MONASH UNIVERSITY LAW STUDENTS
SOCIETY JOURNAL 'ORACLE'

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Hon Justice M D Kirby

1977

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THE LAW REFORM COMMISSION

This is the first time that I have had the chance to visit this Faculty. I am glad to be here in the Law School which is certainly the biggest and some will say the best in Australia.

I already have a feeling of intimate association with you. In the Law Reform Commission's exercise last year on *Criminal Investigation* we looked to this Faculty for assistance. We were required to report with great speed upon a great range of criminal law and procedure. Our deadline for report was six months. We were able to look to a number of members of this Faculty as consultants to the Commission. They responded to the needs of the time. Although not every project of law reform lends itself to work at such a pace, I am convinced that the days when law reform commissions could work for countless years to produce a legal monument have come and gone. To be relevant, law reform commissions often have to produce work quickly. To do this, they will have to be able to turn to members of Faculties like this with accumulated expertise and wisdom in areas of the law. As well, you are used by long experience to work to a high intellectual standard for rewards which cannot match those found in the practicing profession. Nobody who seeks financial gain need look to the Australian Law Reform Commission. What we offer is participation in the exciting task of reforming the law and an opportunity for national service. I am going to tell you something about that task and opportunity.

LAW REFORM: A POTTED HISTORY

Law reform has an ancient but somewhat inglorious history. They say it began in the time of the Persians. In ancient Greece, it was

rather perilous to be a law reformer. The story is told that those who proposed reforms of the law in Greece did so at their mortal peril. Their duty was to assemble the village together in the market place. There they proposed reform of the law. However, the obligation had one condition attached. The would-be-reformer had to make his proposal with a noose around his neck. If in fact the proposal for reform was accepted, the law was changed. If the proposal for law reform was rejected, the reformer was despatched promptly on the spot. It is said that this technique of law reform led to a certain conservatism amongst law reformers in ancient Greece. Some say that even today, law reform has not thrown off the tendency to caution.

Law reformers today are not subject to quite the same rigours. Otherwise, the numbers who volunteer for this service would be even smaller than they are. Today, law reform is difficult for different reasons. It requires very special talents.

In about 1597, Francis Bacon proposed that the solution to getting laws up to date and to dealing with laws that became out of date, too complicated and so on, was a simple one. Bacon proposed that a small group of people called Commissioners should be appointed. He suggested five in number. The task would be to keep in hand the development of the law: to keep it under surveillance. Bacon's idea was not a bad one. A few people tossed it around at the time. In the manner of these things, nothing was done overnight. Indeed it took something like 350 years for this proposal to come to anything.

In 1965 the United Kingdom Government established the Law Commissions. Between Bacon's proposal and this event, a number of bodies were set up to deal with the modernisation and simplification of English law. To-day we would probably call them commissions. There were Commissions in the 1840's. There were vigorous attempts earlier, of which some of you would know. In Australia fitful efforts were made to establish law reform bodies. In Victoria Professor Hearn attempted to codify the law. Committees were appointed, even commissions established, judges and other did valuable part-time work. Ultimately, however, the model for all Commonwealth law reform bodies was the English Law Commission set up in 1965.

LAW REFORM BODIES IN AUSTRALIA.

Since 1965 a number of commissions have been set up in all parts of Australia. In Victoria, alone, you have three. Most States get by with one or two. In Victoria Mr. Commissioner Smith was appointed pursuant to the *Law Reform Act.* The Victorian Chief Justice's Committee has been operating since 1943. The Statute Law Revision Committee of the Victorian Parliament has been in operation since 1916. It is the longest established law reform body in any part of the country. It receives references from within the Parliament and works by and large in a non-partisan way, reviewing important legislation with a view to reform.

In 1960, the Commonwealth established a Law Reform Commission for the Australian Capital Territory. It was thought that the Commonwealth could, as it were, set the pace for law reform in this country by setting examples of what could be done in the Territory. Much valuable work was done by that Commission, substantially on a part-time basis. However, after six reports I understand that very few of the proposals of the Commission have passed into law. It is the intention of the Government that the Australian Law Reform Commission will take over the function of territorial law reform. This, of course, gives my Commission the window into the general law, in addition to its wider national responsibilities, consistent with the Constitution. Hopefully we will be able to do some experimental work which will be of value to the States in areas of their constitutional responsibility. The Territories allows the vehicle for this endeavour. We are working closely with the eleven law reform commissions or committees that are operating in Australasia.

ESTABLISHMENT OF THE AUSTRALIAN COMMISSION.

The Commission was established following the *Law Reform Commission Act* 1973. Its statutory purpose is to reform, modernise and simplify the law which is in the power of the Commonwealth Parliament. The Bill was sponsored by Attorney-General Murphy. But it was passed with the vigorous support of Senator Greenwood. In fact, Senator Greenwood inserted into the Bill two rather interesting provisions which are now part of the Act. The first was a provision which enabled the Commission to suggest references that it should receive. You will know that the models for Law Reform Commissions are three. First of all there are those, like the English Law Commission and the Tasmanian Commission, which can initiate their own programmes. Then

there is the model of the N.S.W. Commission which must work only or references it receives. The Australian Commission is in a half-way position. We can suggest references because Senator Greenwood inserted this provision in the Bill. At the end of the day, however, it is for Government, through the Attorney-General, to say whether a reference should be proceeded with or not. You may think it is desirable that Government should have this say. If Government does not want a Commission to work in a particular field, there may be little point in its doing so. The needs for reform are such that priorities of Government must plainly have great significance if law reform is to be a practical and not just a scholarly exercise.

The second provision which Senator Greenwood suggested is an interesting and unusual one for an Australian statute. It is now to be found in Section 7 of the *Law Reform Commission Act*. It requires that in all of the proposals for reform of the law which the Commission puts forward it should, so far as practicable, ensure two things:

(a) that the proposals are consistent with the International Covenant on Civil and Political Rights; and

(b) that they do not require the rights of citizens to be determined by administrative rather than judicial decisions, any more than is necessary.

The requirement that we should measure our proposals against the International Covenant on Civil and Political Rights is probably the closest we get in Australia to a Bill of Rights provision. It is proper that it should be remembered that this provision was inserted on the suggestion of Senator Greenwood. Senator Murphy, as he then was, welcomed the suggestion and agreed to it. The provision has been a relevant one in the exercises which the Commission has had to deal with. The *Criminal Investigation* Reference which clearly required constant balancing of rights of citizens against the needs for practical law enforcement. The current Reference which the Commission had on Breathalyzer laws took us directly to the terms of the International Covenant. The Victorian Government has decided to introduce a form of random breath tests in this State as a means of combating the road toll. Whether such random breath tests should be introduced into the Capital Territory was one matter coming before my Commission. One of the factors that must be weighed in determining this issue is the International Covenant on Civil and Political Rights which lays down requirements in relation to the intervention by police in the privacy of citizens.

THE WORK OF THE COMMISSION

The original establishment of the Commission was four Commissioners, all part-time. The other Commissioners, apart from myself, were Gareth Evans, a Senior Lecturer in Law at Melbourne University, Professor Gordon Hawkins, Associate Professor at Sydney Law School and Professor Alex Castles of Adelaide University Law School. The constitutional crisis and the pre-occupation of successive Governments with other matters delayed the appointment of full time Commissioners. As well, after exhausting himself in the exercise on *Criminal Investigation* and *Complaints Against Police*, Mr. Evans decided to submit himself for election to the Senate. This required him to resign his Commission. He has not been re-appointed. Two other part-time members were appointed during 1975. They were Mr. F.G. Brennan, Q.C., from Brisbane, the President of the Australian Bar Association and of the Queensland Bar and Mr. John Cain now a member of the Legislative Assembly of this State. Mr. Cain was a past president of the Law Institute of Victoria and a member of the Law Council of Australia.

You will see in these appointments the framework which emerged relating to the composition of the Commission. It is not a unique or unusual one. The Commission comprised a judge, barrister, solicitor and academics, the emphasis being perhaps upon academic lawyers. We should not be ashamed or surprised at this emphasis. Academics have the time and obligation to think about the law and its pruposes. It is to them that lawyers must look constantly for ideas for the regeneration of the law and for the renewal of the legal system.

The Government proposes within the course of a few days to announce the appointment of the first full-time Commissioners. The establishmen of the Commission allows for the appointment of a Deputy Chairman and full time Commissioners in addition to the part-time officers. These, are in addition to the staff establishment. We have already shown the great value to which consultants can be put in the work of law reform.

Like all instrumentalities of the Commonwealth we will be severely restricted in the resources that can be made available for our work. But it must be said that we are one of the few instrumentalities, the Family Court is another, to actually grow since the severe restraints on Government spending were imposed in December 1975. We have suffered less than others. I think this, because Governments of all political complexions can see that there is a value in this

country in procuring the assistance to the Parliament of a bipartisan expert group whose task it is to modernise and reform the law. Australians show a touching regard and confidence in judges and Royal Commissions. At a recent seminar on Aboriginal law reform in Canberra a call went out for yet another Royal Commission, to deal with aboriginals and the law. I had to gently remind my audience that Royal Commissions, committees and bodies such as the Law Reform Commission are not the answer to everything. What is needed is often not another commission but the implementation of suggestions and proposals which commissions have made in the past.

WHAT HAS THE COMMISSION DONE?

In 1975, even before it was fully set up, the Commission received a Reference from the then Commonwealth Government. It related to reforming criminal investigation procedures and the procedure for handling complaints against the police. As I have said, the Reference required a report within six months. In fact we produced our reports within that time. They have been well received in academic journals.

The Report on *Complaints Against Police* came to the not very startling conclusion that the practice by which police receive, investigate, consider and determine complaints against their fellow police was not entirely satisfactory. We proposed the use of the Ombudsman and another Tribunal to inject an independent element into the process.

In relation to *Criminal Investigation*, we made a number of recommendations on the whole area of the criminal investigation procedure. We dealt with aspects of arrest, search, seizure, bail, identification parades, confessional evidence and so on.

The proposals in the first Report were contained in the *Police Bill* 1976, introduced by the former Government. The new Government has referred the two Reports to the Backbenchers' Committee on Government and Law. I have already been invited to address that Committee. I have indicated to the Committee that urgent attention must be given to the processing of law reform proposals. Law reform commissions cannot expect as a right the implementation of their recommendations. It seems to me they can expect consideration of their recommendations by the parliaments they serve. If highly expert and expensive bodies such as the Commission are set up, a mechanism must be found in this

country for dealing with their recommendations. Let Parliament ject the recommendations. That is Parliament's prerogative. But let them consider the reports without undue delay.

NEW REFERENCES FROM THE NEW GOVERNMENT

The events of 11 November 1975 overtook the Commission during its establishment phase. We turned our attention to acquiring staff, premises and other facilities. We set about the task of servicing as a clearing house the large number of law reform bodies now established throughout Australia.

In January 1976, the new Commonwealth Government gave the Commission a Reference relating to the laws governing *Alcohol, Drugs and Driving* in the Capital Territory. That Reference requires us to deal with a number of matters, some of them quite technical. One issue of a general kind was whether random testing should be introduced in the Capital Territory. These issues are presently under study.

In addition to the Breathalyzer Reference, the Government has already given the Commission two further References. Others are under contemplation. One of the new References relates to the reform of bankruptcy laws in respect of consumer debtors who run into problems, especially because of unemployment. In this connection we are investigating experiments that are taking place in Canada for the reform of consumer credit and bankruptcy laws. I invite contribution of ideas and suggestions on this exercise from those who have a speciality in this area.

The major new Reference we have received was one which was foretold in the Prime Minister's policy speech in December 1975. It relates to *Privacy*. It is in the most general terms.

THE PRIVACY REFERENCE

The Reference requires us to do a number of things. First of all, we must get right our principles in relation to the notion of privacy and how it should be protected in Australia. We are invited to consider the issue as a whole, limited only by Commonwealth power and to see just what forms of protection could or should be provided. Secondly, in the light of that clarification of principle, we must attack the statute books and subordinate legislation of the

Commonwealth. By the touchstone of our principles, we are quired to decide which of these legislative provisions offend against proper standards of privacy protection. Thirdly, using the general power of the Commonwealth in the Territories and other powers of the Commonwealth, we are required to deal with the private law area: the question of confidential relationships of doctor and patient, credit bureaux intrustions into privacy, the problems of data banks, computers and so on. Fourthly, our Reference lays positive emphasis upon scrutiny of Government intrusions into privacy of citizens. The Younger Committee in the United Kingdom was not permitted by its terms of reference to scrutinize the intrusions of Government into privacy. It is a scrutiny that is at the heart of our exercise.

SOME OF THE PRIVACY ISSUES

Now, faced with such broad terms of reference, the first problem is to know what limits, if any, should be imposed. Limits will be needed if the report is to be produced promptly. Already I have been urged to give "privacy" a far wider meaning than just the collection of information, the storage of it and its transmission. Obviously, some notion must be secured on the content of "privacy" for the purposes of this Reference.

Dr. Paul Wilson of the University of Queensland has suggested that "privacy" has a far more important meaning than "information privacy' More important, he suggests, is the right to have the privacy of one's thoughts: even the privacy of one's physcosis or mental disturbance. The intrusions of the therapeutic state and of "do good' bureaucrats is, he suggests, more important than the intrusions of a credit bureau or data bank. Likewise, "victimless crime", it is said, falls to the reformed in the name of privacy.

It seems to me that we cannot turn this Reference into the "do good" exercise of the century: solving all the problems of society under the umbrella of privacy protection. This simply will not be on. If the Government had intended this, it would have said so. The Reference will be substantially confined to the informational aspects of privacy.

I am not so naive as to overlook the fact that there are political aspects in this Reference. Those who believe in the individualist

society, the society of "the man alone": able to exercise his ills without too much intrusion, will be "strong" on privacy. Those who believe in planning the economy will emphasise the need for and value of data collection by the Census and so on. They will say that the greatest silent majority in the community who cannot organise themselves, or otherwise have their voice significantly heard, speak to Government through statistics. Their needs are articulated by the Census. The issue has something of the political about it. Studies by Bronfenbrenner in his *Two Worlds of Childhood* disclose different attitudes to privacy among children in the United States and Soviet Union.

In the Soviet Union Bronfenbrenner found that children rate privacy as relatively unimportant. Indeed they consider it a bourgeois phenomenon. They are said to be more tolerant, easy going and kind than American children. But they are not as inquisitive, questioning of values and aggressive as American children. The latter are most concerned about privacy. They are more likely to be violent and rebellious. But they are more likely to "buck the system" and be inventive. Investigations such as this demonstrate something of the political and social questions involved in the phenomenon of privacy. I am not so foolish as to pretend that the resolution of this tension is absent from the Law Reform Commission's exercise.

Now, I know that you people in Victoria are extremely conservative about the role of judges. Judges of your Supreme Court have refused for many years to conduct Royal Commissions, inquiries and like investigations. Elegant support for this view is to be found in the latest volume of the *Modern Law Review* where Lord Devlin talks of "Judges and Law Makers". In the Federal sphere in Australia, this argument was settled as long ago as 1904 when the Arbitration Court was set up. Ever since then judges have had to grapple with social and semi-political issues. That is now the task before my Commission. What will come of it, cannot yet be said. Hopefully, we in Australia are half-way between the American and Soviet model. Hopefully, we can find solutions which will be useful to the whole Australian community.

WHAT CAN BE DONE?

ere are a number of solutions which have been devised for privacy protection. I can do no more than mentioned them now. In New South Wales, a Privacy Committee has been established to investigate and conciliate complaints about privacy. Secondly, in the United States, and in some parts of Canada, there is a tort which can be enforced by the courts in the protection of privacy. Such a remedy would have to be provided in this country by statute. The High Court in *Victoria Park Racing and Recreation Grounds Co. Limited v Taylor* (1937) 58 *C.L.R.*479 said that no such tort was known to the Australian common law. Thirdly, the problem can be attacked by special legislation: to deal with listening devices, credit bureaux and so on. Fourthly, there is the model of self-discipline, self-control by computer societies and other collections of people with a potential to intrude into privacy. These are approaches that have been developed elsewhere to meet the problem. There are some who say that the threat to privacy is sufficiently great for us to provide all of these remedies. Othereise, it is said, the computer will destroy the last vestiges of privacy, before we have shaped adequate tools to protect it. I cannot at this stage say what the solutions are going to be. I can simply outline the problem and say that we will need the help of lawyers and of others who are not lawyers in fulfilling this task.

UNIFORM LAWS

One final matter I want to talk about relates to the effort by the Australian Law Reform Commission to co-ordinate legal research, especially law reform research in Australia. Let's face it, the job has not been done adequately in the past. We are in the situation that tremendous duplication exists among highly talented, scarce people in the law. It is difficult if not impossible to be aware of legal research that is happening throughout the country. In Canada, the Department of Justice publishes a bulletin of research projects that are afoot in legal science. This is seen as part of the effort to rationalise scarce resources.

In this country there is no equivalent circular. Except by word of mouth there is no way to know of law reform and other legal research. To overcome this we have done a number of things. We have produced an index of law reform reports. There are eleven law reform bodies in this country. Many of them are working on the same or similar

projects. The same themes recur. Many are working on reform of pe law and procedure. The law of evidence is under scrutiny in several States. The examples of duplication are legion. At the request of the State law reform bodies, we act as a clearing house for law reform information in this part of the world.

We have also produced a bulletin *Reform*. It is likewise aimed at informing legal scholars of the work of research that is going on elsewhere in the country.

Finally, we organised a meeting of Australian and overseas law reform agencies in Canberra so that information and views could be exchanged We do not yet have in this country, as they do in the Canadian and United States Federations, a mechanism for promoting and servicing uniform laws. I have no doubt that the combined talents of the law Reform commissions could be put to good use in such an endeavour.

PARTICIPATION IN LAW REFORM

That is enough about the background of the Law Reform Commission, its work and objects. It has been said that a law reform commission is heaven's answer to the academic legal profession. We in this country have been rather narrow minded and frugal in the use made of the legal talents collected in our law schools. There are, at the moment, limitations on the funds available for consultants. This is unfortunate. It is also short sighted. Perhaps it is a passing phenomenon associated with the economic conditions prevailing at the moment. It is the hope of the Law Reform Commission that we can look to members of this Faculty for assistance in all of the exercises we get. By Faculty, I mean staff and student alike. The programme of the Commission promises to be an interesting one. The Faculty and students of Monash University Law School can be associated with our work in several ways. I would hope that the appointment of Commissioners will be for short periods so that the chances are that among those listening to me today are a number of people who will at some stage in their career join the Law Reform Commission for a period. It should be seen as part of the normal professional life of our best lawyers. Some of you may in the future, as in the past, be appointed consultants. Many, I hope, will come forward with ideas and suggestions, however informal, about our references, or particular aspects of them. The Commission is an extremely flexible body. I express the hope that at some time

you will look kindly on the thought that lawyers have a particular esponsibility to our community. I believe it is a responsibility felt keenly in this place. Do not be content with teaching the law as it is. Consider its purposes, its faults and many injustices Consider its reform and the way in which it should be renewed.