AUSTRALIAN FRONTIER

NATIONAL CONFERENCE ON FUTURE DIRECTIONS

10-14 AUGUST 1980

FOUR FORCES FOR LEGAL CHANGE

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

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A TIME OF CHANGE

This Conference assembles at a time of unprecedented change in Australian society. The watch word for our time is change. The law, its procedures and institutions are changing. In part, the demands for change which build up are accommodated by our busy Parliaments, which every year, between them, enact more than 1,000 statutes for this continent. In part, the judiciary, armed with the innovative powers of the common law of England, stretch and develop old precedents to apply to new times. In part, the Executive Government, administratively, develops laws in practices in tune with today's needs. Because the pressures for change have tended to outstrip the law making institutions, and because laws today must address more sensitive, complicated, controversial questions from a starting point of fewer certitudes, law reform bodies have been established by Federal and State Parliaments. By procedures of public consultation, discussion with the experts and the community at large, we seek to help law makers to adjust to the challenge of today: the challenge of change.

The modern Australian Parliament has been described as a 'weak and weakening institution'.[1] The courts are less inclined today than they were in past centuries, to

de .op new laws. They tend to leave this task to Parliament and the Executive Government.[2] Yet Parliament and the Executive Government, distracted by recurring elections and diverted by the heady controversies of political life and personality politics, turn away from the hard issues of adjusting the legal system, inherited from earlier times, to our times. In this coincidence of unprecedented pressures for change and institutional disinclination to meet those pressures, there lie many dangers. Lord Hailsham has said that the 'banner' of Western countries is the rule of law.[3] That is, we live in a community in which, ultimately, disputes and differences may be resolved by reference to given rules, defined impartially in independent courts and applied to all, high and low, government official, big business or little citizen, 'without fear or favour, affection or illwill'.[4] If this is the unique feature of our form of society (as I think it is) and if it is a feature worth preserving (as I am sure it is) we must consider the implication for it of our time of change. We must seek to identify the chief forces of change and address the consequences those forces have for the laws by which we are all governed. It is a statement of the obvious which must constantly be made that the endeavour to impose a better educated community, unacceptable rules and values of times gone by will lead to a breakdown of respect for the law and endanger the rule of law itself. In a better educated and better informed community, abject, unquestioning acceptance of the law (particularly of outmoded rules) can no longer be assumed. The courts of Australia do not have armies waiting at the ready to enforce their decisions. Orderly government and peaceful resolution of conflict in society (ultimately in the courts) depends very much upon community consensus and the willingness to accept the judgment of the independent umpire. It is now time for me to state my theses. They are two.

- First, that the unprecedented changes in society also impact the law, its institutions and rules. Society should face up to this impact and so adjust the law that it is brought into harmony with the society of today. Not as it was. Not as some would wish it had remained.

- Secondly, our better educated citizens have a right to a fuller appreciation of the institutions of the law and at least their chief legal rights and duties, than was thought necessary in times gone by. A society which acknowledges this proposition will act to put it into practice.

FOUR FORCES FOR CHANGE

What are the chief forces of change that are at work in the legal system? I would identify four main themes.

- the growing importance of the role of government in the lives of all of us;

- the growing importance of big business and the decisions made in large corporations, affecting our lives;
- the changing moral values and social attitudes which are, in part, the product of an education system which for a century has been 'free, universal and compulsory'; and
- above all, the force of science and technology, the most dynamic factor in the equation and the one which most obviously imposes on us the inescapable necessities of transition.

The Growth and Importance of Government. Take, first, big government. The common law of England, which is the basis of the Australian legal system, stretches for at least 800 years. But during the first 700 years at least, the role of government was distinctly circumscribed. Naturally enough, the legal remedies that were developed for the citizen reflected this limited conception of the functions of government. It is only really in this century, and indeed in recent decades, that the public sector has come to assume such a significant role in the daily life of virtually every one. Perceiving this development the Lord Chief Justice of England, Lord Hewart in 1930 sounded a warning in his book 'The New Despotism'. He alerted lawyers and law makers to the dangers for the individual (and for the rule of law) of large numbers of bureaucrats, working without effective judicial supervision and within very wide discretions conferred in ample terms by legislation, frequently designed by themselves.

It is only in the last decade that, in Australia, Lord Hewart's warning has been answered. One of the happiest developments of law reform in our country has occurred at a Federal level and under successive governments of different political persuasion. It has produced what has been called 'the new administrative law'.[5] An Ombudsman has been established. An Administrative Appeals Tribunal has been set up, headed by judges, to review, on the merits, certain Commonwealth administrative decisions. An Administrative Review Council has been established to develop new administrative remedies in a systematic way. An important measure has been passed through Parliament and, with amendment, may be proclaimed this year. It will, for the first time, confer on people in Australia a legal right to have reasons given to them for discretionary decisions made by Commonwealth public servants affecting them.[6] In the place of bland uncommunicative decisions, the individual will be entitled to a reasoned response. As far as I am aware, only in the Federal Republic of Germany and in Israel is there similar legislation. Freedom of information legislation is before Federal Parliament. Though there has been criticism concerning the areas of exemption from the right of access, critics should not lose sight of the fundamental change which the legislation envisages. In place of the basic rule of secrecy of bureaucratic procedures, will be a basic rule of openness and the right of access. Refusals of access will generally be the subject of independent review in the

Ac .nistrative Appeals Tribunal. Privacy legislation, to be proposed by the Law Reform Commission, and a basic code of fair administrative procedures will complete this 'new administrative law'. Although these developments have so far been limited to the Commonwealth's sphere, moves are afoot for similar changes in the States. The role of government and its employees has increased and is likely to continue to increase. The law has begun the long haul of responding to this phenomenon: providing individuals with accessible, low key effective remedies of review and reconsideration by external and independent machinery. The skill and dedication of the public officer is submitted to the civilising test of 'fairness' on the part of generalists, upholding the rights of the individual.

Growth and Change in Business. The second force for change in the law is the changing face of business. The mass production of goods and services gathered momentum from the automobile industry and is now an important feature of our society. Yet many of our laws reflect the business methods of earlier times and fail to reflect the realities of the mass consumer market of today. The common law of contract assumed an equal bargaining position between the vendor on the one hand and the purchaser on the other. It is precisely to meet the reality, which is different, that we know find most jurisdictions in Australia and elsewhere have enacted consumer protection legislation to ensure that basic conditions are met in fairness to the consumer.

Several of the tasks before the Australian Law Reform Commission illustrate the way in which it is necessary to bring laws developed in earlier times into harmony with the commercial realities of today. Our project on consumer indebtedness led to a report which suggests a new approach to the problems of small but honest consumer debtors. Our debt recovery laws pre-date the enormous expansion of consumer credit that followed the second World War. Accordingly, they are imbued with a philosophy that debt is never innocent and should be dealt with individually. The Commission's report faced up to the reality of the modern extension of credit, the reliance nowadays of creditors upon a credit reference system to protect them and the need to take individual debt not necessarily as a sign of moral culpability but often as an instance of incompetence in coping with the credit community of today. Procedures for credit counselling, aggregation of debts and systems of regular repayment of debts were suggested in the place of present procedures of court action and bankruptcy.

Likewise, the Commission's project on insurance seeks to adjust the law to an age of mass consumer insurance. The law governing the relations between insurer and insured was basically developed in the 18th Century, long before mass produced insurance polices were sold by radio and television to people of varying understanding and little inclination to read the policy terms. The imposition upon consumer insurance of the

ob. ..tion worked out in an earlier time for different kinds of transactions is scarcely appropriate. Yet unless there is reform of the law, that is what will continue to be the case.[8]

The Australian Law Reform Commission has also been asked to report on class actions: a legal procedure which has been developed in the United States. Class actions permit consumers and others to aggregate their claims into one big action, making litigation between the consumer and big business a more equal proposition than may be the case in an isolated individual claim.[9] These are just a few instances of the way in which proposals are being made to adjust the legal system to the commercial realities of today.

Changing Social and Moral Perceptions. The third force, for change is more difficult to describe. It is probably bound up in higher levels of education, longer school retention and improved methods of the distribution of information by radio, television and the printed word. I refer to the changing moral and social attitudes which are such a feature of our time. There are many forces at work. In the space of a few decades we have moved from official acceptance of 'white Australia' to official (and increasing community) support for a more multi-cultural society. We have moved from a devotion to growth at any price to a concern about the environment and the preservation of our history, flora and fauna. The last decade saw the rise of the women's movement, of anti-discrimination boards, of efforts to eradicate 'sexual oppression'. There has been talk of the rights of the child. Next year will be the Year of Disabled Persons. I predict that the growing numbers of the aging in our society will lead to new emphasis upon the rights of the old. Successive governments have carried forward policies to reverse decades of neglect and worse in relation to our Aboriginals. These are just a few of the recent social changes.

For some citizens, especially those of the older generation, it must all seem as if the world has been turned on its head. Not two decades ago, it was the received cultural wisdom that Australia was a man's country of decidedly British values. Others could like it or lump it. Everyone they had to comply with the accepted norm and be assimilated and integrated into it. Now the despised and disadvantaged groups of the recent past are listened to earnestly with growing community appreciation: ethnic groups, women, homosexuals, paraplegics and the disabled, the mentally ill and retarded, women, Aboriginals, the old. Football and cricket still draw record crowds but so now do our theatres, our films and the arts generally. Puritan morality has given way to open advertisement of massage parlors. Nude beaches flourish in at least some of the warmer States.

These changes cannot come about without affecting the law and its institutions. People, including people in high places, begin to ask why there are so few women in the judiciary of Australia?[10] Why various laws still discriminate against migrant newcomers?[11] Why the criminal law contines to enforce, in the so called 'victimless crimes', attitudes to morality which are not now held by the great majority of citizens. In no other Commonwealth Act has the changing community morality been more vividly reflected than in the Family Law Act 1975. That Act substantially replaced the notion of fault as the basis for the disillusion of marriage, replacing it by a new test: the irretrievable breakdown of the marriage. In a time of transition, it is uncomfortable for those who cling to the values and certainties of the past. There are many sincere citizens who bemoan the radical changes, some of which I have touched on. No recent piece of Federal legislation has been so beset by heartfelt controversy than the Family Law Act itself. Yet if community attitudes and standards are changing, the endeavour through the law, to enforce the attitudes and standards of an earlier time is bound, in the end, to fail, unless it has substantial support or at least acquiscance in the community. Laws of earlier times applying on a social base that has shifted tend not to uphold past morality but simply to bring contempt for the law and its institutions. They breed cynicism and even corruption which undermines the rule of law itself. The moral of this tale is that, whilst the law must necessarily tread cautiously, its rules and their enforcement should never be too far distant from current perceptions of right and wrong. When those perceptions are changing rapidly, as they are just now, it is a difficult time for law makers and those who advise them. In a time of transition, it is also a difficult time both for those who support reform of the law and those would cling to old ways. The attitudes of each must be understood and respected.

Dynamic Science and Technology. The fourth force for change in the law is the dynamic of science and technology. The birth, in recent weeks in Melbourne of a child fertilised in vitro heralds remarkable developments in biology which will pose dilemmas for society and the law. Cloning, which has been developed in plants and more recently in prize bulls is now, we are told, a feasible possibility for human beings. Human tissue transplantation is occurring regularly in all parts of Australia, as scientists overcome the body's natural immune rejection of organs and tissues from other persons.

The rapid developments of computerisation, particularly as linked to telecommunications, present many problems for society, including its educators. By a remarkable combination of photo reduction techniques, dazzling amounts of information can now be included in the circuit of a tiny microchip. The computerised society may reduce the needs of employment, increase the vulnerability of society, magnify our reliance on overseas data bases and endanger the privacy of individuals.

These and other developments raise questions which the law of the future will have to answer on behalf of society. Should human cloning be permitted and if so under what conditions. Is it acceptable to contemplate genetic manipulation, consciously disturbing the random procedures that have occurred since the beginning of time? In the case of artificial insemination by a donor other than a husband, what rules should govern the discovery of the identity of the donor, if this is ever to be permitted? What rules should govern the passing of property and how can we prevent accidental incest in a world of unidentified donors? Should we permit the storage of sensitive personal data about Australians in overseas data bases and if so under what conditions? What requirement should be imposed for the supply of data in one computer to another? Is the systematic matching of computer tapes a permissible check against fraud or a new form of general search warrant which should be submitted to judicial pre-conditions? Under what circumstances are we prepared to tolerate telephone tapping to combat crime? Is junk mail a passing nuisance or unacceptable invasion of privacy?

Almost every task given by successive Attorneys-General to the Law Reform Commission raises an issue about the impact of science and technology on the law. In our project on criminal investigation, we had to look to ways in which police procedures could have grafted onto them the advantages and disciplines of new scientific advances.[12] In our report on human tissue transplanation, we had to work out the rules that should govern the taking or organs from one person for the benefit of another.[13] We also had to answer the question of how death is to be defined in modern terms. Should young people ever be entitled to donate a non-regenerative organ to a sibling and if so under what conditions? Should positive donation be required or can we legally impute a general community willingness to donate organs after death. Our project on defamation law required us to face the realities of defamation today: no longer an insult hurled over the back fence but now a hurt that may be carried to the four corners of the country.[14] Our reference on privacy requires us to examine the ways in which we can preserve respect for individual privacy whilst taking advantage of the computerisation of society.[15] Even our most recent project on reform of the law of evidence requires us to rescrutinise some of the accepted rules of evidence against modern psychological and other studies which suggest that many of the accepted tenets of the law do not stand up to empirical scrutiny.

Computing and the advent of the new information science should be seen in the same way as the introduction of electricity: it will be permeate almost every aspect of life. Its impact will not be confined to factory workers. None of the professions will be exempt.[16]

TH. MORAL?

Ignorance, fear, a fealing of remoteness, costliness, inaccessibility. All too often these are the reactions of good decent Australian citizens to their law, its institutions and procedures. We are living through a time of transition. I have sought to identify the chief forces that are at work for the change of the law. We should be doing more than we are to identify the forces for change. We should be doing more than we are to inform citizens about their rights and duties in a time of change. We should be doing more than we are in consultation with the community affected to adjust our laws, institutions and procedures to the changes that are taking place.

FOOTNOTES

1. See G. Reid, 'The Changing Political Framework', Quadrant (January/February 1980) 5. See also [1980] Reform 45.

2. See e.g. Government Insurance Office v. Trigwell (1979) 26 ALR 67 (Barwick CJ and Mason J). Cf [1980] Reform 5.

3. Lord Hailsham, Robert Menzies Inaugural Oration, 1978 How Free Are We? mimeo, 22.

4. This is the language of the Judicial Oath.

5. G.D.S. Taylor, 'The New Administrative Law' (1977) 51 Australian Law Journal 804.

6. Administrative Decisions (Judicial Review) Act 1977 (Cwlth). Note that an amending Bill was introduced into the Australian Parliament in May 1980.

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

8. Australian Law Reform Commission, Discussion Paper No. 7, Insurance Contracts, 1978.

9. Australian Law Reform Commission, Discussion Paper No. 11, Access to the Courts - II Class Actions, 1979.

10. Mr Justice Murphy in an address to the National Press Club, Canberra, 21 May 1980.

11. Australian Law Reform Commission, Criminal Investigation (ALRC 2) (Interim Report), AGPS, Camberra 1975. See esp. paras.259ff (special problems of non-English speakers). See also M.D. Kirby, New Laws for New Australians, Sir Robert Garran Memorial Lecture, mimeo, 24 June 1980.

12. ALRC 2, above. Amongst suggestions made were sound recording of confessional evidence, telephone warrants for urgent searches and arrests and photography or video tapping of identification procedures.

13. Australian Law Reform Commission, Human Tissue Transplants (ALRC 7), AGPS, Canberra, 1978.

14. Australian Law Reform Commission, Unfair Publication: Defamation and Privacy (ALRC 11), AGPS, Canberra, 1979.

15. Australian Reform Commission, Discussion Paper No. 14 Privacy and Personal Information, 1980.

16. M.D. Kirby, 'The New Technology and the Teaching of Legal Studies', mimeo, Melbourne, 10 July 1980. See also C. Evans, 'The Mighty Micro' 1979, Chapter 9.