

THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY

BLACKBURN LECTURE 1988

TUESDAY 31 MAY 1988

CANBERRA

"THE POLITICS OF LAW REFORM"

729

THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY
BLACKBURN LECTURE 1988
TUESDAY 31 MAY 1988
CANBERRA

THE POLITICS OF LAW REFORM

The Hon Justice Michael Kirby*



BLACKBURN REMEMBERED

This is the third Blackburn Lecture. It is the first since the death of Sir Richard Blackburn, for whom the series

was founded. The first lecture was delivered almost exactly two years ago by Sir Richard himself¹. He was in failing health. Yet the text bears witness to the breadth of his interests, the modernity of his attitudes and the sweep of his concerns. The second lecture, delivered last year was offered by Sir Harry Gibbs. The former Chief Justice paid tribute to Sir Richard's "distinguished career in the law". He described him aptly as:-

"...an exemplar of all the best judicial qualities: a deep and scholarly knowledge of the law together with the experience and ability necessary to apply that knowledge in practice, complete dedication to the duties, often onerous, of his office; patience, courtesy, dignity and absolute integrity and propriety in his public and private life".²

And now, in so short a time, this very special man is gone. Death is the common inheritance of all humanity. In Dick Blackburn's case we knew it was to come soon, for his health had been failing rapidly in recent years. His wiry, austere frame took the assaults of illness with a typically brave spirit of cheerfulness and uncomplaining acceptance. It is clear from his own lecture that he was specially touched at this intellectual memorial to his life in the law. It is an appropriate means by which such a thoughtful man of ideas should be remembered and commemorated.

His life was spent in the service of the community, the courts and universities. Because this is the first lecture since his passing, I would invite you to come with me again past the chief milestone of his unusual career.

He was born on the 26th of July 1918, the son of Brigadier A L Blackburn, who won the Victoria Cross for

Gallantry. He was educated at St Peter's College, Adelaide and at the University of Adelaide. He was the Rhodes Scholar for South Australia in 1940 but he postponed the taking up of the scholarship to serve in the AIF between 1940 and 1945. He served in the Middle East, New Guinea and Borneo. He rose to the rank of captain. He took the degrees of BA and BCL at Magdalen College, Oxford, and was the Eldon Law Scholar in 1949. In the same year he was admitted to the Bar of the Inner Temple. Once when I was visiting barrister's chambers in London I was told proudly by my hosts that Sir Richard Blackburn had, in his earlier days, been a member of their chambers.

He returned to South Australia. In 1951 he was admitted to the Bar of that State. In the same year he was appointed Bonython Professor of Law in the University of Adelaide, a post he held until 1957. During that time he continued his interests in the army, serving as commanding officer of the Adelaide University Regiment and rising to the rank of Lieutenant Colonel in the Citizen's Military Force. Later he was to rise to the rank of Colonel.

His first judicial appointment was as a Judge of the Supreme Court of the Northern Territory on 14 October 1966. He lived in Darwin. Soon, news of the scholarship of his writing, the incisiveness of his mind and the modesty of his demeanour penetrated the councils of the Attorney General in Canberra. In 1971 he was appointed a judge of the Supreme Court of the Australian Capital Territory. He moved his residence from Darwin to Canberra which was to be his home for the rest of his life. He was elevated to Chief Justice in 1977, the year after

he had forged his link with the Council of the Australian National University. That University elected him Pro-Chancellor in 1976. In 1984 he was elected Chancellor, a post he held until shortly before his death. Civil honors came his way. He was made an officer of the Order of the British Empire (Mil) in 1965. In 1983 the honour of knighthood was conferred upon him. Even after his retirement, and in poor health, he responded to the call to preside over an inquiry into alleged judicial misconduct.

When the Federal Court was established he was appointed a judge of that Court in February 1977. But his work as a judge was largely confined to the Supreme Court of this Territory. It was here, that by daily toil, he earned the respect, admiration and affection of practitioners so evident in the dinner held in his honor upon his retirement from judicial office.

All of these are the external features of the life of a scholar turned judge. They give a clue to his nature. But they could scarcely bring to life his memory which is still green for those of us who knew him. Nor do they reveal his long and happy marriage to Lady Blackburn. They do not bring to the fore his quisical demeanour. His lively searching mind. His unfailing politeness. His seriousness and precision. His tendency to worry and always to strive to get things right. He was a graceful man with interests beyond the law which sometimes caused astonishment. For example, his skills as an air pilot enabled him to appreciate the peculiar beauties of our country - doubtless a consideration which had

attracted him long years ago to the rather lonely post in the Northern Territory.

A few months ago I was asked to speak at the Adelaide Law School. There in the Dean's office are the photographs of her predecessors. I was arrested by the photograph of Dick Blackburn, at about the age of 35. He was a mere boy with a lifetime of service and many laurels still to come his way. Life would have been kinder to the deserving man if he had been spared for a longer retirement. The assault of illness which overtook him was an unfair blow; but one possibly precipitated by decades of unrelenting stress. His thoughts live on in his writing. His strong personality lives on in our memory. This lecture series is a worthy memorial to him.

BLACKBURN AND LAW REFORM

I first came to know Justice Blackburn, soon after I was appointed the first Chairman of the Australian Law Reform Commission. He was then the Chairman of the Law Reform Commission for the Australian Capital Territory. This was a post which he held between 1971 and 1976. So our terms as chairman overlapped. Some had thought that he would become Chairman of the new national Commission. Perhaps he did himself. If he did, he showed no hesitation in lending me his aid from the very outset. I was then 35. Perhaps he remembered those early striving days as Bonython Professor.

His commission was energetic: a reflection of his own personality. It delivered eight reports from the first in 1972 on a new civil procedure for the Court of Petty Sessions to the last in 1976 on the law relating to conveyancing⁸. Sadly, the

proposals of the Commission were not quickly translated into law. Many have still not been. In the attention to heady national affairs, the needs of law reform in this Territory are often overlooked. This was a source of the most intense frustration to Justice Blackburn. I believe it is a reason why he came to be a vigorous supporter of my endeavours to promote a new sense of the urgency of law reform. He was a stalwart champion of the public discussion of law reform proposals. Where other judges doubted the propriety of judicial activism in the cause of law reform, he never wavered. On the contrary, whenever we met, he was full of encouragement, stimulation and even provocation to more effort.

His concern for law reform in the Capital Territory did not wane with his appointment as Chief Judge - later Chief Justice. He encouraged the Australian Law Reform Commission in a number of projects specifically related to the Territory. He supported the establishment of a branch office in the Territory and the appointment of local commissioners. When I proposed the establishment of the Criminal Law Consultative Committee, he gave it the strongest support. He encouraged Justice Kelly to participate. That Committee now has an impressive number of achievements to its credit. He referred to it in his own lecture at the beginning of this series. Indicating his unquenched enthusiasm for reform - and reflecting his military background - he rejoiced in the fact that the Committee had a number of targets of criminal law reform "in their sights". "Good shooting to them!"⁴, he urged. Sometimes, in discussions with him, I had the idea that he was so frustrated by

indifference to law reform proposals that he considered "shooting" too kind an end for a particularly obdurate bureaucrat! Anyone with doubt about his commitment to law reform, which he maintained to the very end, should read his own Blackburn lecture.

That is why, when the honor of delivering the third lecture was offered to me I thought it apt to speak of the subject which we held most closely in common and for the longest time. This was not the judiciary or even universities. It was certainly not the army. It was not even our shared concern about the position in law of the Aboriginal people of Australia upon which subject he had written the sometimes misunderstood and criticised⁵ decision in Milirrpum v Nabalco Pty Limited and the Commonwealth of Australia⁶.

Our shared activity of acute interest was law reform. Our shared anxiety and puzzlement was how to make the modern instruments of law reform work more effectively and speedily. This is the subject which I believe he would have wished me to address in this lecture.

ACHIEVEMENTS AND FAILURES IN LAW REFORM

As I sit in my crowded, busy courtroom reading the wisdom of 19th century English judges, long since gone to their reward, my mind again wanders back to my time in law reform. This is not to say that the life of a judge of our tradition involves no opportunities for reform of the law. The evidence of our legal history and of the stream of cases emanating from the courts, denies that proposition. Indeed, it has lately been said that a court, such as the Court of Appeal of New

South Wales or the Full Federal Court, now has a special responsibility for creativity and development of the law⁷. But there is a world of difference between the opportunities for law reform which come intermittently and haphazardly to the judge and the opportunities to influence reform which are presented to a law reforming agency in which a judge may participate in a non judicial capacity. The judge has been described as a "crippled" law maker⁸. In the law reform agency, he or she is the lieutenant of the authentic law makers in Parliament.

It is not my purpose to recount the history, activities or methods of the Law Reform Commission. These have been the subject of much writing, some of it by me⁹. Nor is this an occasion to work over the "seven deadly constraints" which, even whilst I was still Chairman of the Commission, I catalogued as the impediments to institutional law reform in Australia¹⁰. Instead, my present purpose is to reflect upon some of the more general achievements and failures of the Australian Law Reform Commission. I shall seek to derive from that exercise, lessons concerning the operation of institutional law reform in Australia. Why does it succeed when it does? Why does it fail when it does? If we can find the reasons for success, it may be possible to target the scarce available resources for institutional law reform in a more precise and well directed manner. If we can find the reasons for failure, these might, once identified, present the targets for remedial action. And if remedial action fails or is thought unlikely to succeed, at least it will be possible to

shape the efforts of institutional law reform so that those efforts will be directed towards attainable objectives, however modest the attainments may typically be.

It must be said at the outset that the Australian Law Reform Commission received from successive governments a series of assignments which are controversial and therefore fraught with the danger of failure. For all that, the Commission has a number of notable achievements to its credit. I sometimes think that the most important achievement has been that of putting the notion of law reform onto the national agenda. Sadly, as I discovered in my time with the Commission, the majority of the people have an Old Testament view of the law. To them, the law is mainly criminal law. It is seen as a kind of elaborated ten commandments with strong elements of the immutable about it. Judges are, in this conception of the law, simply the discoverers of it. They find the appropriate rule, declare it and apply it to the facts of the particular case. This notion of the law in operation was, until recently, reinforced by the declaratory theory of judicial activity accepted by many leading judges, otherwise of great insight. Judges did not make the law. They simply discovered it in the "bosom" of the common law. It took the endless scribblings of legal philosophers and a coup de grace by that splendid jurist Lord Reid (who declared this theory to be a "fairy tale"¹¹) to alter the perception of their role held by judges within the legal profession. But even today, the propensity of judges to accept the creative side of their functions varies enormously from judge to judge. It is the subject of vigorous differences

of opinion - stimulated by the fact that judges in our country manifestly lack the ordinary pre-requisites of democratic legitimacy.

This is not the occasion to reopen that debate. But for the public, the "fairy tale" is faithfully clung to. Pundits in editorials and taxi drivers in the streets denounce judicial law making. Their attitudes sometimes find reflection in the judgments of the Australian courts. For example, in 1979 the present Chief Justice of the High Court of Australia, Sir Anthony Mason, expressed his reservation about judicial law-making in these terms:-

"[There] are very powerful reasons why the Court should be reluctant to engage in [moulding the common law to meet new conditions and circumstances]. The Court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The Court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The Court does not and cannot carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the Court call for and examine submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the Court cannot and does not engage in the wide ranging enquiries and assessments that are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislator. These considerations must deter a Court from departing too readily from a settled rule of the common law and by replacing it with a new rule".¹²

Recently in my own Court, I mentioned similar needs for restraint, at least where what was in issue was a suggested requirement to develop the substantive criminal law of riot.

"[W]hilst the common law must be adapted by the courts (and the common law of crime is not exempt from this necessity) special care must be taken in expanding and

changing the definitions of crimes which have been stated, applied and reapplied over centuries. Particular care must be taken with crimes which relate to public order. They are at the hinge where the liberty of citizens meets the power and authority of the organised state. It is doubtless out of recognition of this fact that in Britain, where riots have been somewhat more prevalent than in this country, the subject of public order offences has been referred to the Law Commission. It is perhaps an indication of the difficulty of getting right the balances which must be struck, that the Law Commission has been engaged in this topic over many years. This, then, is an area of the law where the courts do well to leave adaptation of the law to suit suggested modern conditions, to Parliament, properly advised by law reforming bodies. Considerations which necessitate and justify judicial modification and development of the common law require the observance of particular caution where the substantive criminal law is involved."¹³

As against such calls, there are other instances where judges have pushed forward substantive and procedural law. A clarion to this effect, in many judgments, was Lord Denning. A similar point was made in the speech of Lord Scarman (himself the first chairman of the English Law Commission) when in Gillick v West Norfolk and Wisbech Area Health Authority¹⁴ he said:-

"The law has, therefore, to be found by a search in the judge-made law for the true principle. ... Three features have emerged in today's society which were not known to our predecessors: (1) contraception as a subject for medical advice and treatment; (2) the increasing independence of young people; and (3) the changed status of women. ... Young people, once they have attained the age of 16, are capable of consenting to contraceptive treatment, since it is medical treatment; and, however extensive be parental right in the care and upbringing of children, it cannot prevail so as to nullify the 16-year old's capacity to consent which is now conferred by statute. Furthermore, women have obtained by the availability of the pill a choice of life-style with a degree of independence and of opportunity undreamed of until this generation and greater, I would add, than any law of equal opportunity could by itself effect.

The law ignores these developments at its peril. The House's task, therefore, as the supreme court in a legal system largely based on rules of law evolved over

the years by the judicial process, is to search the overfull and cluttered shelves of the law reports for a principle, or set of principles recognised by the judges over the years but stripped of the detail which, however appropriate in their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work.

It is, of course, a judicial commonplace to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted upon. The mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times, and to apply principle in such a way as to satisfy the needs of their own time. If judge-made law is to survive as a living and relevant body of law, we must make the effort, however inadequately, to follow the lead of the great masters of the judicial art."

Our law is thus not written on tablets of stone. The body of the law resembles nothing so much as an amoeba: constantly moving, adapting, expanding and contracting in many directions at once. The needs for adaptation and expansion flow from the changing nature of society and the stimulus of economic sociological and political pressures. Sometimes efforts to develop the law are seen as unacceptably bold. This is what happened when the Court of Appeal of New South Wales upheld a claim to an entitlement to reasons, brought by a person affected by an adverse administrative decision affecting him¹⁵. The High Court of Australia reversed that decision¹⁶. That reversal has been the subject of some little writing¹⁷. Clearly it signalled the limits to judicial creativity in that connection. By that signal, there is emphasised the importance of legislative attention to many of the needs of reform. To the extent that the judges, by their own self denial, decline to develop and advance the law, the needs for change must be

addressed by the elected legislators. In those matters which are tackled by law reform agencies, the legislators have assistance and stimulation. To the extent that they fail to attend to the perceived needs for reform identified by such agencies, a serious log jam is created in our legal system. This makes it of critical importance to study the projects of the Law Reform Commission which have succeeded and to attend to those which have failed.

Quite apart from the individual effort, public cost and opportunity costs involved in law reform (and other like) reports, the failure of institutional reform represents, in part at least, the failure of the Parliamentary system of government.

REPORTS WHICH SUCCEED AND REPORTS WHICH FAIL

Without pretending to a complete catalogue of the reports of the Australian Law Reform Commission which have passed into law, and those which so far have not, it is clear that some, at least, have been very largely accepted by the passage of legislation enacting, in substance, the proposals. Others have apparently met obstacles on the way to the Parliamentary notice paper. As to the successes, three can be quickly identified. The report on human tissue transplants¹⁸ soon produced a series of enactments. In all parts of Australia, State and Territory laws have been passed or old laws amended to accord with the report of the Law Reform Commission¹⁹. This achievement was the more remarkable because of the novelty of the issues tackled, their controversy within religious and other groups, differences which emerged in the Law Reform Commission itself

and the implications of the report for important bio-ethical questions just around the corner.

Similarly, the relative speed with which legislation was enacted to implement the Commission's reports on insurance agents and brokers²⁰ and insurance contracts²¹ is a substantial achievement. This is particularly so having regard to the long period which had passed since Federation without such regulation, the undoubted legislative powers of Federal Parliament which had been only partly used; the considerable power, importance and economic influence of the insurance industry which did not favour some of the reforms; the cost implications of the reforms and the extent to which they departed from the spirit of deregulation which has been such a strong feature of public policy in the Federal sphere in recent years. Notwithstanding these impediments, the reforms passed into law substantially as suggested by the Law Reform Commission. By any account, they amount to a major shakeup of the organisation and practices of the insurance industry throughout Australia.

A third report on foreign state immunity²² was likewise rapidly implemented²³ and legislation has recently been introduced²⁴ to implement the Commission's report on admiralty²⁵. True, it is, this report deals with a topic, comparatively esoteric and of little, or any, daily concern to ordinary citizens. But such topics run a special gauntlet all of their own. If there is no great concern about them, there may not be the momentum for implementing the proposals in the busy agenda of the Australian Federal Parliament.

Contrast with these success stories four instances of failure. By "failure" I do not, of course, reflect upon the work of the Law Reform Commission or of the dedicated commissioners, staff and consultants who laboured with energy and enthusiasm. Nor do I believe that "success" is necessarily to be judged solely by the criterion of immediate implementation. Sometimes implementation by legislation is delayed. Sometimes judicial, administrative or other means are found to implement, in part at least, the Commission's proposals. Sometimes the very debates of a highly public character which surround the Law Reform Commission's endeavours produce reforms as the Law Reform Commission of Canada recently pointed out²⁶. Occasionally, reforms follow on a piecemeal, rather than a comprehensive and integrated basis. All of these qualifications being noted, it must still be acknowledged that the reports on criminal investigation²⁷, defamation²⁸, sentencing of federal offenders²⁹ and privacy³⁰ have not, so far, been implemented, despite the passage of many years.

Perhaps the most disappointing is the failure to implement the criminal investigation report to which Sir Harry Gibb referred in the second lecture in this series³¹. It originated from the decision of the Whitlam Government to establish the "Australia Police" - amalgamating various Federal policing services into a Federal police force. Three efforts have been made to enact legislation based upon the bill, measures being introduced by successive Attorneys General³². Yet the report remains unimplemented. Minor aspects of it have been implemented by legislation as, for example, the provisions

for authorisation of search and arrest warrants in the Northern Territory by telephone³³. Other provisions have influenced the development of State laws, as for example the legislative power now available in South Australia, and being considered in New South Wales, to detain and question suspects in police custody³⁴. Still other measures have been adopted by administrative practice in the police service. But the general implementation of the reforms by federal legislation remains for the future.

I say that this is specially disappointing because the principal author of the report was Mr (now Senator) Gareth Evans. He was, for a time, the Federal Attorney General. He remains a member of the Federal Cabinet and one of the key political leaders of the country. The report, which I believe to be an excellent and balanced one, has not passed into law, despite the personal involvement in it (and commitment to its basic ideas) of a minister at the very heart of the political processes of Australia. This fact alone must make the reader pause to consider the mechanisms of reform enactment in Australia.

The defamation report proposed important changes to unify, modernise and make more relevant the remedies for defamation in Australia. It struck the obstacle of differing State laws which require choices to be made where it is necessary to reconcile the differences. The report was committed by successive Attorneys General to the Standing Committee of Attorneys General. It was reviewed there in meeting after meeting. In the end, Attorney General Bowen

announced that the endeavour to secure a uniform law had failed. Action on the report was shelved. The result is that we continue to struggle with differing defamation laws in Australia applicable often to the same publication or broadcast which crosses jurisdictional boundaries. The consequence is a measure of forum shopping. Throughout the nation, the basic remedy of money damages is preserved. There is no power, nor any stimulus, to provide alternative and more apt remedies (such as a right of correction or a right of reply recommended by the Law Reform Commission). Powerful publishers resisted the idea of the judges ordering corrections - even though this is a commonplace in the civil law countries of Europe. In the name of "free speech", the same publishers wished to reserve to themselves the control over any "right of reply". With interstate rivalry and media opposition, the rational proposals of the Law Reform Commission came to nothing.

The suggestions on sentencing reform like those on criminal investigation were contained in an interim report. The final report remains to be written. But the proposal for a national sentencing council to ensure guidelines for the purpose of stimulating greater evenness in the punishment of federal offenders throughout Australia struck opposition in the judiciary³⁵. Jealous of the right of the judges to exercise their discretions in each particular case, the notion of sentencing guidelines was resisted by the lobby which Mr Whitlam once described as the "most powerful in Australia" - the judiciary. It remains to be seen whether time and the growing experience of the United States with the sentencing

commissions, will diminish judicial and other resistance to this rational proposal³⁶.

The suggestions of the Law Reform Commission on privacy protection dealt with numerous aspects of privacy invasion. Apart from the physical invasions onto property by Federal officials, telephonic interception and electronic surveillance, the main thrust of the report on privacy concerned the information "penumbra" about the individual in the modern, computerised Australian community. Just as in Europe the development of laws for data protection and data security has become so common, so, it was proposed, laws should be enacted in Australia to instill and enforce basic rules of information privacy. Those rules were derived from the privacy guidelines of the Organisation for Economic Cooperation and Development (OECD)³⁷. As I had been the Chairman of the OECD Committee which developed those guidelines, and had taken an interest in the adoption of the guidelines by the Council of the OECD and their implementation in many other countries, it was natural that the same principle should be considered in an Australian report on the subject. Although the Australian Government has now adopted the OECD Council's recommendation of support for the Guidelines, no steps have yet been taken to implement the privacy report by laws passed either at a Federal or State level. Impatient of legislation, judges, including Justice Kelly, have begun to draw on the OECD privacy principles³⁸.

The Law Reform Commission's proposal was for a comprehensive Federal Privacy Act. In a deft move, of which Sir Humphrey Appleby would have been proud, a proposal was made

for a data protection agency as an adjunct to the then proposed legislation for a national identity card in Australia to be known as the "Australia Card"³⁷. Instead of applying generally to all federal data collections, the proposed agency's role was to have been limited to the data collected for the Australia Card. The rejection of the legislation for the Australia Card by the Senate was the "trigger" for the double dissolution which resulted in the Australian Federal Election of 11 July 1987. The return of the Hawke Government led initially to the prospect of the Joint Sitting of both Houses of Federal Parliament to pass the Australia Card legislation. When this was abandoned in October 1987, the Government announced that it would nonetheless proceed with legislation for privacy protection. This suggests that the Law Reform Commission's scheme for information privacy will be implemented. Still more comprehensive legislation for the protection of privacy remains for the future.

THE CONSEQUENTIAL EQUATION

What inferences may be derived from this experience in institutional law reform? Some will say that, given the nature of the Federal Parliament in Australia, the numerous pressures upon it, the agenda of the political parties and their proper concern with economic issues in hard times, law reform agencies should not be surprised or disappointed that their proposals are ignored, shelved or otherwise neglected. On this view, it is more remarkable that attention is paid to them (lacking, as they typically do, either the stimulus of economic necessity or of political advantage). But why should a report on insurance

contracts be enacted, yet a report on criminal investigation fail? Why should every State enact laws based on the report on human tissue transplants, yet not a single state venture to experiment with the worthwhile reforms on defamation law - let alone cooperate in the achievement of a uniform law on that subject? Why should the report on foreign state immunity pass so smoothly and rapidly into the statute books when a well developed proposal, with overseas analogues and copious justifications for a more even, normative and principled approach to sentencing of federal offenders gathers dust on the library shelves? Why did the general proposal on privacy protection fail to capture political attention, when there is so much talk about the risks of computers and when many social democratic governments overseas have introduced general laws on the topic? Yet a data protection agency be proposed for a limited, and as some saw it, privacy invasive function.

No overall formula can be presented to give the answers to these questions. In every case, a detailed examination of the issues and personalities of the relevant decision makers would have to be studied and evaluated. However, a number of variables begin to emerge from which the law reforming equation can be developed. They include the following considerations:-

- (1) The personality of the Attorney General or other Minister having the responsibility of implementing the Law Reform Commission report. A Minister whose self perception is that of achieving reform and who has the intellect, enthusiasm and energy to push reform through, will achieve much. This much is clear from an examination of

the achievements, for example, of Attorneys General Barwick and Murphy⁴⁰. No one would doubt the great intellectual capacities and fearsome energy of Senator Gareth Evans. He was, after all, at one time a law lecturer. Yet, despite his personal involvement in the Law Reform Commission report on criminal investigation, that report has not been implemented. That fact suggests the need to look for other, additional, considerations.

- (2) The time of a supportive Minister in government and in the relevant portfolio is an important consideration. Senator Evans once declared that a Freedom of Information Act, if it were to be achieved, had to be achieved early in the life of a government. The early years of any government tend to be the years of creativity and reforming achievement. It is not always so. There are noble exceptions. But governments tend to be like people. They tend to become less enthusiastic and imaginative as time goes by. Before the election in the middle of 1987, the Australian Law Reform Commission had for more than a year received no projects at all from the Federal Attorney General. The Commission is limited by its Act to working on references given by the Attorney General. The lack of references obviously dampened the morale and enthusiasm of the Commission members and staff. It is heartening to see that new references have now been given to the Commission⁴¹. The Commission at least has the means of avoiding mid age complacency because of the constant turn-over in its membership and

staff and the renewal of enthusiasm achieved by the assignment of new projects. I applaud the appointment of Justice Elizabeth Evatt as President. I am confident that she will preside over a most creative period for the Commission.

- (3) The relevant bureaucracies are obviously vital. Unenthusiasm or even resentment and opposition by key administrators can provide a formidable obstacle to the achievement of reform implementation. Procrastination on the part of the public service and the inability to digest large and complex reports, present a major institutional obstacle to organised law reform⁴². The departments of state tend to concentrate their energies, naturally enough, on their own projects. Their personnel tend to be already hard pressed. Unless there is Ministerial enthusiasm for a law reform report, it is so much easier to assign it to junior officers, to send it off to an interdepartmental committee or to relegate it to the "too hard basket". It was a constant source of irritation to me, as it was to Sir Richard Blackburn, to see the labours of many months, of some of the finest interdisciplinary talent available in the country, consigned to the desultory, superficial, half-hearted and ill considered judgment of interdepartmental committees of middle ranking officers meeting in Canberra for an hour or so between cups of tea.
- (4) The lobby groups are also of obvious importance. The insurance contracts report was enacted partly because of

the strong support of Senator Evans and partly, I suspect, because the insurance lobby was not at first as potent with the new Hawke Government as it might have been with the outgoing Fraser Government. Furthermore, upon one view of it, the thrust of the Commission's proposals for an informed and enlightened consumer, fitted comfortably into the market oriented philosophy of the Treasury. Contrast this position with the power of the media lobby, which respond unenthusiastically to the proposals for reform of defamation law. Contrast also the abiding power of the police and police union lobby in resisting reform of criminal investigation or those reforms of privacy protection which suggested new checks on telephonic interception. Contrast also the opposition of the judiciary to reforms of sentencing and the delicacy with which most governments deal with issues that do not find favour in the Third Branch of Government. If the external lobby is powerful, noisy and determined, it can often have the effect of frightening off Ministers and officials. Often, where there is a lot of noise, the easy thing to do is nothing. What law reformers have to explain is that, sometimes, doing nothing itself involves making a decision. If nothing is done to provide privacy protection, the community must accept the erosion of privacy in the face of computers, interception and other technology. If nothing is done about sentencing disparity, we must acknowledge our acceptance of the apparent injustice of institutionalised

diversity of punishment of like cases. If nothing is done to improve the remedies in defamation we must face squarely the fact that the public's interest may not be adequately protected by the award to an individual claimant of a sum of money years later in private litigation brought by the person defamed.

ALLIES FOR REFORM

A recognition of these obstacles to reform achievement has led the Australian Law Reform Commission to cultivate allies on the journey of law reform. These allies include particular members of Parliament who have a personal commitment to the orderly reform of the law and to Parliament's role in that process. Support has included appearances before the legal affairs committees of the respective political parties or the Standing Committee on Constitutional Legal Affairs of the Senate. The last mentioned committee has shown a particular attention to the reports of the Law Reform Commission. It became a vehicle, during the Fraser Government for securing the benefit of the self imposed rule requiring an Executive Government response to Parliamentary reports. Reports of the Senate Committee, recommending in favour of this or that Law Reform Commission proposal, necessitated a Government reaction. This in turn had the advantage of pulling the Law Reform report to the top of the pile requiring attention. In a busy Parliament, with an intractable agenda and many other pressures, this was a boon. Although suggestions have been made that law reform reports should be given automatic implementation, unless disallowed by Parliament, such proposals

pay no regard to the high controversy of many of the projects assigned to the Australian Law Reform Commission. Usually such reports do not lend themselves to such automatic treatment. Yet I would not wish that Commission to be consigned entirely to the so called issues of "lawyers law". Important though those issues can be, they may affect fewer people and be of less pressing urgency than the tasks that have typically been given to the Australian Law Reform Commission by the succeeding parade of Attorneys General. The very controversy of those tasks makes the achievement of progress in them the more remarkable. But also the more important.

Other techniques were used to secure allies in the battle for reform. The high profile adopted by the Australian Law Reform Commission - and its use of print and electronic media to outline its proposals - was partly designed to engender information and responses to proposals made tentatively in the Commission's working and discussion papers. But it was also designed to build up a momentum for action. I am glad to see the way the Constitutional Commission finally lifted its profile. Without public awareness of their activities, advisory bodies such as the Constitutional Commission or the Law Reform Commission tend to be ignored. Wide-spread public consultation has the merit of attracting a circuit of vociferous supporters who will help stimulate the political process to action, in an entirely legitimate and democratic way.

Towards the end of my time in the Commission another procedure had been adopted to enhance the prospects of the

implementation of a Commission report. I refer to the involvement in work on the report of the key officials of the Department which would have the responsibility of implementing the report. The assembly of a team of consultants from all affected disciplines and from all parts of the Commonwealth had been a feature of the methodology of the Australian Law Reform Commission from its earliest days. This logic was later extended to the involvement, as consultants, of the key person or persons who would have the responsibility of piloting the report through the administrative and political machinery to the statute book, if it were to receive Ministerial approval. In the report upon Foreign State Immunity⁴³, the Commissioner in charge of the project (Professor Crawford) took pains to conduct seminars in the Department of Foreign Affairs. That Department, with the Attorney General's Department, had the key administrative responsibility for considering and processing the report, once delivered. Of course, the involvement of Departmental personnel has to be accomplished with care. Whilst it may overcome some of the impediments to action to which I have referred, these advantages must not be bought at too high a price. There is no point in having an independent law reforming agency if it becomes just another branch of the administration. Whilst guarding its independence and integrity, the Commission can involve key departmental officers. By their involvement, they may secure a commitment to the project, an understanding of the controversies involved and an appreciation of the differences of viewpoint where these emerge. They will usually secure an ability to explain

is, by tradition and daily practice, relatively uncreative. This is so even when compared with the judiciary of other common law countries. Whatever the causes for their restraint, it is a political fact which must be taken into account in considering the urgency of the needs for effective, alternative institutions for creating and developing the law in this country. Parliament obviously has the power. But the pressures of other topics and the controversy, complexity and lack of general interest of many law reform reports make the capture of Parliamentary attention or of Ministerial enthusiasm a relatively rare achievement. This is where institutional law reform has its place. But it is a place not yet assured in the Australian political landscape.

We must continue to work at refining and improving this institution. At stake is nothing less than the successful adaptation of Parliamentary democracy to the needs of a time of rapid social, technological and legal change. The topic is one deserving of the attention of lawyers. But it is also one worthy of the attention of political scientists concerned about the survival of the least dangerous form of human government.

It is one to which, in his lifetime, Dick Blackburn contributed notably in words and in deeds.

FOOTNOTES

- * President of the Court of Appeal of New South Wales. Formerly Chairman of the Law Reform Commission (Cth) and Judge of the Federal Court of Australia.
1. R Blackburn "The Courts and the Community", Inaugural Blackburn Lecture, mimeo, 21 May 1986.
2. H T Gibbs, "The Powers of the Police to Question and Search", Second Blackburn Lecture, 11 June 1987, mimeo.
3. The reports of the Australian Capital Territory Law Reform Commission were On The Civil Procedure of the Court of Petty Sessions (#1); On Landlord and Tenant Law (#2); On The Management of the Property and Affairs of Mentally Infirm Persons (#3); On the Imperial Acts in Force (#4); On the Review of the New South Wales Acts in Force (#5); On the Law Relating to Commercial Arbitration (#6); On the Law of Guardianship and Custody of Infants (#7); and On the Law Relating to Conveyancing (#8).
4. Blackburn, op cit, 24.
5. See eg Murphy J in Coe v The Commonwealth & Anor (1979) 53 ALJR 403, 411; Calder v Attorney General of British Columbia (1971) 13 DLR (3d) 64, 218; J Hookey, "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?" (1972) 5 FL Rev 85; cf L J Priestley, "Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case", (1974) 6 FL Rev 150.
6. (1971) 17 FLR 141.
7. See M H McHugh, "Lawmaking in an Intermediate Appellate Court: The New South Wales Court of Appeal". (1987) 11 Syd L Rev 183.
8. See discussion M D Kirby, "The Judges", Boyer Lectures, 1983, 58 ff.
9. See eg M D Kirby, "Reforming the Law" in AE-S Tay and E Kamenka (Eds), "Law-making in Australia" Edward Arnold, 1980, 39 ff.
10. In M D Kirby "Reform the Law", Oxford, 1983, 12 f.
11. Lord Reid, "The Judge as Lawmaker". (1972) 12 Journal of Public Teachers of Law. 22 Cf. G E Barwick, "Judiciary Law: Some Observations Thereon". (1980) 33 Curr Leg Prob 239. For a discussion see eg R Clinton, "Judges must make law: a realistic appraisal of the Judicial Function in a democratic society" 67 Iowa L Rev 711 (1981-82); M

- Cappelletti. "The Lawmaking power of the Judge and its Limits" (1981) 8 Monash Uni L Rev 15; S Dickson, "The Judiciary - Law Interpreters or Law Makers" (1982) 12 Manitoba LJ 1; H Lucke, "The Common Law as Arbitral Law: A Defence of Judicial Lawmaking" (1983) 8 Adel L Rev 280; S D Smith, "Courts, Creativity and the Duty to Decide a Case" Uni Illinois L Rev 573 (1985) and M H McHugh, "The Lawmaking Function of the Judicial Process" (1988) 62 ALJ 15, 116.
12. State Government Insurance Commission v Trigwell & Ors (1979-80) 142 CLR 617, 633-634.
 13. See Anderson & Ors v Attorney General (NSW) unreported, CA, 21 July 1987; (1987) NSWJB 139 (NSWCA).
 14. [1986] AC 112, 182-3 (HL).
 15. Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447 (NSWCA).
 16. Public Service Board of New South Wales v Osmond (1986) 60 ALJR 209 (HCA).
 17. See eg M Taggart (ed) Judicial Review of Administrative Action in the 1980's: Problems and Prospects, Oxford, 1986, 53; D St L Kelly, "The Osmond Case: Common Law and Statute Law" (1986) 60 ALJ 513.
 18. The Law Reform Commission (Cth), Human Tissue Transplants (ALRC 7), 1977.
 19. See eg Human Tissue Act 1983 (NSW); Transplantation and Anatomy Act 1983 (SA); Human Tissue and Transplant Act 1982 (WA); Human Tissue Act 1982 (Vic).
 20. The Law Reform Commission (Cth), Insurance Agents and Brokers (ALRC 16), 1980. See now Insurance (Agents and Brokers) Act 1984 (Cth).
 21. The Law Reform Commission (Cth), Insurance Contracts (ALRC 20), 1982. See now Insurance Contracts Act 1984 (Cth).
 22. The Law Reform Commission (Cth) Foreign State Immunity, (ALRC 24), 1984.
 23. Foreign State Immunities Act 1985 (Cth).
 24. Admiralty Bill 1988 (Cth).
 25. The Law Reform Commission (Cth) Civil Admiralty Jurisdiction (ALRC 33), 1986.

26. Law Reform Commission (Canada), 15th Annual Report, Ottawa, 1985-6, 7.
27. The Law Reform Commission (Cth) Criminal Investigation (ALRC 2) Interim, 1975.
28. The Law Reform Commission (Cth) Unfair Publication: Defamation and Privacy (ALRC 11), 1979.
29. The Law Reform Commission (Cth) Sentencing of Federal Offenders (ALRC 15) 1980.
30. The Law Reform Commission (Cth) Privacy (ALRC 22), 1983.
31. See H T Gibbs, op cit supra n 2, 49.
32. See Australian Police Bill 1975; Criminal Investigation Bill 1977; Criminal Investigation Bill 1981 (Cth).
33. Criminal Investigations (Extra-Territorial Officers) Act 1985. See also the Defence Forces Discipline Code.
34. See Summary Offences Act (SA) s 78(2) and 78(6), s 79. Cf. M Little and A Crocker, "Custodial Investigation - Recent Developments" [1987] Law Society Bulletin (SA) 145. See also proposals in New South Wales Law Reform Commission Criminal Procedure - Police Powers of Arrest and Detention DP 16, 1987, 57 ff.
35. Victoria, Report on the Committee of Inquiry into Corrections (Sir John Starke, Chairman) 1988. See comments The Age, 7 May 1988, 3.
36. See observations of Burt CJ in Ralph Joseph James (1985) 14 ACrimR 364.
37. Organisation for Economic Cooperation and Development, Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, OECD, Paris, 1981.
38. Slater v Bissett v ACT Health Authority (1986) 85 FLR 118; noted 62 ALJ 247.
39. Australia Card Bill 1986 (Cth); Privacy Bill 1986 (Cth).
40. J Scutt (Ed), "Lionel Murphy - A Radical Judge", McMillan, 1987.
41. References been recently given on product liability and review of customs legislation.
42. M Kerr, "Law Reform in Changing Times" (1980) LQR 515.
43. The Law Reform Commission (Cth) Foreign State Immunity (ALRC 34), 1984.