

NATIONAL BOOK COUNCIL
LITERARY DINNER, MELBOURNE
WEDNESDAY, 22 JUNE 1983

THE UNFINISHED AGENDA OF LAW REFORM

June 1983

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

HOMO UNIUS LIBRIS

In the reign of Queen Victoria, it was the special rebuke of a man of letters that he was homo unius libris, a man of one book.

Though I have inflicted on the Australian people, since my appointment eight years ago, a veritable tidal wave of words, I am, so far, homo unius libris. The venture for the book originated in the mind of Oxford University Press. James Hall asked for a fresh book on the law, law reform or the judiciary. Because I am a 'type A' person, I was far too busy, when approached, to settle down in that quiet contemplation that is needed, to write a fresh book. Instead, I offered my speeches of the past few years. Little did James Hall realise, in accepting that offer, what he was letting himself in for. The Encyclopaedia Britannica takes up marginally less space on the shelf and covers areas only slightly more catholic in their variety. Never daunted, James Hall, like the true publishing professional he is, surrendered the pleasure of reading a thousand speeches, essays and addresses. That pleasure he delegated to Valerie Haye of the Department of Legal Studies in La Trobe University. The book published by Oxford University Press is very much her handiwork. I do not know how she chose amongst the thousand speeches — the pain of rejecting 988 would have been too insupportable for me to bear. But somehow she managed and selected twelve. With a little editing, updating and refashioning, it became the basis of the book. It gives a glimpse into the varied, frustrating, exciting world of law reform. It deals with:

- * institutional problems : concerning the improvement of our legal system
- * community problems : concerning instruction of ordinary people in their laws
- * multicultural problems : including the design of new laws sensitive to the ethnic diversity of Australia today
- * bureaucratic problems : and the adaptation of the legal system for the growth of big government
- * the vexed question of the recognition of Aboriginal customary laws : a matter that is current under examination by the Law Reform Commission
- * the equally vexed issue of sentencing reform
- * attention to the reform of court procedures and the American invention of class actions
- * consideration of some of the impacts which computers will have on the law
- * a short review of bioethics and the law
- * a closing exercise in futurology as it affects the law and the legal profession.

I know that it is a modest piece. But there is growing interest in reform of the law in Australia. It is right that the work of the Australian Law Reform Commission and its personnel should be under critical scrutiny. The book is dedicated to long-suffering audiences — of which you are but the latest. Yet audiences tend to be specialist : last week it was the British Public Schools Club, Communications Course at the NSW Institute of Technology, a Superannuation Conference, a Banquet for Lifeline in Newcastle, two sessions at the College of Law in Sydney and a Senate Committee. Tomorrow it is a computerists conference in Geelong after a breakfast session with an intrepid Senator, struggling to inflict this American invention upon us in Australia.

For those concerned about the good health of the law in Australia, the work of the Australian Law Reform Commission is important. The book is designed to open the mind of the general reader to the challenges before our legal system. I hope it succeeds in that modest endeavour. I get a second chance later this year when the ABC will publish my collected Boyer Lectures on the judiciary. I will then be homo unius libris no more. The offers, in fact, are pouring in. Publishers are asking for a manuscript. So far I have restrained myself supplying containers full of past speeches. Perhaps I will ultimately renounce the law for the world of books. After all, who nowadays remembers or reads the Viscount Maugham, Lord Chancellor of All England. It is his naughty brother Willy — W Somerset Maugham — the despair of the Lord Chancellor's life, but the man of letters, who is remembered. Perhaps there is a lesson for all judges and lawyers in the impermanency of the fame of Viscount Maugham and the permanent celebration of the life of Somerset Maugham. Each contributed in his way but posterity has awarded the laurels to the bookman, not the judge.

ADVANTAGES OF FEDERATION

I now want to say something that is not in the book, but which could have been, for it concerns the institutions we are developing in Australia for the improvement of the legal system — to make it more sensitive to injustice and more determined to right wrongs. I stand, after eight years as Chairman of the national Law Reform Commission, within sight of the close of an important period of my life. Within a year, I will have left this post and returned to the Bench and the mainstream of legal practice. From this vantage, it is possible to see two most important items on the unfinished agenda of law reform in Australia. Until we tackle these two items, our system of law reform will remain, I believe, incomplete and amateuristic. The two items are:

- * the establishment of better means of securing more uniform laws in Australia; and
- * the development of better means of processing law reform reports through Parliament.

Few people nowadays urge the dismantling of the Australian Federation and the substitution of uniform laws on all subjects throughout Australia. The country is too big. It would be an administrative nightmare.

The Federal divisions, to some extent, protect individual freedom by 'dividing up power'. However, there are many areas where the differing laws between different States of Australia are inconvenient and represent an expensive burden on citizens, and particularly on business and industry. Since the Second World War, business and industry in Australia has been organised nationally. Computerisation and telecommunication encourages uniform business practices. However, State laws and regulations impose costs and inefficiencies which led to uncertainty, confusion and increased expense.

Australia would not be a better place with uniform laws on every subject. But there are matters upon which we should be able to achieve uniform laws. The highest priority, for reasons of sheer efficiency, lies in the field of business regulation and company law. The fact that companies have to comply with eight different sets of consumer protection laws, for the six States and two Territories and, as well, the Federal Trade Practices Act, creates a confusing legal maze. Our legal system should do better. We can take lessons from the other English-speaking federations, Canada and the United States. Even on the continent of Europe, with entirely different legal traditions, they seem to do better.

OVERSEAS UNIFORM LAWS

In the United States, a National Conference was created as long ago as 1892. The Conference has met annually and prepares model Bills for adoption throughout the States of the United States. Many of these Bills have been enacted either verbatim or in a modified form. The Uniform United States Commercial Code has been adopted in almost every State. One can list the topics upon which the American Federation has been able to secure in virtually all States of the United States:

- * The Commercial Code covering most topics of commercial and business law
- * Criminal Extradition
- * Partnership
- * Reciprocal Enforcement of Support and Maintenance
- * Attendance at Court of Out-of-State Witnesses.

In Canada, a Canadian Uniform Law Conference was established in 1918. Although it has not achieved as much as the United States Conference it has developed a number of model Bills which had been copied in many of the Provinces of Canada. Uniform legislation has been secured in this way such as:

- * Statutory Interpretation Reform
- * Legitimacy
- * Contributory Negligence
- * Defamation
- * Reciprocal Enforcement and Maintenance Orders in Judgments
- * Human Tissue Transplants
- * Vital Statistics (I am not sure what this means).

In Europe, particularly since the Second World War, numerous Conventions have been signed by member countries of the Council of Europe, designed to harmonise European laws on matters where differences in laws of neighbouring countries were inconvenient. He said that more than 100 Conventions and Agreements had been drawn up by the Council of Europe since its establishment. Many of these have resulted in important law reforms in Member countries, including Britain.

Is it not ironic that on the continent of Europe, divided by language, separated by culture and history and ancient enmities, not blessed with a common legal system inherited from a common source, served by utterly different legal institutions and personnel, they can agree on uniform laws on so many varied topics? Yet we in Australia, with a common language and traditions, with like institutions and a great degree of cultural homogeneity, find it difficult even to agree on the time of day.

Perhaps the very diversity of the countries of Europe and the States of the United States add to the pressure for achieving uniformity. Perhaps it is something to do with the greater obvious need for harmonisation. Certainly it has proved much more difficult to get uniform laws among the six States of Australia than among the 50 States of the United States. Much more progress has been made towards uniform laws, or uniform principles of law, in 25 States of Europe than in six States of Australia. Complete uniformity is unnecessary and probably undesirable. But what we obviously need is better machinery to develop and process uniform laws on those topics where uniformity is advantageous. Unless we in Australia can develop better machinery, we will pay a high price in the inefficient application of differing laws and institutions. Alternatively, the constitutionally ingenious will search amidst the entrails of the Australian Constitution of 1901 for possible grounds for Federal legislation to overcome the occasional inconveniences of diversity

LAW REFORM HELPS

Now, the work of the Australian Law Reform Commission can often help in securing uniform laws. A number of the reports of the Commission have already provided the basis for State law showing that legislation can promote general uniformity. I would instance:

- * Complaints Against Police : Aspects copied by Federal, NSW, Vic and Qld laws
- * Criminal Investigation : Aspects copied NSW. Federal legislation promised
- * Insolvency : Implemented SA
- * Human Tissue Transplants : Implemented ACT, Qld, NT, WA, SA and Vic. Promised in NSW
- * Defamation : Uniform law promised July 1983
- * Lands Acquisition and Compensation : Implemented NT. Substantial implementation promised Federal and Vic.

Most specifically, the work of the Australian Law Reform Commission on Human Tissue Transplants and Defamation law reform has resulted or will result in uniform laws throughout Australia. However, the process takes time, is chancy, there is a lot of duplication of work and effort, and no certainty that uniformity would be achieved.

ACTION COMING

In the Federal Labor Party platform before the recent elections, a promise was made to establish an Australian Uniform Laws Council. I understand that the Federal Attorney-General, Senator Evans, will be canvassing options for a uniform law body at the forthcoming meeting of the Australian Law Reform Agencies Conference in Brisbane on 2
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The need for action is clear. As recently as last weekend, Mr Justice Murphy told a seminar in Canberra that the extent of diversity in Australian laws was a special burden on business and industry. Our present machinery for achieving uniform laws is unsatisfactory. A new national institution is needed. Nearly a hundred years after the United States established its institution, Australia may get a uniform laws body. It will need proper research backup and, even more important, political support from the States. Without the political will, we will all continue to go our several ways. The Australian citizen will pay the price. And the pressure for more Federal legislation of controversial validity will grow. All Australians concerned about the health of the law in Australia will be watching closely the work of Senator Evans towards uniform law reform body in Australia.

PARLIAMENTARY CONSIDERATION

The second unfinished item on my agenda is the achievement of effective machinery to translate law reform reports into parliamentary action in a routine way. I discussed the problem of bureaucratic pigeon holes with Members of the Senate Standing Committee in Sydney yesterday. The Chairman of that committee, Senator Michael Tate and members from the major political parties, had a meeting with the Law Reform Commissioners in Sydney to discuss improvements in Australian Federal law reform machinery. In 1979 the Senate Standing Committee suggested that law reform reports should be automatically referred to parliamentary committees. This proposal had been rejected by the then Federal Government. However, the Senate Committee has resolved to refer all reports of the Australian Law Reform Commission to itself.

Law reform legislation is typically silent about what happens after a report is delivered. All too often in Australia reports have gathered dust. This has been less true of the Australian Law Reform Commission than most, simply because we involve so many people in the preparation of reports, raise expectations of action and constantly keep our reports before the attention of the politicians and the Australian community. The logjams remain in the busy offices of top bureaucrats and overworked Ministers. Yet the problems for our legal system are coming in such numbers and complexity that we must find bipartisan means to break the logjams. A system of translating proposals for reform of the law into action has become more orderly and routine. I have no doubt that interested politicians on the back benches have an important role to play in this. Unless we can make Parliament work better, problems of law reform will be turned over to the unrepresentative branches of government : the bureaucracy behind closed doors and the judiciary, which may not always reflect community values. Those who value democracy in the Australian community will strive to make Parliament work better. That is the ultimate objective of bodies such as the Law Reform Commission