

THE N.S.W. COUNCIL ON THE AGEING LTD.

ANNUAL MEETING, SYDNEY, 14 APRIL 1980

LAW REFORM AND THE AGEING

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

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A TIME OF CHANGE

We are living through a time of enormous change in our society and its laws. The impact of change is felt by all of us. But it is most keenly felt by the older members of the community who have lived to see established institutions and long-established ways of doing things increasingly challenged and criticised.

The law is a generally conservative force in society and it is interpreted and ultimately upheld by people who, for the most part, are of mature years. I am often asked by older members of the community, including older members of the legal profession, why is there so much change in society? Why are so many laws, procedures and institutions coming under question? Every year Australia's Parliaments turn out more than 1,000 Acts. In addition, Regulations, By-laws, Ordinances and other rules are made which govern us all. The law is growing rapidly and changing rapidly. The Australian Law Reform Commission exists as one means of helping Parliament to cope with the challenges of change. I propose to begin this address, before turning to matters of specific relevance to your Council, by seeking to identify four

forces which are at work in Australian society today which promote the need for change in the law. A clear appreciation of the forces that are at work will help us to understand why it is that things cannot stand still.

FOUR THEMES

The four chief themes which I believe explain our time of rapid change are big government, big business, big technology and big information and education. Let me deal briefly with each of these in turn :

Big Government. By this I refer to the growth of the importance in all our lives of decisions made by public servants. These decisions include entitlement to scholarships, obligation to pay, taxation, pension benefits, deportation decisions etc. From playing a relatively minor part in the life of the individual at the opening of the century, government officials now play an increasingly important role. The consequence can be seen. The appointment of Ombudsmen, the provision of greater judicial review of administrative decisions, the creation of freedom of information and human rights legislation all reflect the recognition of the need for fair, external scrutiny of bureaucratic decisions affecting us. Numerous studies show that older people are not always aware of the way in which they can work the machinery of government to their advantage. In the Report of the Royal Commission on Human Relationships, the comments by Mrs. Averil Fink are recorded :

It is pathetic to see an old man who was looking after his wife and did not realise there was a district nurse who could come in and bathe her. (Vol. 4, p.21)

The role of government expands, although older people raised in a period of smaller government do not always know how to utilise to the full the services provided. Often, they submit to the disciplines and inconvenience of big government without necessarily securing its services. The short point for present purposes is that the importance of government in our lives has increased. This increase necessitates changes in the law, which was largely built up in a time when the role of government was distinctly circumscribed.

Big Business. The growth in the size of business and industry presents many problems. The most visible are in the industrial relations area. But the moves towards consumer protection, fair trade practices laws and regulation of business reflect the effort to provide redress for the individual against the unthinking corporation.

Big Technology. Perhaps the greatest force is provided by science and technology. The computer presents society and its laws with many novel problems. The greater vulnerability of a computerised society may lead to new laws restricting previously accepted freedoms. The need to protect individual privacy might require a right of access to personal computerised data. Criminal fraud by computer is a new, specialised and growing area of white collar crime about which current laws say little. But computers are not all. Medical technology presents the miracle of the test tube baby and organ transplants. The old law may be silent, irrelevant or even obstructive on such issues. For example 'death' may, in common law and commonsense, depend on heartbeat and blood circulation. But with a modern hospital ventilator, this definition becomes irrelevant or even mischievous as the Karen Quinlan case recently

showed in America. Science can also help the law to resolve disputes, as Breathalyzers have removed a lot of impressionistic evidence about intoxication and tape recordings may reduce contests concerning admissions made to police.

Big Education and Information. Above all, citizens today are generally better educated and better informed than ever they were in the past. They are more liable to question the law, its procedures and its practitioners and to expect and demand fair rules and procedures. The age of unquestioning acceptance of authority, in which most of the older members of Australian society grew up, is gone. Nowadays, citizens, especially among the young (but not confined to the young) ask : is this law fair? Is it just? Is it equal?

There are no doubt other great forces for change that are at work in Australia today. But so far as its laws are concerned, the growth of government, the growth of business and the impact of science and technology and great changes in education, explain why our society and its institutions are changing rapidly and will continue to do so in the foreseeable future.

WHO ARE WE TALKING ABOUT?

Now, of course, I look on the problems of the ageing from a lawyer's perspective. I am not a social worker. I am not a psychologist or psychiatrist. I can look with admiration at the marvellous work of the NSW Council on the Ageing and its constituent bodies but can add nothing of special usefulness on the splendid work done in respect of the provision of meals on wheels, recreational therapy, building planning for the aged and the important new emphasis being placed on services for the migrant aged. I listened with much appreciation to the comments of Mr. Bob McDonald on ABC Radio concerning this last-mentioned topic and I am glad that your Council is now turning to survey the particular

needs of elderly people who have settled in Australia from other countries. Although our society has changed radically since the Second World War and a third of our people are now migrants or the children of migrants, the institutions of society remain very significantly in the hands of English speaking people of British origin. I am pleased to see the sensitivity evidenced by the Council to the special problems of people who come to this land from different cultures and who often expect more supportive family arrangements for the integration of older people in the broader family unit.

In the reform of the law, it is necessary first to understand fully the way in which present institutions, laws and procedures work in society. It is necessary to understand precisely the target groups at whom efforts to change things for the better are aimed. I realise that there are real differences of opinion about the definition of the 'old' or 'ageing'. It is clear that whatever age we fix on as an arbitrary point, there is a significant shift in the aged or ageing. Australia was an atypical Western country for the greater part of the last 30 years. The influx of migrants made us a country with a higher proportion of young people than most others of the OECD or Western world. Now, with smaller families, zero population growth and declining immigration, we are joining the pattern of other Western communities and more of our people are and are becoming old. About 8 1/2 percent of Australia's population is now over 65. Before the age of 65, 52% of men have retired and this proportion increases rapidly with increasing age. 80% of all men and 95% of all women over the age of 65 are retired. At 65 on average men can expect to live another 15 years. Women can expect to live 20 years. There has been little change in adult mortality for the over-65 year olds in Australia during the past 50 years. But in times gone by, compulsory retirement at a fixed point was not as common as it is today. Often, people who had work stayed at work until they died or until they fell ill. Today people can look forward to between 15 and 20 years of retirement. This is on average a fifth of their lifetime. We are now seeing

in Australia a great move to increase and not reduce the proportion of 'retired' people. During this weekend the Police Association conference called, amongst other things, for earlier retirement for police. It is true that there are special features of police work which call for young, active, vigorous people. But at the same time as some employment groups are calling for earlier retirement, others are having it pressed upon them.

In Britain new research by the Department of Employment emphasises the growth, since the mid-1970s of age redundancy. According to New Society (12 October 1978, p.83) twice as many 55 to 64 year olds suffer redundancy than 20 to 24 year olds. In a 10% sample of redundant workers for 1975-1976, just over 42% were over the age of 50 years. According to the same report the vast majority of the 320,000 jobless who had no work for more than a year fell into the over-50 age bracket. The report continued :

We have neglected the pride of the older redundant workers for far too long. ... Early retirement on today's inadequate benefits is an insufficient answer.

Although these are figures for Britain, I would be surprised if figures for Australia were very different. We are seeing a growth in early retirement : sometimes voluntary, often less than voluntary. A recent magazine article quoted one management consultant firm as explaining this :

Many retrenchments of older executives are in innovative, youth-oriented industries such as computers or industries which were booming a few years ago, but which have now slumped disastrously ... such as architecture or mining. There have been a lot of take-overs and firms cutting back on staff. ... Firms believe it is better to get rid of the older men and give the young blood a chance. There is a definite prejudice against older people.

Another management consultant pointed to the incentives for employers to do this :

For 2 1/2 percent of the base annual salary of the executive who is being made redundant, the employer can save quite a lot of money.

When the Royal Commission on Poverty reported, it made it clear that poverty in Australia was overwhelmingly a problem of the aged and especially single aged people who made up the largest group of the "very poor". More than half of the total disability groups described as 'very poor' and below the poverty line were aged, single people or couples. Indeed, nearly half of the total number of Australians below the poverty line were aged females living alone. (Interim Report, 1974, p.10). The situation of aged couples was slightly better but about 1/3 of them were also described as 'rather poor'.

I do not have an up-to-date table of the position as it now stands as we enter the 1980s. But I do have Professor Henderson's speech to the Annual General Meeting of the Victorian Council on the Ageing in March 1980 and this is what he had to say :

The first and most important thing that has to be said is this, that unless there is a major change in policy, the great majority of those who are retired in this country will be very poor indeed. The single pension is well below the poverty line, and the great majority of those who are retired are on the pension which as you know has a means test for those under 70. I hope that one of the continuing activities of the Council will be to join with other groups in society in protesting that it is quite scandalous that in this rich country - and we are a very rich country, and we are going to become a good deal richer through the 1980s - the majority of our retired population should live in deep poverty.



Professor Henderson expressed his views in language which is obviously strongly felt. He said that the policy to increase the pension over time in line with cost of living index changes will not maintain the purchasing power of the pension. I am not competent to assess these matters but I draw Professor Henderson's views to your notice.

The Law Reform Commission looks at a fast-changing society. One of our references requires us to examine the other end of the age spectrum : the problems of child welfare, child offenders, children in need of care, children being abused and children's day care centres and employment. We will be reporting on this subject by the end of this year. We have no task which is specific to older people and to the problems of ageing. We do, however, have a number of projects before us which affect all citizens and which require us to keep a close eye on the forces for change in Australian society and on the changing structure of that society.

I have said enough to indicate that in my view our society is changing rapidly and in a direction that will plainly be relevant to its laws and its institutions. We are no longer an overwhelmingly young country. We will increasingly become an older country. Increasing numbers of our citizens are being retired voluntarily or involuntarily at earlier ages. Early retirement imposes psychological and other stresses on people who are retired and economic obligations on those in the workforce who are contributing to the goods and services available for distribution in society. To all of these pressures are added the problems of lack of employment for those retired persons who seek employment activity. I believe that increasing attention will be needed, including attention by the law, to the issues raised by early retirement.

#### RETIREMENT AND THE LAW

The NSW Council on the Ageing conducted a survey into employment of the ageing and it concluded that despite the present employment situation, age should not automatically bar senior citizens from employment. It made a number of practical suggestions :

- \* People should retire gradually i.e. on part-time work or as advisers or on lighter duties rather than a sudden cut-off
- \* Companies should encourage employees approaching retirement to attend retirement seminars and to take up other interests
- \* More part-time work should be developed for seniors

The survey concluded that compulsory retirement based on age alone was discriminatory and that some aged persons are at their best in their 60s and 70s and should be allowed to work if they wished to do so. Compulsory retirement, it declared, often affected health and morale.

Recent studies in Australia suggest that retirement is a major trauma for many people. Statistics show a significant increase in sickness and death among retired people, which cannot be attributed simply to advanced age. Ann Daniels, a sociologist at the University of New South Wales, has expressed the view that prejudice against old people is very real in Australia :

It is not a popular area for social or medical research. This is definitely the century of the child. ... It's mainly men who retire, because it's mainly men in this age group who go out to work. It must suddenly seem to them that they are no longer wanted or needed. They no longer have a regular work routine, they don't even have to get up in the morning. Their social life, which has often been largely centred around their friends at work, tends to drop away. There's a big jump in mortality and morbidity around 63 for men. That's the average age of retirement.

Now, of course, this is not universally true. Mrs. Fink has pointed out that these days many people tend to be more financially secure and in better health than in days gone by. Doctors seek to get their patients thinking about retirement years before they actually retire and to develop alternative interests and pursuits. But this is not always

easy as the habit of life of involvement in work is hard to shake off. Many people brought up in the 'work ethic' tradition simply do not want to shake it off. For them, the transition is most difficult and enforced retirement, especially at a fixed and apparently arbitrary and irrelevant age, is seen as irrelevant and irrational.

A former Chief Justice of New South Wales, Sir Leslie Herron, used to describe the compulsory retirement age of the judiciary (70 years) as the 'age of statutory senility'. Until recently, federal judges in Australia (as a result of a decision of federal judges themselves) held office for life. The introduction of arbitrary retirement age is usually justified by stereotyped disparagement of older people, terming them 'slow', 'prone to sickness', 'difficult' and so on. It is said to be necessary to have a mandatory retirement rule to guard against employees becoming incompetent and to prevent the disputes which will arise in particular cases. It is said to be necessary for administrative convenience. It is said to be essential to encourage younger people who face their own employment problems today.

Nobody suggests that older people should be forced to continue at work. But a real question arises for our society and for its laws as to whether those that want to remain at work should face, as increasingly they do in Australia, the reduction of the age at which they may be compulsorily retired on a mandatory basis, irrespective of inclination and ability.

The interesting thing to observe, so far as the law is concerned, is that whilst we in Australia move to reduce the age of retirement and whilst bodies such as the Police Association call for earlier ages of retirement, in the United States the whole pressure is in the other direction. Since the 1960s, but increasingly in recent years, the United States Congress has moved to forbid what it has declared to be discriminatory rules governing mandatory retirement. The thrust of United States legislation is to permit people to

retire at an arbitrary age but not to force them to do so. Legislation has been enacted in the United States prohibiting discrimination in employment because of age and requiring that employees be retired on their merits and not on the arbitrary application of a birthday and the historical fact of the passage of years.

#### UNITED STATES LEGISLATION

Because we in Australia frequently follow United States legislative patterns (usually about 15 or 20 years later) it may be instructive for us to have a brief look at just what they are doing in the United States about age discrimination so that we can consider whether similar legal moves should be introduced in our country. Some rules against discrimination in the United States arise out of specific provisions of the United States Constitution which are not relevant to Australia, with its very different Constitution, which has no Bill of Rights. I will therefore deal only with the legislation that has been passed by Congress. When Congress was drafting the civil rights legislation of 1964 it considered whether to include age discrimination within the scope of that general Act. Ultimately it concluded the subject of age discrimination was best left to further investigation and study. A study was set up and the result was the federal Age Discrimination in Employment Act of 1967 (ADEA). Under that Act discrimination against employees on the basis of age was outlawed in the federal service and in bodies relying on federal funds. Many States of the United States introduced similar legislation to provide redress to older people who claimed they were the victims of discriminatory practices in employment. The Act was fostered by a concern for the plight of jobless older Americans. The purposes behind the Act were expressed in it in the following terms :

- \* to promote employment of older persons based on their ability rather than age;
- \* to prohibit arbitrary age discrimination in employment;
- \* to help employers and workers find ways of meeting problems arising from the impact of age on employment

The legislation set up administrative machinery to promote conciliation and mediation in preference to court action, and permitted access to the Equal Employment Opportunity Commission to investigate and to conciliate disputes.

In 1978 the United States Act was amended once again to strengthen the machinery for dealing with what were described as the 'unsatisfactory old age classifications'. The 1978 amendments included a Congressional finding that age-based distinctions such as mandatory retirement were unrelated to actual capabilities and caused financial and psychological hardship :

Increasingly it is being recognised that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those persons who wish to be re-employed have a much more difficult time finding a new job than younger persons.

H. of Rep. No. 95 - 527, Part I, 95th Congress, First Session (1977)

In the testimony offered to the Congressional hearings, one medical witness put it thus :

In the past ageing was thought to be invariably accompanied by diminution in mental and other capacities. A person's abilities were thought to deteriorate in direct proportion to their age. Almost every investigation that has been undertaken on the topic has shown definitively that chronological age and functional ability are not related. Ageing as a process of wearing out is related to the concept of biological age, but biological age and chronological age are not co-relative. ... The concept that a

person at age 65 or for that matter 70 or 75 inexorably has suffered a loss of ability and functional capacity is completely at variance with known facts. . . . There is no rational basis for taking age 65 as a milestone as either physical or mental capacity. (Hearings before the Sub-committee on Labour of the Senator Committee on Human Resources, 95th Congress, First Session (1977) (Statement of A.E. Gunn, J.D., M.D.)).

Members of Congress noted that learning ability and intelligence do not necessarily decrease with age but may remain steady or even increase depending on one's profession, interests and health. The brain can substantially deteriorate before the ability to learn is affected. The age associated with loss due to brain deterioration varies widely from age 65 to over 90. Many Members of Congress observed that defenders of mandatory retirement ages offered no evidence in support of their contention but instead resorted to stereotypes. They asserted that the same kinds of stereotypes had for years been offered as justification for restraints on blacks and women in the United States.

With this background the Congress voted to amend the Age Discrimination in Employment Act, raising the earliest allowable mandatory retirement age to 70 for all people covered by federal legislation who were not federal employees and prohibiting mandatory retirement of most federal employees on the basis of age. The prohibition of mandatory retirement of most federal employees was intended as an example for the rest of the employers in the United States.

One legal commentator has suggested that the congressional action in the United States reflects :  
A growing realisation that the impact of many mandatory retirement laws is arbitrary and devastating both personally and socially.  
The conclusion to be drawn from the available evidence on ageing is thus clear : a significant

segment of society is being victimised by rules that perpetuate the very stereotypes used to justify the rules in the first place. ... Just as it is wrong to assume a man is more qualified than a woman to administer an estate, it is wrong to assume that those who have reached a certain age have decreased mental and other professional capacity.

In the United States we have now begun to see litigation based on these principles. In one important case a judge has commenced proceedings claiming that State legislation requiring him to retire at the age of 70 was invalid. The proceedings are still current but one commentator pointed out that the Justices of the Supreme Court, who would ultimately have to hear the case, and who in the United States still hold office for life :

need not look far to discover that age is not a reliable criterion of mental decline.

127 Univ. of Pennsylvania L.Rev. 798, 816 (1979).

Although the Council on the Ageing in New South Wales has called for attention to the problems of early enforced retirement and the special problems of mandatory fixed retirement ages based on arbitrary birth dates, we see nothing in Australia equivalent to the ferment on this topic in the United States. This is curious, because as some commentators point out, the ageing are fairly well represented in our legislatures. Furthermore, they are an increasing number of our population. They will become in the decades ahead an increasingly powerful voice as they grow more numerous (their numbers are swelled by early enforced retirement) and as they come to include the more assertive people of today's middle years.

I predict that we will see in Australia increasing resistance to what has been termed 'ageism'. Just as we addressed last year the International Year of the Child and will address next year the International Year for Handicapped Persons, the time cannot be far off when Australian society and its laws must face specifically the problems of the ageing. If we look to the United States, with its legal

system which shares many common features with our own, we can see dimly the pattern of laws ahead. There will be an increasing realisation that those who wish to retire early should be entitled to do so. There will be an increasing recognition of the need to provide such people with index-linked and consumption-related pensions. There will also be recognition of the need to provide employment activity for those who want to remain in employment. New attention will be given to finding suitable work for older workers, especially those made redundant by technology. There may even be legislation which requires personal assessment of the capacities of employees and forbids mandatory retirement at a fixed age.

I realise that the Council on the Ageing has many other pressing tasks. Professor Henderson, in his address to the Victorian Council, urged that the primary obligation of today was to provide more money to older people, reliant on pensions. He said that it was necessary to provide more and better services. The Royal Commission on Human Relationships supports this view, particularly in the need to provide more varied accommodation facilities and arrangements.

But the increasing number of younger people who are brought into retirement from age 55 on poses new problems for our society and its laws. I believe that in the decade ahead we will see the law come to grips with these problems and I would not be surprised if legislatures in Australia, as in the United States, moved to discourage or even forbid the mandatory retirement of people on the basis only of their chronological age. I am glad to see that the NSW Council on the Ageing, amongst its many other pressing and important tasks, is looking to this question. It is undoubtedly a question of our decade. -



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