360

THE UNIVERSITY OF NEW ENGLAND
ROBB COLLEGE, ARMIDALE

VALEDICTORY DINNER, 25 OCTOBER 1982

# THE SEVEN DEADLY CONSTRAINTS OF LAW REFORM

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

October 1982

THE UNIVERSITY OF NEW ENGLAND
ROBB COLLEGE, ARMIDALE

VALEDICTORY DINNER, 25 OCTOBER 1982

# THE SEVEN DEADLY CONSTRAINTS OF LAW REFORM

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

## THE SEVEN CONSTRAINTS

On his retirement in 1982, reflecting on the difficulties of achieving law reform in Australia, the Victorian Law Reform Commissioner, Sir John Minogue, lamented what he described as the community's apathy to law reform and legal issues. His time as Victorian Law Reform Commissioner, following a distinguished career in the law that took him to be Chief Justice of Papua and New Guinea, had been, he said, 'frustrating and disheartening'. He said that he had received disappointingly small numbers of responses to the widely distributed working papers seeking community comment on such topical issues as corporate crime, dimished responsibility and murder and changing criminal procedure. He then ventured a reflection on the difficulty of achieving reform of the law in Australia.

> 'It is part of the Australian ethos or Australian attitude that unless something hits the hip pocket nerve, it takes a lot to stir us into enthusiasm or thought about matters beyond the rigors of daily life....I think there is a general Austalian apathy to phillosophical questions. We tend not to think too much about the underlying basis for what we are doing.'[1]

Sobered by this observation, and reflecting for my own part on the experience of seven years at the head of the Australian Law Reform Commission, I want to attempt a catalogue of the principal impediments that stand in the way of the achievement of law reform in this country. I have titled my piece 'The Seven Deadly Constraints'. No doubt more time and thought would increase the list. Seven will do for the moment. What are the principal problems that a professional law reformer in a position such as mine faces in

discharging the task of helping our Federal Parliament to achieve reform and improvement of our society by the methods of institutional law reform?

Let us start with the list of the features of the Australian scene which significantly slow down or impede the achievement of prompt law reform. They are, I would suggest:

* The inappropriateness of some constitutional provisions, especially because of developments in technology since the Constitution was adopted in 1901.
* The limitation on most law reform bodies, including the Australian Law Reform Commission, imposed by the need to work only within references specifically assigned by the Government.
* The limitations in the manpower and resources of law reform bodies, so that only about 10 cents is spent for each citizen a year to improve Federal and State laws in Australia.
* The need for law reform bodies to consult widely, which sometimes slows down production of their reports.
* The absence of any regular system to ensure prompt parliamentary attention to law reform reports, once delivered.
* The tardy procedures of bureaucratic committees to which reports are frequently assigned.
* The lack of any systematic scrutiny of reformed laws, even once these are passed, to ensure that they achieve the objectives of the reformers.

## THE FROZEN CONTINENT

Constitutionally speaking Australia has been described as a frozen continent.[2] Everyone knows the difficulty of securing constitutional reform through the referendum procedure. Even where all major political parties agree to reform, there is no guarantee that the referendum will be carried with the requisite majority of total votes and in a majority of the States. In more than eighty years of federation we have achieved only nine constitutional amendments by this formal means. Of course, reform of the Constitution can be secured in other ways. Decisions of the High Court of Australia can, by interpreting the Constitution, significantly reallign power as between the Commonwealth and the States. This has happened. It has happened unexpectantly. But in terms of formal constitutional amendment, the Australian people have proved reticent and cautious. Law reformers, advising governments and parliaments do well generally to operate within the Constitution as it is and as it has been interpreted. Although the prospects for formal amendment appear to have improved, if recent experience is a guide, they remain pretty grim.

I do not wish these comments to be misinterpreted. Our Federal constitutional system has advantages for law reform. For example, it permits experimentation with new

ideas in one State. If they work, they can be adopted elsewhere. Important reforms have been achieved in Australia this way in recent years. They include reforms on such matters as consumer protection, anti-discrimination, censorship, mental health laws, homosexual law reform and so on.

But sometimes the Constitution stands as a major impediment to efficient reform. Sometimes the Constitution simply fails to provide for a capacity for national law reform where a problem is plainly a national one. The development of in-vitro fertilization, the possible development of human cloning and other problems in the bioethical area are examples. There appears to be nmop ready power for the Federal Parliament to achieve national reform to cope with these new problems though they are, in truth, problems of humanity - not just limited to State borders. Likewise, with the advent of national media, there is a need for a uniform defamation law. Yet there is only limited Federal power to enact a reformed Federal defamation law. Hence the effort to consult with the States about defamation reform. This involves a protracted process that has already taken two years, with the end not yet in sight. Computers, operating an international as well as national technology will also impose the need for national regulation if uneconomic efficiencies are not to be imposed by the law on the computer industry and its users. Yet the Federal Constitution, framed long before the first computer, does not readily envisage simple Federal laws to deal with problems arising out of widespread computer use.

There are some who call for an entirely new Constitution. Frustrated by what they perceive as the inappropriateness of the 1901 division of powers to solve 1982 problems, they urge a complete re-write of the Australian Constitution, preferably in time for the 1988 Bicentenary of European settlement. Addressing a meeting at Sydney University on 19 March 1982 the Prime Minister, Mr. Fraser entirely ruled out such a prospect. Furthermore, he urged that it did the cause of constitutional reform a disservice.

> 'There is no prospect of a new Constitution by 1988 as some are suggesting. Nor is a totally new Constitution in any way required. The effort to achieve such an objective is indeed one of the most devisive proposals that can be contemplated in Australia. There are many real and pressing problems which Australia faces in the next few years - a new Constitution is not amongst them. It is matter which can only distract the nation's attention from the issues of substance'.

Steps are being taken to consider the appropriate reform of the Australian Constitution. As it happens, they may bear fruit in time for the 1988 Bicentenary. Given the glacial pace of constitutional reform it is course positive that the issues may come to a

head in time for the centenary of Federation, in the year 2001 or even later. Three recent developments can be mentioned

* The first is the announcement by the Prime Minister that the official Constitutional Convention will be reconvened in May 1983. This is the body in which politicians, Federal and State, take part in proposing reforms of the Constitution. It provides a vehicle for achieving political consensus on some matters of reform. In the nature of the party debate in Australia, the reforms emerging tend to be addressed to minor rather than major controversies.
* The second development is the project of the Law Foundation of New South Wales on constitutional law reform. That project has the participation of representatives of most major political parties. Community leaders, academics and citizens from differing backgrounds, different parts of Australia and different points of view are also taking part in the preparation of a publication which will review the Australian Constitution in 1983. It is planned that public meetings and seminars, to be held in all State capitals and in Canberra, will follow the publication of the review in 1983. This development may stimulate the official Constitutional Convention and permit a wider community voice to be heard on Australia's constitutional future.
* A third development arises from proposals that a treaty or Makarrata should be signed with the Aboriginal people of Australia in time for the 200th anniversary of the arrival of the first settlers. This proposal has now passed beyond talk. An Australian Senate Committee is examining the legal implications of such a treaty.

Clearly, it is most unlikely that a complete re-write of the Australian Constitution will come about for the Bicentenary of the First Settlement or even the centenary of Federation. Radical reform of that kind is just not the Australian way of doing things. But whilst it might well be undesirable for us to throw aside entirely our written Constitution, now one of the most venerable of the written constitutions of the world, it can be said that there is plenty of room for constitutional renewal and reform in Australia. Without deviating from the Federal ideal, it should be possible for us to make a serious re-examination from time to time of the respective functions of the Federal and State Parliaments. Some matters, inappropriate for Federal treatment at the turn of the century, may now legitimately be seen, in this stage of Australia's national development, as national concerns. They may deserve uniform legal treatment by Federal laws, applicable throughout the country. There are obvious candidates to be considered for such treatment, including areas where law reform is long overdue. Instances may be industrial relations law, accident compensation laws, the legal and social implications of the computer and the issues of bioethics. The criminal law and road traffic laws may also now

be suitable cases for national regulation. Above all, there is a need for new institutional machinery to encourage uniform State laws in appropriate areas. Such machinery exists in the other great English speaking federations of Canada and the United States. It has never really developed in Australia.

TEN CENTS A YEAR

The second limitation I have mentioned is the obligation imposed on most law reform bodies to work only within the tasks assigned to them by the Government of the day. Some overseas commissions can roam freely over the whole landscape of the law: chosing their own priorities and programs. On the other hand, the entitlement of the elected government to identify the projects upon which advisory law reformers will work, though a limitation and a constraint, is not for that reason to be criticized. It is a means for channelling the expensive and valuable law reform effort into those matters which democratically elected representatives believe should have priority. It is a guarantee against law reform bodies operating in areas of interest to lawyers only. A glance at the tasks assigned to the Australian Law Reform Commission indicate that politicians are more likely to chose tasks of social relevance than a mere group of lawyers would do. Amongst the projects assigned to the A.L.R.C. by successive Attorneys-General, Labor and Liberal - National Party have been such controversial themes as complaints against police, reform of criminal investigation, the recognition of Aboriginal tribal laws, redesign of child welfare laws, provision of new laws on human tissue transplantation, a suggestion of laws to protect privacy, the provision of class actions and so on. The limitation to projects given by the Attorney-General may be a guarantee of relevance and an insurance against lawyers spending time on tasks of exotic interest to them but of little concern to the community.

More pressing is the third limitation, that of manpower and resources. It has been calculated that the total amount spend on institutional law reform in Australia, Federal and State, is little more than ten cents per citizen each year. Clearly the amount is trivial when compared to the forces for change that require improvement and modernization of old laws and the provision of new laws to meet new circumstances. It is remarkable that we spend so little on the improvement of the discipline that effects us all. The investment of ten cents for every citizen each year is a minuscule budget for the systematic study and improvement of Australia's laws. We are readier in our grumbling criticism of the law than we are in dipping into our pockets to help improve the system.

I do not wish to imply that law reform in Australia is the monopoly of law reform agencies. Important work is done within parliaments themselves, the Departments of State, Royal Commissions, ad hoc enquiries, universities and so. But for the systematic, orderly and coherent improvement of our system, we should clearly be spending

more than we do. Our laws and our institutions all too often reflect community unwillingness to spend money on research and systematic reform of the law in operation.

The special feature of law reform bodies, when contrasted to the courts, Departments of State and other means of securing law reform, is their dedication to widespread public consultation. Although the Victorian Law Reform Commissioner expressed disappointment with the response, others have had a more encouraging reaction from the public. In part, the response will depend upon the techniques adopted. If the purpose of consultation is to secure the views of a wider community as well as experts, new means of communication must be used. This may involve use of public hearings, brief summary discussion papers, talk-back radio, television programs and other means of promoting community debate. But all of this effort takes time. In a Federal country care must be taken to conduct enquiries in all parts of the nation. In a country of continental size, the obligation of consultation can be costly and time consuming. The price of consultation, then, is often delay. But the price of a failure to consult may condemn proposals to inattention or defeat because of the opposition of this or that powerful lobby.

## BYZANTINE WORLD

A fifth impediment to prompt law reform is the absence of a regular institutional system to ensure that proposals made in reform reports are promptly considered by Parliament. No reform body has a right to expect its proposals will be automatically and without consideration passed into the law of the land. In a democracy, this is normally the privilege of the representative parliament. But where great effort and many pains are taken to ensure, even in controversial matters, that proposals put forward are balanced and just, it is important that our institutions of lawmaking should develop their own means to ensure the prompt consideration of reform proposals: deciding, with reasonable speed, whether they should be adopted, modified or rejected.

It was to this end that Sir Anthony Mason, now a Justice of the High Court of Australia suggested many years ago that law reform reports should automatically pass into law unless disallowed by parliament.[3] It was also with the problem of delay and apathy in mind that the Senate Standing Committee on Constitutional Legal Affairs suggested a procedure for the automatic reference of reports to an appropriate parliamentary committee.[4] Neither of these ideas has yet received acceptance. The present Federal Government has assumed the responsibility of announcing the way in which a report, once tabled, will be handled in the administration. But because this procedure falls far short of the Senate Committee's suggestion, the Australian Senate has now moved to refer all reports of the A.L.R.C. to the Standing Committee on

Constitutional Legal Affairs itself. Time will tell whether this new procedure, and the resources available to that Senate Commitee, will permit the development of a useful parliamentary stimulus to the impediments in the Executive Government that sometime retard the adoption of reform proposals. The accumulation of unattended reports is a major problem of English speaking democracies. The need for the representative legislative arm of government to find new procedures for processing proposals for reform and for stimulating attention to them is an important issue that should concern all true democrats who want to see the enhancement of the parliamentary system rather than the continuing enlargement of the role of the bureaucracy and the unelected judiciary.

The bureaucracy itself sometimes amount to an impediment to reform. Many a report has become lost in the Byzantine world of Canberra's interdepartmental committees. These bodies of anonymous public servants, meeting without open public scrutiny and delivering reports, often secret, upon recommendations for reform can sometimes provide a most powerful and significant barrier to the translation of reform proposals into the law of the land. Of course, some procedure for interdepartmental consideration of proposals, their costs and their impact on administration is normally necessary. But negative thinking, a preoccupation with other tasks and the undue attention to the interests of officialdom can sometimes result in great delays in the evaluation of reform reports before ever they get to consideration by the elected politicians. There is a tendency in our country to go over and over problems : constantly reinventing the wheel of reform. Needless to say, it is a tendency that is intensely dispiriting to reformer.

## THE WAY IS HARD

Finally, I would mention the lack of any systematic scrutiny of reformed laws once they are in operation. All too often laws are passed and it is just assumed that they achieve the objects stated by the reformers and accepted by Parliament. It is a rare thing for the operation of a reforming Act of Parliament to be studied and measured against the expectation of its designers. A notable exception is the Federal Family Law Act. That Act is under constant scrutiny by the Family Law Council, the Institute of Family Studies and special committees. There ought to be an efficiency audit of at least major legislation, including law reform legislation, against the declared objects of the reformers. Sometimes Acts of Parliament have odd and unexpected effects. Sometimes those effects indicate that further reforms are necessary or that the earlier reforms were misguided. The reform process is never finished. It would be my hope that, in the future, the Australian Law Reform Commission will be given an ongoing charter to consider the operation of laws proposed by it and accepted by Parliament. Apart from anything else, this would develop a healthy spirit of self-criticism and a realisation that in the real

world perfection is never achieved. We should never rest content with injustice, even unexpected or unintended injustice. Adherence to this ideal is the object which led to the establishment of the Law Reform Commission.

The former Australian Prime Minister, Mr. Whitlam once said that in Australia 'the way of the reformer is hard'. With a Biblical allusion, Lord Chancellor Hailsham, speaking of the position in England from which country we inherited our legal system, recently observed 'truly strait is the gate and narrow is the path which, so far as law reform is concerned, leads to the statute book'.[5] No one can deny these truisms. The problems that stand in the way of reform, some of which I have listed, should not, however, be a source of profound pessimism. We should count our constitutional and legal blessings. They include a basically stable system of government and generally just laws, interpreted and enforced by an uncorrupted expert and independent judiciary. There is the jury system which has been a guardian of our liberties and encourages ordinary citizens to take part in the administration of justice. There is a representative parliament and an adminstration made increasingly responsive to the citizenry by the development of new institutions and laws. And now, in Australia, there is an institutional means for the orderly improvement of the legal system. That we have not achieved perfection is unremarkable, given that institutional law reform is a new phenomenon. Our legal system is eight hundred years old. Times are changing. There are injustices to cure which will not be attended overnight. But at least we have now accepted the imperative of systematic reform of the law. No doubt with time, we will get better at it. And the result will be a juster society.

## FOOTNOTES

1. Sir John Minogue The Age 21 January 1982; [1982] Reform 45.
2. Cf. G.Sawer, Amending Australia's Constitution Exxon Review, No.2, May 1982, 7.
3. Sir Anthony Mason, 'Law Reform in Australia' (1971) 4 Federal Law Review 197.
4. Australia, the Senate, Standing Committee on Constitutional and Legal Affairs, Reforming the Law 1979.
5. Lord Hailsham (1981) 34 Current Legal Problems, 285.