THE YOUNG LIBERAL MOVEMENT OF AUSTRALIA

NATIONAL CONVENTION, ADELAIDE, 18 JANUARY 1983

ACHIEVING LAW REFORM - BEYOND REPORTS

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

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THE RIGHT TO DIFFER

I am delighted to be invited once again to speak to the National Convention of the Young Liberal Movement. The Australian Law Reform Commission values the support of the Young Liberals. I repeat what I said last time. There are great difficulties and challenges before of our country. The more thoughtful, concerned young people take an interest in our political institutions, the healthier they will be. It is no good groaning and moaning on the sidelines. The success of democracy as we practise it requires that a healthy proportion of people - especially young people - should take an interest in politics and play a part in our political institutions. Otherwise the sharpening of political choices by debate, difference, philosophical contests, will not occur.

The great merit of our system of government is, as Lord Hailsham said in the first Menzies Oration, the right to differ and to compete about differences before the whole community. Because of my position, I cannot become involved in party political disputes. I accept, with perfect impartiality, relevant invitations from the Liberal Party, the Australian Labor Party, the Australian Democrats and others. The tradition of Crown service, followed by the judiciary in Australia, is one I cherish: it is one that it neutral to party political differences. But those differences are at the heart of our free institution and I applaud the interest you are showing in them. Do not make the mistake that democracy is about bland consensus on every critical issue. That way lies the path of the one party State, Thought Police and the dreary paraphernalia of dictatorship. There is a certain irony, if you reflect upon it, in the fact that both the fun and relevance of democratic politics would go out of it, if our political parties ever had too overwhelming a success for too long. Value victory. But cherish the privilege to fight for popular support on hard decisions taken on tough issues as an even greater prize of our sort of society.

SEVEN PERSPECTIVES

I have been asked to speak on the theme 'Achieving Law Reform - Beyond Reports'. This requires me to talk candidly about the difficulties of achieving law reform in our continental, federal country. Candour and frankness to such an audience is imperative. I would not be inclined to give, and you would not be desirous of listening to, a panegyric of platitudes about law reform in Australia. Because everything nowadays, particularly in an election year, tends to be politicised, I must tread warily. But we do have institutional and attitudinal problems in achieving federal law reform in Australia. If I cannot speak frankly to a concerned audience such as this, democracy is put at nought.

Let me start by getting a few things in perspective about the translation of reports of the Australian Law Reform Commission into legislation. There are seven 'perspectives' to be kept in mind.

* Not all bad: The first is that the news is not all bad. It is especially not bad by comparison to the record in Australia for implementation of the reports and recommendations of committess, boards of enquiry, Royal Commissions and so on. In Britain, where there seems to be a disease of total indifference to such reports. They join the legion of the lost: one report following another to the archives of Her Majesty's Stationery Office. Forests of Norway have been destroyed to provide the British people with the greatest collection of unread books in human history. We have not quite caught this British epidemic in Australia. But the symptoms are clearly there. Believe me, my colleagues and I know that the urgencies of law reform and of curing injustices are too great for law reformers to wash their hands once they have produced their reports: drawing self satisfaction from a splendid volume and praise from a few academic colleagues. The business of law reform, if it is to be worthy of that name and worthy of the financial support of the Australian people, must take proposals beyond reports. That is certainly the criterion adopted by the Australian Law Reform Commission. We will have failed if we have joined the band of unimplemented reports on the library shelves of the world. Our duty is to help Governments and Parliaments to right wrongs.

* Not party political: The second point to be made is that, in the great debates of Australian political life, law reform is not a matter on which there is much division of party political opinion. So far as the Liberal Party is concerned, the Prime Minister in an address in Melbourne in April 1976 fixed its Party philosophical banner to the mast of reform:

> There are many aspects of Australia's institutions where reform is needed. Reform is needed wherever our democratic institutions work less well than they might. Reform is needed wherever operation of the law shows itself to be unjust or undesirable in its consequences. Reform is needed wherever our institutions fail to enhance the freedom and self respect of the individual...Australia has always been a country where constructive reform has been welcomed and encouraged...Debate in Australian politics has never been about whether reform is desirable. Australians whatever their politics are too much realists to believe that no further improvement is possible and too much idealists to refuse to take action where it is needed. The debate has rather been about the kinds of reforms and methods of reform that are desirable.[1]

* Not only issue: The third point to be made is that law reform, though important, it not the only issue before the Australian community, nor even the most important issue. Clearly at present, the economic problems besetting Australia and the Western world are of monumental concern to our society and priority concern to its politicans. Governments are distracted by economic issues just now. In economic hard times, we must trim our sails. And the trimming will affect law reform expectations, as everything else. Priority political attention must be given to the economy. But practising politicians must continue to give their attention to other pressing issues and concerns that compete for their attention span. In the movements towards greater social and economic justice for all citizens, law reform is central.

* Not immediate attention: Fourthly, the law reform body, as a subordinate adviser to Parliament and to the elected Government, has no institutional monopoly on wisdom. No mantle of episcopal infallibility falls upon law reformers when they receive the Governor-General's commission. Dedicated, hard-working and tireless in their efforts to secure public consultation and community opinion, though they may be, they will get things wrong. They may be insufficiently sensitive to opinion in the electorates. They may pay insufficient attention to costs of particular reforms. They may be out of step with this or that Government policy, especially economic policy. They may put forward proposals too late or too early for action. Sincerity alone is not enough. Reformers have no right to insist upon immediate implementation of their recommendations. In a busy world, with many urgent decisions to be made, the most they can expect is that carefully prepared reports will receive due attention within a reasonable interval of time by officials at an appropriate level and, ultimately, by Ministers, party meetings and Parliament.

* Not only reformers: Fifthly, we have to face the fact that law reform commissions are not the only way by which important reforms are achieved. Some are achieved through departments of State. Others are achieved through small expert committees. Others are secured through interdepartmental committees. Some of the most important reforming measures of the Fraser Government have been in the area of administrative law reform. The Freedom of Information Act is by every just assessment an important reform measure. It originated not in a law reform agency but in departmental working parties. Therefore, failure to attend to the reports of the Law Reform Commission does not necessarily mean a failure of the reform momentum. In the nature of the projects given to the Australian Law Reform Commission by successive Governments - matters of high policy and controversy - it may simply reflect the difficulty and complexity of the issues that the reports are not dealt with more quickly. Better that reports should be produced tackling those issues than that only small, ad hoc straightforward problems of reform should be addressed by our law reform institutions.

* Not all by law: Sixthly, it must be acknowledged that law reform is not the answer to every problem. Some problems are simply insoluble. The devastation of break up of a family has to be sorted out by the law. But there are no easy universal solutions to the vexed battles over custody of children. The law must ultimately leave this extremely difficult matter of judgment to a human decision-maker. Some great issues may be beyond present resources. Take the needs of interpreters, requirements of legal aid, the protection of the environment: the ideal may cost us more than we are able, as a community, to afford. Law reformers like everyone else must work within the boundaries of current resources. Never has this point been clearer than at present. Some of the greatest problems of society are beyond the discipline of the law. No one believes the fairytale anymore that you have only to pass an Act of Parliament and prejudice, injustice, cruelty and human greed will go away. Life in the law was not meant to be so easy.

* Not only by report: Finally, we must acknowledge that even where reports are not implemented by legislation, reform can nonetheless be achieved. Administrators can change their ways. Judges can reflect reform proposals. Lord Denning never thought he should wait for Parliament to get around to implementing the reports of the English Law Commission. He simply adopted their proposals as principles of the common law. Community opinion can be changed by public debate. Legal history may record that the most important contribution of the Australian Law Reform

Commission in its formative years was not a series of statutes passed by the Federal Parliament in short time, but the modification of community and professional attitudes to law reform and a growing willingness of people in the Australian community to accept law reform as the responsibility of us all. Countries, like people, have moods. The Australian Law Reform Commission has sought to develop what the Prime Minister has called 'participatory law reform'.[2] Raising the expectations of reform can contribute to reform action through the judiciary and the administration. It can lay the ground for reform attitudes in law schools and other places where lawyers and administrators of the future are trained. It can contribute to a climate conducive to legal renewal. Reform of our society, including through legal change, is by not achieved only by getting proposals of law reform commissions into the statute book. Even when that achievement is secured, it is by no means sure that reform, however well thought out, will work or will work precisely as was planned. The life of the law, reflecting the society it serves, is exquisitely unpredictable.

THE SCORECARD

Now I have outlined what I might call the 'fairness factors' to be taken into account in judging the scorecard of the Australian Law Reform Commission. Since we were established, with the support of all parties in the Federal Parliament in 1975, we have delivered 20 statutory reports to Federal Parliament. Of these, seven have been Annual Reports. Accordingly the substantive reports with recommendations have numbered 13. They have differed in length, detail, the numbers of recommendations, the complexity of the issues, the controversy raised, and the difficulty of securing implementation. Judged by legislative implementation how have we been going as a Commission, as a Parliament and as a community in turning report proposals into reform action? The answer is, I fear, 'not good enough'. Take the substantive reports in turn:

* ALRC 1 Complaints Against Police and ALRC 9 Complaints Against Police: Supplementary Report. These two reports deal with a difficult and sensitive issue. They have resulted in reforming legislation namely the Complaints (Australian Federal Police) Act 1979. Points in the reports have been picked up in a number of States. Some elements in the proposals have been adopted in New South Wales legislation. The Federal legislation is apparently praised in a paper that has been prepared for a forthcoming Law Ministers Conference of the Commonwealth of Nations. The problem it addresses is one of controversy in most modern communities. Two key elements in the Law Reform Commission scheme were

dropped by the Government, namely the reserve power by the Commonwealth Ombudsman to direct further enquiries and to require a matter to proceed before the independent, judicial Police Tribunal. Nonetheless the Federal legislation is overwhelmingly as recommended by the Law Reform Commission. It is probably the best such legislation in the world. Time will tell whether it works effectively.

* ALRC 2 Criminal Investigation. The second report of the Commission is probably its most controversial. It addresses the whole question of criminal investigation: definition of the powers of arrest, requirements of tape recording of confessions to police, exclusion of evidence unlawfully or unfairly obtained by police, rights to interpreters, the rights of children and Aboriginals under detention and so on. Attorney-General Ellicott introduced a Bill, substantially based on the report, in 1977. The Bill lapsed. Attorney-General Durack introduced a second Bill based on the report in 1981. It modifies the report in many respects. But it is undoubtedly an important reforming measure. It still awaits parliamentary consideration. The speed with which the national Parliament could enact the National Crimes Commission legislation indicates how important reforms need not take years to achieve. Fighting crime, especially organised, sophisticated, computerised crime is vital and urgent to the survival of our society. But, if we take rights seriously, defining them in modern terms and making them available to our citizens and police alike is equally important for a free society. I hope that in the next session we will see equal determination to see the Criminal Investigation Bill into law. In a sense it is a counterpart to the National Crimes Commission Act. Keeping the balance between law enforcement and civil liberties should be the concern of all who love freedom. So on this report, legislation has long seemed tantalisingly close. But it has not yet been enacted. Specific parts of the legislation have been picked up in administrative practice and State laws. But the major Federal reforming law is still to come.

* ALRC 4 Alcohol Drugs and Driving. The report on breathalizer and drug-driving laws for the A.C.T. was quickly passed into law. Unlike the Criminal Investigation Bill, this Bill had the support of police. What a difference is makes if there is official support in law reform. I sometimes wonder whether key Australian officials have taken a course in delay by watching the British television program 'Yes, Minister'. Our federal system adds a further dimension for inaction. Yet this reforming measure has passed into law. It contains many improvements on breathalizer laws and sought to tackle the new problem of people driving under the influence of drugs other than alcohol to which breathalizer equipment is not specific.

* ALRC 6 Insolvency: The Regular Payment of Debts. Our sixth report dealt with a problem unhappily very much a problem of our times: namely consumer indebtedness. Drawing on the experience of the greatest credit economy of them all, the United States, it proposed a system of moratoriums for small but honest consumers who get into debt, a method of regular repayment of aggregate debts and a procedure for credit counselling. All too often the law tackles symptoms rather than the underlying disease. This report has got lost somewhere in the bureaucracy in Canberra. Though legislation based on it has been passed in South Australia, Federal legislation is still to come. Interestingly enough, the Cork Royal Commission in England last year proposed a scheme for Britain not dissimilar to that urged by the Australian Law Reform Commission. Unfortunately our report passed through the hands of four Ministers for Business and Consumer Affairs. Just when some action looked like happening, the Minister was dismissed and then the Department was abolished! The problem of indebtedness in our society becomes more and more acute. The need for reforming law to help and not to punish people who innocently get into debt becomes an urgent priority. No implementation yet.

* ALRC 7 Human Tissue Transplants. The Commission's report on human tissue transplants addressed one of the typical problems of our time: a bioethical problem posed by advances in medicine. This report has proved one of our most successful. It has been adopted in the law of the A.C.T., the Northern Territory, Queensland and Western Australia. A Bill is before the Victorian Parliament and legislation is proposed in South Australia and New South Wales. In a country that cannot boast many uniform laws - in which we cannot even agree on the time of day - this achievement of uniform law reform is notable. It is especially notable because of the sensitivity and controversy of issues dealt with. These issues included the definition of death, the use of human body parts, donations by children and so on. Many like issues wait in the wings for law reform treatment including euthanasia, in vitro fertilization (test tube babies) genetic engineering and so on. Top marks for this report.

* ALRC 11 Unfair Publication. This report urged important reforms of Australia's defamation laws. It said that the reforms could be achieved either through uniform State and Federal action or through a Federal enactment. The Government chose the former course. Since 1979, the report has been before the Standing Committee of Attorneys-General. At meetings as far apart as Perth, Townsville and the languid air of Queenstown in New Zealand, the Ministers have laboured over the report, section by section. Press releases have indicated a fair measure of agreement and consensus is being achieved. I understand that a draft uniform Bill is being prepared. This is, of course, a very controversial subject. In summary, progress, but slowly.

* ALRC 12 Privacy and the Census. This report was a special one dealing with privacy aspects of the Census. It anticipated the major report on privacy which the Law Reform Commission is to deliver in 1983. An urgent report was requested by the Treasurer. An urgent report was delivered. At the moment in Australia we destroy Census returns once they are converted to statistics. The Commission acknowledged that this was the best possible protection for privacy. A majority questioned whether this was going too far having regard to medical, historical and other uses to which the returns could be put. A number of technical reforms were suggested. Some of these found their way into amendments to the Census and Statistics Act passed by Federal Parliament. The Government decided to maintain destruction of original data. Good marks for swift attention to this report.

* ALRC 14 Lands Acquisition and Compensation. The Australian Constitution guarantees that property taken by the Commonwealth shall only be acquired on 'just terms'. To spell out that guarantee in modern terms the Commission delivered a major report, with many proposals for reform. The Northern Territory administration adopted the proposals almost in toto. Action at a Federal level is still awaited. The report seems to have got enmeshed somewhere in one of those dread interdepartmental committees. The report was delivered in 1979. So far no action. Though some satisfaction can be taken from the Northern Territory use of the work, the need for a Federal decision still remains.

* ALRC 15 Sentencing of Federal Offenders. In 1980 the Commission delivered an interim report on sentencing of Federal offenders. The report caused a storm of protest amongst State correctional Ministers and authorities. It had the temerity to suggest (on an interim basis) for the first time that the Commonwealth had perfectly legitimate constitutional rights and duties of its own to take steps to ensure the even treatment of persons convicted for offences against Commonwealth laws. Some of the proposals put forward by the Commission have been adopted by Federal Parliament in amendments to the Crimes Act passed on 1982. These include measures to reduce the use of imprisonment which is so personally destructive and financially costly in Australia. One proposal made by the Commission was for the establishment of a National Sentencing Council by the Commonwealth. The Commonwealth initially supported the idea but put the proposal before the States. Unfortunately (but not unexpectedly) some of the States strongly objected. In the result, I gather the proposal will not proceed. I have drawn to the attention of the Attorney-General that the Commission's proposal was not for a Federal and State body, but for a Federal body looking to the Commonwealth's own responsibilities. This major report leaves much work to be done. The Commission has not had the resources to attend to its completion. I hope that those resources will arrive in 1983.

* ALRC 16 Insurance Agents and Brokers. This was a report which dealt with the problem of insurance intermediaries. It tackled head on the losses to the Australian insurance industry and to insureds by the misuse, by some brokers, of client funds. It proposed a modest system of registration and obligations of trust accounting. These proposals were rejected by the Government as an undue interference in the operations of the insurance market. But they were supported by many branches of the industry itself, the Federal Opposition, the Australian Democrats and some Government Senators. In the result, an Opposition Bill based on the report passed through the Senate and is now in the House of Representatives awaiting attention. This is the only case where there has been a significant rejection by the Government of a report of the Law Reform Commission.

* ALRC 18 Child Welfare. A report on child welfare law in the A.C.T. was issued in 1981. It has been under the consideration of the Department of the Capital Territory since then. The Minister, Mr. Hodgman, has told me that he is keen to secure reform action. But so far (apart from minor amendments of the current Ordinance concerning child care centres) no legislation has been brought forward.

* ALRC 20 Insurance Contracts. The latest report of the Commission proposed major changes to the law of insurance contracts was tabled in Federal Parliament in the closing hours of the session last December. The early months of this year will show whether any action is to be taken to process the report in a speedy and systematic way.

PURER LAWS?

What conclusions can we draw from this record in Federal law reform in Australia? Certainly it is important to keep our perspectives. Some achievements have been made. Reform itself is not an issue that divides the major political parties. The Law Reform Commission is not the only road to reform. Some great issues, such as unemployment and the drought distract our political leaders from attention to law reform; and that is understandable. No law reform body expects immediate, drop-everything attention to its every word. Law reform must join the queue, particularly if there are significant costs involved. Law reform has its limitations. Merely passing an Act of Parliament will not make all problems go away. Furthermore, some reform can be achieved, and has been achieved, without legislation. At the very least, there is a better mood about today and a greater recognition of the need to attend to reform of the law.

One must rate Australia's performance against that of comparable Western democracies and take into account the quality of what is ultimately produced in reform achievement. Taking all these considerations into account, one must still say that the Australian record in Federal law reform is only fair: about a B minus. We are not at the bottom of the class. We have many achievements including recent achievements in the Federal sphere. But we are not at the top of the class either. The chief enemies to reform action remain not frank political opposition but institutional resistance, slow public service processing of reports, the tendency to re-examine every word of a report, to throw proposals publicly canvassed to the closed door meetings of interdepartmental committees which then brood for months and even years on thoroughly researched law reform proposals, insufficiently stimulated into prompt action by Government or Parliament.

An editorial in the Age, on the publication of our most recent report on insurance contracts lamented:

> It seems to be the fate of the Australian Law Reform Commission to be often hailed but seldom heeded. Its reports and recommendations mostly make good sense, but usually the forces of political, commercial or professional interests combined with official inertia and public apathy block their adoption. The ordinary citizen is always the loser.[3]

Need this be so? Can we not find the institutional solutions and political will to process, through the decision-making machinery of our country, into the law of the land, well thought-out proposals for law reform? Proposals even in difficult, sensitive and controversial areas? Those of us who remain optimistic about the fate of parliamentary democracy - and its capacity to survive in the age of the micro chip, test tube babies, nuclear fusion, social, business and moral changes - those of us who are the optimists will look for institutional solutions that make Parliament work better.

Some of you, at the turn of the year, will, like me, have disdained frantic celebration and joined a watch night observance. The changing of the years has always seemed to me to be a time to reflect on successes and failures. The successes of law reform have been notable. But so have the failures. And that should concern us all.

We stand at the threshold of a new year. It is a good time for your Conference. It is a good time to reflect on challenges that will lie ahead in an election year. In hard times, of economic downturn, many of our brightest aspirations are beyond our pocket. But hard times can be made times of achievement for law reform, which often involves

little marginal cost, in attention to injustices long neglected or new problems, put to one side as too difficult. The words of Tennyson's famous poem, recited at the turn of a year, may be out of vogue amongst some members of the younger generation. But I hope this audience at least will attend to the detail of the lesser known stanzas. In invoking the wild bells to ring out to the wild sky, to ring out the old and ring in the new, Lord Tennyson calls on them specifically:

> Ring in the nobler modes of life
> With sweeter manners, purer laws

In very difficult times, facing natural and man-made disasters, that could be a worthy aim for 1983:

> Ring out a slowly dying cause,
> And ancient forms of party strife;
> Ring in the nobler modes of life;
> With sweeter manners, purer laws.[4]

FOOTNOTES

1. J.M. Fraser, address to Melbourne Rotary Club, 21 April 1976, mimeo 1.

2. J.M. Fraser, speech at the opening of the 19th Australian Legal Convention, Adelaide (1977) 51 Australian Law Journal 343.

3. The Age, 16 December 1982.

4. Alfred Lord Tennyson In Memoriam A.H.H., 1850, cvii.