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GEELONG CHURCH OF ENGLAND GRAMMAR SCHOOL

CORIO, VICTORIA

MONDAY, 9 AUGUST, 1982

THE LAW'S DELAY

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

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PRIORITIES IN LAW REFORM

The Australian Law Reform Commission is created by the Australian Federal Parliament to propose reforms and the modernisation and simplification of Federal laws in Australia. It is based in Sydney. It has a staff of 19. There are 11 Commissioners, of whom 4 are full-time. The Commission makes reports to the Federal Attorney-General on projects specifically referred to it by him. The reports, once delivered, must be tabled in Federal Parliament. Many of the reports have been followed by the enactment of new laws, both at a Federal and State level.

Some of the most distinguished lawyers in the country have been members of the Commission, including Sir Zelman Cowen, Sir Gerard Brennan and the new Premier of Victoria, Mr. John Cain.

I have served as Chairman of the Commission for more than 7 years. My term was recently extended for a further three years. If at this stage I were to identify the three chief challenges to law reform in Australia today, I would identify:

* the delays that attend the resolution of legal problems, particularly when they have to go to court;
* the provision of simpler laws and provision of community education in law; and

* the reduction of the costs of the law, so that people with genuine disputes could have them independently decided, without prohibitive costs.

SUGGESTIONS TO SAVE COST AND DELAY

The problem of delay in court hearings is a problem of long standing, going back to Biblical days. The explanation for some court delays is the great complexity of legal problems and the scarce manpower available to provide the solutions. However, the Australian Law Reform Commission and other law reform bodies in Australia are working on projects designed to reduce the delays in the delivery of justice. Even in recent weeks a number of suggestions have been made for speeding up court hearings in Australia. Only if the resolution of matters in the courts could be expedited, will the average costs of justice be reduced, so that it becomes within the reach of ordinary citizens. Among suggestions that have been made for expediting justice, I would mention:

* greater power for judges and magistrates to limit lengthy cross-examination;
* revision of rules of evidence to permit more matters to be proved by documents, rather than by more time consuming oral evidence;
* use of video tapes of witnesses' evidence, to save costs of witnesses waiting around court and interruptions in the trial, waiting for witnesses to arrive;
* greater use of telephone hearings for some simpler legal proceedings;
* reduction of jury trial in civil cases;
* substitution of no-fault entitlements for time consuming accident compensation cases;
* introduction of class actions and other means of joining together multiple claims;
* reduction of committal proceedings and substitution of full access by the accused to statements by prosecution witnesses;
* reduction of courtroom disputes about police confessions, by the use of sound and video recordings of statements to the police;
* introduction of notices of defence in criminal trials, to reduce the element of 'ambush';
* provision, in important cases, for 'leap frogging' appeals to allow important cases to go straight to the highest courts.

USE OF TECHNOLOGY. VIDEO TRIALS

The greater use of technology in the courts could be one means to help fight the delay in justice which frequently results in cases not coming up for trial until years after the event. Psychological research undoubtedly shows, as common experience teaches us, that memories fade and accurate testimony fades with memory. We must either expedite the hearings of disputed cases, in order to capture memory whilst it is fresh. Or we must look to technology to provide a means of obtaining soon after disputed events, detailed testimony, sound and video recorded, which can be placed before the judge or jury. In the United States in 1982 for the first time a murder trial was conducted in Ohio entirely based on video taped testimony. The taping of testimony was done intermittently to suit the convenience of witnesses and lawyers over several weeks in February 1982. The final tape was edited by the judge to remove inadmissable and prejudicial evidence, following arguments by the lawyers. Video tape has been used in civil cases in the United States since at least 1975. One of the defence lawyers pointed out in the recent criminal trial that the elimination of "theatrics" by the use of video tape permitted a jury to determine the outcome "on pure legal evidence and procedure" and less on emotion.[1] Judges claim it has cut average delays in disposing of criminal cases by 13 months. The number of civil cases awaiting trial has also dropped by 36% since video evidence was introduced. As pressure on the courts continues to build up in Australia, I am sure that we will see trial by video tape introduced here. It may promote efficiency and save costs and time. It will be important that it be done carefully, so that jurors and judges too understand that they are engaged in an authentic trial and not simply watching another episode of Perry Mason.[2]

USE OF TELEPHONES

The use of telephones in dispute resolution hearings has already started in Australia. Although we have not yet seen the use of telephones in courts, there has been a notable introduction of the use of telephones in the Federal Administrative Appeals Tribunal. In appeals against denial of social security benefits, there is an element of urgency and, by definition, the people involved can rarely afford lawyers or expensive travelling costs. A hundred years after Alexander Graham Bell invented the telephone, it is now being introduced into our formal decision-making procedure. Telephone conferences and even telephone hearings are being arranged by the Administrative Appeals Tribunal. A three-way and sometimes four-way link is established between the Tribunal, the litigant, the department officer and sometimes other witnesses. Traditionalists may see this as an unsatisfactory compromise with the right of a court or tribunal to see parties and their witnesses. However, although body language is important,

psychological research suggests that the judicial boast of an ability to judge truthfulness of a witness from his appearance in the witness box, is misguided or at least exaggerated. And in any case, it is important that our machinery of justice should adapt, with technology, to be available to all and not just the wealthy, the corporations and unions or the few who can be aided from the public purse. I believe that the innovations of the Administrative Appeals Tribunal will be copied in the court system in order to bring the neutral umpire to serve more people, more economically.

CRIMINAL TRIALS

It is more difficult to modify the procedures of the criminal trial in Australia because these procedures have been developed over many years and were often considered essential to the protection of civil freedoms. However some changes had already occurred and more are coming.

One of the biggest changes in the administration of criminal justice during the past decade in Australia has been the increase in the number of matters that can be tried before a magistrate instead of a judge and jury. Jury trial must be kept for the most serious cases. But increasing doubt has been expressed, including in the judiciary in Victoria, concerning the capacity of juries to handle complex corporate crime and fraud cases. One senior Australian judge re ently proposed the abolition of committal proceedings. He pointed out that all too frequently an accused might spend his available money on the legal costs of the committal proceedings and be left short of funds to finance his defence at the trial. In England, reforms have been introduced to reduce the number of committal proceedings with oral evidence and to introduce "paper committals", so that the accused has access to the prosecution papers. This procedure is already followed in some Australian States. But in others, lengthy and expensive committal proceedings are common. The most notable example is the committal proceeding in the so-called Greek Conspiracy Case. Proposals have also been made and some law reforms introduced, to require the accused to give notice of his defences, such as alibi or diminished responsibility. Yet these proposals are opposed by the traditionalists who say that the accused should be able to say nothing and put the prosecution to the proof, from first to last. Without disturbing the basic rules, I believe that reforms should be introduced to reduce the "ambush" element in the criminal trial and to ensure that expensive court time is focused on genuine disputes between the parties, not side issues.

A.L.R.C. PROJECTS TO COMBAT DELAY

Although the Australian Law Reform Commission does not have a specific mandate to examine the efficiency of court hearings, listing procedures and other procedural rules, it is examining the reform of the law of evidence in Federal and Territory courts. The Commissioner in charge of this project is Mr. T. H. Smith, a Melbourne barrister. In the course of its work enquiring into evidence law reform, the Australian Law Reform Commission is examining ways in which Federal and Territory courts could:

* encourage greater use of documentary evidence which can be read, on average, four times faster than oral testimony can be given from the witness box;
* introduce video segments where witnesses are likely to be unavailable or where it is otherwise convenient to do so;
* permit judges to limit excessively lengthy cross-examination of witnesses.

Earlier recommendations of the Law Reform Commission on reform of criminal investigation law included a recommendation for the use of tape recording of confessions to Federal Police. Proposals based on the Law Reform Commission's report have been adopted by the Federal Government and are included in the Criminal Investigation Bill 1981 presently before Federal Parliament. If the time taken in criminal trial to resolve disputed confessions to police can be reduced, this would itself result in a considerable saving in the administration of criminal justice.

The aim of law reform must include the provision of justice in serious disputes to more Australians, including those who are not poor enough to qualify for legal aid and not rich enough to pay readily from their own purse. Providing justice for middle class Australia - ordinary citizens in the suburbs of Australia, is an important challenge for the law reform bodies of Australia.

CROCODILE TEARS NO ANSWER

General dissatisfaction with 'the law's delay' was not enough. It is necessary to act. Last week a case was concluded in the High Court involving liability of a school to a student injured in the playground eleven years ago. Eleven years is a long time to wait for compensation. Waiting can take a toll on litigants, whether they are injured people seeking recompense or business people involved in complex and urgent commercial disputes. We must promote a more efficient trial system. Without a more efficient

system, we cannot have a cheaper system. An occasional change of court rules and a few crocodile tears about delay will be no substitute for a thorough attack on the causes of delay. There needs to be a greater willingness to change old ways of doing things, especially by the adoption of new technology as an aid to reform. If it means more people will get to the independent umpire, we should be willing to adopt procedures which might be regarded as less than perfect to today's lawyers. It may be better that thousands get to generally fair justice than that only tens get to exquisite justice - because only they can afford the costs and delays involved.

CONCLUSION

I hope that what I have had to say may be of some interest to the students at this famous School. Reform should not be confused with revolution. At the same time, it does imply a movement forward. It implies keeping the best of the old, whilst at the same time adapting or 're-forming' it to changing social, economic, moral and technological conditions. I hope that the work of the Australian Law Reform Commission will have the support of the students of this famous School.

FOOTNOTES

1. 'Videotaped Murder Trial in Ohio' in Trial, May 1982, Vol. 68, 536.

2. Australian Law Reform Commission, Evidence Research Paper No. 8 Manner of Giving Evidence, 1982, 73.