BOOK REVIEWS

LAW REFORM COMMISSIONS IN THE UNITED KINGDOM, AUSTRALIA AND CANADA, by W.H. Hurlburt (Edmonton: Juriliber, 1986) pp. vii + 514.

Law Reform Commissions in The United Kingdom, Australia and Canada is an analysis of the work of law reform bodies in Canada, and in the two jurisdictions whose legal systems and institutions are most like Canada's: What have law reform bodies in these jurisdictions done? What is possible, and not possible, for them to do? What should they do? How should they do it? The book is a thorough and penetrating analysis of these subjects.

This book has obvious value for professional law reformers, as a guide to the range of possibilities of structure and function, and as a survey of the issues which present themselves to those working in the commissions, such as project selection, research methods, problems of implementation, and so on. It is also of special interest to government officials who are charged with law reform or with the processing of the work of the reform commissions.

Beyond this, the work is of interest to practitioners, as law reformers affect the substance of their practice. It is also of value to anyone interested in the abstract question of how the law can be changed. On the premise that changes in the law made necessary by changes in society do not always come about quickly or at all by judicial development of the common law, or by the operation of something like "market forces" on legislators, the question arises: How can a concerted effort at law reform be undertaken?

The answer, or one of them, in the jurisdictions under study, has been law reform commissions — officially created standing bodies, separate from government, dedicated to studying law reform issues and making reform proposals. The book gives the reader a perspective on the question of what can, and should, be achieved by this approach to reforming law.

The author brings a great deal of experience to his task. Mr. Hurlburt has been associated with Alberta's Law Reform Institute — one of the earliest in Canada — since its inception. To supplement his knowledge gained from experience, Mr. Hurlburt toured the various jurisdictions with which he deals to obtain factual and historical material, opinions and ideas, from many of the key figures in law reform, and consulted the large quantity of literature on law reform.

Despite the very considerable authority with which the author may speak on the subject, the book is far from pedantic. Mr. Hurlburt's own views on the subject are seriously given, but not insisted upon. His main purpose seems to be to provide his readers with sufficient information to enable them to reach their own conclusions about the basic questions raised in the book.

To this end, the reader is invited along on a discovery tour of the particular law reform bodies under consideration, through history and across the jurisdictions, to observe the activities of these institutions. In preference to summaries or impressions, the facts are usually permitted to speak for themselves. The statements of aspirations or approach, criticism or approval, are those of the participants or commentators of the time. For each body Mr. Hurlburt

supplies information in relation to the following questions: What was the impetus for establishment of the body? What is its structure, source of funding, and relationship to government? What was its original mandate? What philosophy did it adopt? What projects did it deal with and who chose them? How has the institution changed over time? What has been the rate of implementation of its recommendations? In some cases the author also outlines, usually briefly but on a few occasions quite extensively, some of the body's recommendations and the reasons for them.

The same format, with minor variations, is applied to some seventeen bodies, and takes up approximately half of the book. It might be thought that this would make for tedious reading. This is hardly so. Almost without exception, the author finds some element or elements in each of the institutions or its work, or some episode in its history, which make it unique and on this account of special interest. The public awareness media campaign of the Australian LRC and the charismatic personality of its first chairman, the necessity for the Queensland Commission to engage in modernization by virtue of the archaic condition of its private law, the efforts to achieve "plain English" drafting by the Victorian LRC, the intensely philosophical approach taken in its early years by the Law Reform Commission of Canada, the "project team" working method of the Ontario Commission, the inclusion of lay members in the Manitoba LRC, are just some examples of unique elements which enliven the description and readily sustain the reader's interest. Quotations from participants, and from current commentators, also provide a sense of immediacy. There is more detail here than could easily be retained far beyond the reading. Nevertheless, the reader is rewarded at the conclusion with a feeling of having an intimate knowledge of how the law reform institutions actually function — of the full range of possibilities of structure, philosophy, and even of the personalities of some of the participants — which could not possibly have been attained by a summary or a more general description.

The next portion of the book provides more information, but this time it is categorized under headings relating to subjects general to all of the agencies. The first such section is on the expectations and values which the Commissions have held and articulated, and to the extent that this may be gleaned from the content of reports, applied, in making their recommendations. This section is really a discussion of goals as much as values — what have the Commissions wanted to accomplish? Law reform commissions have never sought to redistribute power within society, but only to make existing law better, in some cases focusing primarily on technical law, but in others, in varying degrees, on areas of law involving social policy. Mr. Hurlburt identifies the following list of more specific values, and gives illustrations of their application: fairness and justice, equality of treatment, satisfaction of interests, freedom, conformity to prevailing values, comprehensibility, and enforceability.

Having equipped his reader to make generalizations of his or her own, and to measure any particular method or goal of law reform against the range of possibilities, Mr. Hurlburt begins the more evaluative portion of his undertaking.

The chapter entitled "A General Description of the Law Reform Commissions" is not merely descriptive but is also evaluative of the structure and methods of the commissions. The portion on structure and composition discusses such matters as the merits of full-time versus part-time membership, or of the participation of non-lawyers. The portion on work methods raises the issues which are necessarily addressed, whether expressly or implicitly, each time a reform project is undertaken: how is the commission to obtain the information upon which it will base its recommendations? Purely legal research is often not enough. The author canvasses the possible methods and sources for obtaining additional input, and the purposes, merits, and feasibility of each — empirical research, consultation with the legal community, other experts, interest groups, government, and, to the extent this is possible, with the general public. He identifies a number of purposes for consultation beyond merely informing the commission: the dissemination of information; the reduction of political risk; and the provision of an opportunity for interest groups and for the public to have their say. Some practical points as to the form of consultative documents, reports and summaries are also included.

The next chapter discusses a matter of critical importance to institutional law reform at the present time. Implementation is an inherent problem given that most of the commissions are separate from government yet must rely upon government to bring their proposals forward into legislation. Many of the law reform bodies have experienced a downturn in implementation rates in recent years relative to early successes. Mr. Hurlburt describes the implementation process, and identifies the major obstacles — apathy on the part of government or lack of information, some degree of official or departmental obstruction, a government perception of political risk, and most importantly, insufficient priority to attract scarce parliamentary time. He then considers the options for improving the implementation rate and the merits of the different options. A key and difficult question is the degree to which commissions ought to base their choice of topics, and their recommendations, upon the likelihood that these will be of interest or acceptable to government. Making choices which will allow commissions to be effective, yet to maintain independence and integrity, can be a difficult balancing exercise. Consultation with or co-option of governmental officials is suggested as a method of increasing governmental support. Another implementation issue is the degree to which the commissions ought to promote their own proposals — a matter on which the practice has differed widely, depending in some cases on the personalities of key actors. The final question in this chapter is how government machinery for processing reform proposals can be improved. Mr. Hurlburt favours the creation of all-party standing committees which can routinely consider reform proposals which do not involve partisan issues, and make recommendations to the legislature concerning them.

One matter which is not dealt with is whether there is any correlation between the political ideology of parties in power, or changes in governments, and the rate of implementation of commission work. Periodically throughout the descriptive portion of the book, mention is made of the degree of receptivity of one government or another, but these suggestions, intriguing as they might be to the reader, are not pursued as separate subjects.

The chapter on the effect of the commissions assesses what they have been able to accomplish, and what they have failed to do. The author notes that this assessment is necessarily impressionistic. One measure of success is implementation, more readily quantifiable than other criteria, though not entirely so. Other criteria are the degree to which discussion on the subject has been generated, and the public has been educated. The commissions have not, in the author's view, been able to fulfil the original mandate of some of them of keeping all of the law under review, or with some exceptions, of engaging in a "systematic development" of the law. Nevertheless, the author regards the work of the commissions, primarily in the area of the technical law, but also, though to a lesser extent, in law affecting social policy, as unprecedented, substantive and worthwhile. With respect to uniformity of laws in the two jurisdictions with federal structures, the author sees this as a desirable goal for many if not all aspects of law. However, the work of the commissions has sometimes tended in the opposite direction. The description of efforts involving the commissions and others towards uniformity reveals that an effective system for promoting it is yet to be developed.

The penultimate chapter contains some of the most theoretical discussions in the book, as well as some quite practical ones. It begins by raising some very basic questions, and carefully laying out the range of possible answers. In this part, little about law reform is assumed or taken for granted. One such question is whether a policy of conservatism, emphasizing stability and certainty, is not as important as a policy emphasizing reform. Other questions include the degree to which it is possible or appropriate for judges to engage in reform of the law, and whether the governmental or political processes are equipped or inclined to undertake reform beyond that undertaken for political or ideological reasons. Mr. Hurlburt draws the conclusion that courts and legislatures are necessary but insufficient to carry on law reform, and that additional machinery is needed. He goes on to consider the matter of what form this machinery ought to take — whether it should be part of government or separate from it, how the need for independence can best be balanced against the need for sufficient contact to foster implementation, and at a more practical level, what is the optimum size for a law reform body.

Those engaged in institutional law reform may be glad to discover that at the end of this thorough inquiry into the various possibilities, Mr. Hurlburt comes out in favour of commissions in more or less their present form as the bodies best suited to the task of continuing, comprehensive reform. Further, happily again, he concludes that though partisan political controversy is to be avoided, and though pragmatic considerations may preclude it in a given case, there is no reason in theory for commissions to avoid making proposals on matters involving substantial social-policy questions. The discussion upon which the latter conclusion is based, involving the prior questions of whether the commissions have the capacity to deal with unresolved value questions, or those requiring the expertise of other disciplines, and considering some of the practical limitations to undertaking such projects, is possibly the most interesting in the book.

The conclusions just described are not meant to suggest that there is no room for improvement; a number of areas which require re-thinking are set out in

the final chapter. These include how to better ascertain facts about how the law operates, how to better link the commissions' work with the legislative process, how to better coordinate their efforts toward the goal of harmonization of law. Basic questions of function — whether commissions ought to involve themselves in the improvement of the civil justice system, or in fundamental social change — are also raised and answered.

The author explains the work methods of law reform bodies as follows:

> Unlike legislators, the commissions, being non-elected bodies, are not at liberty to act upon their own unguided judgment. Unlike legislators, the commissions cannot act but can only persuade. These considerations impel them to justify their recommendations, so that they feel the need for investigation, consultation, analysis, integration and the writing of persuasive reports.

The thoroughness with which Mr. Hurlburt treats his subject matter is reminiscent of the law reformer's meticulous approach. However, the motive here seems to be not so much to persuade as to inform and stimulate thought. All points of view, his own as well as others', are seriously and carefully set out. The reader is thus given the opportunity to choose his or her own position on various issues from among those offered, or to develop new ones based on the wealth of information supplied. This reflects the degree of respect which Mr. Hurlburt typically accords to the views of others — in this case, to those of his reader as well as to those of the contributors to law reform, and commentators on it, which he cites.

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