THE FLINDERS UNIVERSITY OF SOUTH AUSTRALIA

INVESTIGATOR LECTURE 1980

STATE GOVERNMENT THEATRE ADELAIDE

24 JULY 1980

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The Hon Mr Justice M D Kirby
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THE RISE AND RISE OF LAW REFORM

I start by saying that I am pleased once again to be associated with the Flinders University of South Australia. I say again, because (although I have not visited the campus, a default I hope shortly to remedy), I recently had the great pleasure of conferring on Vice-Chancellor Roger Russell, the Honorary Degree of Doctor of the University of Newcastle. So far it is the only degree I have conferred. There are, of course, many similarities and comparisons between the Flinders University and the University of Newcastle, of which I am Deputy Chancellor.

I am especially honoured to be invited to deliver this lecture. I am always pleased to be in Adelaide. Not only have we in the Australian Law Reform Commission enjoyed close co-operation with the South Australian judiciary, academics, public service and successive Ministers. We are almost a South Australian institution ourselves. One of the four initial part-time Federal Commissioners of Law Reform, Professor Alex Castles, teaches law at the University of Adelaide. One of the first four full-time Commissioners was Professor David St.L. Kelly, now returned to that Law School. One of the present full-time Commissioners is Mr Bruce Debelle, a barrister and solicitor of this city. Another part-time Member, until recently, was Mr John Ewens, formerly First Parliamentary Counsel of the Commonwealth - also originally an Adelaide man.

He, Professors Kelly and Castles and Mr Debelle remain involved in the day to day work of the Commission, Mr Justice White, Judge Rogerson, Mr Giles, Deputy Commissioner Giles of the South Australian Police and many other distinguished citizens of the State have been appointed as honorary Consultants to help the commission in particular projects. You will understand that quite often in Sydney I feel left out of things, surrounded as I am by the wisdom of Adelaide. Of course there has always been a strong reformist tradition in South Australia. It is about the institutionalisation of reform that I propose to speak tonight. Law Reform is the subject I will investigate.

One of the most remarkable and persistent features of the recent legal history of the countries of the English speaking world is the development of institutional law reform. A scholarly wag was not far off the mark when he described law reform as a 'booming industry'.[1] The boom is, for once, not limited to our country. Law reform agencies have been created in great number in almost every jurisdiction of the Commonwealth of Nations. Often proposals on similar subject matters of legal reform are worked up independently by law reform agencies in different Australian State jurisdictions or in different Commonwealth countries, on opposite sides of the world.[2] The Australian Law Reform Commission publishes a quarterly bulletin, Reform, and a reform index, which collects relevant law reform reports of LRCs in all parts of the world.[3] New attention is being given to the implementation of law reform recommendations both in Australia and beyond - to ensure that governments and people are getting value for money out of these new institutions.[4] Very many of the reports of the law reform agencies in Australia and elsewhere have resulted in legislative action and practical reform of the law.

The list of law reform bodies in different parts of the English speaking world discloses their differing organisations and composition.[5] Some are units in a Department of the Executive Government. Others are independent statutory authorities. Some are permanent commissions. Others are ad hoc committees. Some (such as the Australian Law Reform Commission) are established by statute. Others (such as the South Australian Law Reform Committee) are created by Executive Proclamation. Alone among the States South Australia has no permanent statutory commission with full-time officers.[6] Under its distinguished Chairman, Mr Justice Zelling, the South Australian Committee is, however, most prolific and inventive. Some agencies deal with a wide brief of law reform. Others are confined to law revision. Some initiate their own programmes. Others are limited to working only on those matters assigned by the Law Minister. Some are well funded, producing handsome reports on a variety of challenging topics. Others are confined to a modest programme of small technical subjects described in mimeograph publications of limited circulation. But through them all runs a common theme.

All evidence the recognition by the lawmakers of the common law world - in old countries - and newly independent countries of the fact that the existing machinery for developing the law and fashioning its principles and procedures has fallen upon hard times. With few exceptions the countries of the Commonwealth of Nations have inherited the common law of England. The original 'dynamic' of that system of law was a force for adaptation, modernisation and reform. Old precedents were constantly stretched and developed by the judiciary to meet new social needs. Former Attorney-General Ellicott put it well, when addressing an international law reform conference in Canberra in 1976:

> We must never forget our dependence on and indebtedness to the common law. The dynamics of the common law, in its formative stages, embodies the true spirit of law reform - law and lawyers responding to new situations demanding just solutions. It is symbolic of its acceptance in the four corners of the world, that we are able to sit down at this stage and discuss the problems associated with its reform. It is not so many years ago that in many places law reform was simply a matter of considering the adoption of proposals originating at Westminster. We have all come a long way since those days. Yet none of us should forget the indebtedness we all have to the common law of England and the principles which it secures.[7]

Even in the heyday of the confident common law of England, critics pointed to its basic structural weakness. Sir Francis Bacon, at the end of the 16th Century, called for a committee to take the whole body of the law of England into its hands. Such a committee should develop the law systematically. It should be released from dependence upon the haphazard chance factors of particular litigation : whether a barrister saw the important point; whether his client could afford to test it through the appeal courts; whether the judges wanted to grasp the nettle; whether this was the case to take a new direction. In 1859 Lord Westbury, later to be Lord Chancellor of England, advocated the establishment of a Ministry of Public Justice. He returned to Bacon's theme and the organisational defect of a system so heavily dependent upon judge-made law:

> We have no machinery for noting, arranging, generalising and deducing conclusions from the observations which every scientific mind could naturally make on the way in which the law is working in the country. ... Why is there not a body of men in this country whose duty it is to collect a body of judicial statistics or, in more common phrase, make the necessary experiments to see how far the law is fitted to the exigencies of society, the necessities of the times, the growth of wealth and the progress of mankind?[8]

Lord Westbury's call was ultimately heard in the many countries where the common law took root. But the flowering of 19th century enthusiasm for scientific law reform soon withered. In the middle of this century, following the establishment of the Law Revision Committee and later the Law Reform Committee in England, the Law Commission of India and the English and Scottish Law Commissions, the movement revived. If some of the enthusiasms of the 1960s have been replaced by a cold-eyed realism in the 1980s[9] the fact remains that institutional law reform throughout the common law world, especially in the Commonwealth of Nations is at this moment in full flower. Every jurisdiction must have its law reforming agency. The one jurisdiction which established and terminated its law commission, Sri Lanka, has now even revived it.

Part of the explanation for this international and national institutional proliferation may be the pursuit of the fashionable. Part may be even the realisation by some politicians that difficult issues can occasionally be defused for a time by the handy availability of a permanent law reform institution.[10] Part of the reason may be political tokenism : the creation of a small ill-funded, under-staffed body almost as a placebo for public disquiet about the law's delay and the defects in its rules and procedures. Once the Privy Council in London provided a unifying force for judicial pronouncement and occasional reform of the common law. But the declining jurisdiction of the Judicial Committee of the Privy Council and the development of active, self-confident local legislatures, led in the four corners of the world to fresh scrutiny being given to the transplanted English law. Released from legislative and judicial dependence on London, local lawmakers increasingly questioned the appropriateness of some of the principles developed in earlier times for a very different society but transplanted during colonial times generally without regard to special local features of geography, race, religion, customs and social climate of the recipient jurisdiction. Many law reform bodies including those in Australia, are now engaged in the business of adapting English law to the specia local characteristics. No doubt these and other considerations help to explain the sudden development of law reforming institutions in so many jurisdictions. But I want to suggest that the fundamental reason for the development of so many law reform bodies, in Australian jurisdictions and indeed in most common law countries, in such a short space of time is the coincidence of a number of universal pressures upon lawmaking institutions today. There is a growing recognition that our inherited institutions, including the judge-made common law, are simply not competent to cope with contemporary pressures for change. My thesis is a simple one. Into the institutional vacuum left by a legislature generally unable to cope with detailed changes in the law, a distracted and over-busy Executive and a tongue-tied Judiciary, has come a new institution : the law reform agency. This is a high claim to make. Perhaps it is too hold.

But I believe that we are, throughout Australia and indeed in many countries of the common law world, at the brink of nothing less than an important and common constitutional development. I refer to the all but universal development of law reform bodies whose function will be to fill part of the void left by the retreating common law faced at this time with unprecedented pressures for legal change. Is this thesis valid? Is the institutional response adequate for contemporary needs?

FOUR MAIN THEMES

It is a bold man who would try to describe the common forces for change that are at work in the legal system of common law countries today. Cultural, economic and social differences are self-evidently enormous. The growth of legislation, of local codification and post-independence adaptation of the laws make the generalisations which would have been possible even a decade or so ago much more problematical today.

Despite this it is perfectly safe to say that the challenge to the legal systems of common law countries (and indeed in others) is uniformly the challenge of change. In all countries, the institutions, laws and procedures are coming under increasing question. Perceived wisdom is being questioned. The proper province and function of the law is now passionately debated as it was not but a decade ago. The task of judges, lawyers, police and government officials becomes daily more difficult to perform. Why should this be so? There are, I suggest, four themes which describe the chief forces at work in all of our societies and in their legal systems. Shortly expressed, these themes are big government, big business, big moral social and economic shifts and big science and technology.

So far as big goverment is concerned, we can all see the growth of the public sector and the increasingly important responsibilities it has to make decisions affecting every individual in society at various stages of his or her life. There will be no going back to what some contend were the 'good old days' of small government. There will, of course, be efforts in some jurisdictions, including some in Australia to rein in the public purse, to reduce taxation, to introduce 'sunset clauses' in legislation, by which a particular Act will lapse after a given time and to limit and control the rapacious quango.[11] But I believe there is no chance of a return to the laissez faire society of the 19th Century. On the contrary, I believe that the growing integration of our societies nationally and internationally and their recognition of responsibility for the poor, inarticulate and underprivileged members will, if anything, gradually increase the role of government and its influence upon the lives of all citizens.

Whereas countries of the civil law tradition developed a detailed and specific administrative law to control and discipline the public sector, we of the common law tradition, under the influence of Dicey and others, largely failed to do so, despite enourmous changes in the role of goverment and its multitudinous agencies:

> [T]he concept of the proper sphere of governmental activity has been completely transformed in all countries deriving their jurisprudence from the English common law. The State is a welfare state whether covertly or overtly; it provides elaborate social services and undertakes the regulation of so much of the citizen's daily business, in order to carry out so many schemes of social and economic service and control.[12]

As a reaction to the growth of the power and influence of government, the courts, committees of inquiry[13] and law reform agencies[14] have devoted much attention to improving procedural processes to facilitate judicial scrutiny of official acts.[15] But the most pervasive and uniform development has been what the former Chief Ombudsman of New Zealand, Sir Guy Powles, has described as the 'ombudsman explosion'. The ombudsman 'idea' has proved one of universal attractiveness.[16] Whereas the legal procedures of common law jurisdictions follow the adversary mode, the ombudsman's procedure is inquisitorial.[17] Whereas courts can be expensive, slow and frightening for ordinary citizens, the ombudsman is usually free, fast and approachable. Whereas courts can impose their will by an order that will be obeyed, the Ombudsman's sanctions are persuasion, mediation, reconciliation and if this fails, a report to Parliament and an appeal to public opinion.

The development of open government legislation in many jurisdictions[18] and the development of a coherent administrative law reflect the reaction of the legal order to the rapid growth of the public sector everywhere. Thirty years after Lord Hewart, the Lord Chief Justice of England, wrote 'The New Despotism' lawmakers and law reformers are putting forward effective, practical and accessible machinery to assert and uphold the rights of the individual against the unthinking administrator. This is a great challenge to our legal system and it is one in respect of which the common law's voice is often muted:

> The consequent effects [of the modern welfare and administrative state] such as the increasing dependence of the citizen on the State, the expansion and increasing bureaucracy of the administrative apparatus, the swelling flood of legislation, are producing an increasing degree of disenchantment with the State, and a certain uneasiness based on a feeling of powerlessness and mistrust vis-a-vis an anonymous bureaucracy that is difficult for the individual to comprehend.[19]

It is both inevitable and desirable that our legal institutions should shape up to responding to the universal growth of the role of government and its agencies. This is a pervasive phenomenon of contemporary life and it is one in respect of which our inherited legal order needs urgent attention.

The second theme I have mentioned is big business. It is scarcely likely that the same disciplines which are now being developed and enforced as against big government will not, in time, come to the rescue of the individual against large corporations. Private corporations can be equally unthinking, oppressive and bureaucratic. The problems of big business are somewhat different to the problems of big government. At least with big government, we share an ultimate national or sub-national identity. Through the ballot box there is generally the opportunity, however indirect, inadequate and intermittent, to influence the conduct of government through the political process. But business can operate insensitively for its own purposes, without necessarily showing due regard to the needs of the country in which it operates. The ever-diminishing significance of distance and the ever-increasing speed and economy of international communications, make the development of international business both inevitable and, generally, desirable. But there are by-products which we will see in the last decade of this Century. For example, the efficiencies which persuade electronic companies, motor manufacturers and others to centralise their research or other facilities in overseas developed countries or even in other States may not always benefit small market economies such as those of Australia. The marriage of computers and data bases, through satellite and other communication systems, presents the very real possibility that vital data on individuals and businesses in one country will be stored increasingly outside that country. This is a concern which is already in the forefront of a great deal of European thinking at this time. With memories of invasions still fresh in mind, European leaders are sensitive to the external storage of personal data, sensitive or vulnerable data, data relevant to national security and defence and data vital to the cultural identity of a country. Although these concerns are not yet in the forefront of the thinking of Australians, I believe that they will, in time, become matters upon which all jurisdictions, certainly all in Australia will have to reflect. They will require new laws to protect national interests, for the interests of international and trans-national corporations do not necessarily coincide with national interests.

The growth of the large corporation, of the credit economy with its paraphernalia of credit cards, electronic fund transfers, telephone bank tellers and the like is already with us or just around the corner. The growth of consumerism and the need for laws to ensure consumer protection and fair trade practices is a common feature of

most of the legal systems of the common law. Laws developed in England when debt was a reprehensible, deliberate wrong, are sadly out of place in the modern society, fuelled by easy credit.[20] The law of insurance, developed in England to suit the contractual relations of underwriters and shipping adventurers, may need significant modification and adaptation to be appropriate to the mass consumer insurance market of today where, try as you will, the insured will not be induced to read his policy.[21]

To the forces of big government and big business must be added the impact of changing social values, ethical perceptions and economic concerns. In the space of a few decades we in Australia have moved from official acceptance of 'white Australia' to official (and increasing community) support for a more multi-cultural society. The last decade saw the rise of the women's movement against insidious discrimination, 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 ageing 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 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 our Festivals - including the great Festival of this city - 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 after the lead was first given in this State by the appointment of Justice Roma Mitchell there are still so few women in the judiciary of Australia? Why various laws still discriminate against migrant newcomers? 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 dissolution of marriage, replacing it by a new test: the irretrievable

breakdown of the marriage. There are many sincere citizens who bemoan such radical changes. 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 acquiescence 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, worse, 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, including L.R.C.s.

Of course, these changes or most of them, should not surprise us. Our society is better educated and more inquisitive. It is daily bombarded with news and information, views and comment to an extent only made possible by the technological advances in the distribution of information. In short, in a fast-changing society, we have a better educated citizenry, liable to question received wisdom and accepted values to a degree that would have been unthinkable in previous generations. Rapid political changes in most countries of the common law world raise community expectations of improvement in society, including in its legal system and economic system. It is vital that these phenomena should be thoroughly understood by lawyers and lawmakers. Indeed, it is vital that they should be understood by all. Not only do they help to explain the challenge to long-established laws and institutions. They also justify many of the questions which are now being asked about the defects in our substantive laws and procedures.

The fourth great contemporary force for change is the impact on society of <u>big science and technology</u>. In many ways this is the most dynamic of the forces for change which are now at work. It is the one which the law and lawmakers find most difficult to accommodate. In some cases, science and technology present novel problems which can be swept under the carpet for a time but which will ultimately require the attention of lawmakers. In other cases science and technology may actually assist in the resolution of legal disputes. The Breathalyzer has been adopted by law to measure by a breath test the blood alcohol level of allegedly intoxicated drivers which not two decades ago was proved by tedious impressionistic evidence of police. The readings from this scientific instrument are substituted for unreliable unscientific impressionistic evidence.[22] Numerous reports now urge the adoption of tape recording to set at rest some of the disputes about alleged confessions to police officers.[23]

But if science and technology present solutions to some of the difficulties of the modern administration of justice, they also produce problems. Take for example the problems presented by the transplantation of organs and tissues from one person to another, an issue examined by the Australian Law Reform Commission. In such operations it frequently becomes necessary to determine the 'death' of the donor for legal purposes. Although the common law has never attempted to define 'death' with precision and has left its diagnosis to the medical profession, it is generally accepted that the classical criteria for determining death were the cessation of respiration and circulation of the blood. Interpose an artificial ventilator in a modern hospital and these criteria become not only irrelevant but potentially mischievous.[24] Problems such as artificial insemination, test tube babies, the right to die (in respect of which a Bill is presently before the South Australian Parliament), human cloning and genetic engineering crowd upon us and demand clarification of acceptable conduct including by new legal regulation.

Another vivid illustration of the impact of modern technology on the law is one which will affect all countries and all jurisdictions in time. It is the impact of computerisation. The advent of automated data systems will require a rapid reassessment of the law of fraud and theft, the law of evidence, copyright and patent law and so on. Computerisation presents special difficulties to society because of the vulnerability to accident, blackmail and deliberate destruction which miniature technology makes possible. The impact of computers on employment levels in society may also have social effects which our laws will have to address. The capacity of the computer to store vast masses of information, retrievable at ever-diminishing cost and ever-increasing speed, raises important issues for individual liberties including the privacy of individuals which many inquiries (one of which is that by the Law Reform Commission) have now begun to tackle.[25] The linkage of computers in different countries by satellite and telecommunications makes possible the modern ease of airline travel and hotel bookings. But it also raises great questions of individual rights, economic dependency and national security and social vulnerability which lawmakers will have to tackle before this century is out.

THE DECLINE AND FALL OF THE COMMON LAW

To meet the challenges which I have described and which all countries of the common law face to some extent, what do we have? By reason of its organisation and the pressures on it the elected Parliament is not really geared to handle the 'nuts and bolts' of law reform. Professor Gordon Reid, a past officer has called it a 'weak and weakening institution.[26] Often its procedures themselves the result of a long historical process are frozen in a bygone age with the loss of valuable sitting time in what has been called 'the tedious and often unedifying process of voting'.[27] In Australia at least,

the vast bulk of legislative work is still conducted in plenary sessions, where Party contests and Party discipline are strongest and where the Whips of the Executive Government hold sway. We have no tradition of Private Members Bills - a facility which has proved useful for the implementation of law reform proposals in Britain. One thoughtful Australian observer of the Federal Parliamentary scene in Australia described the Parliamentary malaise Australia in language which is probably appropriate in many places:

> If as a nation we are concerned about the declining reputation of our politicians and of the political processes we should ask ourselves whether the state of our Parliament has any influence on this condition. I believe it has. It is not that our parliamentarians are undignified, it is that the Parliament-Executive relationship is such. By stripping our rank and file politicians of continuing responsibility in Parliament ... the proceedings have degenerated into a continuous and elementary election campaign. Subtlety, diplomacy, and verbal dexterity in Parliament will only develop in the context of Parliamentary responsibility, not with Parliamentary impotence.[28]

The principal beneficiaries of the loss of initiative in Parliament in Australia and elsewhere are the Executive Government and the permanent civil service. But under the pressure of repeated elections at short intervals and the sheer complexity of the modern challenges of change, it is extremely difficult for busy, distracted Ministers and their preoccupied permanent administrators, to look far into the future, consult the numerous experts, listen to the public voice and consider in a reasoned way the future direction of the law and its institutions, under the multiple pressures for change.

Since the frank abandonment of the 'fairy tale' that judges do not make the law, increasing attention has been paid to the role of the judiciary as lawmakers. The original 'genius' of the common law lay, as Mr Ellicott's statement suggests, in the capacity of its judges not only to provide predictability and certainty by the use of precedent but also to cope with change and new circumstances by the development of new rules or the modification of old rules where circumstances required it.[29] Now, we are seeing the general retreat in judicial lawmaking. The bold early dynamic of the common law is replaced by judicial caution. Lord Scarman predicts that 'case law will become as much as it already is, the interpretation of enacted law. It will lose its character as a separate source of law'.[30] Certainly, this prediction seems to be borne out in recent decisions of the highest courts of Australia. Within the space of a year or so, a number of decisions of the High Court of Australia illustrate the disinclination of the judges of our country's highest court to adapt and revise old common law rules established in earlier times, to

meet entirely new social situations. In one case[31] it was held that a convicted capital felon was disentitled to sue in the courts. He had lost his civil rights. Although this rule originated at a time when convicted capital felons were uniformly executed, it was for Parliament not the courts to alter the rule. Likewise, in a South Australian case, it was held that it was for Parliament to change the rule in Searle v. Wallbank.[32] The Court would not overrule or find inapplicable the common law as stated in that case concerning the liability of landowners for stock straying from their land. The advent of expressways and fast motor cars was not sufficient to warrant an alteration in the settled common law:

> Where the law has been declared by a court of high authority, this Court, if it agrees that that declaration was correct when made, cannot alter the common law because the Court may think that changes in the society make or tend to make that declaration of the common law inappropriate to the times.[33]

Explaining the Court's position, one judge, Mr Justice Mason, pointed to the relative advantages of law reform bodies and disadvantages of the courts as a forum for radical legal change and modernisation:

> [T]here 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 inquiries 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 inquiries and assessments that are made by governments and law reform agencies as desirable, if not essential, preliminary to the enactment of legislation by an elected legislature. 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.[34]

More recently the High Court of Australia specifically refused a frank invitation to modify the common law of locus standi, precisely because the Executive Government had referred the subject to the Australian Law Reform Commission.[35]

Although attitudes may differ marginally among the final courts of common law countries (the United States Supreme Court being an obvious exception) it is reasonably safe to assert that in the presence of the popularly elected legislature, the powerful and active Executive Government and the burgeoning statute book, the judiciary of today is not as prepared as its forebears were to contribute in the courts to significant measures of law reform. Exceptions exist both in terms of personalities and particular cases. But by and large we find ourselves in a time when Parliament is ill-organised and generally uninterested in law reform, the Executive and permanent bureaucracy are distracted by urgent daily tasks and the judiciary is disinclined to play the creative role which was, until quite recently, the principal means of law modernisation and reform in the common law system.

The lack of interest, distraction and disinclination of others is the opportunity and challenge of law reforming bodies. Lord Scarman has said that a special feature of English-speaking people is their inclination to reduce matters of controversy and debate to routine arrangements. The challenges of change which I have identified will impose upon all modern societies and their legal systems considerable pressures for change and re-organisation. Although the bright hopes of the 1960s have dimmed somewhat, and realism requires us to acknowledge the limited capabilities and achievements of institutional law reform, the fact remains that there is a distinct need for a routine method to help lawmakers cope with the problems of fundamental change which face our countries.

CONSTRAINTS ON INSTITUTIONAL LAW REFORM

Setting up a law reform agency is one thing. Making it effective to fill the institutional gap I have identified may be quite another. It is not difficult to list the problems of the law reform agencies of Australia and indeed other common law countries. With few exceptions, they are common problems and it is possible here to do no more than mention some of the chief of them.

An obvious constraint arises from the resources which are devoted to institutional law reform. A recent analysis showed that in Australia the amount expended on law reform, Federal and State, is small, divided and uneven.[36] It is obvious that the quality, speed and quantity of law reform effort will vary to some extent with the funds which society is prepared to devote to the enterprise. Thoroughgoing law reform, based upon empirical scrutiny of how current laws actually operate, is an expensive business beyond the purse of most law reform bodies. The Australian Law Reform Commission has found that large numbers of experts in the judiciary, the legal profession, business, industry, other related professions and community groups are prepared to offer their services as consultants free of charge with no reward other than participation in a national project of legal renewal.[37] Limitations in resources are noted in most of the law reform bodies.[38]

A second constraint arises from the tasks assigned to the LRCs. Most of the agencies work upon references given by the Executive, although some can initiate their own programme and others can suggest items appropriate for study. There are critics who complain that this control by government is a constraint on the freedom of law reform bodies and an inhibition in the way of their tackling the real causes of injustice and unfairness in the law.[39] A criticism of the English Law Commission was addressed to the programme it had adopted:

> Instead of tackling [criminal and family law] the Commission devotes much time to lawyers' law - the minutiae of the law, of interest only to lawyers and only marginally affecting the general public. It is examining such topics as interest on contract debts, implied terms, rent charges and the vicarious liability of corporations. Not all of its work is so obscure; it has done very useful and important work in criminal and family law. But valuable though this work may be, its utility is diminished by the failure to tackle the problem of court procedures and that of the complexity of legislation.[40]

This feeling is not confined to critics but is voiced by Lord Scarman himself, first Chairman of the English Commission. Describing the 'disillusion felt by many over the work of law reform' he explained:

> It adds to the volume of the law; is focused on lawyers' law and has little, or nothing, to offer towards social and economic betterment of the community; does not enter the fields of public, constitutional or administrative law; and it offers no reform of the legal process or the legal profession.[41]

Mr Justice Zelling put the same point well in the Australian context:

> [T] o the average man a great deal of what we are doing is irrelevant. He is not remotely interested in whether we ought to adopt the wait-and-see-rule with regard to perpetuities or as to what Public General Acts of the Imperial Parliament were in force in South Australia on 28 December 1836. Questions that I have been asked by people in all walks of life are to the effect of 'what are you doing to get a speedy, efficient and cheap system of justice?' and 'what are you doing to protect us from the oppressions of Government, local government and large corporations?'. Those questions are asked over and over again and unless in some way we come up with the answer to them we will disappoint gravely the expectations of those whose expectations were raised when these commissions were formed ... If we can ally to the law reform work

> which we are doing what I have denominated as justice reform, which in itself is a kind of law reform, we shall gain acceptance by the public. After all, law requires acceptance by the public. Secondly we will be doing a work which is more satisfactory and therefore more likely to endure ...[42]

Whether it is necessary to overcome the resistance of political leaders who generally have control of the tasks assigned to law reform bodies or the myopia of lawyers and law reformers themselves concerning the real problems of society, there is no doubt that new attention should be paid to the priorities of law reform so that the scarce resources available for this important endeavour are devoted to improving those areas of the law's operations which are seen by the community to involve the greatest injustice or the most pressing inconvenience. We must resist the temptation to indulge ourselves in fashionable technicalities of real interest only to lawyers.

A third constraint relates to the processing of law reform proposals, once finally made. The legislation establishing most of the law reform agencies is silent upon what is to happen once a report is presented. The Canadian Law Reform Commission put the issue thus:

> All reform involves change, but not all changes are reforms. Reform, then, is change for the better. But better, by whose lights? The Commission's principal function is to recommend reform ... However the power to implement any such recommended changes resides in the government of the day and in Parliament. ... This process follows all the settled norms and traditions of Parliamentary democracy, including, of course the government's responsibility to elected Members and the elected Members' ultimate responsibility to the electorate, diluted as it might be in regard to any particular law reform proposals.[43]

Views will differ concerning the importance that should be attached to prompt legislative implementation of law reform proposals. Sometimes law reform suggestions are implemented by administrative action in advance of legislation. Sometimes judges adopt LRC proposals and incorporate them in the common law.[44] Sometimes, in a Federation, the legislature of one jurisdiction may adopt a law reform suggestion in advance of the jurisdiction for which the suggestion was actually prepared. This actually happened when the South Australian Parliament adopted, in advance of Federal legislation, the substance of a report of the Australian Law Reform Commission report on consumer indebtedness.[45] Sometimes legislation may be introduced based on a consultative document, even in advance of the final report.[46] In Australia, we have even had the case of legislation being introduced in another Commonwealth country, based on a law reform report, still under examination in the various Australian jurisdictions.[47] So, law reform acts in mysterious ways.

Nevertheless, the record of a large number of unimplemented law reform proposals in countries of the common law including Australia suggests that new institutional machinery should be found to promote the routine consideration of law reform proposals. A Senate Committee in Australia proposed in 1978 that the reports of the Australian Law Reform Commission should be automatically referred to a Parliamentary Committee and that the government should indicate within six months whether it intends to implement, in whole or part, the law reform report.[48] The Commonwealth Government has responded with a generally negative view to this proposal. Whilst acknowledging that 'it is most desirable' that reports of the Law Reform Commission should be considered with 'all due expedition' the Government rejected the notion of automatic reference to Parliamentary Committees.

> This would duplicate the processing of the reports by the Government and may cause a lot of unnecessary work for both officials and members of the Committee. It would be preferable in most cases for the Government's view to be known before a reference to a Committee is made. When tabling a report the Government will indicate the arrangements proposed for handling the Government's consideration of the report.[49]

How this modest alternative promised advance will work, remains to be seen. That there is a real and potentially endemic logjam is beyond serious question. That the challenges and urgency of law reform require an institutional solution seems obvious to those considering the coalescence of great pressures for legal change and puny machinery to respond to those pressures. Nor are these problems confined to Australia. Recently the Chairman of the English Law Commission, Sir Michael Kerr, spoke of a 'slowing down' of law reform. He blamed this on the 'passive resistance' to effective law reform offered by the permanent public service and inadequate attention to proposals by the Parliament. Of the procrastinations of the public service he had this to say:

> The prospects of implementation by legislation at present depend almost entirely on the interest and efforts of Ministers and their Departments., However, the Departments are inevitably primarily concerned with their day to day work in the areas of the law which they are administering and reluctant to devote time and resources to the consideration of reforms. In addition, it is usually impossiblke to obtain any reaction from Departments at the stage when the Commission seeks views by means of Working Papers. Generally it is only after a final Report and draft Bill have been laid before Parliament that the Departments feel able to embark upon any realk consideration of the policy implications, and then usually only after further consultation within Whitehall. It is therefore often only at that stage, when the Commission is effectively functus officio, that points of departmental policy may emerge of which the Commission would have wished to take account during the stage of consultation.

> The trouble, to put it bluntly, is that ... the Commission sometimes meets with varying degrees of passive resistance to its proposals by lawyers and administrators in Government Departments; one sometimes feels that the views of even a single person in a key position may determine the future of many months of work, at any rate for the short or medium term. Unless and until there is some change in the system concerning the examination of Law Commission recommendations, and in the negative attitude which is at present often the predominant first reaction of Departments, much of the Commission's work is liable to result in wastage and frustration.[50]

As to Parliament, Sir Michael Kerr was not kinder:

> The difficulties of implementation stem from our parliamentary procedures and the notorious problem of securing time in legislative programmes, which are usually greatly overcrowded. ... [T]here is at present no special procedure of any kind for law reform Bills. The need for some new parliamentary procedure to deal with law reform Bills was clearly foreseen even before the Commission was established, and the debates in both Houses fully reflected the concern about the legislative blockage which the Commission's proposals were likely to meet. At that time the Government envisaged that some special parliamentary procedure might be evolved for law reform Bills by the then recently appointed Select Committee on Procedure, and the possibility of some procedure analogous to that of the Scottish Grand Committee was mentioned by the Government spokesmen in both Houses. However, nothing ever came of this. It is also interesting to note that precisely the same problem has been encountered in Australia and Canada. ...
>
> The target is indeed the right one, the achievements are little more than a drop in the ocean, and no fundamental solution to our historic problems is yet in sight. Admittedly, we have now at last got a statutory scheme for the systematic and continuous review of our law. But all we have done is to create the basic machinery; we have not found the administrative and legislative solutions to make it effective.

You may think that a good many of Sir Michael's observations apply equally to the Australian scene.

For the long term, one Australian commentator, who should know, is optimistic - though his view was expressed before the Government's recent statement cited above.

> The federal Law Reform Commission and the Parliament have recently moved, in a brilliant and unique way, towards establishing a welcome reform for lawmaking in Australia. The envisaged synthesis will blend democratic values claiming the supremecy of Parliament with the elitist values which claim the supremecy of legal expertise. ... The national Law Reform Commission which started four years ago as an apparent creature of the Executive Government has recently been brought closer to a pemanently linked relationship with the committees of the Australian Senate ...[52]

Whether the 'synthesis' will develop or whether the Commission will remain a 'creature' of the Executive Government is yet to be seen. The enemy of a great deal of legal reform in our country is not frank opposition, and the powerful lobbies. All too often, it is governmental indifference, the Parliamentary agenda, bureaucratic inertia or suspicion and intimidation by the technicalities, complexities and sheer boredom with much legal reform. Unless we can overcome these impediments, we will have reached a serious impasse. Law reform, which was formerly done in great measure by the courts of the common law will be postponed by the courts for Parliamentary attention. Unless Parliament and the Executive can be helped to focus that attention, injustices will pass unattended and the challenges for the law of the dynamic forces of change will elicit an inadequate and incompetent response, at great ultimate risk to the peace and health of our society.

CONCLUSIONS

Fashion and imitation do not fully explain the remarkable development of law reforming agencies throughout the Commonweath of Nations in the past 20 years. These agencies amount to an endemic institutional response to an institutional problem of the common law system. In the post-independence age of active legislatures, the judges of our tradition have retreated. What is now needed, to cope with the challenges of change, is a new institution which will help Parliament and the Executive to review, modernise and simplify the law, adapting its rules and procedures to the demands of rapidly changing societies, but in a way consistent with the democratic institutions of elected legislatures and responsible Executive Government.

The forces for change will not go away. On the contrary, they will increase apace. They include the growth of the role of government, of big business, of changing morality and of big science and technology. The pressures for change of the law and its institutions are now fuelled by societies that are better educated and increasingly better informed. The old way of doing things, of requiring unquestioning obedience to rules laid down by authority has, uncomfortably for the lawmaker, passed. Our citizens will increasingly require that the law be fair and compatible with other developments in society.

Into the vacuum left by the retreating judiciary, diminished Parliaments and distracted and sometimes hostile Executive Government, has come the law reform agency. It is a new institution and it is in its infancy. Its precise future relationship to the established organs of government has yet to be worked out although the start has been made. It may come to nothing and be subdued by the all-powerful Executive. It may fall victim to its own bureaucratic and institutional forces. But with a little luck, it may be adapted to help our older institutions to cope with the enormous challenges of change they will face as this Century closes.

Alvin Toffler, in his latest book,[53] suggests gloomily that our institutions simply cannot cope. The changes, he declares, are happening too fast and our elephantine lawmaking processes will simply prove inadequate to the pressures of change. This is a voice of despair. Those who know the adaptability of our legal system, stretching as it does through more than eight centuries, may be more sanguine.

On his retirement Chief Justice Bray of South Australia expressed confidence that our law system would adopt adequately to change.

> I am confident that the common law system of justice will survive the technological and social revolutions of the late 20th Century as it survived the apprehended reception of Roman Law in the 16th Century, the constitutional conflicts and civil wars of the 17th Century and the industrial revolution of the 19th Century. There are causes of concern both in the administration of the law and the content of the law at the present time. (1978) 19 SASR xiii.

A little later in an address now published in the University of New South Wales Law Journal Dr Bray made a prediction:

> A few years ago the English courts rejected with indignation the suggestion that they had been empowered by Parliament to administer what was traditionally called palm tree justice, the justice which is traditionally administered in Eastern societies by the cadi sitting in the city gate. It seems to me, however, that the Australian judge is going to have to assume, more and more, the role of the cadi in the gate, whether he likes it or not.

It is up to the courts and the law reforming agencies to respond to the challenge of change as it affects our legal order to-day. But it is also up to the lawmakers to adapt their processes so that these bodies are equipped to do relevant work well and their recommendations are translated in a regular and routine way into improvement of society by improvement of its laws.

FOOTNOTES

1. B. Shtein, 'Law Reform - A Booming Industry' (1970) 2 Australian Current Law Rev., 18.

2. See for example (1979) 5 Commonwealth Law Bulletin 447 (proposals on insurance law reform by the English Law Commission (WP No. 73 'Insurance Law : Non-Disclosure and Breach of Warranty') and by the Australian Law Reform Commission, Discussion Paper NDo. 7, 'Insurance Contracts'.

3. Australian Law Reform Commission, Australian Law Reform Digest (Interim), mimeo, 1976, with Supplements.

4. Commonwealth Secretariat, 'Law Reform in the Commonwealth : Law Reform Proposals and Their Implementation', (Pilot issue), October 1979.

5. The current list of law reform bodies throughout the Commonwealth of Nations is as disclosed in the Commonwealth Law Bulletin:

COUNTRY	LAW REFORM AGENCY
Antigua	Law Reform Advisory Committee
Australia	
Federal	Australian Law Reform Commission
NSW	NSW Law Reform Commission
Northern Territory	NT Law Review Committee
Queensland	Law Reform Commission of Queensland
South Australia	Law Reform Committee of South Australia
	Criminal Law Reform Committee of South Australia
Tasmania	Law Reform Commission of Tasmania
Victoria	Chief Justice's Law Reform Committee
	The Law Reform Commissioner
	Statute Law Revision Committee
Western Australia	Law Reform Commission of WA
Bahamas	Law Reform and Revision Commission
Bermuda	Law Reform Committee
Canada	
Federal	Law Reform Commission of Canada
Alberta	Institute of Law Research and Reform
British Columbia	Law Reform Commission of BC
Manitoba	Law Reform Commission
New Brunswick	Law Reform Division of the Department of

Nova Scotia	NS Law Reform Advisory Commission
Ontario	Ontario Law Reform Commission
Prince Edward Island	Law Reform Commission
Saskatchewan	The Law Reform Commission
Fiji	Fiji Law Reform Commission
Ghana	Law Reform Commission
Gibraltar	Law Revision Committee
India	Law Commission of India
Jamaica	Law Reform Division, Ministry of Justice
Malaysia	Law Revision Committee
Mauritius	Law Revision Unit, Attorney-General's Office
New Zealand	Law Reform Council
	Contracts and Commercial Law Reform Committee
	Criminal Law Reform Committee
	Property Law and Equity Reform Committee
	Public and Administrative Law Reform Committee
	Torts and General Law Reform Committee
Nigeria	
Federal	Law Revision Committee
	Law Reform Commission of Nigeria
East Central State	Committee for Law Revision
Papua New Guinea	Law Reform Commission of PNG
Sierra Leone	Law Reform Commission
Sri Lanka	Law Commission of Sri Lanka
Trinidad & Tobago	Law Commission
Tonga	Law Reform Committee
Uganda	Commissioner for Law Reform
United Kingdom	The Law Commission of England and Wales
	Scottish Law Commission
	The Criminal Law Revision Committee
	The Law Reform Committee
Zambia	Law Development Committee

6. For a history of law reform in Australia see Australian Law Reform Commission, Annual Report 1975 (ALRC 3) 13, 17 (South Australia).

7. R.J. Ellicott, Opening Speech, Third Australian Law Reform Agencies Conference, Canberra, May 1976, in Australian Law Reform Agencies Conference, Minutes, Third Conference, 34.

8. Lord Westbury in cited as J.W. MacDonald, 'The New York Law Revision Commission' (1965) 28 Mod.L.Rev. 1, 2.

9. Lord Scarman, 'Law Reform - The British Experience', Jawaharlal Nehru Memorial Lectures, mimeo, January 1979.

10. P. Wilenski, 'Political Problems of Administrative Responsibility and Reform', (1979) 38 Australian Journal of Public Administration, 347.

11. Quasi autonomous non-governmental organisations.

12. G. Powles, 'Citizen's Hope : Ombudsmen for the 1980s' (1979) 5 Commonwealth Law Bulletin, 522.

13. For example, the Report of the United Kingdom Committee on Administrative Tribunals and Inquiries, 1957, Cmnd. 218 and the Report of the Commonwealth Review Committee (Australian Parliamentary Paper 144, 1971).

14. The Law Commission, Report on Remedies in Administrative Law, Law Com. No. 703. See also Law Reform Commission of Canada, Working Paper 18, 'Administrative Law. Federal Court. Judicial Review' 1977.

15. Important developments in Australia include the establishment of a Federal administrative law tribunal (Administrative Appeals Tribunal Act 1955) and the passage of an Act for the simplification of judicial review and the giving of reasons by administrators (Administrative Decisions (Judicial Review) Act 1977).

16. A list is contained in (1979) Commonwealth Law Bulletin 967.

17. Powles, 525.

18. Freedom of Information Bill 1979, Bill C-15 (Canada) (lapsed). Freedom of Information Bill (1979) (Aust.)

19. Report of the Commission of Inquiry of the Federal German Parliament on Questions of Constitutional Reform, 1973, cited in Powles, 524.

20. See, eg Report of the Study Committee on Bankruptcy and Insolvency legislation 1970 (Canada); Australian Law Reform Commission, 'Insolvency : The Regular Payment of Debts' (ALRC6) 1977.

21. See consultative documents cited in note 2 above.

22. Australian Law Reform Commission, 'Alcohol, Drugs & Driving' (ALRC4) 1976.

23. Australian Law Reform Commission, 'Criminal Investigation' (ALRC2) (Interim) 1975, 71.

24. As was shown in R v. Potter, unreported [1973] Criminal Law Review 529 where an accused charged with manslaughter asserted that the death of the victim had been 'caused' not by his act but by the termination of life supporting mechanical ventilation. See Australian Law Reform Commission, 'Human Tissue Transplants' (ALRC7) 1977, 58.

25. Report of the Committee on Privacy (Younger Committee) 1972, Cmnd. 5012; Report of the Committee on Data Protection (Lindop Committee) 1978, Cmnd. 7341 (United Kingdom); Report of the Task Force on Privacy and Computers (1972) (Canada); Australian Law Reform Commission, Discussion Paper No. 13, Privacy and Intrusions: Discussion Paper No. 14 Privacy and Personal Information, 1980. Cf Privacy Protection Study Commission, Personal Privacy in an Information Society, 1977 (United States)

26. G.S. Reid, 'The Changing Political Framework', Address to the 1978 Summer School of the Australian Institute of Political Science, Quadrant (Jan-Feb 1980) 5.

27. ibid, 6.

28. ibid, 7.

29. A. Diamond, 'Law Reform and the Legal Profession' (1977) 51 Australian L.J. 396, 398.

30. Lord Scarman, op cit n.9, cited [1979] Reform 40.

31. Dugan v. Mirror Newspapers Limited (1978) 22 Australian L.R. 439.

32. [1947] A.C. 341

33. State Government Insurance Commission v. Trigwell & Ors., (1979) 26 ALR 67 at 70. See to similar effect Scarman LJ in Farrell v. Alexander [1976] 1 Q.B. 345, 371.

34. Mason J in Trigwell, 78.

35. Australian Conservation Foundation Incorporated v. Commonwealth of Australia, unreported, High Court of Australia, 13 February 1980.

36. M.D. Kirby, 'Reforming the Law' in A.E.S. Tay and E. Kamenka (Eds), 'Law Making in Australia', 1980, 39, 64.

37. Australian Law Reform Commission, Annual Report 1979 (ALRC13) 1979, 16.

38. New Nigerian, 14 January 1980, 1, 19. ('Lack of fund hampers law body's work').

39. 'Law Reform in Action' (1976) 126 New LJ 1.

40. J. Levin in New Society, 11 January 1979, 13.

41. Lord Scarman, op cit note 9; [1979] Reform 40. Similar observations were made by the second Chairman of the Law Commission, Sir Samuel Cooke, 'The Law Commission : The First Ten years' (1975) 125 New LJ 1036.

42. (1969) 43 Australian Law Journal, 526.

43. Law Reform Commission of Canada, 7th Annual Report, 1978, 6.

44. ibid, Appendix B, 30f.

45. See eg Police Regulation (Allegations of Misconduct) Act 1978 (NSW) based on Australian Law Reform Commission, 'Complaints Against Police' (ALRC1) 1975. Similarly see Repayment of Debts Act 1978 (SA) based in part on Australian Law Reform Commission, 'Insolvency : The Regular Payment of Debts' (ALRC 6) 1977.

46. For example, the Lands Acquisition Act 1978 (Northern Territory) implemented many proposals contained in the Australian Law Reform Commission, Discussion Paper 5, 'Lands Acquisition Law : Reform Proposals'. The final report of the Commission, Lands Acquisition and Compensation (ALRC14) 1980, was recently tabled in the Australian Parliament.

47. Legislation for defamation law reform has been introduced in Barbados based on Australian Law Reform Commission, 'Unfair Publication : Defamation and Privacy' (ALRC II) 1979. In Australia, the report is still under the consideration of the Standing Committee of Commonwealth and State Attorneys-General.

48. Australian Parliament, Senate Standing Committee on Constitutional and Legal Affairs, 'Reforming the Law', 1979.

49. Senator P.D. Durack, Q.C. (Attorney-General) Ministerial Statement, Commonwealth Parliamentary Debates (Senate) 15 May 1980, 2295, 2296.

50. Sir Michael Kerr, 'Law Reform in Changing Times', Second Edward Bramley Lecture, 19 June 1980, mimeo, 31f.

51. ibid 33f.

52. G.S. Reid, Address to the Fifth Australian Law Reform Agencies Conference, Perth, Western Australian, June 1979, cited [1979] Reform 83.

53. Alvin Toffler, 'The Third Wave', William Coldlins, 1980.