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COMMONWEALTH LEGAL AID COMMISSION

COMMUNITY LEGAL EDUCATION SEMINAR

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PREVENTIVE LEGAL AID AND LAW REFORM

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

June 1979

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COMMUNITY LEGAL EDUCATION BECOMES FADISH

A seminar on community legal education organised by the Commonwealth Legal Aid Commission is something of a turn up for the books. It arises, naturally enough, out of the statutory duty imposed on the Commission by s.6(h) of its Act which obliges it :

> "to advise the Attorney-General as to the educational programmes that would be effective in promoting an understanding by the public, or by sections of the public that have special needs in this rrspect, of their rights, powers, privileges and duties under laws in force in Australia".

It should not be assumed that the merits of public legal education are undisputed in Australia. There is recent evidence to the contrary.

One of the few statutory authorities in Australia subject to a "sunset clause" is the Law Reform Commission of Tasmania. That Commission has had hanging over it, since its establishment in 1974, the Damoclean sword of a statutory life of five years only. The period will expire in July 1979.

In early 1979, the Tasmanian Government presented legislation to establish the Tasmanian Law Reform Commission as a permanent authority. But the legislation also contained a novel provision which became a focus of controversy when presented to the Tasmanian Parliament. It proposed that amongst the duties of the new permanent Commission there should be added a special duty with respect to community legal education. Clause 7(b) of the Bill envisaged a power :

> "to carry out or arrange to be carried out such education of persons, whether at school or otherwise, in order that the purposes and principles of the law applicable to [Tasmania] may be easily understood by persons without legal knowledge or experience."

When this legislation was introduced into the Tasmanian Legislative Council, opposition was expressed to making the Commission a permanent body. Instead it was proposed that the Commission's life should be extended for a further five years only. Even greater opposition was voiced against the proposal to confer on the Commission a role in respect of legal education.

The Tasmanian Government explained that its intention was to introduce a working knowledge of the law in the High School syllabus and to give the Tasmanian Law Reform Commission a function in that regard. These extra functions were described as "ludicrous and ridiculous in the extreme" by the Opposition Whip, Mr. Pearsall. As reported in the Hobart Mercury[1], he said that teaching the law at schools might encourage young people to take it upon themselves "to be their own lawyers". Their newly-found knowledge might get them into "all sorts of trouble", he declared, particularly with finance :

> "People will get themselves into major contractual dangers with a basic insight into law. They will walk away thinking they know sufficient about the law and do things themselves".[2]

This view carried the day and the subclause was deleted from the Bill. The decision has yet to be made on whether the life of the Commission will be extended.

It is inevitable that, whether a specific provision is made in their statute or not, law reform commissions will become involved, one way or the other, in community legal education. In 1978 the role of the Australian Law Reform Commission in legal education was referred to in what remains, in my view, the most important review of community legal education in Australia.[3]

> "Law reform activities can also provide valuable information and practical training in the mysteries of the law. The A.L.R.C. with its emphasis on socially oriented references and its practice of pursuing those matters in a very public way through media publicity, the encouragement of submissions from interested parties, public hearings advertised as such and the extraordinary round of conference lecturing pursued by the current Chairman .... has raised public interest and involvement in law reform as never before. These are commendable initiatives which could well be emulated by other State law reform bodies. The A.L.R.C., perhaps unintentionally, has done as much in C.L.E. as any other legal institution in the past two years".[4]

I say nothing of the tribute. However, the allegation of unintention is not accepted. At least so far as the national Commission is concerned, the Commissioners saw it as one of their functions to raise community consciousness about the law, its problems and defects. By doing this, specific proposals for law reform are better understood and expections of actual reform and orderly change are raised. Such expectations carry with them the imperative of modernisation, review and simplification of the legal system, which is the statutory charter of the Commonwealth's Law Reform Commission and of its sister institutions in the States.

The intentions of this paper are modest. Community legal education having become suddenly, and somewhat unexpectedly, a matter of debate and controversy, it is necessary to outline the impediments that stand in the way of the advance of community legal education in Australia. A short outline of current, relevant developments will be sketched. A few proposals will then be outlined. The paper will close with a number of comments about the possible role of class actions in preventative legal aid. This last topic is of special concern to the Australian Law Reform Commission which has a reference from the Commonwealth Attorney-General to advise whether class actions should be introduced into federal jurisdiction in Australia.

THE IMPEDIMENTS TO C.L.E.

How does it happen that community legal education is suddenly in the news? Until recently it was a profoundly unimportant "non-issue". The legal profession was unenthusiastic about it. Lawyers tended to be, generally, a conservative group, unsympathetic to any but the most technical reforms of the law.

The studies done by John Goldring suggest that the great majority of lawyers still come from a highly limited socio-economic group in the Australian community.[5] The background, training and education of lawyers and the nature of the legal discipline all tend to encourage the notion that the law is a mystery that is and should remain the possession of a special "cult", whose members have been initiated in its rites and are familiar with its dogmas. These fancies are encouraged by the extraordinary dress into which many lawyers must bedeck themselves, in order to perform their routine daily tasks. It seems to me to be an extraordinary thing that today most barristers and judges are still wearing 17th century periwigs. These relics of by-gone times serve to distance and even sometimes alienate those who practice the profession of the law from those outside the charmed circle. I believe this alienation is unfortunate. It inhibits the recognition

including within the profession of the social utility of the law and its practitioners. It deflects attention from the positive force which the law can be for the orderly change of our society.

Some writers have asserted that the basic impediment to spreading knowledge about the law is the frank economic interest which the lawyer has to preserve the monopolies and economic advantages that were in some cases hard won and which will not readily be released.[6] But quite apart from impediments of this kind, from within the legal profession, there are other inhibitions on the advance of community legal education. Our statute law is obscure to the point of incomprehensibility on occasions, not only to the layman but even to the lawyer. Commenting on recently enacted federal legislation, one observer described an important Commonwealth Act in terms that are hardly flattering, but equally applicable to many other laws :

> "Because of the pressures under which they must work, they tend to develop habits in drafting which, though uncondusive to clarity and simplicity, are unlikely to be modified because Parliamentary Counsel so seldom have the time to make a thorough review and reappraisal of established draft practices. Some of the habits which have been entrenched in this way are the tendency to use participles and ablative absolutes instead of indicative verbs, and the stubborn refusal to break a subsection into two or more sentences. This latter pratice in particular, which produces what must be the most breathless, tedious and confusing legislation in the English-speaking world, is not explicable on the grounds of ancient practice ..."[7]

In addition to these defects of laws made by Parliament, the language in which judges couch their decisions is often unclear to the lay reader. Lengthy reference to legal authorities and old fashioned or Latin expressions may sometimes divert attention from principles and concepts.

To these impediments to understanding must be added a further obstacle. This is the frequent unavailability of the law, to practitioner and layman alike. The statutes of many States of Australia are difficult to obtain. In some cases they are not available months after they have begun to operate as law. The subordinate legislation (regulations, ordinances and by-laws) is even more difficult to secure. The availability of decisions of the courts to ordinary citizens is limited. I have previously pointed to the fact that the costs of getting access to the decisions of the High Court of Australia, the third arm of government of our country, are high, if not prohibitive.[8] I believe it is not unreasonable, at a time when substantial funds are being spent on court buildings, to call attention to the need to supply and distribute the intellectual product of the courts, in a form that can be readily appreciated by the community. I refer to the decisions of the highest courts, which are reported in an ill-balanced and even inaccurate way.

I have no doubt that we will see in the next few decades a growing recognition of the increasing literacy of the community and its legitimate interest to have ready access to the law, whether made in Parliament, the courts or elsewhere. I believe that courts will appoint officers whose task it is accurately to summarise important court decisions and to explain their significance to the average citizen in an interesting way. If this were done, I have no doubt that it would encourage the news media to a greater reporting about the law in the courts. I see nothing inconsistent with the proper dignity of courts and the solemnity of the law for court officers to outline and explain court decisions by the modern means of communication, including the electronic media. Why should the law's means of communication be limited to the printed word when direct, oral communication of other information is expanding in every other discipline, with the aid of telecommunications and electronic facilities?

Without ready access to the law, a knowledge of what the law is and what new laws are made, there can be no proper

understanding of civic rights, powers, privileges and duties. The first step, then, in communicating information about the law is a concentration upon the means of communication. Until lately, there has been no great interest in the techniques of communication. The views expressed in the Tasmanian Parliament were generally shared by lawmakers and certainly held by most lawyers. Things are changing. The advance of education, literacy and the spread of information in Australian society makes it increasingly likely, as it seems to me, that non-lawyers will demand some knowledge of the law and of the machinery by which it is made and changed. Though there are still intrepid supporters of Pope's dictum that "a little knowledge is a dangerous thing" a contrary view secures an increasing number of adherents. This view asserts that although it is dangerous to advise oneself on technical and complex areas of the law, it is even more dangerous to live in a society regulated by proliferating laws, without any knowledge of their content, yet fixed with a presumed knowledge that requires obedience to their minutest detail. This seminar, and the statutory provision from which it originates, is, I believe, fresh evidence that the new view is in the ascendant. Increasingly, the question is not whether legal education of the community but to what extent and how it should be achieved.

NEW MOVES TO C.L.E.

Apart from this seminar, there are many signs of the changing attitudes. The teaching of law and law-related subjects in schools is a growing, busy reality in the school curriculum of several States. The publication of periodicals such as Legal Eagle, the Legal Service Bulletin and the Law Reform Commission's quarterly bulletin, Reform, represent efforts to bridge the gulf between the law and its practitioners, on the one hand, and a wider interested community, on the other. Production of the Legal Resources Book by the Fitzroy Legal Service and the Redfern Legal Centre has been a remarkable success in providing relevant information about recurrent daily legal problems.

The legal profession itself is changing. Lawyers are taking their part in teaching law to schoolchildren and laymen. The Australian Legal Education Council has established a sub-committee comprising Mr. Justice Samuels and Professor Lindgren. Their task is to examine ways in which the organised legal profession throughout Australia can take an appropriate part in promoting community legal education. A draft discussion paper circulated in August 1978 expressed a rather cautious view about the rôle of the Australian Legal Education Council. However, later, A.L.E.C. appears to have taken a more positive view of its own potential role and of the responsibility of lawyers in the business of community legal education. Whilst that business is not a job for lawyers only, the abandonment by lawyers of any role in this connection would be a great misfortune and an opportunity lost. The objects of A.L.E.C. are, among other things, "to provide a forum for the exchange of information and ideas on legal education ...". Whilst it may be entirely understandable that the first priority of the Council is the actual training of members of the legal profession, to confine its functions to this question and nothing more, would profoundly disappoint those who look to lawyers to take a useful initiative in facilitating and advancing knowledge in the lay community of the law and its machinery. It might also pass the problem over to others who, without the help of lawyers, are less well prepared to initiate and promote an effective programme of community legal education.

Although I understand that A.L.E.C. has now adopted a wider view of its mandate, it would appear that this subject has been accorded a faily low priority. I regard this as unfortunate. At least two other well-qualified committees have looked or are looking at the structures of professional legal education. The committee chaired by Sir Nigel Bowen has lately delivered its report. A further committee constituted by the Chief Justice of New South Wales (Sir Laurence Street) was established in November 1978 for the purpose of :

> "Co-ordinating and rationalising the increasing activities in the field of legal education in [N.S.W.]"[9]

The committee is chaired by the Chief Justice and is known as the "Legal Education Consultative Committee". The charter of the committee is to "take under consideration and express opinions upon any matter affecting legal education in New South Wales". Although it is confined to New South Wales, its consultative and advisory role will be of considerable national interest. In February 1979, Sir Laurence Street informed me that the committee would interest itself in the "broad and important question" of community legal education. The prospect of playing a role in both the formalised area of secondary education and the more general area of ongoing legal education for lawyers and laymen alike was considered attractive. On 20 March 1979 a special sub-committee on community legal education was appointed. Mr. Justice Samuels was named as chairman of the sub-committee. Because of the activities of the Law Foundation of New South Wales in this field, Mr. T. Purcell, the Executive Director, was also appointed a member. There are two other members [illegible]

[illegible]

It has been said that the genius of the English-speaking people is their capacity to make difficult tasks routine, generally by the creation of a committee. We now have many committees within the legal profession. It is to be hoped that they will do more than just talk. I realise that none of the committees of the legal profession has available to it regular and substantial funding. A.L.E.C., for example, is presently serviced by administrative and secretarial staff supplied by the hard pressed Secretariat of the Law Council of Australia. It does not have available to it, for example, the research and other facilities available to an equivalent professional body in the United States which has a staff of five qualified people working on community legal education. Nevertheless, access to the law is something about which many laymen feel powerfully. I have no doubt that, if the will were there, funds could be secured either from within the legal profession or otherwise, to establish a small national unit to co-ordinate work on community legal education, now advancing unevenly in different parts of the Australia. This is a task that goes beyond the Curriculum Development Centre, for it is not simply a task of school or other formal education.

The inquiry by the New South Wales Law Reform Commission into the future organised and tasks of the legal profession is plainly relevant here. The Commission has issued discussion papers[10] tentatively recommending, amongst other things, the creation of a community committee on legal services. This would be an independent body having up to 31 members nominated by various consumer, ethnic, trade union and other groups. Its functions would be to respond to consumer aspects of the administration of justice. A similar proposal for district boards was made recently by the Royal Commission on the Courts in New Zealand. Amongst other functions, the New South Wales Commission envisaged that the committee could have a role in law reform :

> "Law reform commissions are frequently disappointed by the small amount of discussion which their proposals evoke, even when their potential impact on the general community is considerable". This may be because most laymen are daunted by technical legal questions. The committee would have some accumulated expertise in legal matters and might often be a useful sounding board and source of ideas for, and critic of, the Law Reform Commissions".[11]

This proposal and the notion of lay participation in setting the standards for the legal profession, through its disciplinary bodies, seems, in principle, to have gained widespread acceptance throughout Australia. The notion of introspective professions looking only to their members for standards and common interests appears to be on the way out. Without debating the many controversial proposals put forward by the New South Wales Commission, it is perhaps significant to note that the New South Wales Premier, Mr. Wran, told a law graduation ceremony at the University of New South Walers that the public would no longer accept "special pleading" from the legal profession. All professions, including the law, he declared, were the product of massive public investment by governments and taxpayers :

> "Workers' compensation, third party insurance, conveyancing - ultimately these are all matters where the public foots the bill. These are all reasons, therefore, why the public will demand and has the right to demand, a much greater degree of public accountability from our profession than ever before ... It might be quite offensive for some of us to have their profession depicted as one of those industries where the consumer has any rights at all.... The fact is, of course, that clients are consumers and they have rights in that role as much as consumers of any product or service".

The New South Wales Law Reform Commission inquiry, the committees specifically looking at community legal education in schools and elsewhere and the great shift in the composition of the legal profession of Australia towards younger members, are all developments that promise a more sympathetic relationship between lawyers and the community in the future. The fact that there are many lawyers now who cannot secure "premium work" in the profession and that an increasing band of young lawyers choose to pursue a more imaginative and less rigid career than in days gone by, will probably ensure a number of trained lawers take an active, professional interest in legal education of the community as a whole. I am not unmindful of the criticism of lawyers as educators. But it seems to me that lawyers should be taking an active part in interpreting their profession and its percepts to the community and in learning from the community the inevitable criticisms that will come from knowledge so that these criticisms can be recounted to the profession and to lawmakers.

INFORMING PEOPLE ABOUT LAWS

In addition to general community legal education, and activating the debate about the law, its purposes and defects,there are a number of specific things which governments can and should do to promote an understanding in the public of rights and duties under the law.

The most obvious is to inform people of rights, so that the mind can be activated to them and advantage can be taken of rights conferred by law or compliance can be secured with duties imposed by the law. It should not be necessary to argue that if a person has rights, he should be made aware of them. Whether, once he is informed of the rights, he will have the determination or wisdom to pursue those rights, is something which no law can fully ensure. It is a hollow gesture to confer paper rights by statute and then to do nothing to inform people about those rights. Fortunately, this truism is gaining more widespread acceptance in law making.

If we take the criminal justice system, it must be frankly acknowledged that much advantage has been taken of the fact that important rights are not known or understood or are not taken advantage of. One writer has described this situation thus :

> "If warnings need not be given, the intelligent are favoured over the ignorant, the rich over the poor, the habitual offender who has learned his rights from experience over the (possibly innocent) first offender".[13]

In examining the rules that should be observed in the process of criminal investigation by Federal Police, the Law Reform Commission came to the uncomplicated view that consigning these important rights and duties to rules made by judges in 1912 and 1918 in England, to obscure case law or unavailable Police Commissioners' instructions, was just not acceptable in today's society. If the rule of law is to mean anthing, such rights, vital to a free society, should be readily available in an Australian statute. Of course, it is difficult to spell them out, to summarise them and to set them down in succinct and readily available prose. But to abandon the attempt and to persist with hiding away these rights and duties in obscure and unavailable sources, is quite indefensible. This view has been accepted by the Commonwealth Government. Its acceptance is signalled by the introduction of the Criminal Investigation Bill 1977 which is the first attempt in Australia to spell out

these important rights and duties and to collect them in an Australian statute, available to all. Senator Durack, the Commomwealth Attorney-General, has announced his intention to reintroduce the Criminal Investigation Bill in 1979[14].

Apart from availability, in the form of a statute that can be purchased, more must be done. The Law Reform Commission concluded that no criminal justice system deserved respect, if its wheels were turned by ignorance :

> "There can be little argument about the injustice involved in capriciously determining who shall enjoy [particular rights] by criteria which have nothing to do with merit, need, desert or any other factor which could conceivably be relevant".[15]

Having reached this view, the Commission recommended that persons under restraint by the Commonwealth's police should have the right to be informed of the offence for which they are arrested[16] and of their entitlements whilst being questioned or under restraint. Again, these proposals were accepted by the Criminal Investigation Bill. Not only must the police officer give oral warnings, as at present. The Bill provides that where a person is to be charged or summoned, a written caution must be handed to him, in accordance with a precribed form and in a language in which he is fluent, which summarises his principal rights namely :

* the right to silence
* the right to communicate with a lawyer; and
* the right to communicate with a relative or friend.[17]

The Criminal Investigation Bill requires the Minister to keep a list of lawyers who are willing to assist people under restraint. This is to be done in consultation with the professional body or bodies representing private legalpractitioners. A copy of this list is to be supplied to an accused person who is under restraint and who wishes to communicate with a lawyer but does not know of a lawyer with whom he could communicate.[18]

Special provisions are made for interpreters for persons not fluent in the English language,[19] children[20] and the provision of a prisoners' friend to certain Aboriginals and Torres Strait Islanders.[21]

The criminal investigatiosn process puts the liberal values of our society to the test. Not everybody will agree that the important rights already conferred by our legal system should be collected in a single Act and made available by positive notification. A committee in Victoria has recently contested this notification of legal entitlement. One judge has criticised the proposals of the Law Reform Commission and the terms of the Criminal Investigation Bill as having treated the privilege to remain silent "as though it were a right of a positive nature to be 'enjoyed' as a perquisite of citizenship such as a right to vote or the like ..."[22] It was suggested that the Commission and the Bill had erred in "taking peculiar pains to ensure that suspects do not answer police questions".[23]

I regret to say that I do not find these criticisms persuasive. With few exceptions, it is generally acknowledged that most people under interrogation are not aware of their rights. Those who do know them are generally the educated and the experienced criminal. Resisting notification to people of the rights and privileges under laws already in force in Australia demonstrates the ambivalence of our legal system towards individual rights. The real fear, generally unexpressed, is that a genuine notification of rights will dry up vital processes of police interrogation. Empirical studies suggest that too much should not be made of this fear. Whether for reasons of resignation, shock, embarrassment or relief, suspects continue typically to confess. Notification of rights has only a marginal effect upon the propensity to assert rights.

In any case, as it seems to me, if the real fear is that the right to silence will be unacceptably enforced in practice and will have unacceptable results, it is this right, rather than notification of it, that should be criticised. Resignedly to accept that the "weak and ignorant" are

discriminated against by the law is to perpetuate a dangerous hypocrisy and inequality in the application of our laws. It is heartening to see that Commission McNee of the Metropolitan Police in London has himself come out in favour of a written notification of rights.[24]

> "About the continuance of the privilege of silence and the rights against self-incrimination, there may well be room for legitimate dispute. About the need to take rights seriously and inform people of their right, whatever these may be determined to be, there should be no debate".[25]

Notification of rights and duties is not confined, nor ought it to be, to the criminal law. A recently distributed consultative paper, issued by the Administrative Review Council of the Commonwealth[26] dealt with reform of the procedures of social security appeals. It seems obvious that the extent to which citizens will use their rights to appeal against adverse social security decisions, will depend, in part, upon their knowledge of those rights and how they should go about exercising them. The weaknesses in the present situation are disclosed in the A.R.C. consultative paper :

> "Departmental instructions seek to ensure that every adverse decision is notified to the beneficiary concerned. This is largely, but not completely, achieved, the degree of notification varying among the States. Cessation of payment because of failure to lodge an income statement or a medical certificate is not notified to the beneficiary. Currently where notification is given the reasons stated for the decision is generally uninformative. Sometimes only the relevant legislative provision is set out along with the statement that the beneficiary has no fulfilled the legislative requirements. More often the conclusion is simply stated in general terms (e.g., the beneficiary is not taking reasonable steps to find work) without indicating the particular basis for the conclusion. Quite apart from the needs of an

appeal system, such reasons are, in the Council's view, inadequate, since they provide no real information and leave the beneficiary with a grievance that he has not been told why he has failed. The provision of adequate reasons by computer poses problems ... but uninformative reasons are of no real value. Better reasons may reduce the number of dissatisfied beneficiaries who might otherwise seek redress through the appeal process. It may be noted that the Administrative Decisions (Judicial Review) Act 1977 will require the Department of Social Security to supply on request fuller reasons than those at present provided."[27]

The A.R.C. paper recommends that notifications should state decisions and the reasons for them, clearly and intelligibly and advise the beneficiary of what he can do to contest the decision, if he is dissatisfied.[28] Indicative of the strong feeling in the United States about the exercise of rights is a decision in which one Federal Court held that a system designed to provide the opportunity to a welfare recipient for hearing but which built in a procedure intended to deter the exercise of that right or unduly to influence the benificiary so as to deter him from exercising the right, was constitutionally invalid as depriving him of due process of law.[29] Without embracing such a doctrine in its entirity, the fact remains that it is an empty gesture to confer rights without providing adequate means to inform citizens about those rights.

As a form of preventative legal aid, I believe that we will see more statutes incorporating provisions for notification of rights. I think it would be a good thing if those most alert of Parliamentary committees, the Senate Standing Committee on Regulations and Ordinances and the Senate Standing Committee on Constitutional and Legal Affairs, could include in their charter special attention to the incorporation in legislation of obligations to notify rights, privileges and duties. A start has already been made in the Commonwealth's sphere. The whole thrust of the new administrative law is to provide people living in Australia with readier access to

information in the possession of government. The vital "right to reasons" which is conferred by the Administrative Decisions (Judicial Review) Act 1977[30] posits a request on the part of the person affected by an adverse bureaucratic decision. But unless a person knows that he may make such a request (and that it will be fruitful to do so), the beneficial machinery of legislation may never be set in motion.

It will not be enough to give notices in the usual language which lawyers employ. Special attention will be needed to the words chosen and the forms adopted.[31] Many legal disputes could be avoided and still more legal rights asserted and upheld if notification in straightforward and simple language became a commonplace of our legal system. I am sure that every person involved in legal aid would agree that prevention and foresight of this kind is to be preferred to action in court after the event.

In all of the projects before the Law Reform Commission special attention is given to the notification of rights. Thus in the project on Alcohol, Drugs & Driving provision was made for the handing to the accused of the print-out of the modern Breathalyzer analysis and also notification of his right to be medically examined by a nominated medical practitioner.[32] These recommendations were accepted and have now passed into law. The need to notify people of the facility of debt counselling and of reformed laws governing debt recovery and an obligation on the administration to publicise the new laws was specifically referred to in the report on Insolvency : The Regular Payment of Debts.[33] In the discussion paper on Lands Acquisiton Law, the Commission attempted to come to grips with the practical problem that can arise when the Commonwealth seeks, under compulsory process, to acquire homes and other private property :

> "The acquiring authority is an arm of government with access to complete valuation and sales information, equipped with a highly trained staff including expert valuers. Yet the claimant is expected to make his assessment first, the authority then valuing it. If

> the claimant retains a specialist valuer he does so at his own initial expense, paying a skilled and expensive expert to gather information already known to the acquiring authority. The claimant is generally concerned with only one claim, the authority with many. The smaller the claim the less experienced the claimant the greater the chance that he will underclaim or simply accept whatever is offered ... Many resumees [labour] under a feeling of injustice but [feel] they have no option but to accept an inadequate offer.
> The current procedures developed in a different world, 19th century England. "Titles depended on a lengthy abstract, leasehold interests were frequent and complex, claimants were often wealthy, landowners, and, most importantly, inflation was unknown. In the age of Torrens titles and computer lists of sales we can do better. ... Notices of acquisition and of compensation rights should be framed in plain English with explanatory information including an address for translation into foreign languages"34

There are several other examples in the proposals of the Law Reform Commission.35 The common theme is the inclusion in legislation of short, plain language notification of rights and duties. I am convinced that we will see more provisions of this type. The Commonwealth Legal Aid Commission would do well to call to the attention of Government those entitlements or duties which are overlooked or unknown and which emerge in the course of litigation. There are some who fear the proliferation of paper notification of rights. Others see such notification as nothing more than a recognition of increasing literacy in society and a need to protect the individual at a time of burgeoning legislation, much of which affects rights or imposes obligations. I do not believe that it is impertinent to say that the "educational programme that would be effective in promoting a knowledge of rights, powers, privileges and duties under the laws in force in Australia" could begin within the four walls of Parliament. One obvious way to educate people as to their rights and duties is to ensure that they are notified about them as a result of a statutory obligation to do so.

CLASS ACTIONS AND LEGAL AID

Finally, I turn to a subject which is under present study in the Australian Law Reform Commission. The Commission has been asked whether class actions should be introduced into federal jurisdiction in Australia. A class action for damages is a variety of representative action that has developed in the United States. It is a procedure by which a litigant or small group of litigants can sue for damages on behalf of a large number of people who have a similar legal claim. Class actions have been brought in the United States for consumer claims which would never be litigated for the amount of the individual loss but which, when aggregated, represent very sizeable verdicts indeed. Proponents argue that the class action procedure permits the small band of determined, courageous and knowledgeable litigants to sue on behalf of the mass of ignorant, apathetic or timid people for whom a legal right to sue is purely theoretical.

The arguments for and against the introduction of class actions and the impediments that exist in their way in Australia, including impediments as to legal costs, are recounted in a discussion paper of the Law Reform Commission that will shortly be issued.[36] Proponents assert that class actions represent the response of the administration of justice to the mass consumer society : adjusting legal procedures to deal with multiple claims in a way that will effectively invoke legal sanctions and thereby secure internalisation of law abiding conduct and true observance of the rule of law :

> "Access to federal court is often the only way the ordinary person ... can effectively challenge the massive power of a modern corporation or the far reaching power of government itself. Closing the courthouse door leaves them no other place to go. ... Nothing is more destructive to a sense of justice than the widespread belief that it is much more risky for an ordinary citizen to take $5 from one person at the point of a gun than it is for a corporation to take $5 each from a million customers at the point of a pen"[37]

Opponents of class actions, on the other hand, recount the windfall gains that can occur to people who were never concerned about the alleged wrong. They point to the penal impact of large verdicts and what is seen as the misuse of civil law process.

If a form of class actions were developed in Australia, the most obvious ancillary problem that arises relates to the funding of such an action. In the United States, the facility of contingent fees and the general cost rules encourages the bringing of class actions. In Australia, the absence of contingent fees and the rule that the loser pays the bulk of the winner's costs, provide a significant obstacle to the effective introduction of class actions without special provision for costs. Class actions typically involve many parties, a great deal of time and the marshalling of very significant resources. Whereas it may be inappropriate for legal aid to be made available for a small consumer claim, however important is the principle involved, there could well be a more significant argument for the devotion of scarce resources of legal aid for large cases in which action is brought on behalf of many citizens with a like complaint.

Legal aid is not an effective alternative to the mass consumer claim. It may, however, have a role in the provision of funds necessary to ensure litigation that is equitable to class plaintiff and defendant alike.

Mauro Cappelletti is the director of an international project entitled "Access to Justice". He holds chairs in both the University of Florence and Stanford University. He is the convenor of an international conference in Italy devoted to improvements in the delivery of justice. He has asserted that increased access to justice is the next stage in an historical trend. In the liberal states of the 18th and 19th centuries, the procedure for civil litigation reflected the individualistic philosophy of rights. Access was a natural right but it required no positive action on the part of the State to secure its protection and attainment. It was sufficient that the state did not allow infringement of the

right. Such a notion is modified by 20th century popular democracy.:

> "Widespread literacy, popular education, improved communications and universal sufferage have made obsolete the old concept of a propertied elite; property is more evenly distributed, social welfare programs alleviate individual distress. In legal terms the first fruit was provision of legal aid; a social welfare mechanism to allow all citizens, whatever their financial position, to enforce their private legal rights, to defend their personal liberty, status and property. Legal aid, in Cappelletti's term, the "first wave" towards access, put them on a par with their wealthier brethren but it did not affect the interests sought to be protected. The "second wave" Cappelletti defines as "the reforms aimed at providing legal representation for 'diffuse' interests especially in the areas of consumer and environmental protection.[38]
> It is an expression of a wider concern; better educated citizens demanding an increasing part in the running of their society and the decisions of their government. A more crowded affluent society has developed idealogical causes; racial tolerance, civil rights, environmental and consumer protection. These interests may touch liberty or property but chiefly they are expressions of the values individuals wish their society to respect ...
> Legal aid has come to Australia but not yet the "second wave". ..."

The Law Reform Commission's project on "access to the courts" which deals with reduction of the "standing" impediments and the improvement of representative procedures, raise the question of whether we are ready for this "second wave".

CONCLUSIONS AND MATTERS FOR DISCUSSION

The need for educational programmes to promote understanding of legal rights and duties is not self evident, as recent illustrations demonstrate. Law reform commissions have a special part to play in community legal education because the developed methodology of institutional law reform is nothing if it is not consultation. Consulting the lawyer and the experts is now giving way to consultation with the wider lay community. As that community is governed by the reformed laws, it is right in principle and efficacious in practice that it should be consulted about their contents.

Numerous impediments still stand in the way of an effective community legal education programme. But some of the impediments are being removed and already important first steps have been taken. What more should be done?

The following is the list suggested by this paper :

1. New attention should be given to the language of legislation, including federal legislation. No fundamental change will be made to the style of legislation and lawmaking generally until a new approach to legal interpretation is taken by the courts. Such a new approach might be facilitated by a new Interpretation Act, although this is by no means certain. So long as legislation continues to be drawn in the special, obscure style that is used at present, it will continue to be a mystey to most laymen and indeed to many lawyers.
2. The courts themselves are not exempt from criticism. The computer may force on judges a different mode of expressing reasons for decision. Legal education has a long time fuse. Education of succeeding generations of lawyers in excessive attention to detailed authority and inadequate attention to concept and principle leaves its mark on the reasoned judgments of

even the highest courts. There may be no escaping this consequence of the common law method. An Australian Institute of Judicial Administration and a growing sensitivity to the difficulties of the consuming public, including the lay public, may encourage reforms here.

3. There is a need for court officers to be appointed who will summarise important court decisions and explain their significance to the community in an interesting and informative way. Such explanation should not be confined to the printed word but should use the modern means of communication, including television and radio.

4. Periodicals which discuss the law and its problems in frank and simple terms should be encouraged and distributed outside the charmed circle of the legal profession. In this regard the <u>Legal Eagle</u> and the <u>Legal Resources Book</u> deserve special approbation as models in their field.

5. The committees established by the legal profession should report promptly on the role which lawyers should have in the business of community legal education. Teachers and others should be invited to contribute to the thinking of these committees and seminars of interested bodies and persons should be organised in all parts of the country to gather opinion concerning the extent to which legal education of the lay community can go, without losing its effectiveness.

6. The organised legal profession in Australia should consider, with or without external funding assistance, the creation of a special post to centralise the information on community legal education and co-ordinate the work that is now advancing unevenly in different parts of the country. This has been done in the United States but not yet in Australia. It is obvious to me

that the legal profession itself should play an active and enthusiastic part in the community legal education debate. It is heartening to note that in the Australian Legal Convention that gathers in Adelaide in July 1979 a great deal of attention is paid to the role of the laymen.[39]

7. Legislation which confers rights and duties should normally include provision for notification of rights, where this is appropriate. Many examples have been given, in the programme of the Law Reform Commission, illustrating how this can be done. At a time when Australian Parliaments enact more than a thousand Acts a year (to say nothing of Regulations, Ordinances and By-laws) a heavy duty is cast upon lawmakers to ensure that new duties and rights are drawn to the attention of the citizen.

8. The Legal Aid Commission would do well to alert practitioners to the provisions of s.6(h) of its Act so that they can indicate cases that have arisen where ignorance of relevant legislative rights and duties might have been cured by an appropriate notice.

9. The Senate Standing Committee on Constitutional and Legal Affairs and the Standing Committee on Regulations and Ordinances, which have proved so protective of the rights and liberties of the citizen, might now consider it appropriate to give special attention to the incorporation in legislation, where appropriate, of provisions obliging the notification of rights and duties.

10. Specific thought should be given to the role of legal aid, if any, in representative and class actions, test cases and other means of bringing multiple claims to justice.

11. The general procedures of legal aid commissions throughout Australia should include a sensitivity to the reform of the law. In some

cases, specific provision is made for calling to attention matters in need of reform.40 But even if there is no such specific provision, there is little doubt that legal aid commissions and the practitioners supported by them, could play a positive and constructive role in the improvement of the legal system and of the administration of justice by calling to notice cases which have demonstrated a perceived defect in the law or in legal procedures. The recent report of the Senate Standing Committee on Constitutional and Legal Affairs, Reforming the Law41 proposes that the Australian Law Reform Commission should institute and maintain a register of law reform suggestions. This is not a new idea. Judges have for decades, in Australia and elsewhere, complained about the perpetuation of injustice previously called to attention but just overlooked. Judges are not alone in this. Suggestions by academics, legislators and ordinary citizens are sometimes remembered, but more often not. In the age of computer retrieval, we can do better. The Senate committee has proposed that the chief suggestions for reform should be reported annually to the Parliament. The legal aid commissions could provide a ready source of practical and useful proposals for change.

It is not possible to train every layman in the intricacies of every law. Nor would this be appropriate or necessary. The target of community legal education must be something else. Views differ as to what this "something else" should be. There is a growing conviction that much more should be done than is now done. We can take heart that this conviction has at last begun to be reflected in legislation. I look to the day when the enthusiasm for new laws is equalled by a passion to ensure that the chief at least of the rights and duties enacted are communicated adequately to those affected and those who advise them.

FOOTNOTES

1. 11 April 1979, 8.

2. Ibid.

3. B. Keon-Cohen, "Community Legal Education in Australia" (1978) 4 Monash Uni.L.Rev. 292.

4. Ibid, 317.

5. J. Goldring, "Admission to Law Courses in Australia" (1977) 20 Vestes (Australian Universities Review), 61.

6. Z. Bankowski and G. Mungham, "Images of Law", 1976, 106.

7. J. de Q. Walker, Book Review (1978) 9 Federal L.Rev. 523.

8. Keon-Cohen, 315.

9. Memorandum of the Chief Justice of New South Wales, 28 November 1978.

10. New South Wales Law Reform Commission, "The Legal Profession : General Regulation," (Discussion Paper 1) 1979; "The Legal Profession : Complaints, Discipline and Professional Standards", (Discussion paper 2), 1979.

11. Ibid, DP1, 193.

12. N.K. Wran, Address to Graduation Ceremony, University of New South Wales, 27 April 1979.

13. J.D. Heydon, "Police Powers and the Trial of the Accused : Some Modern Attitudes", Mimeo, A.N.U., August 1975.

14. (1978) 3 Commonwealth Record, 889, 892.

15. The Law Reform Commission (Aust), "Criminal Investigation", (A.L.R.C.2), 1975, 44.

16. This is already substantially provided for by the common law. See Christie v. Leachinsky [1947] A.C. 573. See also A.L.R.C.2., 26, 44.

17. Criminal Investigation Bill, clause 19(2).

18. Ibid, clause 21

19. Ibid, clause 27.

20. Ibid, clause 28.

21. Ibid, clauses 25, 26.

22. F. Neasey (1977) 51 A.L.J. 366.

23. Report of the Committee appointed to examine and advise in relation to the recommendation ... of the Board of Inquiry [Beach Report] (the Hon. J.G. Norris Q.C. Chairman) Part I, Police Procedures Relating to the Investigation of Crime, 1978, 47.

24. As reported (1978) 128 New Law Journal, 770.

25. See the author's paper "Controls Over Investigation of Offences and Pretrial Treatment of Suspects : Criminal Investigation and the Rule of Law", in papers of the 20th Australian Legal Convention, Adelaide, July 1979, 227 at 240.

26. Administrative Review Council (Aust), Social Security Appeals, Consultative Paper (ARC1), 1979.

27. Ibid, 5-6.

28. *Ibid*, 19.

29. *Burgoyne* v. *Lukhard*, 363, *Fed.Supp*, 831 (1973).

30. *Administative Decisions (Judicial Review) Act*, 1977 (Cth), s.14.

31. *Australian Government Commission of Inquiry into Poverty, Law and Poverty Series, Debt Recovery in Australia*, 1977 (Mr. D. St.L. Kelly).

32. The Law Reform Commission (Aust), "*Alcohol, Drugs & Driving*" (ALRC4), 1976, 137.

33. The Law Reform Commission (Aust), "*Insolvency : The Regular Payment of Debts*, (ALRC6) 1977, 52. See also clause 64 of the *Debts Repayment Bill*, attached to the report, 131.

34. The Law Reform Commission (Aust), "*Lands Acquisition Law : Reform Proposals*" (Discussion Paper No. 5), 1977, 11.

35. *E.g.* The Law Reform Commission (Aust), "*Insurance Contracts*" (Discussion Paper No. 7, 1978, 9-10 (notification of cover);

36 *Ibid*, *Debt Recovery and Solvency* (DP6), 1978 (Prior notification of rights before debt recovery proceedings commenced; *Ibid*, *"Privacy and the Census"* (DP8), 1979, 28 (Disclosure of private information). *Ibid*, "*Access to the Courts II, Class Actions*", DP11, 1979.37.

37. Vice President Mondale, Address to the Second Judicial Circuit Conference, 10 September 1977, cited *loc cit*, 8.

38. M. Cappelletti, *Rabels Zeitschrift*, 1976, 682.

39. See e.g. D.A. Jones, "The Role of the Layman" in Conference Papers, 114.

40. Legal Aid Commission Act 1978 (Vic), s.10(2)(a) ("Make recommendations with respect to any reforms of the law, the desirability for which has come to its attention in the course of the performance of its functions").

41. Parliament of the Commonwealth of Australia, Reforming the Law, May 1979.