

2478

INSTITUTIONAL RENEWAL AND
REFORM: THE CHALLENGE OF
THE COMMONWEALTH OF
NATIONS IN THE TWENTY-FIRST
CENTURY

THE AUSTRALIA AND NEW ZEALAND SCHOOL OF
GOVERNMENT
THE JOHN PATERSON ORATION 2010

Melbourne, Victoria
11 August 2010

The Hon. Michael Kirby AC CMG

THE AUSTRALIA AND NEW ZEALAND SCHOOL OF GOVERNMENT

THE JOHN PATERSON ORATION 2010

MELBOURNE, VICTORIA

11 AUGUST 2010

**INSTITUTIONAL RENEWAL AND REFORM: THE
CHALLENGE OF THE COMMONWEALTH OF
NATIONS IN THE TWENTY-FIRST CENTURY**

The Hon. Michael Kirby AC CMG*

INTRODUCTION

When I was asked to give this lecture a month ago, Professor Allan Fels confronted me with a predicament. The invited speaker, Professor Michael Sandel of Harvard, had withdrawn at the last minute. Professor Fels invoked my acute sense of duty with a skilful two-pronged attack, asking me to step into the breach.

The first was the invocation of the memory of my friend John Paterson, for whom this series is named. The second was an appeal to long forgotten ambitions, fondly held at about the time I first met Dr. Paterson. Professor Fels pointed to the fact that previous Antipodean lectures in the series had been presented by a succession of Prime Ministers. In 2003, the Hon. John Howard (Australia). In 2004, the Rt. Hon. Helen Clark (New Zealand). In 2009, the Hon. Kevin Rudd (Australia). If I could not attain the Prime Ministerial office by my own efforts, I could at

* Justice of the High Court of Australia (1996-2009); Chairman of the Australian Law Reform Commission (1975-84); member of the Administrative Review Council (1976-84); member of the Eminent Persons Group of the Commonwealth of Nations (2010-).

least secure the next best thing: delivering this address to ANZSOG. Who could resist such a temptation? The idea was worthy not just of Sir Humphrey, who was more pedestrian in his thinking. This was the brain-child of Sir Claude, whom John Mortimer would occasionally introduce to us in *Yes Prime Minister* as the ultimate manipulator of lesser beings.

Ghosts of long-forgotten desires were rekindled in my loins. So, for these unworthy reasons, you find me before you. Otherwise, the apparently unacceptable prospect was presented that those attending the ANZSOG conference in Melbourne in 2010 would have to get by without a lecture and instead enjoy the pleasures of Melbourne eating places without enduring a speech at all. Because that would never do, I succumbed to the Sir Claudean inducement. So here I am.

Inevitably, with the passage of time, those who give this lecture will not have known its honorand. But I did. In the 1960s, we met in the National Union of Australian University Students (NUAUS). He represented the University of Melbourne, where he had been president of the Students' Representative Council of Melbourne University in 1962. By 1963, he was completing a commerce degree, to be followed later by his PhD in urban studies at the Australian National University. I was president of the Students' Council of Sydney University in 1962-3, pursuing a succession of degrees which that Gareth Evans, was later so unkind as to characterise as concentrating on quantity rather than quality.

John Paterson was born with diastrophic dwarfism. Not for a moment did he allow this to impede the full and rich life that he led. He was a remarkable student and man. He was a great debater and activist. He

became a lobbyist for greater federal expenditure on tertiary education. He later became an outstanding public servant. In the politics of students, so intense because of the insignificance of the stakes, he could sometimes be quite difficult. He had a sharp intellect, with tongue to match. Kevin Rudd quoted an apt description of him offered by Gareth Evans:

“What made him so memorable ... was his ability and his personality; his formidable achievements; his extraordinary combination of professional tough-mindedness and personal tender-mindedness. His passion and his ideas for life and his immense courage and good humour”¹.

John Paterson rose in the public service of New South Wales and then Victoria, where he went on to head important agencies and departments during successive governments of different political stripes. Arguably, according to Professor Fels, he was the person who conceived the idea of ANZSOG in a seminar paper that he wrote in 1998. In May 2002, recalling that paper, John Paterson threw down a gauntlet²:

“To create a new thematic base, linked loosely to its disciplinary precursors, will be a demanding task. Development of a new school of thought will call for clarity of purpose, originality, experiment, risk, forbearance and persistence. It will also call for a process capable of harnessing the efforts of many strong and talented people – in itself no small thing.”

A year after presenting this challenge, John Paterson was dead. In his lifetime, I would see him from time to time, generally in planes and at airports. He was not only a practitioner of the skills necessary for uncorrupted government in Australia. He was a theoretician and a noted reformer. In our encounters, we found much in common. As in my own case, he turned his life’s experience into a ceaseless effort to ensure

¹ K.M. Rudd, Don Paterson Oration 2009, p1 quoting G.J. Evans.

² J.P. Paterson, speech May 2002.

non-discrimination and equal opportunity. Back in those student days, with Dr. Peter Wilenski, he was an early proponent of an end to White Australia; for the advancement of Aboriginal Australians; and for the promotion of equality for women. Curious as it may now seem, these were not universally popular causes amongst the student leaders of that time. In fact, he was in advance of my own thinking. All of which demonstrates that we all need change agents for human progress: to test our comfortable presuppositions and to disturb our settled values. This is the way that societies and their institutions progress and flourish.

For his example, both personal and professional, we remember John Paterson tonight in his home city.

LAW REFORM

The encounters in student affairs that John Paterson and I had occurred in 1963-6 at successive meetings of NUAUS. Within a decade of those encounters, I had been appointed, during the Whitlam government, to my first judicial office in the Arbitration Commission and seconded to be the inaugural chairman of the Australian Law Reform Commission (ALRC)³.

It was in the ALRC that I came to work again with Gareth Evans, then lecturing in law at the University of Melbourne. At first, I had been reluctant to accept the ALRC post. This was because of the usual limitations of the legal mind. Aspiration to judicial duty was, at first, the horizon beyond which I could not see. However, having accepted the post, I initially threw myself into its challenges with alacrity.

³ From 1 January 1975 (Arbitration Commission) and from 6 February 1975 (Law Reform Commission).

Establishing a new federal statutory agency was aspiration enough. Creating a permanent national infrastructure for institutional law reform met many obstacles. Several of the judges whom I admired at that time reacted to the new body with suspicion and to its young chairman with hostility. I needed all the lessons of my parents' charm school to win them over. Gradually, I had some success: mainly because of the excellence of my colleagues, the brilliance of the staff, and the techniques of consultation that we pioneered. Our consultation embraced the modern media. In part, this was done to procure community feedback for the controversial topics assigned to us successively by the Whitlam and Fraser governments. In part, the consultation became an insurance against dissolution of the Commission and a stimulus to political action by the government. Perhaps more importantly, it built up within the legal profession and the community, expectations of reform and, eventually, a greater culture of reform in the courts, the practising profession and academic circles.

Questions of legal policy were addressed by the ALRC in a much more open way. Our techniques and our labours gradually spilt over into a increasing candour of the judiciary, in exposing the value judgments that must be made by the judges, especially in appellate courts and particularly the High Court of Australia. To some extent, the very notion of reforming the law (seen by some of its practitioners in those early days as insidious and dangerous) shone the light of scrutiny upon then current professional assumptions. And it demonstrated the importance not only of conventional consultation with interested groups but also of empirical research, social science data⁴ and economic analysis.

⁴ Stuart Macintyre, *The Poor Relation: A History of Social Sciences in Australia*, Melbourne Uni Press, Melbourne, 2010, 175f.

A study of the advent, challenges, achievements and failures of institutional law reform in Australia, and the wider world, would be a topic worthy for a Paterson Lecture. As with much of the process of reform in a country like Australia, the achievements were dependent (at least in part) upon finding champions in the community and within the bureaucracy and gaining the momentum of political interest and endorsement in the political parties. In the competition for such champions and supporters, the Law Reform Commission enjoyed good success, on the whole. But its enemies, in the community, in politics and in the bureaucracy, are never entirely vanquished.

I have written in the past of the institutional challenges of law reform⁵. But I have decided in this lecture to address a different and more immediate challenge that I am facing today. I refer to the challenge of reforming the Commonwealth of Nations. In July 2010, I was appointed to the Eminent Persons Group (EPG), established by the Commonwealth Heads of Government meeting held in Trinidad and Tobago in 2009. At that meeting were gathered the leaders of the 53 Commonwealth nations⁶. Those leaders decided to establish the EPG in order to investigate, and report on, the structures of this global family of nations. At a time of reform of the institutional arrangements for government within the Commonwealth of Australia, for which the Council of Australian Governments (COAG) has been a key institution, there may be lessons for the Commonwealth of Nations as to the essential ingredients for the reform process and for the attainment of desirable identified objectives. At the least, this global challenge will identify some

⁵ M.D. Kirby, *Reform the Law*, OUP, London, 2983, 1, 28ff.

⁶ The CHOGM agreed to the application of a 54th nation, Rwanda (which had not been a colony of Britain) to join the Commonwealth.

of the impediments that must be overcome if lasting reform is to be attained. This is always a complex and challenging task, at least when it involves the creation of new structures and the disturbance of long-settled and comfortable ways.

In this lecture I want first to examine some of the institutions that make up the Commonwealth of Nations (“the Commonwealth”); to identify the important role that these institutions play in a reform process; and to examine the new initiatives that will be necessary to assist the Commonwealth of Nations as it undertakes the present process of renewal. I will reflect briefly on the options for institutional reform. Of course, the views that I express are my own and not those of the EPG.

Secondly, I will seek to examine the importance of the common values that are probably still shared in most of the Commonwealth. Historically, this organisation has evidenced success both in changing and evolving its own characteristics and in influencing change in member countries where a clear and coherent voice can be found to that effect. The struggles against the oppressive apartheid regime in South Africa (and its later counter-part in Rhodesia) constitute an example of success. However, as I will show, the Commonwealth has not always found a commonality of will in facing later challenges. In particular, the failure of the Commonwealth adequately to address serious human rights problems in member countries is an example of where the organisation has fallen short of the effective defence of the values that it ostensibly espouses.

The purpose of this lecture is ultimately two-fold. First, to demonstrate that the process of institutional renewal and ongoing reform is critical to

ensuring effective policy development and implementation in the organisation in question. Secondly, I hope to show the importance of the constant evaluation and re-evaluation of policy objectives, based on identified institutional values. Only if those objectives are clear and coherent will true reform be proposed, refined, put into concrete form, delivered and maintained.

SHARED HISTORY AND REFORM

The Commonwealth of Nations grew out of the British Empire – the largest, most diverse and successful imperial enterprise in human history. In its heyday, early in the twentieth century, the sun never set on the Empire. It comprised more than a quarter of the land surface of the world; about a third of its population; and the Royal Navy ruled the waves.

An Australian of my age grew up in the last decades of the British Empire, after it had survived the challenges of its enemies in the Second World War. Every 24 May, John Paterson and I, at school in Australia, celebrated (on Queen Victoria's birthday) Empire Day. It was to some extent a triumphantalist reminder of the warrior character of the British race; of its economic, intellectual and industrial inventiveness; of its strong institutions of law and government; and of its sense of racial superiority and destiny, only ultimately shattered by the drain on its manpower and treasure in the global war of 1939-45.

The Commonwealth of Nations was eventually formed in April 1949 to replace the British Empire and former British Commonwealth. It was then, at the Prime Ministers' meeting attended by Ben Chifley of Australia and Peter Fraser of New Zealand, that the formula was worked

out between Attlee and Nehru whereby India could remain a member of the Commonwealth without allegiance of its citizens to the British Crown. Until then, it was that allegiance that had been the cement that kept the British family of nations together. Unwilling to accord such allegiance, Ireland departed, as earlier the United States of America had done. But by an inventive solution, it was agreed that thereafter the Commonwealth would be a community based on “free association”. The British monarch would be accepted as a symbolic Head. In this way, King George VI added the title “Head of the Commonwealth” to his royal style and titles. On the accession of Queen Elizabeth II, she was recognised as Head of the Commonwealth, an office she takes most seriously⁷. In witness of this role, the first meeting of the EPG, held in London in July 2010, concluded with an audience with the Queen, as Head of the Commonwealth, at Buckingham Palace.

Various former links that once held the Empire and early Commonwealth together successively fell away, including judicial appeals to the Privy Council (finally ended in Australia in 1986⁸ and in New Zealand in 2003⁹). Commonwealth preference in trade declined after the 1960s. In a recent speech to the Commonwealth Legal Forum, Sir Shridath Ramphal, second Secretary-General, declared that “Language, Learning and Law; these three are the most precious heritage of the Commonwealth; but the greatest of these is law”¹⁰.

Certainly, these are the fields which, over my professional life, I have come to know and appreciate the work of the Commonwealth and of its

⁷ J. Mayall (Ed.), *The Contemporary Commonwealth: An Assessment 1965-2009*, 26.

⁸ *Australia Acts 1986* (Cth and UK), s6.

⁹ *Supreme Court Act 2003* (NZ).

¹⁰ S. Ramphal, “A Commonwealth of Laws: At 60 and Beyond”, (2010) 36 *Commonwealth Law Bulletin* 359.

Secretariat housed in the former royal palace of Marlborough House in London.

There are nearly a hundred associations that have the word “Commonwealth” in their name. They bring together professional, institutional and other colleagues whose nations have substantially shared the experience of British rule and institutions. The Commonwealth Parliamentary Association, for example, taps the deep reservoir of experience found in the legislatures of Commonwealth nations. Because one of the core values of the Commonwealth is accepted to be electoral democracy, it is natural that the nations that substantially follow the traditions mainly derived from the British parliamentary legacy, should find utility in an ongoing conversation between parliamentarians of the Commonwealth nations.

The *Affirmation*, agreed at the CHOGM conference in Trinidad and Tobago in 2009, apart from establishing the EPG, contained an extensive elaboration of the belief of the Commonwealth “in the inalienable right of the individual to participate by means of free and democratic processes in shaping the society in which they live”¹¹. The same document recognises “that parliaments and representative local government and other forms of local governance are essential elements in the exercise of democratic governance”. Of course, today, such legislatures also participate in the Inter-Parliamentary Union (IPU) with its broader, global, membership and operation. However, there is something specially comfortable and friendly in a meeting of personnel who share a common language, common history, many common institutions, common laws, common traditions and interests. Often these

¹¹ Trinidad and Tobago *Affirmation* (2009),p.12.

are unspoken. Sometimes they are even unconscious. But enough survive to make the dialogue capable of proceeding without as many adjustments for the differences as must be recognised in United Nations and other international circles.

In addition to professional and governmental bodies, and the regular meetings of ministers of Commonwealth Nations holding similar portfolios, a very large number of civil society organisations that have flourished within the Commonwealth enjoy representative bodies that focus on this connection. Thus, the Royal Commonwealth Society (RCS) plays an important function in stimulating and maintaining the lines of connection that exist within the Commonwealth. In recent times, the RCS has taken a lead in exploring the attitudes of Commonwealth citizens and their knowledge concerning the Commonwealth; their criticisms of present arrangements; and their suggestions for ways in which the Commonwealth links could be strengthened¹².

Last year, the RCS conducted a so-called *Commonwealth Conversation*. It was a hard-hitting, candid, disparate and impressive dialogue identifying what is wrong with the Commonwealth and how Commonwealth citizens might go about trying to improve it. A repeated feature of the comments that emerged was a criticism that the “Commonwealth is just too timid; that’s the problem”¹³; that “the Commonwealth isn’t serious about human rights”¹⁴; and that it must be more articulate and forthright in declaring what its values are and establishing frameworks to hold the member nations and their citizens to

¹² Royal Commonwealth Society, *Common What? Emerging Findings of the Commonwealth Conversation* by Joanne Bennett et al. (Royal Commonwealth Society), November 2009.

¹³ *Ibid*, 20.

¹⁴ *Ibid*, 23.

their obligations of upholding the shared values proclaimed at the regular meetings of CHOGM¹⁵.

I cannot think of another international organisation that would welcome, encourage and support such a critical and public introspection about its own strengths and weaknesses. In the final published version of the RCS document, the Secretary-General of the Commonwealth, Mr. Kamalesh Sharmar, welcomed the enterprise. He said¹⁶:

“I support the Commonwealth Conversation. It is extremely important that discourse takes place within the Commonwealth so that it is no longer seen as working along rigid paths or as being something belonging to the past, rather than something that belongs to the future. A future that is being shared. A future that is being shaped through discourse about expectations and possibilities.”

In some ways, the RCS seized an opportunity and took an initiative akin to the intensive public consultations in which the ALRC engaged under my leadership in the 1970s and 80s. The commitment that this process extracted from the Secretary-General is a welcome and fresh approach, certainly unusual in international agencies. It has also been welcomed by participants in the Commonwealth Conversation. In my opinion, there must be more such dialogue¹⁷.

There have been several investigations of ways to revamp the Commonwealth and to improve its institutional structure. A common theme of past enquiries has been the emphasis placed on the need to improve the performance of the Secretariat in London. This was

¹⁵ *Ibid*, 24.

¹⁶ *Ibid*, 6. Also see the very candid conversations in the Report of the Commonwealth Round Table Conference. See *The Round Table, A Great Global Good?* Esp. Anwar Choudhury, p23.

¹⁷ *RCS Common What?* Above n12, 6.

recognised by CHOGM in 2009. The Port of Spain *Affirmation* expressed a demand for¹⁸:

“... efforts to improve the Secretariat’s governance, its responsiveness to changing priorities and needs, and its ability to enhance the public profile of the organisation. We commit ourselves to supporting the Secretariat in this endeavour. We also underline the importance we attach to intensifying the Secretariat’s commitment to strategic partnerships with other international organisations and partners in order to promote the Commonwealth’s values and principles.”

By the standards of other international agencies (even of the much less effective French equivalent, Francophonie), the Commonwealth Secretariat is small in size, diverse in background and varied in experience. Observers sometimes complain about the variability of performance and the inordinate delays in addressing communications. Whatever the reasons, the need for improvement in the Secretariat is clear. The inability in the RCS poll of two-thirds of those interviewed to name a single activity that the Commonwealth undertakes was especially discouraging¹⁹. At least one might have expected citizens to name the Commonwealth Games.

The ways forward for Commonwealth renewal were suggested, in part by the CHOGM leaders themselves in establishing the EPG and affirming the Commonwealth values and, in part, by the suggestions of the RCS and other commentators. Common themes in contemporary proposals include:

- * The need for the Commonwealth to prioritise its activities more effectively;

¹⁸ *Affirmation*, above n2, par.14.

¹⁹ Llango, above n25, p2.

- * The need to concentrate on those activities that the Commonwealth does best without replicating the activities done elsewhere in the United Nations, the G20, OECD and so forth;
- * The need to avoid the delusion that the Commonwealth can be a global fulcrum of political, business, educational, economic, human rights and developmental activities;
- * The need to embrace greater openness in the bureaucratic style of the Commonwealth which, in some ways, reflects the old colonial tradition of secrecy and non-transparency; and
- * Above all, the need to walk the walk, and not just talk the talk of so-called “Commonwealth values”. Several countries of the Commonwealth have been seriously in default in their maintenance of the core values of electoral democracy; independence of the judiciary; and adherence to fundamental human rights. Yet in the past, little or nothing has ostensibly been done by the Commonwealth or its Secretariat to redress these defects.

SEARCHING FOR SHARED VALUES

In repeated meetings of CHOGM, the leaders of Commonwealth governments have attempted to state the values for which the Commonwealth stands and which are ‘guaranteed’ for their citizens. Thus, in 1971, the statement of the Singapore CHOGM affirmed a very strong stand against racism and, in particular, apartheid, then dominant in the former government of South Africa. There is little doubt that pressure from the Commonwealth and facilitation by an earlier EPG, hastened the demise of that regime and the return of a democratic South Africa to the Commonwealth table.

In 1991, in Harare, in happier times for Zimbabwe, the CHOGM meeting contained an assertion of the centrality of:

“Democracy, democratic processes and institutions which reflect national circumstances, just and honest government and fundamental human rights, the rule of law and the independence of the judiciary, freedom of expression and the enjoyment of such rights by all individuals regardless of gender, race, colour, creed or political belief.”

These statements were, in turn, re-affirmed in 1995 by the Millbrook Declaration adopted during the Auckland CHOGM. That declaration accepted the need for improved machinery in the Commonwealth by a sub-committee of foreign ministers in the Commonwealth Ministerial Action Group (CMAG). It was hoped that CMAG could respond quickly to perceived dangers to, or departures from, declared Commonwealth values. This body was declared to be the “custodian of the Commonwealth’s fundamental political values”²⁰. However, whilst it has been partly effective in responding to the military overthrowal of elected regimes (Fiji) and to serious infractions in democratic elections (Zimbabwe), CMAG has been far less effective in investigating and responding to persistent abuses of civil, political, economic, social and cultural rights for all. Sometimes, despite the rhetoric, the inhibition of non-interference in domestic affairs seems to have been at work. Yet if that rule still prevailed in the Commonwealth, South Africa would still be an apartheid state.

NEW INITIATIVES

This, then, is the challenge that currently faces the EPG. Although the United Kingdom is a nuclear power, it has neither the means nor the will

²⁰ *Affirmation*, above n2, pars.8 and 10. See also 2010-2 High Level Review reporting to the Coolum CHOGM of 2002.

to re-assert Imperial rule. On the contrary, the United Kingdom has never had the fascination for the Commonwealth or its former Imperial legacy that many had in the Commonwealth nations themselves. The growth since 1949 of countless international agencies and groupings, of the power and influence of the United Nations Organisation, and of economics as a pre-condition to good governance and effective achievement of human rights makes the challenge before the EPG today a very large one.

Nonetheless, if we look to those times in the past when the Commonwealth has been most effective, they would undoubtedly include the times when the Commonwealth could agree on a significant moral cause based on Commonwealth 'values' founded in the essential notions of human dignity shared by people everywhere. The Commonwealth was never stronger than in responding to the oppression against people on the ground of their race in the southern African countries that had been part of the British Empire. The question now is whether, grounded in the strong and repeated assertions of fidelity to universal human rights, the Commonwealth can re-capture the same unity of purpose around basic ethical principles. And whether it can re-vamp its institutional structures to ensure the attainment of the goals so eloquently stated, and re-stated, at successive CHOGM declarations.

If the Commonwealth is simply to be a congenial club of mostly middle-aged men, who attend its meeting every second year, enjoy the Royal ambiance and then depart to continue oppressive regimes, it will probably fade away. Perhaps deservedly so. Yet that would be a tragedy for the utility of the official, professional and other shared experiences that the Commonwealth facilitates, although many of them

might survive an institutional winding up. The utility of having an organisation of 54 states of all sizes and degrees of power, which can meet together in comparative friendship and harmony and share experiences and viewpoints on a basis that (formally at least) is one of equality and mutual respect has a special value.

One ethical issue upon which the Commonwealth of Nations has evidenced a very obvious blind spot is a peculiar legacy of British rule. I refer to the anti-homosexual laws that remain in place in 41 of the 54 member countries of the Commonwealth. In our world of nearly 200 nation states, only 86 states today still criminalise consensual same-sex acts between adults in private. Nearly half of those states are members of the Commonwealth. This is because the common and statute law of Britain, in colonial times, imposed a criminal offence for such conduct throughout the Empire. Napoleon's codifiers had abolished the offence in France in 1803. The result of that action was that countries which derived their penal codes from the codifiers (France, Spain, The Netherlands, Belgium, Germany, Russia, Scandinavia) never exported the sodomy offence to their colonies. So this was a peculiar British export. And whereas the United Kingdom and the older Commonwealth members have repealed such laws during the past 40 years, they remain firmly in place in most developing countries of the Commonwealth of Nations. Half of the nations of the world that criminalise such conduct are members of the Commonwealth. Many of the remainder are Islamic States.

In Zimbabwe (presently out of the Commonwealth), President Robert Mugabe has voiced many attacks on homosexual citizens describing them as "un-African" and "worse than dogs and pigs". Reportedly, he

told crowds: “We are against this homosexuality and we as chiefs in Zimbabwe should fight against such Western practices and [demand that they] respect our culture”. At the same time, former President Daniel arap Moi of Kenya declared that homosexuality was “against African tradition and biblical teaching”. In Zambia, a government spokesman in 1998 declared that it was “an abomination to society”. The previous President Obasanjo of Nigeria, in 2004, declared that it was “definitely un-African”. In Malaysia, s377 of the country’s penal code has been invoked twice to prosecute the former Deputy Prime Minister, and now opposition leader, Anwar Ibrahim. The potential for misuse of this law is very large. The impediment it presents to the battle against HIV/AIDS is significant. The attempts to reform the law in Commonwealth countries have failed. Even in modern Singapore, where the former Prime Minister Lee Kwan Yew supported reform, the legislature rejected a Law Society proposal for reform. The government contented itself by saying there would be no prosecutions for consensual conduct. But the law remains on the books to harass, shame, belittle and endanger citizens.

In Malawi, two young men were sentenced earlier in 2010 to 14 years’ imprisonment on conviction of sodomy following the conduct of a symbolic ‘wedding’, probably only a party. Only the intervention of the Secretary-General of the United Nations led to a presidential pardon²¹. In Uganda, a bill has been introduced that, if enacted, would impose the death penalty for various homosexual acts²². Despite this sorry record, the Commonwealth Secretariat has publicly remained silent and

²¹ See e.g. Commonwealth Lawyers’ Association condemns Malawi gay couple imprisonment, statement of Mr. Mohamed Husain, CLA President, 20 May 2010

²² Opinion for Commonwealth Lawyers’ Association by Mr. Timothy Otty QC, Judith Farbey and Gemma Hobcroft, 9 March 2010.

apparently inert and ineffective. It has been left to United Nations officials to take the running in defence of the very human rights that are repeatedly declared as core values of the CHOGM declarations.

In the face of populist politics, religious passions, spiritual competitions between religions, alleged cultural and regional attitudes and unwise public health strategies, how does a body like the Commonwealth of Nations find the resolve and the institutional machinery to deal with such issues? At least on one footing, in the light of modern scientific knowledge about established variations in human sexuality, the attitudes of so many Commonwealth member states to their homosexual citizens is a kind of sexual apartheid. But where is the leadership and institutional machinery to intervene and to ensure that the Commonwealth can make a difference in a truly modern way on this and other human rights issues? Is the Commonwealth of Nations condemned to stumble along as an ineffective body, publishing grand declarations of human rights every two years, but, then, when tested, lapsing into public silence and failing to take any effective remedial measures?

CONCLUSION

Reforming a national system of administrative law is difficult, as I found in my service on the Administrative Review Council in Australia between 1976-84. Yet in that time, at the federal level in Australia, huge and beneficial changes were made under successive governments. Parliament enacted the *Administrative Appeals Tribunal Act 1975* (Cth); the *Administrative Decisions (Judicial Review) Act 1977* (Cth); the *Ombudsman Act 1976* (Cth); the *Freedom of Information Act 1982* (Cth) and many other laws and policies. The reforms have endured and been

implemented and sustained. So on a national level reform can be achieved and maintained.

Likewise, institutional law reform has been achieved as a result of the reports of law reform bodies, both in Australia and New Zealand. Amongst these, the Australian Law Reform Commission has been one of the most successful, utilised by the succeeding governments of differing political outlook. The ALRC is still at work and its reports are treated with respect by the courts and lawyers in a way that would have seemed unlikely in 1975.

Still, to achieve institutional reform at a global level is much more difficult. So much is demonstrated by the endless arguments about reform of the United Nations Organisation and the comparatively little progress that has been made under successive Secretaries-General to achieve such reform. The project now facing the EPG for the reform of the Commonwealth presents a mighty challenge. Agreeing upon and securing proposals that will gain acceptance at the CHOGM meeting in Perth in October 2011 will be difficult. Success is by no means assured.

It may be expected that smaller and developing countries of the Commonwealth (which are very numerous, being 31 of the 54 being classified as small states) will demand recognition by the EPG and the Commonwealth of the integral role of the 'right to development' as an element in universal human rights. And a demand that the Secretary-General of the Commonwealth become a kind of global spokesman for the members of smaller Commonwealth states at the meetings of the new groupings of the world's richer and more powerful countries, specifically the G20. Five nations of the Commonwealth (United

Kingdom, Canada, Australia, India and South Africa) have a seat at the G20. The proposal for a more active Commonwealth role there may run into resistance from the G20 themselves because of its ramifications for other potential participants. It may also run the risk of diverting the Commonwealth from attention to a present institutional challenge, namely the better implementation of the declared values of the organisation and their translation into regular effective practical action. So should the Commonwealth not concentrate on improving the machinery it already has in place in the CMAG? Should it not first strive to uphold the values that it has regularly proclaimed before it takes on other, larger, economic and geo-political challenges, however integral they may be in theory and even in practice for attainment of human rights for all Commonwealth citizens.

This is the tricky problem that must be addressed by the EPG. Perhaps in the contrasting demands of the older, developed countries of the Commonwealth and of the younger, developing countries may lie the seeds of a common agreement. The long-term attainment of practical human rights for Commonwealth citizens will never be assured whilst poverty, homelessness, lack of access to water, education and basic health care remain a feature of daily life in many Commonwealth countries. By the same token, in the face of the activities of human rights-denying countries of the Commonwealth, it may be better to exclude some of the more egregious offenders for a time until they get their human rights record and conduct into better shape. Yet is the Commonwealth ready and willing to face up to this challenge, and to decide that such action should be taken? So much easier to drift along without confronting the needs for structural change.

The dialogue of the EPG continues. Its report will be provided to the CHOGM meeting in 2011. And even when the report is produced, the adoption of any reform and its successful implementation throughout this global community will be a huge challenge.

To focus on the way ahead requires the concentration by the EPG on what is attainable and what can be achieved by strategic decisions. The EPG needs to heed the warnings of Eric Patashnik²³ in his book *Reforms At Risk – What Happens After Major Policy Changes Are Enacted*. Although stated in the political context of legislation enacted by the Congress of the United States of America, much of what he says is relevant to the deliberations of the EPG in the still more difficult challenge of achieving reform in an institution that function, like the Commonwealth at a global level:

“Like a child’s room”, writes former Treasury official Eugene Steurele, “one has little expectation that when [the reform] is cleaned up, it will stay tidy forever. By the same token, permanent improvements can often be made along the way”. Just as parents learn to pick some battles with their children and avoid others, so idealistic yet savvy reformers must reflect on which potential reform targets are worth the effort.

Because battles over reforms sometimes get caught up in broader partisan and ideological conflicts, it is easy to lose sight of the fact that reform decisions also reflect normative tensions between the values of commitment and discretion, and between the pay-off from the avoidance of foreseeable policy mistakes, on the one hand, and the pay-off from the preservation of the flexibility necessary for beneficial social learning and policy evaluation on the other. The often circuitous paths that reforms take matter not only because they create winners and losers at certain moments in time, but because they shape the possibilities for governance in the future. Strategic leaders will want to think carefully about the reform legacies they leave to their successors.”

²³ E.M. Patashnik, *Reforms At Risk: What Happen After Major Policy Changes Are Enacted* (Princeton University) 2008, 180.

These words, written in the particular context of securing lasting reforms to the tax code of the United States of America have a more general relevance. They carry a general instruction for national reformers. But also for those who seek to change international organisations to reflect more clearly the altered world in which those organisations now operate.

The altered world of the Commonwealth of Nations is one in which the trappings and realities of British power, that once held the family together, have retreated almost to vanishing point. Even the trappings of British symbolism are no longer particularly potent. What is left is a body held together by history, sentiment and perceived current utility. Yet it is a body that proclaims its allegiance to values that are vitally important for peace, security and equity in the world.

Unfortunately, that is what universal, fundamental human rights represent. It is why the Commonwealth so gladly embraces these rights and asserts them as the “core values” that it upholds. It is why it has created an organisational structure to ensure the attainment of such important values. It is difficult, in an ever watching world, to get away for long with grandiose declarations, followed up by seriously inadequate performance. Yet this is what the Commonwealth of Nations has so far stumbled along trying to do.

Reform in an international organisation cannot be imposed against the will of at least most of the members. Effectively, it must be agreed. At the heart of securing agreement is the need for a conviction, at least in a sufficient number of participating governments at CHOGM, that it is in their interests, as well as right, that they should do so. Or that the game

is up and that they cannot continue to go on declaring one thing and doing another: to declare human rights as a 'fundamental value' but to deny them repeatedly and to do so publicly in domestic policies.

The time is fast approaching where the Commonwealth must make a choice. Upon the choice that is made may well depend the survival of the organisation, certainly in anything like the form it presently manifests. So much seems to be inherent in the many responses of disillusionment and despair expressed in the *Commonwealth Conversation* conducted by the RCS and in many other contributions urging effective institutional reform.

At this moment in my life, I wish that Dr. John Paterson were still with us. If he were here, he would focus his sharp intelligence upon the problem; define its contours and possibilities; express the trade-offs that will be necessary to achieving reform; and then outline the strategies that are essential to ensuring that any proposed reforms endure. It is reformers of his ilk who push the world along in the trajectory towards greater justice, efficiency and respect for one another. It is why I was honoured to speak in this series and to endorse and remember his legacy. Of one thing we can be sure. John Paterson would not have said: "Give up. It is too difficult. Reform cannot be achieved". That was simply not his nature. Nor should it be ours.

As a useful link among many states and peoples which history has fortuitously presented to us, the Commonwealth of Nations is certainly worth preserving. Particularly, we might say to Australia and New Zealand, to whom it affords a regular link with countries that might otherwise be outside their normal orbits of contact. However, the

Commonwealth needs effective and lasting institutional reform if it is to survive. If there is sufficient will, it should be possible to secure lasting and relevant reforms. But is that will attainable? Or would its members rather that it atrophy into insignificance, because they were unwilling to face the painful and competing realities of what they need to do to ensure survival of the post-imperial century?
