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THE NEW SOUTH WALES PUBLIC INTEREST ADVOCACY CENTRE

OFFICIAL OPENING

SYDNEY, THURSDAY, 29 JULY 1982

PUBLIC INTEREST ADVOCACY AND LAW REFORM

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

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A COMMENCEMENT AND AN END

This is a week of beginnings and endings. This week marks the commencement of the N.S.W. Public Interest Advocacy Centre. It also marks the retirement in England of the Master of the Rolls, Lord Denning. He once boasted he had every Christian virtue, save retirement. But there it is. Retired. End of an era. One gets the feeling that a judge of Denning's temperament might not have felt the need for a Public Interest Advocacy Centre. In an address in 1979, he put law reform bodies in their place:

> Law reform...should not be left solely to the Law Commissions. There is a great movement today which says that judges should not be anything to reform the law...We will leave it to other bodies. The Law Commission can do all this and eventually report. How long will it take? Will it ever take place? I would suggest that there is still a field for judge-made law in our land. Of course, I do not get my own way as a rule.[1]

On the other hand, perhaps a Public Interest Advocacy Centre could have encouraged Lord Denning to greater fortitude and inventiveness. Perhaps it could have helped to carry more of his judicial colleagues in the process of judicial reform of the law. It should never be forgotten that the original genius of the common law system we have in Australi lay in the capacity of the judges in the courts to change things. To stretch old precedents and principles to new circumstances. Lord Denning again:

> What then is the way of iconoclast? It is the way of one who is not content to accept cherished beliefs simply because they have been long accepted. If he finds that are not suited to the times or that they work injustice, he will see whether there is not some competing principle which can be applied in the case in hand. He will search the old cases, and the writers old and new, until he finds it. Only in this way can the law be saved from stagnation and decay.[2]

In the age of the elected, representative Parliament, judges, in court, and especially in Australia are much less ready to take an active part in reform of the law. They constantly remind us:

* The case is one between particular parties.
* There is little opportunity for widespread community consultation.
* They cannot issue consultative documents and appear on radio and television to debate social implications.
* They do not have before them all of the relevant parties who could be affected by reform.[3]

I do not think for a moment that this new Advocacy Centre would solve all these problems in or out of our courts. I cannot forecast a new golden age of judicial reform in Australia, even if this were desirable. But the Centre may on occasion, prove a valuable instrument for law reform especially in the courts. It must do so within its resources. It must operate within the primary duty of a lawyer to his particular client and not to some broad social or political goal. Not all of its tasks will be confined to courtrooms. But the Centre may come to fill a void when important social questions are already before a court and need expert elaboration. Or when a matter should be brought before a court in defence of the public interest for the enforcement of the law.

BE YOU NEVER SO HIGH

Most of you will know that in the Gouriet decision, Lord Denning reminded us of the famous, aweful words of Thomas Fuller. He did so in the judicial style which was his trade mark. Short staccato sentences. The language of the evangelist:

> The law shall be obeyed. Even by the powerful...We sit here to carry out the law. To see that the law is obeyed. And that we will do. A subject cannot disregard the law with impunity. To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago 'be you never so high, the law is above you'.[4]

But unless people can get access to the courts the law may be 'above you' but it may not be enforced. It may be so far 'above you' that it may be unattainable to the ordinary man and woman.

If we were to identify the two chief urgencies of law reform in this country, they would be:

* the need to develop a simpler method of expressing the law and of educating our citizens in its basic rules, which they are all deemed to know; and
* the need for a better system of justice ,to assure all people, in a serious case, can have assess to the umpire. Only in this way will the Rule of Law be upheld; not only for the powerful but also for the poor, the underprivileged, the inarticulate, the Aboriginals, the migrants, the unpopular minorities and other disadvantaged groups.

Lord Devlin in an essay in his book The Judge said that we have a reached a point in the adversary trial system which we follow here in Australia that unless the litigant is a powerful corporation or trade union, is the government or is supported by legal aid, the opportunity of bringing a matter, however important, to justice is remote.

We in the Australian Law Reform Commission are trying to do something about this. In our project on the reform of the law of evidence, in co-operation with our colleagues in the New South Wales Law Reform Commission, we are working hard to devise a simpler and more readily understandable law of evidence. Commonsense judges in Australi are already forcing the pace of evidence law reform. But the letter of the law remains a trap for the unwary, and must be reformed.

We are also working on the project for reform of the law of standing and consideration of the development of class actions in this country. I would see this work as complementing the establishment of the Public Interest Advocacy Body. It is not much use establishing such a body, if its representatives can be turned away from courts and tribunals, in the most important cases, because there is no 'standing' or legal right to be heard in court.

LESSONS FROM BONAPARTE

Napoleon had at least one endearing characteristic. He never opened his mail for six months. He worked on the principle that, if you leave problems long enough, most of them will go away or solve themselves. We in the Law Reform Commission do not necessarily subscribe to this Napoleonic principle. However, our slender resources have delayed our work on reform of the law of standing and class actions. We hope to produce our report on reform of the law of standing early next year. In the meantime, cases in the High Court of Australia appear to have stretched the concept of standing in a way that will sometimes help public interest litigants.[5] In England the courts have stretched somewhat the concept of the representative action.[6]

This is where I hope the Public Interest Advocacy Centre will have an important role in the future. Providing assistance to the judges in the proper reform of the law. Not every case is suitable for judicial treatment. Our democratic theory and federal constitution will limit the inventiveness of the Lord Dennings of Australia. But our special system of justice - that of the common law - flourishes in one-third of mankind precisely because of its adaptability in the hands of creative judges - inheritors of an 800 year old tradition of pragmatism and renewal. In this sense, far from being a radical departure, I see the Public Interest Advocacy Centre as an important development to support our institutions and to make them work better in changing times. It is for that reason that I congratulate the N.S.W. Legal Services Commission and the Law Foundation of New South Wales for their foresight and imagination in initiating this venture.. I hope that some of the work of the Australian Law Reform Commission can support and sustain this experiment. It is surely a case of the 'bold spirits' triumphing over the 'timorous souls'.[7] May it succeed!

FOOTNOTES

1. Lord Denning, Address to the Law Society's National Conference, Jersey, October 1979, (1979) 76 Guardian Gazette, 1057.

2. Address to an audience at Oxford. See M.D. Kirby, 'On the Retirement of Lord Denning: An Appreciation of a Reforming Judge', address to the Lord Denning Society, Darling Downs Institute of Advanced Education, 30 July 1982, mimeo (C.55/82).

3. See e.g. Judge Mason in Australian Conservation Foundation v. The Commonwealth (1979) 54 ALJR 176, 189.

4. Gouriet v. Union of Post Office Workers [1977] 2 WLR 310, 317.

5. Onus v Alcoa of Australia Ltd. (1981) 36 ALR 425.

6. Prudential Assurance Co. v. Newman [1980] 3 WLR 543, [1980] 2 WLR 339.

7. Candler v. Crane, Christmas & Co. [1951] 2 KB 164, 178.