinery of law reform. The traditional source of reform has been the findings of a Royal Commission; the major measures of reform in England in the last 150 years have been based on the reports of a Commission or of a committee. In pre-Law Commission days Royal Commissions were the only bodies which were able to do more than just scratch the surface of a topic; in addition the prestige of a Royal Commission inquiry was of assistance in the passage of a measure. But despite a comparatively high success rate in terms of resulting legislation Royal Commissions have been criticized for their defective procedure. The editors of Law Reform NOW stated that the ground covered by Royal Commissions in the fifteen years following the end of the second world war was far too small in relation to all the reform needed. In the last analysis, they said, the Commissions that had reported since the end of the war had effected not one single fundamental change in the system of substantive law.\textsuperscript{17} In the first place the delay inherent in the deliberate procedure of a Royal Commission was a factor to be avoided, if possible, in the construction of a Law Commission. There has grown up a popular belief that the appointment of a Royal Commission is a delaying tactic, designed to ensure that the topic under consideration will never be acted upon. Indeed this may be the indirect result of the deliberations of a Royal Commission, since the delay in action often results in time for the opponents of the proposed reform to band together while the reformers become divided in their aims. On the other hand, speed is the enemy of good law reform, and thus a system of rapid but thorough investigation needed to be designed for the Law Commission. An obvious improvement in procedure that could be made was the establishment of a permanent secretariat for the Law Commission, instead of building up a secretariat for each Royal Commission anew. Again, Royal Commission techniques of inquiry left room for improvement. The standard practice was for a Royal Commission to announce in the press that it was prepared to receive evidence and, in addition, to invite memoranda from interested persons and organizations. A Royal Commission also receives oral evidence and may employ research workers to make in depth investigations. The findings and proposals of the Royal Commission are kept secret until the publica-

\textsuperscript{17} Op. cit., footnote 12, p. 4. This statement is too sweeping in view of the Acts resulting from the recommendations contained in the Report of the Royal Commission on Marriage and Divorce (1956), Cmd. 9678, to give but one example.
tion of the Report. The defects in the inquiry procedure are that the witnesses have little idea of the sort of evidence required by the Commission and thus give broad opinions rather than being able to direct themselves to specific knotty problems. In addition, the secrecy attaching to the findings of a Royal Commission deprives it of the advantages of public and professional discussion of its tentative ideas. Public feeling can only manifest itself constructively after publication of the Report and this results in a Report being more controversial and less practicable than it need be.

In consequence the Law Commissions Act was so drafted as to leave the choice of procedure open to the Commissioners and the procedure they have developed has avoided many of the previous drawbacks. The remedy is quite simple: it is the use of Working Papers, issued as soon as the Commission has completed its first round of research into a given topic and setting forth the Commission's provisional conclusions. The recipients of the Working Paper, often running into the hundreds, include the press, the profession, the judiciary, interested organizations and any person who requests a copy, and are invited to address themselves to the provisional conclusions but are not confined to the problems that are there revealed. In this way public and professional opinion may be canvassed at an early stage, the opposition assessed and taken into account and specific problems highlighted for more constructive comment and further research.

The other predecessors of the Law Commission, whose defects were instructive, are the permanent law reform committees, namely, the Law Reform Committee, established by Lord Simonds in 1952 as a successor to the 1934 Law Revision Committee; the Criminal Law Revision Committee, established by the Home Secretary in 1959; and the Lord Chancellor's Private International Law Committee, instituted in 1952. The Law Revision Committee was the first of the series and was a model for similar committees in other countries. However, some obstacles to efficient reform were inherent in its constitution. The terms of reference of the Committee were:

... to consider how far, having regard to statute law and judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions.

This meant that the initiative lay with the Lord Chancellor of the day, who could stifle the Committee by his failure to refer topics.
Lord Sankey gave the Committee seven topics in its first year, Lord Hailsham, his successor, gave it two topics in three years. The work proceeded at intervals, for the committee members, who were representative of the different branches of the legal profession, all had their careers to attend to. There were no research facilities, so the Committee could only deal lightly with a topic. Despite the drawbacks, a certain amount of useful legislation did result from its efforts. The revival of this method of law reform in 1952 resulted in the establishment of the Law Reform Committee, whose terms of reference, excluding statute law, were even more narrow than those of the Law Revision Committee. The nature and scope of the topics to be considered still depended on the Lord Chancellor although in practice the Committee takes considerable initiative. There are still no facilities for research but the use of sub-committees is now sanctioned. The members are as distinguished as their predecessors on the Law Revision Committee and thus have as little time to spare for law reform work. The Criminal Law Revision Committee and the Private International Law Committee are similar in constitution but more confined in scope; the latter’s work is closely bound up with the work of the Hague Conference. The committees have this in common: their constitutions are such that no amount of expansion could meet the need for adequate law reform machinery. Most

---

18 For details of action taken on permanent committee reports to 1961, see E. C. S. Wade, The Machinery of Law Reform (1961), 24 Mod. L. Rev. 3, at p. 10. More recent Reports of the Law Reform Committee and resulting enactments are:

<table>
<thead>
<tr>
<th>Report</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>11. Loss of Services (1963), Cmd. 2017</td>
<td></td>
</tr>
<tr>
<td>12. Transfer of Title to Chattels (1966), Cmd. 2958</td>
<td></td>
</tr>
<tr>
<td>14. Acquisition of Easements and Profits by Prescription (1966), Cmd. 3100</td>
<td></td>
</tr>
</tbody>
</table>
serious of all, none of these committees could evolve a long term plan; they worked independently of each other, they were composed of busy part-timers and they did not have any assurance that their work would not be ignored by the Government.  

In this way the requirements for a successful Law Commission became plain. Accordingly the Law Commissions Act 1965 provides for five-year appointments to the Commission and eligibility for reappointment, thus encouraging long term planning and the codification of the laws. The commissioners are full-time reformers with sufficient legal assistants, research facilities and supporting staff. Significantly, the statute does not require the inclusion of a layman nor does it require the commissioners to be representative of the different branches of the legal profession, and this reveals an English point of view concerning law reformers, one not shared by many other countries. This seems to be that lawyers, and lawyers alone, are the persons best equipped to deal with the technicalities of law reform and that consultation with outside experts can be relied upon to achieve an overall opinion. In addition, the criterion for selecting a commissioner should always be his outstanding qualifications and not his leadership of any branch of the profession; moreover, non-representative commissioners may be more radical and more easily agreed in their proposals because they do not feel bound to represent the interests of their own branch of the profession.

Subject to the Lord Chancellor's approval of the programme, the Commission has the initiative in choosing projects for reform. The Annual Report is laid before Parliament and the Commission's findings are published, but, like its predecessors, the Commission has no pathway to legislative success other than the Government's goodwill, for, as explained above, it has no member-spokesman in Parliament. The price paid for securing the absolute independence and co-operation of the judiciary may yet prove too steep. In four years of existence the legislative results have been scarce but an impressive amount of research has been undertaken and good relations established with all branches of the legal profession. Yet the services of the Private Member are still invaluable and the Law Commission's long term programme may run counter

---

Only three of the enactments resulting from the Law Reform Committee's work were Government Bills, the remainder were Private Members' Bills. Half of the Criminal Law Revision Committee's enactments were Government Bills introduced in the House of Lords; the fact that this Committee is attached to the Home Office probably explains its good fortune.
Contrary to expectation, permanent committees still survive to do a useful job, for there can never be too many bodies researching law reform problems, while at the same time some topics are more suited to investigation by a body other than the Law Commission.

It is plain that the structure of the English Law Commission has developed from history, tradition and lessons learned from the failure of previous attempts. It owes little or nothing to the New York model, and, in its turn, is not necessarily the best model for other countries. Whether it is even the best model for England has yet to be proved. It may be that a Vice-Chancellor who is both a member of the Government and a member of the Commission is still needed to give the Commission's work the support and the place in the Government's legislative timetable that it deserves. If such an official could be found, would it still be possible to retain the active co-operation of the judiciary as advisers and as members of the Commission? The question would present itself on an even more acute basis if a Minister of Justice were ever to take charge of law reform in England. The present trend of thinking in England seems to be that judges and Members of Parliament (or a Minister of Justice) could not act side by side in a law reform commission lest the judges seem to be involved in politics. These fears are probably ill-founded. In the first place judges and members of legislatures do act together on several law reform commissions without any loss of judicial independence, for example on the Louisiana State Law Institute and the Chief Justice's Law Reform Committee in Victoria, Australia. In any case, by virtue of the Parliamentary process, politicians already have the last word concerning the results of law reform proposals and this has not deterred judges from becoming involved in the formulation of proposals. If the Law Commission were to include legislators in its membership it is likely that the involvement would amount to no more than advice on political feasibility and the rendering of assistance in Parliament; it could not be thought that judicial independence would be threatened by this procedure.

II. New Zealand.

New Zealand has had a long and distinguished history of pioneer-

---

20 Some would have preferred the Divorce Reform Bill of 1968-9 to have been introduced after completion of the Law Commission's investigations of Financial Relief and Matrimonial Property (still pending in early 1969).

ing law reforms and for that reason alone its present machinery would be worth examination. Moreover, the recently established New Zealand Law Revision Commission is interesting as a model of a law reform commission functioning side by side with a Ministry of Justice in a common law country. The problems of New Zealand law were akin to those of English law and New Zealand at one time adopted a similar solution to that adopted in England, namely, the creation of the Law Revision Committee of 1937, modelled on the English counterpart of 1934. Yet today New Zealand stands far away from England in her answer to the problems of law reform and the main divergences between the New Zealand Commission and the English Commission seem to stem from the existence of the New Zealand Department of Justice.

The Department of Justice pre-dated the Law Revision Committee, having been established in 1873. It had been established at the start of the “golden age” of New Zealand law reform but played little part in reform until the creation of the Law Revision Committee, when the Under-Secretary for Justice was appointed advisory officer to the Committee. Subsequently an advisory section was developed within the Department to work with the Committee.²² Throughout its lifetime the Committee remained representative of the different branches of the legal profession but from the start the judiciary, by its own choice, was not represented on the Committee. If a member of the Committee was elevated to the Bench, he would cease to attend Committee meetings. However, over the years more political members were added to the Committee and by 1965 it included the Minister of Justice, the Chairman of the Statutes Revision Committee in Parliament, one member of the Opposition, the Solicitor-General and the Secretary for Justice. Clearly the presence of political members and the connexion with and assistance of the Department of Justice had been found to be of the greatest value. This opinion is borne out not only by the numerous successful legislative changes which resulted from the Committee’s work²³ but also by the considered

²² In 1965 this section consisted of seven lawyers under a permanent head.  
²³ To give but a few examples:  
Legal Aid Act 1939  
Law Reform Act 1944  
Joint Family Homes Act 1950  
Sale of Goods Amendment Act 1961  
Matrimonial Property Act 1963  
Perpetuities Act 1964.
statements of the Minister of Justice, who brought the new Law Revision Commission into being. In a statement made in 1965 he said:

Whatever the origin of a recommendation for an alteration in the law by way of legislation it must, in accordance with the normal procedure, receive the approval of Cabinet and Caucus and time must be found for it on the Government's legislative programme. It is here that the value of having a regular department of State bearing the responsibility for law reform is most clearly manifested. The Department of Justice ensures that the recommendations of the Law Revision Committee are, subject to the Minister's approval, placed on its legislative programme at the beginning of the year and endeavours to secure as high a priority for them as is reasonable. The Committee's recommendations thus become part of the Department's own programme.2

Speaking of the Committee's political members he said:

This link between the Legislature, the Executive and outside interests is a most important and desirable feature that ought to be retained in any reconstruction of the machinery.25

Clearly New Zealand had found it helpful and effective to combine its Law Revision Committee with a Department of Justice and with political membership and was not willing to abandon that principle, even though the judiciary had found itself unable to take an active part.

Nevertheless, it was felt that the New Zealand machinery had certain defects and needed overhauling. The greatest defects were (i) the lack of full-time legal staff; (ii) the tendency to wait until a particular reform was accepted in England before promoting similar legislation in New Zealand; and (iii) the tendency to deal only with injustices that had already occurred and not to take preventative measures. More time needed to be devoted to research and the Drafting Office needed expansion. On the other hand the Law Revision Committee could already initiate its own projects, unlike the English Law Reform Committee, and since the New Zealand statutes had been consolidated in 1908 the need for revision was not as great as it was in England. The Minister considered the new English model but decided that it was out of place in a New Zealand setting, partly because there was less need for such a radical break with the past in New Zealand and partly because, as he said:

The practice in New Zealand is that the preparation and introduction of almost all legislation is done by the Government. Law reform legislation is no exception. Few reforms of the law concern only

25 Ibid., at p. 16.
lawyers, and most of them have varying social, economic, or even moral implications that lawyers are perhaps no more fitted than others to weigh. To some degree almost every substantial measure is a policy measure, however divorced it may be from party politics in the ordinary sense.

The carrying out of a programme for law revision must therefore be the responsibility of the Government through the Minister of Justice. For the purpose of assisting the Minister there is already an advisory committee. An English-type law commission could do little more than duplicate what we have already, and by taking the work further away from the normal constitutional agencies might actually impede reform. Too much stress cannot be laid on the fact that much of the comparative success of law reform in New Zealand is owed to the presence on our Law Revision Committee of the Minister of Justice as chairman and of a representative of the Opposition.26

Obviously the Minister did not favour the English practice of using committees and commissions composed of lawyers alone. The Minister suggested that the Law Revision Committee be reconstituted as a Law Revision Commission of twelve members under the Minister, to be responsible for oversight of the reform programme as a whole. In February 1966 the Minister set up the Commission along the lines mapped out in his statement. In order to preserve flexibility the Commission was not created by enactment; this means that its existence is comparatively precarious, at least in theory. The Commission has the tasks of long term planning, deciding priorities and allocating work to standing committees. Four standing committees were also established to consider respectively Torts and General Law Reform; Public and Administrative Law Reform; Property Law and Equity Reform; and Contracts and Commercial Law Reform. The standing committees are responsible directly to the Minister rather than to the Commission, but the Chairman of each standing committee is a member of the Commission. The Minister of Justice heads the Commission and some of his staff work full-time for the Commission. Subjects are usually referred to the committees by the Minister on the recommendation of the Commission. The reports of the standing committees are made to the Minister and copies are sent to the Commissioners, who may make comments thereon direct to the Minister. No report of a standing committee carries the Commission's authority until approved at a meeting of the Commission. The system is intended to be flexible and may be modified as required. Not a great deal of legislation has yet

26 Ibid., at p. 18.
resulted from the new arrangement, but, as in England, ground
is being laid for major legislation to come.

The Minister claimed to have provided a better technique of
reform and he does seem to have achieved a method of long term
planning and provision of adequate research facilities while retain-
ing the best features of the old system. However, it is an expensive
and cumbersome procedure, one of whose strangest features is the
method whereby the standing committees report to the Minister
and not to the Commission which handed down the topic in the
first place. In the attempt to be more adaptable and informal
complications have arisen and the new machinery is moving along
slowly. Nevertheless New Zealand has shown awareness that there
is more than one type of law reform machinery, and the design
of a new type of commission is in itself progress. It is not the
only channel of law reform proposals in New Zealand, for the
Department of Justice, in addition to the assistance it gives to
the Commission, initiates its own studies and prepares bills on
topics not suitable for being dealt with by the Law Revision Com-
mission. Thus, as in England, it is felt advisable to have more than
one type of body to investigate law reform proposals and not to
rely on the Law Revision Commission alone. But it is clear that
the joint existence of a Department of Justice and a law reform
commission requires a careful allocation of functions and it may
be that consideration of the New Zealand experiment will lead
to the conclusion that the existence of the English Law Commis-
sion lessens the need for a Ministry of Justice in the United
Kingdom.

III. Michigan.
The Michigan Law Revision Commission was established in
1965.27 A Legislative Service Bureau had been created in 1941,28
but all its available resources were channelled into its drafting and
codification functions.

The membership of the Commission is made up of the chair-
man and ranking minority members of the Committee on Judiciary
of the Senate and of the House of Representatives; the Director
of the Legislative Service Bureau; and four members appointed
by the Legislative Council for four-year terms. The Commission
has a part-time executive secretary in the University of Michigan
Law School and relies largely on professors for research work.

28 M.C.L.A. 1948, 4.301.
In its constitution the Commission conforms entirely with the New York tradition of law revision commissions, a pattern which prevails in all the American states which have law reform commissions.

The New York type of commission stems from the use of commissions to codify New York's laws in the nineteenth century and from Cardozo's call for a "ministry of justice". Cardozo envisaged a:

... permanent agency, continuously functioning, to consider the changes essential to the proper administration of justice and to report its recommendations yearly. ... The members should not be more than five in number. We are strongly persuaded that at least two of the five should be members of the law faculties of some University of the State ... 20

The statute creating the Commission was said to have been drafted by Dean Burdick along the lines suggested by Cardozo, and the essential nature of this type of Commission can be seen from the relevant portions of the statute. 20

S.70. A law revision commission is hereby created, to consist of the chairman of the committees on the judiciary and codes of the senate and assembly, ex officio, and five additional members, to be appointed by the governor. ... Four members appointed by the governor shall be attorneys and counselors at law, admitted to practice in the courts of this state, and at least two of them shall be members of law faculties of universities or law schools within the state recognized by the board of regents of the state of New York. ... s. 72. It shall be the duty of the law revision commission:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.
2. To receive and consider proposed changes in the law recommended by the American law institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.
3. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.
4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.
5. To report its proceedings annually to the legislature on or before February 1st, and if it seems advisable, to accompany its reports with proposed bills to carry out any of its recommendations.

29 (1924), N.Y. Leg. Doc. No. 70.
20 Laws of N.Y., 1934, ch. 597, now N.Y. Legislative Law, art 4-a.
The duties of the Michigan Commission are expressed in identical language.

The New York Commission has been a success in terms of legislative enactments and indeed by almost any standard. Its success has been based on its high standards of research, the presence of political members on the Commission and its good relations with the courts. It has been the model for law reform commissions in Louisiana, California and other states, most of which have found the pattern equally successful. Like England and New Zealand, New York still has other types of bodies to which reform topics may be handed for investigation, such as temporary commissions.

The American pattern has at least two features which are peculiarly American. One is the availability of the assistance of the great law schools with their ample facilities. So New York's Commission is based at Cornell, California's Commission at Stanford, Michigan's at Ann Arbor. This ensures an exchange of ideas between academics and government, avoids wastage or duplication of research and brings law schools and students to the forefront of constructive pressure for reform. Secondly, a more streamlined method of introducing bills into the legislature exists in the United States than in most Commonwealth countries, and the commissions are able to avail themselves of the services of their political members in introducing bills. The American commissions have been accused of making few radical reforms and indeed, the New York Commission at any rate strives to avoid political controversy. Not surprisingly, the Commission seems to have realized that the greatest success will come in non-political fields and has kept in that area. It is possible that the presence of political members has dampened the radical spirit but certainly their presence must have assisted the Commission in the successful encountering of opposition to reform.

By following this tested pattern Michigan has assured itself a measure of success and, in its first year of operation, six of its recommendations became law. But Michigan is eschewing experiment. The very success of New York has tended to blind other states to the possibilities of even investigating different models of law reform commissions. The New York type is, in all probability, the best for American states, but an experiment with another form would be of interest.

---

Ontario's Law Reform Commission, like that of England, was preceded by a Law Revision Committee. In 1940 after legislation had been introduced to implement the recommendations of the Barlow Report, the Ontario legislature deferred consideration of the bills in order to set up its own committee to investigate the whole subject of law reform in the province. This committee recommended a Law Revision Committee based on the English model of the times. The Committee was appointed by the Attorney General in 1942 under the chairmanship of the Hon. Mr. Justice C. P. McTague. It consisted of eighteen members, including seven judges and the Chairman of the Legal Bills Committee of the Legislative Assembly. The Committee was subject to the same drawbacks as its English counterpart, and, like it, provoked public and professional demand for a more efficient approach. After the establishment of the English Law Reform Committee in 1952 another attempt to remedy the situation in Ontario was made in 1956 when the Attorney General, the Hon. Kelso Roberts, Q.C., established an advisory Committee on the Administration of Justice. The 1956 Committee was a voluntary one, comprising twenty-five permanent members. The members were representative of the whole province, of the bench, the bar, the law schools and the Attorney General's Department and invited representations from other groups who might be interested in the subject-matter of the Committee's deliberations. The Committee met three or four times a year and was supported by secretarial assistance. Its recommendations were frequently taken up by the Attorney General and among its more important achievements is the Certification of Titles Act, originally enacted in 1958. However, in the long run this type of part-time representative committee without research facilities could not succeed.

Following a period of public concern with the administration of justice in the province the Ontario Law Reform Commission was established by statute in 1964. The statute is written in very general terms, leaving much choice and initiative to the Commission and the shape that has evolved is similar to that of the

---

Committee of the Legislative Assembly of the Province of Ontario, appointed February 21st, 1940.


See, for example, Legislature of Ontario Deb., Legis. 26, Sess. 4, p. 774 et seq. (Feb. 15th, 1963).

S.O., 1964, c. 78.
English Law Commission, established a year later. In Ontario too, the first chairman was a judge, the Hon. J. C. McRuer, who had recently retired as Chief Justice of the High Court. There is no restriction on the number of the commissioners (except that there must be three or more) and no restriction on their qualifications, so that in theory laymen and politicians could be included. However, in 1969 there were five commissioners, all with legal qualifications, four of whom are part-timers. Like the English model, the Commission has the assistance of counsel and flexibility in recruiting outside assistance. Unlike the English Law Commission, the Ontario Commission may initiate its own projects without any external approval, and relies heavily for research on the teaching staff of law schools. Thus it has some American features, but is also similar in structure to the English Law Commission. It has the same independence of politics and politicians and is likely to suffer from the same disadvantage, namely, that it is dependent on the goodwill alone of the Government for the achievement of the legislation it desires. So far it has been successful and all its bills have been sponsored by the Government. Indeed, compared with the lack of a spokesman for the English Commission, the Ontario Commission is fortunate to have the assistance of the Attorney General. But it has no guarantee that action will be taken on its recommendations.

In addition most of the Ontario commissioners are part-timers and in this respect the English Commission fares better. When the pressure of work grows, as it surely must in view of the ambitious codification projects of the Commission, the Commission is likely to find full-time appointments preferable. It is, of course, difficult to find eminent practitioners and law teachers who can give up their careers for a while to work for a law reform commission, but the necessary persuasion can be provided by the guarantee of excellent research and good results by the Commission. As the changed attitude towards law reform takes root and the challenging nature of the research required to make reform possible is fully recognized recruitment as a commissioner may well come to be valued as one of the greatest legal honours.

In addition the growth in Ontario law schools may be harnessed to the needs of law reform. As the American commissions have found, there would be many advantages in having the Commission's headquarters at one of the major law faculties in the province. This would not only greatly expand the research facilities of the Commission but would stimulate research in law schools,
While the atmosphere of reform would be valuable for class teaching.

Experiments with other methods of law reform have taken place elsewhere in Canada. For example, in 1964 Alberta established a Law Reform Committee with a membership drawn from the Attorney General's Department, the judiciary, the profession and academic lawyers. Very shortly it was realized that this Committee, like other voluntary part-time committees, could never be an efficient agency of reform. Albertans, however, decided against the establishment of a conventional law reform commission in favour of a new agency, designed to allow maximum academic involvement in the process of law reform.

In November 1967 an agreement was drawn up between the Province, the Law Society and the University of Alberta, providing for the establishment of the Alberta Institute of Law Research and Reform with the following objects:36

(a) To conduct and direct research into law and the administration of justice; and
(b) To consider matters of law reform with a view to proposing to appropriate authority means whereby the law may be made more useful and effective; and
(c) To promote law research and reform; and
(d) To these ends, to work in co-operation with the Faculty of Law of the University and with others.

The Institute is governed by a Board of nine members including its Director, who is also a member of the Faculty of Law. The Institute is sited on the campus and the expenses of its operation are borne by the Government and by the University. The Institute assists and encourages research not only in law reform topics but in all fields of law for, as indicated in its name, it has a dual purpose. No settled procedure has yet evolved but the Institute intends to make use of the research carried out by other law reform commissions as well as initiating its own projects. At the moment some research is carried out by graduates and practitioners engaged on an ad hoc basis by the Board of the Institute.

The reports prepared by the Institute will be submitted to the Attorney General and on him will depend the legislative success of the Institute. Owing to its informal constitution the new agency has only the most tenuous links with the provincial government and it may find difficulty in achieving the enactment of law reform measures. On the other hand the creation of the

Institute in its present form cannot fail to stimulate legal research and, to a greater extent than any other commission, it has developed a method of harnessing the facilities and skills of the law school to the cause of law reform.

In June 1968 the Attorney General of British Columbia announced that a Law Reform Commission would be established in the province. An Act to Establish a Law Reform Commission was assented to on April 2nd, 1969, to come into force on July 1st, 1969.37 The Act provides for the appointment of at least three commissioners by the Lieutenant-Governor in council for five-year terms, for assistants and supporting staff, and subcommittees. The Commission's duties and constitution are very similar to those of the English Law Commission and, like the English Commission, the British Columbia Commission's programmes will require the approval of the Attorney General.

At present the Province of Saskatchewan lacks an active law reform agency. A Law Reform Committee was established in Saskatchewan in 1958 under the provisions of the Attorney General's Act and the Statutes Act. The Committee was composed of two members of the judiciary in the province, two practising solicitors and a member of the Department of the Attorney General who acted as Secretary to the Committee. The Committee remained active for some five years but after 1963 the work of the Committee became less regular and, although technically the Committee is still in existence, since 1966 it has, for all intents and purposes, become defunct.38

A Law Reform Committee has existed in Manitoba since 1962 when it was established by the Attorney General under the authority of the Attorney General's Act.39 The thirty-odd members include practising lawyers, the Legislative Counsel and other members of the Attorney General's staff.

The status of the Committee is that of an advisory body to the Attorney General. Most of the topics it has considered have been referred to it by the Attorney General; the Committee reports the results of its deliberations to the Attorney General. Other members of the bar have assisted the Committee by suggesting topics for its consideration and by serving on the ad hoc sub-

---

38 Information received from the Department of the Attorney General, Province of Saskatchewan.
39 This account is based on information received from the Secretary of the Manitoba Law Reform Committee.
committees to which the Committee frequently refers matters for study.

Although the Committee is voluntary and part-time, meeting only three times a year, its output has been high. By 1967 thirty-six topics had been studied by the Committee, over half of which resulted in enactments, a remarkable achievement by comparison with other voluntary part-time law reform committees.

In 1955 the Province of Quebec provided by statute for the revision of the Civil Code. In the preamble to the statute it was explained that,

Whereas the Civil Code has been in force since the first of August 1866; Whereas since then many changes were made thereto; Whereas a general revision of the Civil Code would permit the improving of its co-ordination and the making of such improvements as may be opportune; . . .

and a jurist was appointed to take charge of the revision. His duties were set out in the Act as follows:

1. Such jurist shall prepare within the delay fixed by the Lieutenant-Governor in Council a draft of a revision of the Civil Code, adhering to the legislative method followed when it was first drawn up, maintaining its distinctive characteristics, making the requisite corrections of style and arrangement and advising as to such substantive changes as might advantageously be made therein.

In 1959 the Lieutenant-Governor was empowered by statute to appoint four codifiers to study the reports, observations, proposed amendments and recommendations of the jurist as well as any suggestions and information which they might obtain from other sources, and to prepare a final draft of a new Civil Code. The Civil Code Revision Office, which was the result of these provisions, was drastically reorganized in 1965 and the various titles of the Code have been allocated to twelve committees. These are the committees on the law of persons and the family; civil status and the solemnization of marriage; private international law; civil rights (two); the law of obligations; property law; real and personal property security law; prescription law; evidence: lease and hire; and matrimonial régimes. While the Civil Code Revision Office still feels that a complete and fully co-ordinated revision is preferable to piecemeal revision, and is striving towards that goal, some parts of the Code were found to be in need

---

40 3-4 Eliz. II, c. 47.
41 The revision was originally entrusted to the Rt. Hon. Thibaudeau Rinfret, P.C., former Chief Justice of Canada. The present director of revision is Me Paul-André Crépeau.
42 8-9 Eliz. II, c. 97.
of immediate reform. The Revision Office has already submitted to the Quebec Minister of Justice seven reports, prepared by the appropriate committees, suggesting revised laws on the following subjects:

i) the legal capacity of married women;
ii) adoption;
iii) a declaration on civil rights;
iv) matrimonial régime;
v) solemnization of civil marriage;
vi) recognition of certain rights of parents and natural children;
vii) judgments in declaration of death.  

It is noteworthy that "revision" has been found a more appropriate term than "reform" in relation to codes, and the choice of the term reflects the difficulty inherent in changing codes. The very success of a code and the desire to preserve a familiar arrangement has added to the complications experienced in updating codes of the scope of the Quebec Civil Code. The codifiers of 1866 recommended that revision take place after thirty years; now a century has passed and a complete revision of the code has not yet taken place.

There are two methods of approach to code revision. The first involves the complete remodelling of the code in question, taking into account the social and economic changes of the time that has elapsed since the last wholesale revision. Supporters of this type of revision believe that it should take place at regular intervals in the lifetime of a code. In fact, the whole concept of radical code revision is theoretical and such fundamental revisions have rarely taken place more than once in the history of any particular code; even that one complete revision may be difficult to achieve.

The other and more practicable approach to code revision is the setting up of an agency to carry out continuous revision of the code to keep the whole under scrutiny and to prepare amendments to whatever sections need revision at any given time. A reform agency is essential to this method and may be the existing department of justice or, preferably, a specially-created code revision commission whose duties would include the embodiment 

---

**Footnotes:****

43 Information received from the Civil Code Revision Office.
44 The California Code Commission recodified the state's laws between 1929 and 1953 but did not undertake substantive reform. In 1953 the task of continuous reform was given to the California Law Revision Commission.
of new legislation in the code, the study of new cases with a view to incorporating their effect in the code and the preparation of amendments.

In practice, code revision is usually achieved in patches and the timing and success of amendments have depended not only on the nature of the body proposing the reforms but on the method of passage through the legislature. Although Quebec intends revision on a grand scale piecemeal revision has continued to take place and, as mentioned above, has been found necessary in some instances because the completed project is still too far ahead in time. It is to be hoped that the Quebec revision will not go the way of past French Civil Code revision plans, none of which were completed. No matter what the outcome of the Quebec venture, reformers in that province may profit from the experience and consider the establishment of a permanent code revision commission to keep the Civil Code continuously under review.

Despite the fact that the provinces have awakened to the urgency of law reform and are devising a variety of methods of dealing with the problem the Federal government has not, so far, taken steps to deal with reform of the law within its jurisdiction. Reform of the law is, in theory, the task of the Department of Justice, and proposed amendments to the Criminal Code for example, come, as does all drafting, from the Department. Awareness of the problem exists but the Department is fully occupied with day-to-day administration of justice and has no full-time law reformers.

In view of the proposal to set up a national Canadian law reform commission, what lessons can be drawn from a comparison of existing commissions?

While it is clear that no one model of law reform commission is the best in all circumstances, several traits may be apparent in the commissions studied which would appear to contribute to sound research and good results.

In the first place, a minimum of five full-time salaried commissioners, picked not to represent all branches of the profession, but for their legal qualifications. In the second place, fairly long terms of appointment, five or seven years, in order to promote continuity and overall planning. In the third place, careful al-

45 It has recently been announced by Canada's Minister of Justice that a permanent national law reform committee will be established.

46 The first appointments should be staggered.
location of functions between the Ministry of Justice, where one exists, and the Commission. If the ultimate responsibility for law reform is to lie with the Minister and if he is given a veto over the programme of the Commission, then the Commission should at least have the assurance that its suggestions for legislation will be supported by the Minister and a place found for them in the legislative programme. The commissioners should be safe from arbitrary dismissal and enjoy the closest co-operation of draftsmen and the finest research facilities available.