120

UNITED KINGDOM NATIONAL COMMITTEE ON

COMPARATIVE LAW COLLOQUIUM ON

"METHODS OF LAW REFORM"

LAW REFORM EXPERIMENTS IN AUSTRALIA

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

September 1979

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THE TYRANNY OF AIRLINE TIMETABLES:

In its processes of consultation the Australian Law Reform Commission conducts public hearings in major centres throughout the country. The necessity of spanning a continental country requires a constant eye to be kept on airline timetalbes. So it is here today. Airline schedules necessitate that I get what I have to say over and done with and depart to London to catch the last plane to Paris. I regret that this should be so as the papers before this Colloquium are tantalizingly attractive to me.

I appreciate the rearrangement of the program and apologize in advance for my early departure.

INTELLECTUAL INNOVATION IN AUSTRALIA

We in Australia are, in matters of the law and law reform basically children of England. Whereas Captain Phillip and the First Fleet took 8 months to reach Australia, I accomplished the same distance in little more than a day, sitting in an armchair. Captain Phillip brought with him to Australia the Common Law of England, to say nothing of his rather unwilling band of convicts and soldiers. People tend to think of Australia as a big farm or mineral resource. But from the outset we have been overwhelmingly a metropolitan country with scattered communities clinging

generally to the coast of a great island. Our tiny population and economic and political factors, as well as the tyranny of distance, have tended to mute our inventiveness. This has been true in many areas, including the law. Times are changing.

THE NEW ADMINISTRATIVE LAW

Lately there has been a greater willingness to experiment and innovate. There is not time, and it is not appropriate for me, to recount the various things that are happening. In terms of the law perhaps the most interesting developments are in the fields of federal administrative law and family law. In administrative law, for example:

- A new national, general Administrative Appeals Tribunal has been established to co-ordinate review of administrative decisions and to develop a body of administrative law. This tribunal reviews matters of law, fact and policy.
- Ombudsmen have been created in all jurisdictions, Commonwealth and State.
- An Act has been passed simplifying and codifying judicial review law and procedure in respect of Commonwealth offices.
- The same Act confers on persons affected by federal laws a right to reasons for administrative decisions; findings of facts made and a reference to evidence relied on by the administrator.
- A Bill has been introduced - the first in a Westminister Parliament - to establish and enforce "freedom of information" - i.e., access by residents in Australia to government information in the Federal sphere.

THREE AUSTRALIAN DEVELOPMENTS IN LAW REFORM

The national Law Reform Commission has also been experimenting. True, it is the basic model of an institutional permanent Commission for the reform of the law was borrowed from the United Kingdom. But in a few important respects we have been stretching this model and adapting it to our own needs. I do not come here pretending that what we do would be suitable elsewhere. Even in my own country there are some (including some in law reform)

who look escance at our experiments. The time has not yet come for the Antipodean children to repay their intellectual debts. But there are three law reform developments in my country that I think worth calling to your attention. One of them is the subject of my paper. I never assume that participants in seminars or even in colloquia read papers in advance (except, perhaps, their own). I will therefore outline these three developments briefly. In turn they are:

- Experiments by the Federal and State L.R.C.s in new methods of consultation in the process of preparing a law reform report: public hearings; industry seminars held nationwide; extensive use of the media - especially television and broadcasting; use of surveys and public opinion polls and so on.
- The "flushing out" of bureaucratic reactions to law reform proposals - (as for example the publication of an official Treasury Department response to our discussion paper on Insurance Contracts.
- Most important of all, potentially, the examination by Parliament of institutional ways of linking this new creature - the L.R.C. to the law making process.

L.R.C.s IN AUSTRALIA

Perhaps I should first say that there are no fewer than 11 institutional law reform bodies in Australia. Some ante-dated the establishment of the Law Commission in 1965. But these are generally part-time bodies having a small output. Since 1965, in all States but one, a permanent, statutory law reform commission has been established with full-time officers and with statutory duties modelled on the United Kingdom legislation. Even if they were combined, the resources of these institutions would be modest. The Federal or Australian Law Reform Commission was one of the last to be established. Its first members were appointed in 1975. It is the largest

Australian Commission. The Commission's resources include

4 Full-Time Commissioners
7 Part-time Commmssioners (1, effectively full-time)
10 Research Staff
10 Support Staff
4 Seconded or Temporary Employees
No Legislative Draftsmen

The full-time permanent working unit in Sydney is about 25.

The Australian Constitution leaves most matters of private law with the States. The special difficulties of law reform in a Federation - with the conceptual agonizing that comes from the necessity to "characterise"laws as falling within or outside federal power - is itself the subject of another colloquium. We have in part "overcome" this federal "problem" because our remit also extends to the federal territories where the national parliament has plenary lawmaking powers. Thus, many tasks given to the Commission are in truth State matters. A happy development is the increasing willingness shown by State Governments to pick up and enact in State Parliaments our proposals, nominally put forward for the Australian Capital Territory.

EXPRIMENTS IN CONSULTATION

I said that there were three experiments I wanted to call to attention. The first are experiments in consultation leading up to report. These are outlined in my paper. I suppose one of the fundamental reasons that sustains the law reform commission idea is the capacity of these institutions to consult more widely, intensively (and even more slowly) than the Departments of State can normally do.

The U.K. Law Commissions developed the :

- Working paper
- University seminars
- Widespread direct consultation
- Participation by Commissioners in talks and learned journals
- Attaching draft legislation to reports and so on.

All of these, in the spirit of the highest form of flattery we have copied sedulously. I now want to list certain

additional steps we have taken : all I should stress designed principally to achieve the same ends : the gathering of relevant fact and opinion.

First, the collection of statutory consultants. Our Act envisaged the appointment of consultants by the Chairman with the approval of the Attorney-General. In our first heady days we had a budget of almost North American proportions in mind. But the axe fell with what has become known as "budgetary restraint" and "staff ceilings". We now have an annual budget of $2,000 for consultants' fees. Yet we have in all of our projects 20-30 top experts from all parts of the country. They sit down with the Commissioners at various states in the work towards a report. Consensus is not the aim. But the process is one of mutual education. This is especially useful in interdisciplinary tasks - e.g. the law on tissue transplants; the taming of computerised information systems for privacy protection; the recognition of Aboriginal customary laws etc. Our experience has been that busy people, in responsible positions, are only too willing to participate with law reform commissioners for no better reward than a brown bread lunch, washed down with orange juice and Nescafe. A continuing consultative committee of this kind, fashioned for each reference, invariably proves very successful.

Secondly, Discussion Papers. The object of a consultative paper (however it is described) is to elicit comment. Experience suggests that in this busy world it will not do so if it is long winded and boring. Even at the price of some oversimplification, law reformers must find a means of consulting a wide audience in a brief, attractive way - preferably written in language which the informed layman - as well as the expert lawyer, will understand. That is why we developed discussion papers. Summaries of these papers (in pamphlet form) are now distributed with the Australian Law Journal. They thus reach most lawyers in Australia, relevant industry and consumer journals, Members of Parliament, administrators etc. Certainly in the tasks given to the Australian Law Reform Commission a very wide net must be cast if the process of consultation is to be more than tokenism or

the involvement of that small band of enthusiasts or bodies well organised and funded to deal with technical tomes.

Thirdly, Public Hearings. I realise that there is something of a controversy about the value of holding public hearings. In the Australian Law Reform Commission (and recently State bodies) the technique is now well established and increasingly successful and useful.

- Media coverage ensures increasing numbers know about it and attend
- Lobby groups come forward to justify their written submissions
- Individual lawyers/citizens who make written submissions are specifically notified and invited to come forward
- The local Bar Association and Law Society have a deadline to face : always a good discipline for lawyers
- Ordinary citizens make brief submissions and recount their experiences which tend to "personalise" and "individualise" legal problems
- Problems not previously considered "turn up"
- A non legal perspective is given to law reorm
- The predicted flood of disturbed nuisances just never eventuated.

The utilities of these efforts are basically three :

- First, it is surely correct in principle that citizens should have a say - or an opportunity of a say - in law reform tasks. This is particularly so where, as in the Australian Law Reform Commission, the projects in hand involve important policy questions.
- Secondly, it is useful. As our societies retreat from government in secret by the expert to a more open involvement of our better educated populous - we find peole actually do have valuable new insights to contribute to law reform proposals.
- Thirdly, it is wise. Law reforms must generally face in the end hard-nosed politicians and bureaucrats. Suggestions for reform that have been tested in the public media and refined under its withering eye are more likely to come out right and in a form acceptable to Parliament than a "backroom" or "expert" job. Furthermore, expectations of reform are raised.

Our fourth experiment involves the use of the Media. In my paper I discuss the ways in which we have engaged the broadcasting and other media in our work :

- Reports and discussion papers are widely covered and discussed.
- Legal topics - even if only tenuously relevant to our programme - will be commented on
- T.V. interviews are given in conjunction with public hearings
- National T.V. discussions - with audiences of millions - watch Commissioners explain defects of the law with which a discussion paper seeks to grapple
- Commissioners take part in radio "talkback" programmes and discussion proposals with phone-in listeners and commentators.

This public discussion under television lights and in front of huge audiences is uncongenial to (or even frowned upon by) some lawyers. Let us be blunt. There are dangers : personal and intellectual in the exercise. But the very task that brings me to Europe is the disciplining of the exponential growth of data flows across borders - computers in one country talking to computers in another. The issue is related to a task we have on privacy protection. This project has alerted me to the extent of the revolution in telecommunications that is occurring. Nationally, this is reflected in the new means of communication - radio and T.V. above all. If we in the legal profession linger lovingly with the printed word I am afraid we will be left behind. However personally distasteful lawyers and law reformers may find it, we must, I believe, master the new means of communication. We may even find it a useful supporter of orderly reform. We will certainly find it a most relevant and powerful means of furthering the central good idea of institutional law reform - widespread consultation and discussion before report.

The latest experiment we have tried is in the use of scientifically sampled public opinion polls and surveys. We have sounded public opinion in relation to our projects on e.g. road traffic laws and sentencing and punishment of federal offenders. In this last exercise we have also distributed a

survey to all judges and stipendiary magistrates in Australia - 506 in all. I believe this is the first such national survey in the English-speaking world. Despite the fact that it took about 2 hours to complete the survey - our response from these busy people was more than 75% : a signal of the increasing readiness of judicial officers to take a proper part in law reform. The response would have been higher but the Chief Justice of one State successfully urged the majority of judges in that State that it was wrong - even in such a matter as sentencing - for judges to express views on social questions, even anonymously. His views left the other States unimpressed. I am sure that we will be using this technique more frequently in the future. Sound law reform should be based on a thorough grasp of empirical data and relevant opinion. That was a point emphasised many times (rightly I believe) in our firs session - as a weakness of the courtroom and the forensic forum as a place for law reform.

THE TREASURY SUBMISSION

I said that there were 2 developments not mentioned in my paper to which I wanted to refer. Time does not permit elaboration. The first is an event that occurred just before I left Australia. The Commission had published a discussion paper on insurance contract law reform and conducted public hearings, consultations, seminars in every major city organised by the insurance industry bodies, media discussion and so on.

Now the Treasury - certainly one of the most powerful and influential Departments of State, has issues a public submission - widely distributed throughout the country, commenting on - and criticising - some aspects of the Commission's discussion paper.

Though not the views of the Minister (or the Government) here is the public response of the bureaucracy - the permanent Executive - exposed in the market place of ideas for its own share of criticism and comment and where there is disagreement, reasoned response by the Commissioners. Instead of adopting the usual technique of bureaucracy i.e. anonymous interdepartmental committees speaking directly to Ministers in private, here is a public statement : debting in turn, the

Australian Law Reform Commission's proposals and exposing a civil service flank to critical public gaze.

Not only have governments around the world - including the Australian Government (and as I found yesterday in Brussels, the Commission of the European Communities) copied the Law Commission's technique of working papers, "Green Papers" as they have come to be known. Now, the extension of rational debate about the policies behind future laws has been provoked within the central government bureaucracy - by this technique. I believe it to be a significant development - and a healthy one.

THE SENATE REPORT

Finally, I turn to a report by the Australian Senate Standing Committee on Constitutional and Legal Affairs. It was delivered in May 1979 and is still under the study of the Australian Government. It responds, in a bipartisan way and by the relevant committee of our Parliament, to the nagging comments in our first four Annual Reports about the lack of a routine machinery for processing law reform reports in Austraia. We have had cases of legislative "palsy". We have no tradition of Private Members Bills. For various reasons the record of implementing Royal Commission and committee reports had not been good. The Law Reform Commission Act was silent about what should happen after tabling of a report in Parliament. In our Annual Reports we urged a routine procedure to stimulate action. Everyone loyally accepts the prerogative of elected governments to reject proposals. What we urged was regular machinery to ensure consideration of reports in good time and at an appropriate level.

The report signed by the Senators of Government and Opposition Parties urges many innovations. Some of them also arise from other suggestions made in our Annual Reports. For example it is proposed that the national Law Reform Commission should institute a register of law reform suggestions, judicial, academic and otherwise - an idea advanced in this country 15 years ago by Sir Robert Megarry - and that we should report annually to Parliament about the most urgent or important proposals for reform - large and small.

On processing Australian Law Reform Reports, the committee recommended that all reports, once tabled, should be automatically referred to an appropriate Parliamentary Committee and that within six months of that committee's report the Government should accept the discipline of stating its intentions in relation to the reform proposal. This procedure would not restrain the government from acting more quickly. It would simply put a time constraint on consideration of reports. The idea is not entirely novel. The Australian Government recently accepted the duty to respond within six months to Parliamentary Committee reports. All this does is to graft the Law Reform Commission's procedures to an established parliamentary mechanism. The role of Parliament - and of interested backbenchers - in stimulating attention to Law Reform Commission reports is vital in the age of Cabinet (indeed Prime Ministerial) paramountcy. It is especially critical in Australia because of the controversial nature of several of the references entrusted to the Australian Law Reform Commission by successive Attorneys-General.

CONCLUSIONS

Lord Scarman has declared on another occasion that the genius of the English speaking people is their capacity to reduce controversy to routine - and to develop institutions to regularise problem solving.

On the other side of the world we are adapting the institutional model first developed here. The needs for law reorm grow apace - far beyond the inclination and opportunities of the modern common law judges to deliver or the capacity of Parliament and Executive, unaided, to produce. That states our opportunity.

The key to success lies in the central notion that reform proposals will be more lasting if evolved after the closest scrutiny of the defects in the application of present laws. That requires widespread consultation.

We must, I believe, harness the new available means of consultation and debate, especially broadcasting and surveys. If we do so we may just find that our proposals are better informed and more attractive to sensitive politicians and bureaucrats and to Parliament. If whilst remaining independent we find a niche - however modest - in the routine Parliamentary process - that will be a pretty important constitutional development : and one which took place (if I can be permitted to say so) in a very typically British way : namely by a mixture of good ideas - extended beyond their original intent, to which has been added the requisite amount of muddling through and accident.

* These are oral comments made by Mr Justice Kirby speaking to his paper "Reforming Law Reform: New Methods of Law Reform in Australia) (c 21/7a) delivered to the United Kingdom National Committee on Comparative Law Colloquium on "Methods of Law Reform", University of Warwick, 11 September 1979.