19th AUSTRALIAN LEGAL CONVENTION

SYDNEY, TUESDAY 5 JULY 1977

LAW REFORM AND THE LEGAL PROFESSION

COMMENT

Hon Justice M D Kirby

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A commentary on the papers by Professor A.L. Diamond and Mr. R.D. Nicholson

by Hon. Mr. Justice M.D. Kirby
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LAW REFORM, LAWYERS' LAW & LAWYERS' CONSERVATISM

Professor Diamond deserves our thanks for outlining once again the procedures adopted by the Law Commission in promoting reform of the law. Mr. Nicholson is to be congratulated for assembling, in an analytical fashion, such a mass of material about law reform in Australia and organising the numerous ways in which the profession, in all its aspects, can assist to promot "renewal" of the legal system. Law reform is now a matter of increasing community interest in Australia. Opening the Second Symposium on Law and Justice in the A.C.T., on 26 March 1977, the Commonwealth Attorney-General, Mr. Ellicott, said :

> *"What we are seeing in this country today is that law reform is being taken into the living rooms of the nation, by television and by other means. We are all becoming involved in it".*

Organised law reform in the Commonwealth of Nations will come in for scrutiny at the forthcoming Conference in Edinburgh. Some of the law reform agencies will collect in London in August 1977. The discussion of a number of matters relevant to law reform at this Convention is therefore timely. Obviously, with two papers, three commentators and ten minutes at my disposal, only a few themes can be picked up.

Both papers raise for debate the question whether law reform agencies should be confined to so-called "lawyers' law", avoiding review of laws with "any substantial political or moral content" and concentrating on matters "non-controversial, save amongst lawyers".[1] Certainly, there are dangers in policy-pregnant References. One law reform body in Australia declined

to become involved in the abortion debate.[2] The last Annual Report of the N.S.W. Law Reform Commission pointed out that "social and political issues" are "matters that are not properly the sole preserve of lawyers".[3] Within days of this report, that Commission was given its major reference to reform the legal profession!

I think we should put this debate to rest. In Australia, most law reform bodies have no choice in the matter. Under their statutes, when given a Reference, it is their duty to get on with the job. No doubt governments weigh the advantages and disadvantages of committing important social issues to an independent commission of lawyers. The advantages of doing so, given the way these bodies are now operating, should not be underestimated.

In any case, there are few areas of law reform that are entirely innocuous and lacking in social or economic significance.[4] But even assuming it were possible neatly to categorise a group of subjects as "lawyer's law" and assuming I had a choice in the matter, I am not at all convinced that this is the exclusive territory for law reform projects. I appreciate that some members of the profession would disagree. It is my view that, included in such a category, would be those laws which are either of minimum significance for the just organisation of society[5] or are of concern to the wealthy and educated members of society, who are already fairly well served by legal talent.[6] The ultimate consumers of the law, as Professor Diamond once said, are the people affected by it.[7] Many more people are affected by injustice in social security laws or court delays than by defects in the rule against perpetuities. There is surely room for reform of the latter. But, given the pressures on Parliaments nowadays, the urgency of reform and the widespread inconvenience of lack of reform, there is also merit in giving to law reform bodies, projects which involve significant policy questions. Law reform is not a mere hobby-horse of the legal profession.[8] Given the way in which Australian law reform bodies have shown that they can handle complex, contentious, controversial issues, I predict

that Law Ministers will increasingly use their talents to help Parliament grasp thorny, social problems. Let us have no more of this debate. The pass is sold. The only reference which the Australian Commission has received from successive Attorneys-General that might have been described as "lawyers' law" relates to standing to sue in Federal Courts. Professor Diamond's paper shows clearly that even this reference cannot safely be seen as a task for lawyers only.

WORKING PAPERS, SURVEYS AND PUBLIC PARTICIPATION

Now, the consequence of giving law reform bodies references involving decisions on controversial social questions is that the old way of achieving law reform will no longer do. Professor Diamond's paper is especially helpful for the description it contains of the processes of consultation that go on in England. The use of the working paper, used almost universally in Australia to promote debate, is certainly a step forward in promoting public consultation and the input of ideas and points of view necessary to ensure an informed and balanced proposal for reform.[9] It is not enough. Most law reform bodies engage in comparative law analysis,[10] empirical research,[11] including social surveys,[12] and consultatio with persons having particular expertise to offer. In every one of the Australian Commission's references, the Attorney-General is advised to appoint a *cadre* of persons with different skills as consultants. They sit down with the Commissioners at numerous stages throughout the project. It is an interdisciplinary process that is bracing and extremely useful. It should also be said that the Commission has experienced no difficulty whatever in securing top experts, both within and outside the law to give their time without charge, their only reward being participation in a project of national law reform.[13]

But even this is not enough. Given the matters that have been referred to the Australian Commission, in every case public sittings or public seminars have been held in all parts of the country. Professor Diamond indicates that the Law Commission has not yet conducted public hearings. The tendency in Australia is certainly towards an endeavour to secure public

participation, not just expert participation.

In addition to the efforts of the national Commission, the Tasmanian Commission attempted public sittings outside Hobart in 1975.[14] In conducting its inquiry into the legal profession, the New South Wales Commission has had "open house" sittings in Armidale, Forbes and Parramatta, at which members of the public and legal practitioners attended to put points of view to the Commission.

The rationale for enlisting public participation of this kind is not only to be found in participatory democracy and the movement for open government.[15] Whatever the "ultimate values" which law reform commissions seek to sustain in their reports, commonsense dictates that where highly controversial subjects are referred, an attempt at least must be made to procure public comment and also the comment of interested groups, in a public forum. Success varies. Sometimes the public participation at open hearings is disappointing. Certainly, in a large country like Australia, it is an expensive and time-consuming process. However, there is no doubt at all that useful and original ideas do emerge. Take one example only. The Australian Commission sat in all parts of the country with public sittings on its working paper concerning human tissue transplants. The issues before the Commission were controversial, touching basic human and social values. The aid of the media was enlisted to put the issues calmly and fairly before an audience numbering millions. Letters of suggestion and opinion were procured and the Commission's proposals were put before a much wider audience than any working paper could ever procure. Some suggestions advanced in the public sittings were simply not covered in the working paper, writings on the subject or expert submissions. A young Perth medical student, for example, pointed to the inadequacy of university training to cope with the moral and legal questions now facing medical practitioners.

I concede that care must be observed to avoid mere window dressing or grandstanding.[16] It is not necessary that

any particular formality should be observed. It is probably undesirable that the adversary process should ever be used. But it is important for Parliaments and for the cause of law reform that controversial matters should be publicly aired in this way. The report on them by a Commission which has sounded public opinion is more likely to command respect in the community and support in the Parliament than would be the case if no more had been done than to consult the special interest groups involved. I say nothing about the methods that may be appropriate for other countries or References less controversial than those that my Commission has received. I regret that I cannot agree with the view of the Scottish Law Commission that "the man in the street is concerned with a specific grievance and not with the legislative or administrative authority which may ultimately be responsible for remedying that grievance".[17] It has certainly not been my experience in Australia. I predict that there will be an increasing interest in law reform in Australia and the demand for greater expenditure upon it, including demands from within the legal profession itself.

THE LEGAL PROFESSION AND REFORM

Mr. Nicholson's paper outlines the many ways in which the profession can and does, individually and collectively, take part in the process of law reform. Although things are changing, it must be said that not much has altered since Sir Robert Megarry in 1956 asserted that "lawyers are not playing their part".[18] He said that :

> "By and large ... there is very little response from the legal profession as a whole ... Perhaps two or three lawyers write in with suggestions".[19]

I say things are changing because since that was written, the Law Commission and law reform bodies have been established throughout the common law world, largely peopled by lawyers and fuelled by ideas often promoted by lawyers. The fa remains that the numbers of lawyers taking an active part in law reform are few, in comparison to the numbers of the

profession. The cause of this must be traced to legal education, attitudes to professional responsibility and the sheer pressures of coping with day-to-day professional life. Megarry started his essay with the proposition that law reform is "the concern and the duty of all lawyers". The Chief Justice of New South Wales suggested last year that lawyers would gain a fresh insight to the need for changes in the legal framework if they had personal experiences as litigants in court.[20] Part of the role of a law reform commission is to promote within the profession genuine acceptance and not mere lip service to the duty propounded by Megarry and the sensitivity called for by Sir Laurence Street.

Now of course important contributions are made by lawyers commenting upon reform proposals, whether they originate in government or in law reform bodies.[21] Sir Alexander Turner put it well, describing the lawyers' role as being the "sentries of the citizen".[22] Clearly the proliferation of law reform bodies throughout Australia has taxed the professional societies beyond their present capacity. The numbers of committees working upon law reform projects and enlisting the expertise of lawyers grows apace.[23] It is certainly important that good working relationships be established between law reform bodies and the professional legal societies.[24]

But this is not enough. The organised profession should not simply react on an ad hoc basis. The Canadian Bar Association has now appointed a Director of Legislation and Law Reform.[25] His task is to "monitor legislation and proposals of the Federal Government and the Law Reform Commission". He is responsible for liaison with government and agencies working on law reform. His task is to identify matters appropriate for reform. His appointment is described as :

> "a major thrust by the Canadian Bar Association to fulfil its professional responsibility ... [to] put the public interest ahead of our own interest without equivocation".[26]

Australian professional bodies are now coming to the realisation that permanent officers will be needed to fulfil like tasks.[27] The Law Foundations are beginning to play a part in funding research upon State law reform projects.[28] These are steps in the right direction. But our efforts in Australia contrast unfavourably with the efforts of the organised profession in Canada. There is no officer engaged full-time upon law reform co-ordination and implementation. As yet there is no equivalent to the C.B.A. *National* with its strong emphasis upon law reform in Canada and its promotion of an active interest in and knowledge of law reform on the part of the ordinary member of the profession. Nor have we yet faced up to the practical suggestion made by Megarry[29] twenty one years ago when he said that there ought to be some person or body to whom all lawyers could be encouraged to send suggestions for reform of the law, however minor. That was a good, hard-headed, practical suggestion for participation of the practising lawyer in the process of law reform. It has not borne fruit in this country. Megarry suggested that all lawyers should regard it as "part of their professional duty to note such points as they occur and in due course to send them in ... to ... one central wellknown point".[30]

Why have we not developed such machinery? It must be said that the professional enthusiasm for writing in with suggestions would vary in accordance with the profession's conviction that there was utility in writing. At the very least, there should be a central and well established line of communication so that lawyers and their professional organisations could ensure that inconveniences, defects and oversights in the law could be plugged into a system for consideration either immediately or upon the next general review of that subject. In a modest way, the Australian Commission has begun to collect judicial and other suggestions for the reform of the law. It is a pity that the enormous legal talents available in this country for proposing suggestions cannot be harnessed in a better way. I propose that we should consider afresh at this Convention Sir Robert Megarry's suggestion, made in 1956 and not yet acted upon.

I cannot leave the contribution of the legal profession without saying just a word about the contribution of legal academics and scholars to law reform in Australia. In many ways, I regret to say, legal academics are treated as "second-class citizens" by the practising profession, among whom I number the judges. There is no doubt that the contribution of legal academics to the processes of law reform is quite disproportionate to their number and financial reward. They provide the vital synoptic view of the law. Almost alone in the profession, it is they who see the law, its history, development and defects, as a whole.[31] A vigorous, successful law reform body provides at last the vehicle to translate their suggestions into action and to provide a practical means of utilising the critical skills of the legal academic. It is my hope that the Australian Law Reform Commission will help to bridge the gulf which undoubtedly divides the practising and academic branches of the profession in this country.

LEGAL EDUCATION AND LAW REFORM.

I have one other positive suggestion. It arises from Mr. Nicholson's paper and is crucial to professional attitudes to law reform. Professor Diamond rightly stresses the genius of the common law in maintaining sufficient predictability whilst at the same time retaining flexibility to accommodate change. I believe that in some at least of our law schools, there is undue emphasis upon the first and inadequate reference to the second : the dynamic aspect of our legal system. Perhaps it is inevitable that in teaching students to find and identify the law, the tendency should develop to accept what they find, without subjecting it to sufficient questioning. Of course finding the law amidst the case books (or even the statute books) can often be a task so exhausting that there is not much enthusiasm left to ask whether what is discovered is satisfactory Law students should be taught to be critical of law as it is and alert to the social implications of their criticism. Inculcating the notion that a lawyer's responsibility does not end with finding and declaring the law is something that should begin at t earliest stage of legal education. If this were done, I have no

doubt that many more lawyers would respond when questions were raised by law reform and like bodies concerning the defects in the law. I recognise that courses in jurisprudence and other subjects do attempt to develop critical thinking. Nevertheless, it is my view that there would be value in teaching law reform as a formal part of the law school curriculum. Alternatively, it should be entirely possible to include in the study of particular subjects, discussion with the local law reform commission, working upon a relevant project.

At this moment, I get the distinct impression that many legal practitioners regard law reform as something for the "experts": something for the overtaxed few in the law society or possibly even something that actually undermines the certainty which in their conception it is the business of the law to provide. The legal profession in Australia must be constantly reminded that the original dynamic of the common law was a true spirit of law reform : law and lawyers responding to new situations demanding just solutions.[32] That is why the Australian Commission utilises every opportunity it gets to enlist the support and participation of the profession. In our number we have lawyers from many parts of the country. We procure consultants some of whom are lawyers from other parts of the country. We conduct public sittings and seminars in all States upon all of our projects. Our publications are widely distributed and we have now adopted the procedure of sending short discussion papers on our proposals to all those members of the profession who subscribe to the *Australian Law Journal*. The notion that law reform could be added to the curriculum of our law schools is not an eccentric one. It is done at Harvard and I believe should be considered in this country. I am sure that it would have the support of the law reform agencies.[33]

We are living through a new age of reform. When Sir Leslie Scarman was asked how the Queen's first twenty five years would be remembered in legal history he suggested that this period would be seen as "the age of legal aid and law reform and Lord Denning".[34] The pressures for law reform will not abate. On the contrary, they will increase. We must equip th profession with the skill and inclination to answer this challeng

FOOTNOTES

1. R.E. Megarry, "Law Reform" (1956) 34 *Canadian Bar Rev.* 691 at p.693. *Cf.* G. Sawer, "Who Controls the Law in Australia? The Instigators of Change and the Obstacles Confronting them" in A.D. Hambly and J.L. Goldring (Eds) *"Australian Lawyers and Social Change"*, 1976, p.120; N. Marsh, "Law Reform in the United Kingdom : A New Institutional Approach" (1971) 13 *Wm. & M.L.Rev.* 263 at p.275.

2. F.C. O'Brien, "The Victorian Chief Justice's Law Reform Committee" (1972) 8 *Melbourne Uni.L.Rev.* 440 at p.450.

3. Law Reform Commission (N.S.W.) *Annual Report 1976*, p.10.

4. K.W. Wedderburn, "Reflections on Law Reform", *The Listener*, 6 May 1965, 685 at p.685. *Cf.* J. Beetz, "Reflections on Continuity and Change in Law Reform" (1972) 22 *Uni. Toronto L.J.* 129 at p.140.

5. Sir Samuel Cooke, "The Law Commission : The First Ten Years" (1975) 125 *New L.J.* 1036 at p.1037.

6. This is the view of J.N. Lyon, "Law Reform Needs Reform", (1974) 12 *Osgoode H.L.J.* 421 at p.431.

7. A. Diamond, "The Work of the Law Commission" (1976) 10 *J.A.L.T.* 11 at p.19.

8. This is the Declaration of the New Zealand Law Reform Commission's *Annual Report 1971*, p.3

9. The Working Paper has been previously described : Marsh, p.279 and Diamond, pp.13-14 and criticised, Lyon, pp.425-6.

10. The *Law Commissions Act 1965* (G.B.), s.3(1)(f) positively requires this in England. O. Kahn-Freund "On Uses and Misuses of Comparative Law" (1974) 37 *M.L.R.* 1. The use of overseas study by the Australian Commission in *Alcohol, Drugs and Driving* (A.L.R.C.4), 1976 is referred to in (1977) 127 *New L.J.* 53.

11. Law Reform Commission of Canada, *Fifth Annual Report 1976*, p.3

12. The way was shown by the Law Commission in 1972 in relation to inquiries concerning a wife's proprietary interest in the matrimonial home and her rights on dissolution. *Cf.* (1976) 126 *New L.J.* 529.

13. Australian Law Reform Commission *Annual Report 1976* (A.L.R.C.5) p.22. Law Review editorials in Australia constantly call for consultation of this kind. See, e.g. (1975) *Aust.Bus.L.Rev.* 240.

14. Tasmanian Law Reform Commission *Annual Report 1975*, p.3. The Commission concedes that the experiment was not very successful.

15. Lyon, p.425.

16. Lyon, p.427.

17. Scottish Law Commission *Memorandum 32*, 1976, pp.45-46.

18. Megarry, p.697.

19. *Ibid.*

20. Speech at a Seminar of the Australian Crime Prevention Coun 25 October 1976, unreported.

21. As pointed out by Sir Anthony Mason, "Where Now?" (1976) 4 *Fed. Law Rev.* 197.

22. Sir Alexander Turner "Changing the Law" (1968-9) 3 *N.Z.U.L.* 404 at p.417.

23. See the comment (1976) 50 *Law Inst. Jo. (Vic)* 266. The position is not different in England: (1977) 74 *Law Soc. Guardian Gazette* 54.

24. The co-operation achieved in Canada has been remarkable. See R. Basford (Minister of Justice) *C.B.A. National*, September 1976, p.3.

25. *National*, November 1976, pp.1, 3.

26. *Ibid*, p.3

27. (1976) 50 *Law Inst.Jo. (Vic)* 266.

28. N.S.W. Law Foundation, *Annual Report 1975*

29. Megarry, p.700.

30. *Loc cit.*

31. Megarry, p.698; Turner, p.425.

32. R.J. Ellicott, Speech at the Opening of the Third Australia Law Reform Agencies Conference, 8 May 1976, *Minutes and Record of the Conference*, p.34.

33. P.J. Brenner and K.A. Lahey, "Skills Courses" (1976) 14 *Osgoode H.L.J.* 166 at p.207.

34. Sir Leslie Scarman "The Age of Reform", *London Times*, 5 Jan. 1977, Suppl., p.II.