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MEETING OF COMMONWEALTH LAW REFORM AGENCIES

FORUM ON LAW REFORM WITHIN THE COMMONWEALTH

HONG KONG, 21 SEPTEMBER 1983

RESEARCH AND CONSULTATION

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

NEW METHODS OF CONSULTATION

1. The common feature. If there is a single common feature of the methodology of the law reform agencies of the Commonwealth of Nations, it is their commitment to consultation before presenting recommendations for law reform. The precise manner and extent of the consultation engaged in depends, in turn, upon a number of variables. These include:

* the resources available to the law reform agency
* the inclination or ability of members of the agency to become exposed to or engaged in public controversy
* the nature of the projects undertaken and whether they are likely to arouse interest beyond the circle of the legal profession, and
* cultural, political and technological factors. In some countries radio and television is freely available for public discussion and debate. In other countries only the print media is available, and then rarely. In some countries public canvassing of high policy issues is not encouraged by governments. In other countries, still imbued with the somewhat secretive traditions of British administration, public debate and controversy is regarded as a thoroughly bad thing. In others freedom of information is in vogue and public debate, de rigeur.

2. Working paper. The Law Commission of England and Wales and the Scottish Law Commission developed, from the outset, the procedure of the working paper. This is a scholarly, if brief, analysis of the current law, perceived defects in the law, options for reform and proposals that are favoured. However, the Law Commissioners frequently complain of the relative lack of response to this mode of consultation. Despite widespread distribution of working papers, the responses were generally few and often superficial. The

working paper was not cost-effective as an instrument of consultation. Though directed to consultation, it was not particularly effective in promoting responses from the busy class of people to whom it was issued:

* Judges and lawyers were generallay too busy to read such a lengthy and technical document.
* Politicians and bureaucrats were disinclined to do so because of the provisional nature of the working paper.
* The public could not get interested because of the subject matter or the technical manner in which the working paper was typicallyexpressed.

The experience of the Law Commissions has been paralleled in Australia. According to what is read elsewhere, there has been a similarly disappointing response in other parts of the Commonwealth of Nations. What can be done about this?

3. New means of consultation. Seizing on the central idea of the working paper (consultation), the Australian Law Reform Commission (ALRC), now followed by a number of law reform agencies in Australia, has introduced important innovations in the procedures of community, expert and professional consultation. These innovations may be listed:

* Discussion paper. A shortened pamphlet (about 30 pages) is produced summarising the main points and in a less technical way that can be understood by intelligent laymen. This pamphlet is then widely distributed.
* Summary flier. For those who will not read 35 pages, a flier is produced, generally of four or eight pages. This is then distributed as a supplement to the Australian Law Journal and through journals in the industry or discipline most affected by the inquiry.
* Seminars. Professional, expert or industry seminars are then arranged in all major cities of the country, in order to focus on the discussion paper, flush out lobby groups and competing viewpoints, and identify problem areas.
* Public hearings. The ALRC now conducts public hearings in all capital cities concerned with all of its references. These hearings are conducted informally, are open to the public and the press and generate a great deal of public discussion.
* Use of media. In conjunction with the public hearings, and also separately, the print and electronic media are used and encouraged to cover debates about law reform matters. This coverage in turn promotes many letters, telephone calls and other inquiries and thousands of comments on law reform discussion papers.

* Tape recordings. In conjunction with its inquiry into Aboriginal customary laws, the ALRC has been producing tape recorded cassettes with summaries (including in Aboriginal languages) of proposals to promote discussions in the groups most affected. Commissioners then travel to the outback to listen to Aboriginal communities who could never be expected to attend formal or even informal public hearings.

* Surveys. In order to reach out to those who will not participate but whose views are important, the ALRC is using, with due caution, public opinion and special surveys. The polls have been conducted by independent experts but funded by national newspapers as part of their regular sampling of community opinion on topical issues.

* Research papers. The latest innovation of the ALRC is the production of in-house research papers. These represent virtual draft chapters of reports. They are summarised from time to time by discussion papers which are more widely distributed. Research papers are used for experts and for the team of honorary consultants appointed in each reference.

* Open house. An innovation of the NSWLRC has been the conduct of 'open houses'. These are even more informal than public hearings. They have encouraged community groups in suburbs and country towns to come along for discussion on particular references with visiting Law Reform Commissioners.

4. Purposes. The purposes of this whole process of consultation include:

* identification of defects in tentative proposals
* illustration and personalisation of problems in the current operation of the law
* generation of a momentum behind recognition of the need for law reform actions, making it more difficult for politicians to ignore final reports when they are produced, and
* promotion of a greater general community concern about the state of the law and a sense of responsibility for the removal of injustices.

5. The techniques of consultation used by the ALRC are used in varying degrees by other law reform agencies in Australia. Participants who read the Report on Laws Governing Homosexual Conduct (Topic 2) of the Law Reform Commission of Hong Kong, will find there a detailed discussion of the careful way in which the HKLRC approached consultation with the various communities in Hong Kong about reform of the law concerning that controversial topic. The Law Commission of England and Wales has itself begun experimenting with shorter issues papers. In Australia, the Federal Government has adopted the discussion paper technique in connection with matters of general government policy (eg establishment of a National Crimes Commission and reform of the law governing the interpretation of Federal statutes).

The original idea of the English Law Commission which led to the distribution of working papers was clearly right. There is still a need to do the detailed research evidenced in working papers. But it is suggested that there is also a need to diversify our procedure of consultation. In doing so, we should utilise fully the new media of communication that are available. This can be cost-effective. It can also promote much greater interest in and attention to law reform.

USE OF SOCIAL SCIENCES

6. Multidisciplinary experts. In virtually all of the projects of the ALRC, social scientists, outside the legal discipline, have been intimately involved in assisting the Commissioners to develop their discussion papers and to refine these into final reports. Assuming the law is sui generis and not itself a social science (a bold assumption and probably wrong) some indication of the multidisciplinary mixture of expertise used by the ALRC can be seen from the following examples of the mixture of talents shown in counsultants attached to the inquiries:

* ALRC 2 : Criminal Investigation : Criminologists and experts in police operations
* ALRC 4 : Alcohol, Drugs and Driving : Forensic medicine, analytical chemistry and drug rehabilitation
* ALRC 6 : Insolvency : Budget advice service, Council of Social Service and finance industry
* ALRC 7 : Human Tissue Transports : Moral philosophy, theology and medical disciplines
* ALRC 11 : Unfair Publication : Defamation and Privacy : Media studies, Councils for Civil Liberties, Journalists' Associations, religion and media
* ALRC 15 : Sentencing of Federal Offenders : Penologists, criminologists, probation and parole experts, sample survey research experts
* ALRC 18 : Child Welfare : Social work, penologists and police
* ALRC 22 : Privacy : Computer scientists and surveillance experts

  Aboriginal Customary Laws : Anthropologists and historians

7. Social survey techniques. The most direct controversy about the use of social sciences by the ALRC arose in connection with its inquiry into the reform of sentencing law. Because Federal offenders in Australia are tried in State courts and sentenced by State judges and magistrates, disuniformity in punishment has occurred in punishment in different parts of Australia. With the assistance of expert criminologists and the Director of the Sample Survey Research Centre of Sydney University, the ALRC prepared a number of surveys following well-established social science techniques. These surveys were addressed to:

- public opinion (newspaper national opinion sampling)
- prisoner opinion
- judicial opinion (national judicial survey)

Undoubtedly the most significant and interesting of the surveys conducted was addressed to all judges and magistrates in Australia engaged in sentencing of Federal offenders. The results of the survey, which is believed to be the first of its kind in the Commonwealth of Nations, is to be found in Appendix B to the ALRC report, Sentencing of Federal Offenders (ALRC 15) 1980. It covers about 150 closely typed pages. It describes, in detail, the outcome of the questionnaire. It discusses the response rate (ALRC 15, 492), criticism of the survey method (id, 494), the design of the questionnaire adopted (id, 500) and the role of empirical research in law reform (id, 502). It is encouraging for those who see a role for the social sciences and empirical research in law reform, that the response rate to the Australian judicial survey was extremely high. Leaving aside one State, the response was 80% of judicial officers. In some jurisdictions, the return reached 100%. In one State an objection was raised that the approach adopted by the ALRC was misconceived. The purpose of mentioning this is not to examine the specifics of the debate or the particular criticisms of the questionnaire or survey undertaken. It is to indicate the reservations in some quarters in the legal profession to the use of survey techniques in sampling expert and community opinion for use in developing law reform.

8. 'Matters of Sociology'. One specific criticism of the questions which were asked that they related to 'matters of sociology' (id, 499)as if such matters were self-evidently not of concern to law reform. It was suggested that it was 'not part of the judicial function to either express views or to answer sociological questions of uncertain meaning'. The ALRC report responded:

> Needless to say, Judges are also members of the community. They are also, by virtue of their daily work, most intimately aware of the problems involved in sentencing offenders. They are one of the four groups intimately involved in the administration of criminal justice, whose views have been sought in the course of work on the current reference on sentencing. It was a legitimate concern to tap the knowledge and expertise of judicial officers ... However, it was apparent that certain judicial officers would prefer not to express personal opinions or comment on matters of judicial practice or policy. [Some] suggested that various questions sought respondents' opinions on matters which were described as matters of policy for the appropriate parliament. There can be no doubt that this is in fact the position. However, one of the objectives of the survey is to enable those who are to decide such policy issues to have the benefit of the considered opinions of the judges and magistrates who administer

> the law in this area. ... With regard to the criticism that the survey deals with matters of sociology, there are some questions directed at judicial officers themselves. The individual sentencer pays a crucial role in the sentencing process. Sentencing is not simply an application of abstract rules and principles to specific fact situations. It is an inherently dynamic and essentially personal process. If this observation is a mere 'matter of sociology', then it would appear to be shared by other lawyers, defendants and by a number of judicial officers as well. The process of sentencing is not exclusively one of syllogistic legal reasoning. That is why some of the questions raise issues which have fairly been described as sociological and others seek to identify relevant personal values of judicial officers (id, 499).

9. If law reform agencies of the Commonwealth of Nations are confined to projects such as the Rule against Perpetuities or, possibly, the Statute of Limitations, it is likely that 'matters of sociology' and the sociological sciences would continue to be ignored or dispensed with. But once the law reform agencies of the Commonwealth become involved in matters of social concern (such as sentencing, the recognition of Aboriginal customary laws, child welfare law, the laws governing homosexual conduct, the definition of death etc) it is imperative that they should find appropriate means of involving experts in the social sciences in their deliberations. Furthermore, it is essential that they should develop techniques of empirical research so that they base their recommendations to Parliament on grounds more sure than anecdotal submission or the personal prejudices and attitudes of law reform commissioners, most of whom, as lawyers, have led lives atypical of the rest of the community subject to the law.

10. Non-lawyer commissioners. The Law Reform Commission of Canada was the first Commission to have a Professor of Sociology appointed as a full Member of the Commission (Professor Mohr). The NSW Law Reform Commission has recently had the participation of two members with sociological expertise, not specifically lawyers. The ALRC has, in Professor Alice Erh-Soon Tay, a scholar with expertise in comparative law and jurisprudence. The involvement of non-lawyers of high quality even in small and hard-pressed law reform agencies will become increasingly necessary as those agencies are committed to tasks beyond the narrow domain of so-called 'lawyers' law'.

USE OF COST BENEFIT ANALYSIS

11. A growing concern. Concern about the cost effectiveness of law reform recommendations has always been a feature of institutional law reform operations. Law Commissioners will have in the back of their minds the need to minimise costly bureaucracies or undue demands on the hard-pressed courts.

However, with the general economic downturn of the past decade, particularly in the last three years, growing attention has been paid in Law Departments, law reform agencies and even in the courts to the necessities of ensuring that new laws are not unduly expensive to operate, having regard to the benefits they seek to achieve.

12. Law reform concern. The subject of the economics of law reform has been examined in the last two Annual Reports of this Australian Law Reform Commission (see ALRC 19, 1 and ALRC 21, 1). It has also been examined in the Annual Report of the Administrative Review Council of Australia, which has law reform functions relevant to the establishment of improved laws and procedures for the accountability of the Federal public service. The catalyst for this new concern has been provided by the economic stringencies facing lawmakers and public administrators in Australia and beyond.

13. Concern in the courts. Concern with cost benefit analysis has extended to the United States Supreme Court. In Matthews v Eldridge 424 US 319 (1976) the court developed the proposition that 'due process' under the United States Constitution does not necessarily and in every case require a trial-type hearing. It can be satisfied by less expensive procedural safeguards. In reaching that view, the court took into account the rate of error, the direct cost of hearings and the fiscal and administrative burdens which additional or substitute procedural requirements would entail (id, 334-5). Although the approach of the US Supreme Court has been criticised by lawyers and economists alike, it has also been acknowledged as a significant step in the process of approaching the administration of justice in a managerial way. It also requires recognition of the fact that there may be wrongs and even injustices which, balancing costs and benefits, our societies choose to do nothing or little about. In the past, the law has implicitly acknowledged this formula but it has done so generally in an unscientific fashion without a real endeavour to identify, even imprecisely, the competing costs and benefits.

14. Limits of analysis. There are difficulties in precisely measuring costs and benefits of various factors relevant to law reform. It is, for example, much easier to identify direct costs. Opportunity costs (ie the alternative use that might be made of resources) are much harder to estimate. The usefulness of the analysis depends on the extent to which costs or benefits are capable of being made factual rather than evaluative or speculative. From a lawyer's point of view, the difficulty of cost benefit analysis is illustrated by reference to the difficulty of putting a money value on, for example, the value of a transplanted kidney to dialised patients or the value of a wilderness area to people sensitive to their environmental heritage. Such matters are not readily reduced to dollars and cents.

15. Intangible benefits. As indicated in the ALRC Annual Report for 1982, the issue of costs and benefits arose for the ALRC in connection with criticism of two reports:

* of ALRC 7, Human Tissue Transplants, for suggesting that commerce in organs and tissues should be forbidden
* of ALRC 16, Insurance Agents and Brokers, for suggesting regulation of insurance brokers rather than mere acceptance that the market would sort out good from bad brokers

The ALRC Annual Report, whilst acknowledging the value of cost/benefit analysis and its importance in hard times, pointed to the necessity of taking into full account intangible benefits, not readily susceptible to purely economic analysis.

16. It seems likely that law reform agencies throughout the Commonwealth of Nations will become more concerned with cost/benefit analysis. Insofar as this seeks to identify more precisely the criteria that lead Law Reform Commissioners to their conclusions, the analysis is useful. Economists definitely have useful things to say to law reformers. Better that they should be heard by the Law Reform Commissioners than that their voices should later be raised in the Departments of State or in the legislature, to cripple reform achievement.

POINTS FOR DISCUSSION

* New methods of consultation to make law reform more effective
* The value of the social sciences in law reform
* The function and limitations of cost/benefit analysis in law reform.