LAW SOCIETY OF BRITISH COLUMBIA

INTERNATIONAL SYMPOSIUM ON THE ROLE OF THE LEGAL PROFES

IN THE 21ST CENTURY

FOCUS ON THE FUTURE

VANCOUVER, CANADA, 24 AUGUST 1984

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Hon Justice MD Kirby CMG
Chairman of the Australian Law Reform Commission

THE LAW'S DELAY

For the 'jurisprudential cousins'[1] around the Pacific rim, the problems are well identified. Chief Justice Brian Dickson, on taking office as the fifteenth Chief Justice of Canada, declared that 'The two things that concern me are, one, delays in the law and two, increasing cost, to the extent that you're pricing the legal profession and the service they perform out of the range of a large number of Canadians ...'[2] President Bok of Harvard University, in his 1982 Cardozo Lecture, drew a comparison between the legal system and the health care system 20 years ago. 'Access to the courts may be open in principle', he declared. But 'in practice ... most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures and the long, frustrating delays involved in bringing proceedings to a conclusion. From afar, therefore, the legal system looks grossly inequitable and inefficient'.[3] In his annual report to the American Bar Association in February 1984, Chief Justice Burger reminded the delegates of the address 78 years earlier by the young Roscoe Pound on 'The Causes of Popular Dissatisfaction with the Administration of Justice'.[4] At least nowadays we do not run the risk that criticisms of the Bar will not be published. Indeed, some say that we have become almost obsessively self-critical.

The New Zealand Law Conference held in Rotorua in April 1984 addressed much of its attention to access to justice and the future of the legal profession. The lead paper on 'Access to the Courts' was offered by Justice Tom Eichelbaum.[5] He began his paper with the reminder:

> The twin curses of the law are expense and delay. It has probably been so ever since there were courts and lawyers. Hamlet thought the law's delay sufficiently important to mention it in his soliloquy. And nothing has changed.[6]

In Australia there have been similar themes. The Federal Attorney-General, Senator Gareth Evans QC, told a recent conference on 'The Challenge of Legal Aid' that, unless radical changes were introduced in the legal aid system, it would soon be unavailable to any but the very poor. In a financial sense, he declared, the system was 'reaching breaking point'.[7] He pointed out that in the previous three years Federal expenditure on legal aid in Australia had risen by 52.2% in real terms. However, the number of people assisted had increased by only 20.3%.[8] This kind of disillusionment led Justice Peter Connolly of the Supreme Court of Queensland to venture his suggestions for reform. On the top of his list was concern about the proliferation of judges and the legal aid industry. He asserted 'In truth it would be very much in the interests of the Australian people if both our industries were heavily throttled back'.[9] His alternatives for the resolution of legitimate disputes and tensions in society were less clear.[10]

The common feature in these and numerous other statements of self-criticism is a growing recognition throughout the common law world of a need for increased concern about the efficiency with which lawyers deliver their product to the community. Everyone agrees that times are changing. The problems confronting the legal profession in the 21st century will, in many ways, be different from those that have been around for a long time. Technology, alone, will ensure this.[11] It is healthy that there is an increasing concern about the efficiency of legal practice and the administration of justice. There is much more candour in acknowledging the limitations of the justice system. For a long time, we lived in the dream world that the law and lawyers could provide solutions for all of society's problems and disputes. Now, with increasing clarity, we are perceiving our limitations:

> The inescapable fact is that no society is likely to provide a lawyer and a formal judicial proceeding to anyone with a tenable legal claim, and it is even less likely that a society will encourage lawyers to reach out affirmatively to mobilise rights-enforcing litigation among all such individuals. Even if that were a desirable goal, it would be inconceivable to commit enough resources to provide 'Rolls Royce justice' to everyone and every legal claim.[12]

Books are now being written about the economics of justice.[13] Courts of the highest authority are considering frankly cost/benefit analysis of a rudimentary kind, in their judgments.[14] Law reform agencies, in recommending improvements to the legal system, are approaching their suggestions with a candid endeavour to itemise, or at least identify, the major costs and benefits.[15] All of this is thoroughly desirable, if somewhat belated. It requires us to address much more directly than in the past, the deployment of the scarce resources that society can make available to the law and lawyers for their role in society. Defining what that role is and then ensuring the greatest efficiency in the performance of consequential functions, is a major issue before the legal profession as it approaches the 21st century.

NEW INITIATIVES

In response to the early perceptions of the above simple truths, important reforms have begun to appear in the legal systems of the jurisprudential cousins. Time and space permit only a summary of some of these. But the catalogue includes the following:

(1) Prevention of legal problems. Just as in medicine where more attention is now being addressed to preventative measures, so in the law. Using the law, or redefining the law, to keep people out of legal trouble, is a major thrust of reform. In the Australian Law Reform Commission's (ALRC) first report on insolvency law reform[16] attention was paid to the underlying problem of people who get into debt, rather than dealing exclusively with the latest symptom, such as the failure to pay a debt in due time. The Commission recommended legal machinery to facilitate credit counselling in certain circumstances. The basic scheme proposed by the Commission has recently been accepted by the Australian Government.[17] Similarly, reform of the criminal law, to remove from the criminal docket a number of the so-called 'victimless crimes', releases scarce police and legal resources to deal with other, non-consensual antisocial acts. In Australia, reforms are being introduced to remove offences relating to consensual adult homosexual acts, from State criminal laws.[18]

Similar reforms have been achieved in relation to vagrancy and drunkenness. They are also being proposed in relation to laws on consorting, prostitution, gambling and other such offences. Redefining the proper scope and attention of the criminal law has been a major preoccupation of the Law Reform Commission of Canada.[19] But there is no more radical and decisive way to prevent a crime occurring than to remove the offence from the criminal calendar altogether. Unhappily so effective a reform cannot be universally available.

(2) Community legal education. Another way to make the legal system work better may be to educate our citizens more systematically in its rules. Legal studies is now one of the most popular secondary courses in Australian high schools.[20] Innovations in this direction, tried in Canada, have been drawn to the notice of Australian lawyers.[21] In the past, law reformers have traditionally focused on proposals for change in substantive rules of law, the creation of new tribunals and changes in legal procedures. Much less attention has been paid to education, including community legal education. Yet alerting people to the existence and purpose of at least basic rules may be the beginning of the prevention of legal conflicts or of their orderly resolution. Community legal education may promote a greater measure of assertiveness in the enforcement of just legal claims. It may help overcome the obstacle race which the poor, the inarticulate, the ignorant and the disadvantaged have to run in securing and asserting legal rights. Reforms in Australia have lately paid more attention to this issue. Legislation nowadays commonly requires the notification of rights and the entitlements to reasons for administrative[22] and even private sector decisions.[23] The suggestion by the ALRC that insurers should have to give reasons for the cancellation of insurance policies and for the refusal to write insurance has now been accepted by the Australian Parliament.[24] A proposal for the provision of oral and written notification of rights to criminal suspects, including in major community languages, has also been accepted by the government. It is expected to be the subject of legislation in the next sittings of the Australian Parliament.[25]

(3) Professional legal education. Legal education needs improvement in the profession as well as in the community. This point was made effectively by Chief Justice Burger of the United States in his recent address to the ABA:

> We know that a poorly trained, poorly prepared lawyer often takes a week to try a one- or two-day case.[26]

Chief Justice Burger has repeatedly asserted that 25 to 30% of lawyers presenting cases in United States courts are 'incompetent' and that this is not a tolerable figure.[27] Ten years ago he suggested that up to a third or one-half of the lawyers coming into United States courts were not really qualified to render fully adequate representation and that this contributed to the large cost and delays in the courts. If this figure is even partly accurate, and if it applies to Canada and Australia (as it partly does) it suggests that something is going wrong in the selection of lawyers and in their preparation and training for professional life. Nor do I exempt the judiciary from the need for training and retraining. In a recent series of lectures in Australia I called attention to the well established system of judicial training in the United States.[28] In Australia it was suggested that formal training of this kind was not necessary because of the appointment of judges from the separate Bar. But, though our problems may be less acute, the rapid changes in the law and the new tasks daily being imposed upon judges for which their training and experience do not well equip them, all suggest the need for more systematic institutions, procedures and obligations of judicial education, if only in the name of efficiency.

(4) Specialist tribunals. In that name, most legal jurisdictions have set about the creation of specialist tribunals to deal expeditiously and cheaply with routine or specialist legal problems. In Australia, a number of Federal Courts have been created in the past decade, including the Federal Court of Australia[29] and the Family Court of Australia.[30] The Family Court was established only after negotiations with the States made it plain that the State Supreme Courts (which can be vested with Federal jurisdiction) would not wholeheartedly embrace the innovative reforms of procedures insisted upon by the Federal Parliament. For constitutional reasons, a number of very important tribunals have been created in Australia to perform court-like functions which, not being strictly within the 'judicial power' cannot be conferred or imposed upon courts.[31] The interaction between Federal Courts and State Courts and courts and tribunals promises inefficiencies in the overlap of jurisdiction which may become a major source of concern in Australia in the decades ahead.[32]

Without creating separate, specialised courts or tribunals, there are distinct advantages in the division of court business in a specialised way. The appointment of specialist judges to deal with commercial disputes is now well established in Australia.[33] It has recently been proposed for New Zealand.[34]

Although there is a problem in over-categorisation and over-specialisation, the fact has now to be faced that specialist bodies served by specialist lawyers can process routine problems in a much more cost-effective and speedy way.

(5) Inquisitorial techniques. Another suggestion heard with increasing insistence is that judges should pay a more active part in the trial to move things along and to get lawyers quickly to the essential issues. This idea, a commonplace in the European civil law tradition, strikes resistance in the common law world. Chief Justice Burger asserted that the day had long since passed when we can simply 'let the lawyers run it'.[35] Yet the trial judge who interferes too much runs the risk of reversal. The common law system, with its open-ended oral techniques, has been described as a 'Rolls Royce' system of justice, beyond the pocket of the ordinary citizen.[36] This perception has led thoughtful commentators to urge a grafting on to our procedures of greater facilities for judicial intervention. Summing up the New Zealand conference, Chief Justice Sir Ronald Davison acknowledged that, at least in commercial adjudication, the judge must 'take control of the proceedings almost from the outset' and direct the course of the interlocutory steps up to the trial.[37] Within the legal profession, views differ about the desirability of the activist judge. But the growing concern with efficiency and the realisation of the very large public investment that is involved in the use of judge time, are now forcing the reconsideration of the conception of our judges as 'neutral umpires'. One distinguished Australian judge[38] has even suggested that by the turn of the century judges will afford lawyers a given time within which to refine their evidence and argument. The skill of the lawyer will then be maximisation of the available time for oral evidence and argument.

(6) Arbitration. The growing use of arbitration is likely to continue, as one response to the delays and costs of courts and tribunals. Arbitration has been around for a long time, though now new attention is being paid, at least in Australia, to improving its procedures.[39] Sometimes commercial arbitration is infinitely preferable to determination by the courts, as a means of achieving speedy and commonsense resolution of commercial and other disputes. By and large businesses, at least in Australia, regard the courts as a place of last resort. They look elsewhere for extra-judicial mechanisms which are quicker, cheaper, less technical, less stressful and less time-consuming for the business people involved. In New South Wales, an innovative use of expert arbitrators to deal with particularly technical questions that arise in commercial cases has now been introduced by a State Supreme Court Judge.

The judge made it plain that arbitration and the use of court-appointed experts had to be 'moulded to the requirements of the moment'.[40] An even more interesting use of arbitration has been introduced by which 150 barristers and solicitors have been appointed arbitrators. They are nominated by the Law Society and the Bar Association. Most matters are dealt with in their own offices or chambers. Of 1 450 contested cases referred out to arbitrators in the first six months of the operation of the scheme, about 830 were determined. There were requests for rehearing in court in 35 cases. The Past President of the NSW Law Society considered that the results were 'excellent'. The cost of disposing of the cases referred to arbitration in this informal way was a 'fraction' of what it would have been if the matters had been dealt with in court. Experience has also shown that between a half and two-thirds of the cases referred out to arbitration under this scheme are 'in fact settled before the hearing of the arbitration or on the day of the hearing'.[41]

(7) Legal aid. Legal aid has existed in various forms in common law countries for centuries. However, the 1970s saw the birth and growth in Australia of a large network of private and public legal aid facilities.[42] The Labor Government in 1973 established the Australian Legal Aid Office. Its constitutionality was challenged in the courts. After the change of government in 1975, a new organisation for publicly provided or funded legal assistance was established. Side by side with these Federal initiatives came the flowering of numerous 'legal centres'. They included the initiatives of private lawyers in the suburbs of the major cities and later the establishment of the Aboriginal Legal Service to provide direct assistance to the disadvantaged Aboriginal population of Australia.[43] In the private legal profession, suggestions have been made for the introduction of contingency fees as the 'free enterprise answer to legal aid'. In connection with the ALRC project on class actions in Australia, it has been said that, without such contingency fees, the class action would not be effective.[44]

(8) Reform of legal profession. Another suggested means of identifying unmet needs for legal services and getting people across the threshold of the lawyer's office has been the reform of the rules governing the legal profession. As in some of the Provinces of Canada, a number of the States of Australia have now permitted informative advertising, including fee advertising. However, much more radical reforms are proposed in the reports of the New South Wales Law Reform Commission on reform of the legal profession in that State.[45]

The proposals include the abolition or modification of monopolistic practices and land title conveyancing, change in the two-counsel rule, fusion of the Bar and solicitors' branches of the profession, changes in the handling of complaints and changes in the organisation and government of the legal profession. The reforms in New South Wales, upon which legislation has been promised, are seen as setting the pace for the rest of Australia and some of them have been welcomed by the legal profession.

(9) Technology and efficiency. The concern about efficiency has led to new attention to the use of technology and the improvement of dispute resolution procedures. The use of the telephone for taking evidence is now common in a number of Federal tribunals in Australia, notably in social security claims.[46] The satellite has been used in Canada[47] to beam oral argument across the continent to the highest court. Such a facility has been talked about in Australia. The use of computers to monitor court workflows and the introduction of word processors is now common in the courts. Special attention is being paid to the use of written argumentation to reduce oral advocacy. When I put them forward in my published lectures in Australia on the judiciary[48], it was roundly criticised by members of the judiciary and the legal profession.[48] But a number of judges of our tradition are now making this same point. Justice John Bouck of the Supreme Court of British Columbia began his essay on 'Written Presentations in Civil and Criminal Proceedings' with the reminder from Bacon that writing maketh 'an exact man'.[49] In Australia, Sir Anthony Mason, one of the High Court Justices, recently predicted an end to the availability of unlimited time for argument, especially in courts of appeal. He pointed out that 'the delivery of a written case or submission is a more effective and helpful means of putting a court in possession of the issue and of the basic contentions, even if it is to be followed by oral elaboration'. I do not expect that the legal profession in Canada or Australia will embrace the idea of written argumentation with enthusiasm. However its manifest efficiency and the pressure on the courts will certainly produce moves in this direction in the not too distant future.

(10) Conciliation and healing. All of this discussion leaves the fundamental question about the role of the legal profession to last. Our self-conception has been, overwhelmingly, that of mercenaries in the business of conflict. The new Deputy Prime Minister of New Zealand, and former Law Professor, Dr Geoffrey Palmer, told an audience at the Faculty of Law in the University of Windsor in March 1984, of the difficulty he had, as a law teacher, in introducing to the University of Iowa in 1969, an 'anti-torts' course.[51]

> To concentrate upon disputes and their resolution it is not necessary to concentrate upon the law and courts. The task of resolving conflicts may not be served best or most efficiency by dealing with legal rules and courts. There are other ways. If negotiation is a better way than litigation, how does one negotiate? Law students should be taught how to negotiate. What sort of disputes could be dealt with by mediation? Who can mediate? How do they do it? How does arbitration work? ... It was a great deal easier to state the conception of the courses than to execute them in a manner which kept up the level of student interest and provided scope for reasonable examination. Both these courses were unpopular and ultimately they were abandoned at Iowa. I often wonder, if an empirical survey were taken of practitioners who were subjected to those courses, what they would think of them after ten years of practising law.[52]

In like vein, and probably with a similar reaction, Chief Justice Burger's recent address called on lawyers to be healers:

> Our distant forebears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilised people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.
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> We lawyers are creatures — even slaves — of precedent, which is habit. We tend to do things in a certain way 'because we have always done it that way'. But when we must constantly witness spectacular expansions of court dockets, requiring more and more judges, something is wrong. When we see costs of justice rising, when we see our standing in public esteem falling, something is wrong. If we ask the question 'Who is responsible?' the answer must be : We are. I am. You are.
>
> The entire legal profession — lawyers, judges, law teachers — has become so mesmirised with the stimulation of the courtroom contest that we tend to forget that we ought to be healers — healers of conflicts.

> Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?[53]

In Australia and New Zealand (and doubtless in Canada) initiatives are now being taken. Community justice centres are being established to provide mediation.[54] They are still to be evaluated. But they pick up the theme constantly urged by Geoffrey Palmer, and with increasing insistence by leaders of the legal profession. We should not be locked by legal history into the ways of the past. We should look to our role in society and then set about reforming our institutions, laws and procedures in order to fulfil that role.

ACCIDENT COMPENSATION : A CASE STUDY

I now turn to a specific case of law reform of concern on both sides of the Pacific. It relates to proposals for the reform of the compensation paid to victims of accidents. The matter is under consideration in British Columbia as a result of the report of the Automobile Accident Compensation Commission in 1983.[55] It is also under consideration in New South Wales. The Law Reform Commission of that State has distributed an issues paper favouring a scheme of no-fault liability in respect of transport accidents, but at the price of removing common law and statutory benefits to which some victims of transport accidents are presently entitled.[56] In the State of Victoria, as a result of a major report on workers' compensation, the government is considering further reforms, including reforms to expand the already existing 'no-fault' motor vehicle accidents scheme, which supplements but does not replace common law entitlements.[57] There has also been an expression of interest in a no-fault system in the State of South Australia[58]. In the Federal sphere, the Australian Federal Attorney-General, Senator Gareth Evans, has announced that the Federal Government will be watching closely the proposals of the New South Wales Law Reform Commission, with a view to considering once again a national scheme for compensation and rehabilitation.[59] Moves in Australia follow the introduction of no-fault compensation schemes in various parts of North America. As disclosed by the report of the British Columbia Automobile Accident Compensation Committee, there are two major models, namely those of Quebec and of the State of Michigan in the United States.[60]

Bold as these various schemes for accident compensation reform are, they pale by comparison with the most radical approach of all. This was adopted in New Zealand by the Accident Compensation Act 1972. That Act, in a radical sweep, embraced many of the moves to reform foreshadowed above, replacing tort actions for the few by a social security-type cover for all.

At once, the legislation addressed the issue of prevention. It did so by centralising the collection of information on the causes of accidents and providing attention to rehabilitation of injured persons, in the place of the award of money damages which are often frittered away. The reform contributed to community legal education by replacing the conglomeration of common law and statutory entitlements in specific defined circumstances by a simple provision, which all could understand, of universal coverage for accidents. For the efficient despatch of the business of claims, the courts, with their cost-intensive procedures and necessarily expensive lawyerly activities, were replaced by an Accident Compensation Commission. Like specialist tribunals, this Commission soon built up expertise and efficiency in the despatch of claims with a minimum of administrative costs. In place of the adversary system for the resolution of disputes as to entitlements or as to amounts of benefit, an inquisitorial and administrative procedure was substituted, accessible in a low-key way by ordinary citizens without benefit of lawyer. Technology was called into play by the use of the most modern electronic data processing systems to assist in the registration, control and determination of claims, the review of benefits and the collection, storage and analysis of data.[61] Facilities permit 'on-line' entry of data at regional offices and return transmissions resulting in display and hard copy output. By the use of data transmission it has proved possible to give speedy, personal service throughout the country. Every visitor arriving in New Zealand receives a form on the plane setting out entitlements to accident compensation for events occurring in New Zealand. It is a universal scheme. The chance factor of fault or other statutory entitlement is swept away. The benefits are necessarily lower. The benefits for general damages, for pain and suffering and loss of the amenities are attenuated. But there has been a social 'trade-off'. In the place of high benefits for the comparatively few who can prove an entitlement under fault or supplementary statutory principles, there is substituted a general entitlement for all, which provides basic cover for loss of income and certain statutory lump sums in addition.

In New Zealand, this scheme of breathtaking simplicity was introduced during the administration of a conservative Government. It is not without its critics. Indeed, the incoming New Zealand Attorney-General, Dr Palmer, has specifically identified a number of areas which are in need of further reform.[62] But within the legal profession, the criticism was, from the start, muted. The subsequent developments have shown that the prophets of doom and gloom who elsewhere suggest that the loss of accident compensation litigation will have a devastating effect on the legal profession, may be proved wrong. According to the 1978 Royal Commission on the Courts in New Zealand, the experience with accident compensation was 'that the removal of areas of jurisdiction, while affording some relief [to court dockets] is soon offset by an increase in cases within the jurisdiction'.[63]

Indeed, as Dr Palmer has pointed out, although there was a 'dip' following the impact of the New Zealand legislation, the legal profession soon found other work to do. The civil caseload of the Supreme [now High] Court of New Zealand for the years preceding and after the introduction of the scheme, demonstrate that new business took up the slack with extraordinary rapidity, despite the fall of personal injury cases which, before 1973 amounted to 50% of the Court's docket and by 1976 had dropped to a residual 14.5%. Since the period of limitation in New Zealand for personal injury cases was two years, it can safely be assumed that the number of personal injury cases coming before the court is now negligible. It can now be concluded that the long-term impact of accident compensation on the aggregate level of civil litigation, a decade after its introduction in New Zealand courts, has not been great and has certainly not been the sustained misfortune for the legal profession that was feared by some. True it is there has been a reduction in the number of civil jury trials which are now rare and confined mainly to defamation cases. But the abolition of civil damages in cases of accident has neither been the unrelieved disaster for the legal profession that was predicted by some nor the panacea for court agendas, that was predicted by others. Instead, the courts have turned to other, and some may think more relevant areas of disputation : administrative law, town and country planning, judicial review of the work of other tribunals and government decisions, and matrimonial property disputes.

The New Zealand reforms were based on the first of two reports on accident compensation reform prepared by Justice [now Sir Owen] Woodhouse, then a Judge of the Supreme Court of New Zealand, now President of the Court of Appeal of New Zealand. The First Woodhouse Report, for they are properly so described after their principal author, was delivered to the Government of New Zealand in December 1967.[64] The Act of Parliament which was enacted five years later followed in every important respect the Woodhouse proposals. The Second Woodhouse Report was prepared for Australia in 1974.[65] It is most unusual for a judge of another country to be invited even to one so close and similar as Australia is to New Zealand, to write proposals for a major reform in a sensitive and controversial area of the law. Yet history records that the first act of the incoming Australian Labor Government of Mr EG Whitlam, elected in December 1972, was Mr Whitlam's telephone call to his newly elected counterpart, the Labour Prime Minister of New Zealand, Mr Kirk. He asked to borrow Justice Woodhouse to lead an inquiry into accident compensation in Australia. The request was granted. Supported by Dr Geoffrey Palmer as his principal assistant in the inquiry, Sir Owen Woodhouse laboured for 18 months on the preparation of a proposal for national compensation and rehabilitation in Australia. The intervention by Mr Whitlam to secure the services of Justice Woodhouse could have been predicted.

For many years, during the long period in Opposition, one of Mr Whitlam's recurring themes for an action program for reform was the need to address accident compensation and to do so by national legislation of the Federal Parliament.[66]

The Australian inquiry had before it not only the earlier New Zealand report but also a White Paper on that report drafted in 1969, also by the indefatigable Dr Palmer.[67] This formidable New Zealand team then began a public inquiry throughout the length and breadth of Australia, leading ultimately to a report, attached to which was a draft Bill proposing an improved version of the New Zealand scheme, adapted to the Federal necessities of the Australian Constitution.

On the last day of the Whitlam Labor Government, the Bill to enact the proposal for national compensation in Australia was to be introduced into the Australian Parliament. However, on that day, 11 November 1975, the Governor-General dismissed the government. An election was held. The Government changed. The Bill never became law. A Private Member's Bill was later introduced by Mr Whitlam.[68] However, it made no progress and lapsed. The endeavour to secure national compensation reform in Australia petered out amidst cries of opposition and much general disillusionment.

Proponents of reform became more circumspect. The Hawke Labor Government included proposals for accident compensation reform in its 1983 platform. However, the grand scheme for national Australian legislation proposed by the Whitlam Government was replaced by a more cautious proposal to study reforms suggested in the State sphere with a view to considering whether those reforms could subsequently be extended into a more comprehensive national approach. In the place of the single stroke reform was a more cautious philosophy of 'step by step' change, initially at the State rather than the Federal level. The major vehicle for reform is now the New South Wales Law Reform Commission, with its tentative suggestion for a no-fault transport accident scheme. The scheme has attracted praise and criticism.[69] The criticism includes the suggestion that any reform which deprives injured persons of current common law or statutory entitlements, without a commensurate social 'trade-off' such as was done by the comprehensive scheme in New Zealand, is bound to create as many problems at the margin as it solves. The beauty of the New Zealand model, and the feature readily understood by citizens perceiving its social equation, was its very universality. But the experience following the second Woodhouse report for an Australian scheme after the New Zealand model has muted the enthusiasms of the universalists. The sights of the reformer have been lowered. It is instructive to ask why this is so and what lessons there are in these developments for law reform generally and for accident compensation reform in particular.

RATIONALE OF A FAILED REFORM

Why is is that the moves towards accident compensation in Australia failed under a Labor Government, when three year earlier, in New Zealand, they had succeeded under a Conservative Government? The basic model was the same. Indeed, the principal authors were the same. The social circumstances of the two countries were very similar. The basic issue (that of compensating the victims of accidents in a just and cost-effective way) was identical. The Australian report was, by every assessment, a better one than the New Zealand Royal Commission report. The draft legislation attached to the Australian report had the benefit of a great deal of public, lobby and administrative scrutiny. It was also generally considered a great improvement on the New Zealand legislation. Why then did the one venture succeed and the other, so soon after, fail?

These questions may be asked both by the would-be reformer who seeks to avoid the pitfalls that defeated the second Woodhouse proposals and by the anti-reformer who, for self-interest or other perceived social policy reasons, wishes to create the pitfalls and to frustrate the reformer. Fortunately, it is not necessary for me to scrutinise at length the course of the New Zealand and Australian legislation. This has been done by Dr Palmer in a most interesting book, Compensation for Incapacity : A Study of Law and Social Change in New Zealand and Australia.[70] It must surely be one of the most interesting and scholarly books ever written by a Deputy Prime Minister! Part Four of the book contains a detailed analysis of the politics and policy behind the two reform movements. It is a study in social engineering in which Dr Palmer calls on his practical experience, his academic skills of analysis and his political perception. He makes the point that reform achievement depends on a number of considerations which are often out of the control of the reformer. They include the existence of powerful interest groups opposed to reform, and the preference of democratic English-speaking communities for piecemeal reforms which they can absorb rather than the grand reform that is likely to attract the scholar or the professional reformer conscious of the defects of the law. Dr Palmer suggests that big reforms are harder to sell than small reforms which may be more easily understood, more easily designed, more readily enacted and more effectively administered, once law.[71]

In the case of the Australian accident compensation proposals, a number of problems arose which are carefully analysed in Dr Palmer's book. They included the fact that the accident compensation reforms had to compete with a number of other proposals for reform, one at least of which had the effect of mobilising the opposition. This was the Australian Government Insurance Corporation Bill 1975 which aimed to establish in Australia a Federal Government Insurance Office.

The private insurers, which until then had enjoyed the lion's share of under-writing accident compensation risks, became fearful of the prospect that a public insurer would move into the field and exclude an important source of cashflow and a traditional area of private sector insurance business. Subsequently, following years of unsatisfactory business in most areas of accident compensation, many in the private insurance industry have expressed a greater receptiveness to the prospect of losing this dubious market. But in 1975 the government was waging a battle on many fronts. The contemporaneity of the insurance corporation legislation and the proposed national compensation scheme brought into the streets the employees of the insurance companies. Furthermore it brought together an unexpected coalition of forces opposed to the reform.

This unusual alliance comprised, in addition to the private insurance industry, the legal profession and the trade union movement. The legal profession's opposition was partly self-interested, arising from a fear of the loss of a significant portion of the profession's activities in the courts. As in New Zealand, personal injury litigation is a major proportion of civil litigation in the courts in all parts of Australia. But many lawyers were also concerned about features of the scheme : its constitutionality, its proposed administration, the due process it provided for review, the abolition of general damages and so on. Some were offended by Mr Whitlam's choice of Justice Woodhouse : a reformer with very great skills of persuasion but one who had already shown his hand.

It was the third branch of this trinity of opposition that was perhaps the most significant. This was the trade union movement, the traditional ally and supporter of Australian Labor Governments. By a curious coincidence of history, the trade unions had, through processes of compulsory industrial arbitration, just secured for certain of their members full compensation during periods lost as a result of accidents at work. In these circumstances the proposal of the Woodhouse report that only 85% of average earnings should be recoverable following accident seemed an untimely one. The call to make a sacrifice as a price for universal coverage outside work hours, was not immediately persuasive.

To all of these problems must be added the bitter political circumstances of 1975. The flavour of those circumstances can be gathered when it is remembered that an Opposition lawyer, Mr [later Sir James] Killen denounced the Woodhouse inquiry in uncharacteristically brutal terms:

> I remain singularly unimpressed with this report. I erred very much on the side of charity when I described it as a disgrace to judicial inquiry.[72]

The Whitlam Government did not have control of the Australian Senate. Indeed it was for this reason, ultimately, that it fell. It was beset with many internal and external problems. It was confronted, in this case, with a number of legal opinions of high authority to the effect that the proposed legislation was unconstitutional, especially to the extent that it purported to abolish common law damages. Delay, and the constant critical scrutiny of the draft Bill, did not diminish Mr Whitlam's desire to press on with the reform. He saw it as one of the major achievements he wished to make in government. But it did lend time for the organisation of the opposition. And time ran out on 11 November 1975.

Geoffrey Palmer reflects upon these events with appropriate detachment. He is not without a proper measure of self-criticism for the manner in which the Australian inquiry was conducted. For example, he expresses the view that where governments have a clear policy objective, they sometimes do better to proceed without a public inquiry, taking political responsibility for the reform.[73] He concedes that quite possibly too little attention was paid in the inquiry to the social sciences and in particular to economic analysis. He stresses the vital importance of engaging the attention, sympathy and understanding of public servants, if reforms are to be actually achieved.[74] He emphasises the importance of a small committee, with capacity to employ its own staff, with close liaison with the relevant departments but independent of them.[75] He cautions against a protracted inquiry and is sceptical about the value of public hearings, preferring instead informal discussions which do not afford the enemies of reform a forum in which to parade their antagonism.[75] Above all he stresses the importance of persuasion as an essential tool of the law reformer. He laments that the media in Australia were unreliable allies, whereas in New Zealand they had given a fair measure of support to the moves for reform.[76]

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With some of Dr Palmer's conclusions, based on an actual case study, it is possible to agree. But of others, I am less certain. For example, it is not at all clear that the reservations he expresses about public hearings are well founded, at least as a general technique in law reform. In the work of the ALRC, we have found public hearings, held in all parts of the country extremely useful for a number of reasons. No matter how careful has been the preparation of tentative proposals for reform, individuals and organisations directly affected can often bring new perspectives and new information to the benefit of the reform process. Furthermore, the procedure brings into the open the powerful lobby interests, invited to attend, who will otherwise have their say only behind closed doors. The procedure, at least as organised in Australia, attracts a great deal of media coverage. This raises interest in the reform process and in the particular issue under consideration. It also raises a community expectation of reform.

It helps the politician by providing a neutral forum in which competing interest groups can have their say. Final reports record the conflicting views. But they state the recommended reform. In this way, opinionated groups can have the reality and appearance of being heard and of having their views considered. All of this helps to insulate elected politicians from controversy and to provide them with reinforcement which a more secretive preparation of reform proposals cannot afford.

Dr Palmer also expresses reservations about the early publication of tentative views, in the form of interim reports. But the whole point of institutional law reform nowadays is consultation. Most of the law reform bodies in Australia produce consultative documents, thereby exposing their initial ideas to criticism. Yet this criticism can help to refine the final proposals and to eradicate difficulties that may otherwise arise for the first time in the Parliament, crippling reform. What is needed in the business of reform is a more efficient method of consultation. Even at the price of over-simplifying complex matters, it is essential to reduce detailed proposals to a brief and simple form. This too has been achieved in Australia with the publication of summary discussion documents.

Dr Palmer's lament about the public media is understandable.[76] But the experience of the last ten years in the ALRC has been that the media can often be a powerful ally for law reform. By and large there has been altogether too little discussion of the law and its reform. Journalists tend to be very cautious when dealing with lawyers and legal issues. They need help if they are to do so accurately. Lawyers who are curiously poor performers in the public media must learn the skills of public communication through the means by which the overwhelming majority of citizens receive their daily information. At least they must do so if they are involved in law reform.

Having come to these views in Australia, it is naturally interesting for us to read the expressions of similar conclusions in Canada. According to a report in December 1983 the Law Reform Commission of Canada has held its first public meeting. The President, Justice Allen Linden, has declared it to be 'fascinating' and a success.[77] A later review, in March 1984, contained the suggestion that the reports of the Canadian Law Reform Commission had not been implemented because 'no-one was selling them properly'.[78] I cannot comment on the Canadian scene. But I must confess to sympathy with the reported observations of Allan Leal, Vice Chairman of the Ontario Law Reform Commission, that law reformers must be careful to avoid the endless pursuit of the perfect and 'the building of the new Jerusalems'.[79] I certainly agree with Justice Linden's assessment that to translate law reform proposals into action it is necessary to 'hustle a little'.[80] Of course, it depends upon the project. It also depends partly on the personality and abilities of the reformers.

Some reformers, especially judges, would find the notion of 'hustling' the political and bureaucratic forces of inertia, uncongenial or even unseemly. But if that is their view, they ought not to be in the business of major social and legal reform. They should confine their reforming endeavours to small, technical and uncontroversial tasks. They should leave the bold ventures to those who, by temperament or inclination, are prepared to help the system along a little.

CONCLUSIONS

The array of problems which we face in common law countries in the delivery of justice is a daunting one. But at least now there is a more clear-sighted perception of the limited functions of the law, especially when lawyers of high talent and training must be used. There is also a growing appreciation of the economics of law and of law reform. New initiatives are being taken that point the way of our profession to the 21st century. They include preventative law, experiments in community legal education, improvements in professional legal education, the greater use of cost-effective specialist tribunals, new attention to the role and obligations of the judge, experiments with arbitration, improvements in legal aid, reform of the legal profession itself, introduction of new technology and new concentration on conciliation and mediation.

Reform proposals may be bold or modest. Sometimes, as in the New Zealand accident compensation reform, a major renewal of the legal system is achieved in a bold stroke. Sometimes the bold venture comes unstuck and reformers are sent scurrying back in search of more limited, more timid and more modest proposals. The success of the New Zealand scheme and the failure of the proposals for Australian national accident compensation reform bear lessons for all reformers, legal, administrative and political, and not only in respect of accident compensation. The lessons include the need to pay attention to the techniques of reform, the importance of the personalities of the chief actors, especially the relevant Minister and the indispensability of a fair slice of luck.

Techniques we can learn from past experience. Ministers come and go. The inclination to reform varies over time. The final component, luck, cannot be pre-ordained. It is a vital ingredient. But the reformer must remain optimistic. If the reform proposals are right, they need to be sold as Professor Michael Zander teaches us. Good ideas do not always triumph on their own merits. But time is generally on the side of the reformer. History will surely record that the Woodhouse proposals pointed the way.

Intermediate reforms, in North America as in Australia, will be seen as staging posts in a great movement of the law from fault to social security. And future generations will pay tribute to the enterprising New Zealanders for showing us the path and to their politicians for having the courage to tread it.

FOOTNOTES

1. Justice Estey, 'Who Needs Courts?' (1981) 1 The Windsor Yearbook of Access to Justice, 263, 264.

2. Chief Justice Dickson, Interview with W Monopoli, in CBA National, May 1984, 47.

3. D Bok, 37th Annual Cardozo Lecture, November 1983, New York Bar.

4. Chief Justice Burger, 'The State of Justice', in American Bar Association Journal (April 1984), 63. Cf similar comments in American Bar Association Journal, October 1983, 1356.

5. Justice T Eichelbaum, 'Access to the Courts', Paper for the New Zealand Law Conference in Papers, 3.

6. ibid.

7. GJ Evans, cited Sydney Morning Herald, 28 May 1984, 11.

8. The figures were quoted by Senator Evans and are cited Australian Financial Review, 20 May 1984, 4.

9. Justice P Connolly, 'How Can the Existing Legal System be Made More Efficient and More Economical?' in Papers for the Conference of the Commonwealth Legal Aid Council, Sydney, 26—27 May 1984, mimeo, 17.

10. His criticisms and those of Justice DA Yeldham, 'A Judicial View of the Legal Aid System', id, sparked a vigorous debate and counter-attacks by legal aid and other lawyers.

11. For a few predictions, see the paper by Justice A Rogers, 'Dispute Resolution in Australia in the Year 2000', a paper delivered at the Australian Bar Association Conference, Surfers' Paradise, Queensland, July 1984. mimeo.

12. M Cappelletti and B Garth, 'Access to Justice as a Focus of Research', Foreword to (1981) 1 Windsor Yearbook of Access to Justice, xxii.

13. R Posner, Economic Analysis of Law (2 ed) Boston, 1977. Cf JL Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication', 44 University of Chicago Law Rev, 23 (1976); DL Williams, 'Benefit Cost in Natural Resources and Decision-making : an Economic and Legal Overview', (1979) 11 National Resources Lawyer, 761, 794; HP Green, 'Cost-Risk-Benefit Assessment and the Law : Introduction and Perspective', 45 George Washington Uni Law Rev 901, 910 (1977) and many articles since.

14. The leading case is Mathews v Eldridge, 424 US 319 (1976).

15. Australian Law Reform Commission, Annual Report, 1981 (ALRC 19) 1—5; Australian Law Reform Commission, Annual Report 1982 (ALRC 21) 1—2; Australian Law Reform Commission, Insurance Contracts (ALRC 20), 20ff.

16. Australian Law Reform Commission, Insolvency : The Regular Payment of Debts (ALRC 6), 1977.

17. See announcement by Senator GJ Evans, Federal Attorney-General, 3 June 1984, reported [1984] Reform 90.

18. See eg 'Moral Laws' in [1984] Reform 121. The contemporaneous Private Member's Criminal Code Amendment Bill 1984 (WA) failed in the Upper House.

19. See eg The Law Reform Commission of Canada, Working Paper 29, Criminal Law, The General Part — Liability and Defences (1982)

20. MD Kirby, Reform the Law, Oxford, 1983, 70.

21. S Bothman, 'Vancouver Peoples' Law School' (1980) 5 Legal Service Bulletin, 208.

22. Administrative Decisions (Judicial Review) Act 1977 (Aust) s 13.

23. See eg Insurance Contracts Act 1984.

24. ibid, s 75.

25. Australian Law Reform Commission, Criminal Investigation (ALRC 2), Interim, 1975. Senator Evans, the present Federal Attorney-General in Australia, was the Commissioner in charge of this report.

26. Burger, 64.

27. ibid.

28. MD Kirby, 'The Judges', Australian Broadcasting Corporation Boyer Lectures, 1983, 24. Cf England, Home Office and Lord Chancellor's Office, Judicial Studies and Information, Report of Working Party (Lord Justice Bridge), 1978, 32.

29. Federal Court of Australia Act 1976 (Aust).

30. Family Court of Australia Act 1975 (Aust).

31. See eg the Australian Conciliation & Arbitration Commission and the Administrative Appeals Tribunal.

32. Chief Justice Street (NSW) has made comments to this effect in Law Society of New South Wales, Law Society Journal, Vol 22, No 5 (June 1984), 272.

33. Dr L Sealy, 'The Business Community : Is It Being Served?' in 1984 New Zealand Law Conference, Papers, 21, 24.

34. Eichelbaum, 8.

35. Burger, 66.

36. Professor Dr W Zeidler, now President of the Constitutional Court of the Federal Republic of Germany, 'Evaluation of the Adversary System' (1981) 55 Australian Law Journal 390.

37. Chief Justice Davison, Closing Address to the Triennial Law Conference, Rotorua, New Zealand, mimeo, 4.

38. Sir Richard Eggleston.

39. Almost every law reform agency in Australia has delivered a report on arbitration law and practice. For summaries see Australian Law Reform Commission, The Law Reform Digest, AGPS, Canberra, 1983, 71. The Australian Standing Committee of Attorneys-General is expected shortly to propose a model Uniform Arbitration Bill.

40. Maschinenfabrik Augsberg-Nurnberg Aktiengesellschaft v Altikar Pty Limited, unreported, Rogers J, 4 August 1983. For discussion see MD Kirby, 'Law, Business and CER', Paper for the New Zealand Law Conference, mimeo.

41. D McLachlan, Comments at the NZ Law Conference, reported Triennial Times (NZ Law Society), 26 April 1984, 4.

42. For a summary of earlier state systems in Australia see J Basten, R Graycar and D Neal, 'Legal Centres in Australia', (1983) 6 Uni of NSWLJ 163, 164. Cf 'Legal Centres in Australia 1972—82', Special issue of the Legal Service Bulletin (On Tap, Not on Top), editor D Neal, 1984.

43. See Basten, et al; M Chapman, 'Aboriginal Legal Service :D A Black Perspective', in Neil (ed) 35.

44. See the discussion of this issue in Australian Law Reform Commission, Discussion Paper 11, 'Access to the Courts -- II, Class Actions', 26, 28, 40.

45. New South Wales Law Reform Commission, First, Second and Third Reports on the Legal Profession, Sydney, 1982.

46. The Administrative Appeals Tribunal has pioneered the use of the telephone in Australia. See R Balmford, 'The Administrative Appeals Tribunal in Practice' in Law Institute of Victoria, Law Institute Journal, July 1984, Vol 58 No 7, 799, 808.

47. Reported Canadian Bar Association National, July 1983, 3.

48. MD Kirby, The Judges, 75.

49. Justice JC Bouck, 'Written Presentations in Civil and Criminal Proceedings', Paper for publication in the Advocate, mimeo, February 1984.

50. Sir Anthony Mason, 'Jurisdictional and Procedural Constraints on the Evolution of Australian Law' (1984) 10 Sydney Law Rev, 253, 258.

51. G Palmer 'The Growing Irrelevance of the Civil Courts', Annual Lecture, University of Windsor, Canada, mimeo, 12 March 1984, 4 (hereafter 'Palmer, Civil Courts').

52. Palmer, Civil Courts, 6.

53. Burger, 66.

54. Community Justice Centres (Pilot Project) Act 1982 (NSW) ???; Community Mediation Service (Pilot Project) Act 1983 (NZ). A like scheme has now been proposed for Victoria. See Palmer, 'Civil Courts', 39.

55. British Columbia, Report by the Automobile Accident Compensation Committee, 1983.

56. NSW Law Reform Commission Issues Paper, Accident Compensation, 1984. See [1984] Reform 13.

57. A report by the Victorian State Inquiry into workers' compensation is noted in the Age, 12 June 1984, 1. Cf ibid, 13 June 1984, 1.

58. The South Australian Government summoned a major conference on the issue in June 1984, attended by Sir Owen Woodhouse.

59. Senator GJ Evans (Federal Attorney-General), Address to seminar on Road Accident Compensation, Melbourne, 22 October 1983, noted [1984] Reform 15.

60. British Columbia report, n 55, 119.

61. G Palmer, 'Compensation for Incapacity : A Study of Law and Social Change in New Zealand and Australia', Oxford, 1979 (hereafter Palmer, Compensation) 384. Cf TG Ison, Accident Compensation, London, 1980.

62. Palmer, 'Civil Courts', 9.

63. New Zealand, Royal Commission on the Courts, 1978, para 228.

64. New Zealand, Report of the Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand, December 1967.

65. Australia, Report of the National Committee of Inquiry, Compensation and Rehabilitation in Australia, 3 vols, 1974.

66. MD Kirby, 'Whitlam as Law Reformer' (197??) ??? Federal Law Rev ???

67. New Zealand, Personal Injury — A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (4 Appendices to the Journals of the NZ House of Representatives, H50, 1969).

68. National Rehabilitation and Compensation Bill 1977 (Aust)., Read a first time, Aust House of Representatives, 24 February 1977.

69. See eg J Lloyd-Jones QC, 'Compensation Plan : The Bad Effects' in Sydney Morning Herald, 14 June 1984, 8.

70. Palmer, 'Compensation', 197ff.

71. ibid.

72. J Killen, cited Palmer, 'Compensation', 189.

73. Palmer, 'Compensation', 200.

74. ibid, 207.

75. id, 201. Dr Palmer points to the great value of draft Bills.

76. Palmer, 'Compensation', 207.

77. As reported, Globe & Mail, 14 December 1983, 2.

78. G Brodsky, CBA Criminal Justice Section, quoted Globe & Mail, 16 May 1984, 12.

79 A Leal, quoted in Globe & Mail, 17 March 1984, 14.

80. A Linden, quoted Globe & Mail, 16 March 1984, 12.