

THE NEW SOUTH WALES JUSTICES' ASSOCIATION LIMITED

JOURNAL

THE LAW : FORCES FOR CHANGE AND REFORM

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

April 1980

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In 1835 the Solicitor-General for New South Wales, John Hubert Plunkett, dealt with the duties of a Justice of the Peace for the Colony of New South Wales. He declared that:

In no part of His Majesty's Dominions are the duties that belong to the Magistracy more arduous and complicated than they are in this colony; and upon their proper discharge, depends very much the wellbeing of its anomalous community.

The community in Australia today may be somewhat less anomalous. The complexities of the law increase apace and the duties of those involved in its administration are made even more arduous than they were by the dynamics that are at work to change the law, its institutions and practices. This short essay is an endeavour to explain the chief forces that are at work in society today contributing to the pressure for change and reform of the law. It also seeks to identify some of the issues which the Australian legal system must face in the decade ahead.

We are certainly living through a period of rapid change. The legal system sometimes finds it difficult to keep pace with the pressure for change.

The law and its machinery represent forces for order, predictability and conservation in society. The primitive Aborigines had rules long before white settlers came to this continent. Australia is today one of the most urbanised countries of the world. Its towns and cities throw individuals into constant,

daily contact. Land must be bought. Goods must be exchanged. Credit must be granted. Property must pass on death. And even in the best societies things go wrong. Antisocial crimes are committed. Carelessness causes accidents. Parties to a contract disagree on its terms. Debtors fail to pay creditors. Disputes arise as to the ownership of land, custody of children, inheritance of property and so on.

To establish the rules by which we live together in reasonable harmony, we have laws. To interpret and ultimately enforce those laws we have courts: judges, juries justices and magistrates. Marx believed that in the perfect society, laws would not be needed. The state and the law would simply 'wither away'. There is little evidence of the withering process anywhere in the world. Certainly in Australia law is a growth industry. Every year Australia's Parliaments turn out more than a thousand Acts. In addition, regulations, by-laws, ordinances and other rules are made governing us all. Some rules are laid down by judges, applying and developing precedents inherited from the past. The law is growing rapidly. But it is also changing rapidly.

Times Are Changing

There are four forces at work in Australian society today which promote the need for rapid change in the law.

- * Big Government: The growth of the importance in all our lives of decisions made by public servants. These 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.

- * 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.

Judges as Law Makers?

It used to be said that the 'genius' of our common law system of law, inherited from England lay in its dual features:

- * it was stable, predictable, discoverable because you could look for a precedent, a decision of an earlier court, which would tell you with fair certainty what the law was.
- * it was changeable, malleable to new circumstances and able to adjust to new social conditions, because the judges were willing to 'stretch' old precedents and develop new rules applicable to new problems.

Many Judges in Australia today are less inclined than they were in the past to develop the law to meet the challenges of change. This is not surprising. We now have representative, elected Parliaments. Problems are more complex today and often require a more detailed investigation than could ever take place in a court room. The community and not just the parties in a case should generally have a say in the development of important new laws.

The old tension remains. Amongst the judges there are some 'timorous souls' and other 'bold spirits'. In the past year the High Court of Australia, the Federal Supreme Court of our country, has on several occasions, by majority, refused to change established rules inherited from a different society of Britain. For example, by majority, it has:

- * confirmed that a person convicted of a capital crime who is in prison may not sue in the civil courts even though this rule originated when such people were invariably hanged
- * confirmed that property owners in the country are not liable for accidents caused by their straying cattle which they have not fenced in, even though this rule arose in a village society in England before the motor car and the freeway
- * denied that a person facing a rape trial has an enforceable legal right to always have a barrister represent him, even though legal aid is now much more commonplace and is perhaps most needed in serious criminal trials.

The Court majority felt that if reforms of these and other matters were to be achieved, they would have to come from Parliament. But Parliaments, in the midst of busy political activities, sometimes overlook the 'nuts and bolts' of law reform. That is why Law Reform Commissions have been established to make the process of change more even and more routine. We exist to help Parliaments systematically modernise and improve the legal system.

Issues for today

There is plenty of room for fundamental questions about our legal system. Some of these are now being asked. Some of them arise in the work of the Australian law reform commissions.

- * Should we be doing more to teach citizens about their legal rights and duties, and if so how?

- * Should the Judge be a passive umpire of the issues presented by the parties, or should he take a more active role in the search for the truth of the matter?
- * How should the law, especially criminal law, reflect the tremendous changes that have taken place in the community's moral values?
- * Should lawyers have a monopoly in paid land conveyancing and advocacy in the courts?
- * How can we adapt individualised court procedures to a mass produced age with its mass produced legal problems?
- * How can we bring greater consistency in the punishment of criminals, without removing the good features of individualised justice?
- * Can jury trial cope with the complexities of cases today, especially white collar crime?
- * Does the law do more harm than good in industrial relations disputes?
- * How can we possibly keep the law up-to-date with the problems caused by massive advances of computer technology?
- * To what extent should our law, based on English values, adjust to the influx of migrants of different cultures?

A lack of knowledge about the law breeds a feeling that the individual has no responsibility for its content. The days of unquestioning obedience to the law and automatic application of unreasonable or out-moded rules, have probably gone forever. Even the most honoured features of our system of law are now being questioned. A great English Judge, Lord Devlin, has said of the adversary trial system 'It is the great centrepiece of the legal structure that has about it an air of decay'. In the midst of change and decay we should seek renewal and renovation. The new effort to involve citizens in discussion about the law, its institutions and rules and to teach them about these things represents an inevitable response to the challenge of our time: the challenge of change.

The responsible citizens who are sworn as Justices of the Peace trace their lineage to the 'conservators of the peace' of Norman times in England. They have seen the common law develop and change and flourish in its transplanted habitats, including Australia. They have seen and been part of its genius in adapting to the recurring forces of change. They have a special responsibility to take part in today's debates about the changes in the law and to lead community opinion about the directions which the renewal of the legal system should take.