INDUSTRIAL FOUNDATION FOR ACCIDENT PREVENTION

CONFERENCE ON LAW REFORM IN OCCUPATIONAL SAFETY AND HE

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

TWO OPPORTUNITIES

Judges, at least sitting alone, rarely get two chances. If they get it wrong, there is usually an appeal court which, with brutal all-seeing wisdom, will get it right. Similarly, all too many industrial accidents and problems of occupational health, give no second chance. A moment's mistake or bad industrial design, and the employee and his family may for years suffer the blight of injury and disease — even death.

On this occasion, I do get a second chance. My task at the outset of this afternoon session is to offer a brief 'backdrop' for the issues of law reform in occupational safety and health in Australia — and indeed beyond. Many of the themes will already have emerged from the morning's presentations. In fact, the perceptive among you will already have seen how reform of the law and of social practices governed by the law tends to come in waves. So it is with mental health law reform. One wave took us out of the punitive lunatic asylums. A new wave is now proposing stricter definitions, better procedures and emphasis upon deinstitutionalisation of care.

So too it was in divorce law. I am old enough to remember the snoops and spies, the bedrooms raids and the scandal newspapers. But a great wave of reform began in Scandinavia with the adoption of a new principle based on respect for individual relationships. If a marriage had irretrievably broken down, the parties should not be forced to live together against their will. That wave reached Britain. Reforms in Britain were ultimately copied in Australia and other common law countries. There are many other illustrations of developments of this kind.

For present purposes we are seeing a like phenomenon in safety legislation. Until quite recently, the basic structure of Australia's safety legislation traced its origins directly to English Factory Acts, supplemented by a hotchpotch of highly specific, ad hoc bits and pieces -- enacted to meet immediate problems, as they were perceived. The Robens Committee, appointed in the United Kingdom in 1970, condemned this legislative approach:

> Present regulatory provisions follow a style and pattern developed in an earlier and different social and technological context. Their piecemeal development has led to a haphazard mass of laws which is intricate an detail, unprogressive, often difficult to comprehend and difficult to amend and keep up to date. It pays insufficient regard to human and organisational factors in accident prevention, does not cover all work people and does not deal comprehensively and effectively with some sources of serious hazard. These defects are compounded and perpetuated by successfully fragmented administrative arrangements.[1]

NEW SAFETY LAW

As a result of the Roben Committee report, the Health and Safety at Work Act 1974 was passed in the United Kingdom. It became the principal model (supplemented by models in the United States and Canada) for reform in our country. Interestingly enough, as in the case of divorce, many of the ideas adopted by Robens derived from Scandinavia. No doubt because they cannot spend so much time in sybaritic existence on the beach, our Scandinavian friends find the opportunity to reflect more than we do on the improvement of their society. However that may be, legislation based on the Robens model was introduced in Victoria in 1981[2], in South Australia in 1972[3], and in Tasmania in 1977.[4] The Robens model also profoundly influenced the Occupational Health and Safety Act 1983 of New South Wales. Its influence can be seen quite clearly in the discussion document so commendably issued by the West Australian Government as a prelude to legislation in this State.[5] I say commendably because the whole methodology of the Australian Law Reform Commission is too dedicated to the principle of public and expert consultation on important issues of legislative policy before measures are introduced into Parliament. We should see more of this. I congratulate the Minister, Mr Dans and the Industrial Foundation for Accident Prevention for providing this opportunity to focus our minds on the legislative way ahead.

Some things seem clear from a consideration of the Scandinavian, British and North American experience:

- The costs of accident and disease are under-measured, often hidden but clearly high in economic and human terms.
- As Premier Brian Burke has said, the legislative approach of the past has tended to concentrate on safety and accidents to the neglect of occupational health and work-related illnesses.[6]
- He also pointed out that in times of economic downturn there is a tendency not to press safety issues. Yet in terms of costs and benefits for the nation as a whole, investment in occupational health and safety can often pay high dividends.
- Clearly, in Western Australia as in all other States, efforts should be made to reduce the proliferation of legislation. The discussion document cites 44 statutes and 58 regulatory provisions governing industrial safety in Western Australia alone.[7] Much of it is 'anachronistic and fragmented'. The effort is now on to provide umbrella legislation with a number of clearly stated general principles, improved consultative machinery and enhanced on site organisation to provide a new focus for an attack on avoidable accidents and illnesses.

LEGISLATIVE SETTING

Our legal system, inherited from Britain, relies partly on common law principles developed by the judges. These will remain the backdrop against which new and old legislation will operate. Geoffrey Miller QC will develop in his paper the way in which the courts have been contributing pressure for work health and safety, by decisions which assign responsibility for compensation when things go wrong. But we should not deceive ourselves that tidying up the statute book, creating councils and work committees or even enacting new legislative obligations and increasing fines will provide the entire answer to reducing avoidable work-related disabilities. There is a touching faith in some quarters that the enactment of laws has an immediate and precise impact on social behaviour. It is not so. Law reform can only be one part of the mosaic of a broadly based community response to the problems we are addressing. You should keep in mind the limitations of the law as an instrument of social control and reform, as you listen to the papers in this session. By all means we should:

- enact comprehensive legislation on industrial safety;
- establish commissions and councils for tripartite consultation;
- set up advisory committees to investigate specialist problems;
- improve the inspectorate and administration of the legislation;
- enhance the powers of inspectors, including to give notices, on-the-spot fines and even injunctions against particularly unsafe practices;
- appoint work committees, constantly to monitor safety questions;
- perhaps even, as in Canada, confer a statutory right, without penalty, to stop work in the face of perceived danger to safety or health;
- enhance education, training and research on safety questions.

All of these are important things which the law can facilitate. But getting into the minds of the employer and the employee, overcoming the traditional complacency and acceptance of unions, employer bodies, judges and administrators — this requires more than the enactment of a law or two.

It is here that the work of the Industrial Foundation for Accident Prevention is specially useful. The media too is vitally important to counter apathy and unenlightenment. Positive attitudes by employers and employees alike in particular institutions and the realisation that attention to safety and health can be cost-effective — these are things that no statute can enact.

The legislative reforms for better health and safety laws in Australia are now coming like a wave. One of the advantages of a federation is that we can learn from each other and copy each other when things are well done. The way of safety legislation is itself only part of the relevant background to be kept in mind. Also vitally important are the current moves to no-fault accident compensation reforms[8] and the still smouldering debate about industrial democracy. Worker participation on governing boards is so far, in Australia, a phenomenon only of the public sector. But I believe it will come to private corporations in due course, as it has in Scandinavia and Germany. It will bring with it a heightened realisation that employing enterprises represent a community of interests with just as much proper concern for shareholders' profits as for the safety and health of those who devote their daily lives to the success of the enterprise.

As any good lawyer should, I have now strayed beyond my allotted ten minutes. My chairmanly code, which I now announce, is simple. I will allow no similar lattitude to following speakers that I have just extended to myself. At the end of the session, my task will be to draw to your attention a number of key issues which require your consideration and the consideration of those whom we have elected to do something about the vitally important national problem we are here to discuss.

FOOTNOTES

* Views presented are personal views only. The Australian Law Reform Commission has no reference on the subject of industrial health and safety as such.

1. Robens Committee, cited in F Marks and J M Churchill, 'Understanding the Occupational Health and Safety Act, 1983 (NSW), CCH, 1983, viii.

2. Industrial Safety, Health and Welfare Act 1981 (Vic).

3. Industrial Safety, Health and Welfare Act 1972 (SA).

4. Industrial Health, Safety and Welfare Act 1977 (Tas).

5. Western Australia, Occupational Health, Safety and Welfare Legislation: A Public Discussion Document, issued by Mr D K Dans MLC, Minister for Industrial Relations, October 1983.

6. B Burke, Address at the Opening of Industrial Safety Week 1983 in IFAP Bulletin, Feb-April 1983, 15.

7. Western Australia, Discussion Paper, n.5 above, 9.

8. See [1984] Reform 13; New South Wales Law Reform Commission, Working Paper, Transport Accidents Scheme for NSW, 1983. See also [1983] Reform 105.