VICTORIAN COUNCIL OF SOCIAL SERVICE

LEGAL SERVICE BULLETIN

CONFERENCE ON 'HELP YOURSELF TO JUSTICE'

COLLINGWOOD, VICTORIA, 6 JUNE 1981

HELPING YOURSELF TO LAW REFORM

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

May 1981

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LAW REFORM : INSTITUTIONS AND PEOPLE

I have been invited to take part in this conference because I am Chairman of the Australian Law Reform Commission. The Commission is a permanent authority established by the Commonwealth Parliament to assist it and the Executive Government in the reform, modernisation and simplification of Federal laws.

When I was first invited to participate, a topic was proposed for this address that I did not consider apt. It was 'Law Reform by Institutions or People?' I considered that title inappropriate, at least for a speech by me, because it contained assumptions which I simply could not share. First, it assumed that there were so few tasks for law reform in Australia that we had the luxury of choosing between individual initiative in securing reform of the law and the use of institutions such as the Law Reform Commission to assist in the process. My view is that there is more than enough need for reform of the law (especially, perhaps, reform of procedures and the delivery of justice) to keep all of us busy : law reform institutions, community organisations, parliamentarians, administrators, concerned citizens. Law reform institutions in Australia are uniformly small in number, poorly funded and extremely busy in the programmes they have assumed or been given by their respective governments. The Australian Law Reform Commission, for example, has a research staff of eight qualified lawyers. At any given time, and at the present, we have eight major projects before us assigned to us by the Commonwealth Government. Each of these projects involves the most detailed analysis of current laws, the elaboration of alternative forms, intensive consultation with the community and the preparation of detailed reports with reasoned argument and

dra. legislation. Recently, as a result of razorly activities, the Commission's staff ceiling was reduced by two. Obviously, in a small institution, a staff reduction of this size must impede the amount of reform that can be done. It must also affect the speed with which reforms can be presented to Parliament and the efficiency with which the small resources of the Commission can be mobilised to the benefit of the community.

I disclose this not in the spirit of complaint but simply to indicate that there is plenty of room for law reform initiative. The establishment of law reform institutions is no panacea for the defects of the legal system. At least as presently organised, those institutions cannot afford a complete answer to the needs for law reform in society. They can, however, cope with a number of important questions. Furthermore, they can provide a catalyst for action and a focus for community debate about the need constantly to renew our legal system and to make it sensitive, in changing times, to the dynamics of our society.

There is, however, a second reason why I declined to accept the proffered title for my paper. In posing the question 'Law Reform by Institutions or People?' there was more than a hint that institutions, or at least the Australian Law Reform Commission's institution, were in some way distant from the people and not concerned with people's views about law reform. Nothing could be further from the truth. No other law reforming agency in Australia, indeed I would say no other law reforming body in the English-speaking world, has been so keen to secure the input of the opinion of people as the Australian Law Reform Commission in the discharge of its various tasks. From the very start, the Commission has avoided the usual bifurcation between lawyers or law reformers, on the one hand, and people, on the other. It has rejected the notion that law reform (at least in the matters assigned to it) can properly be accomplished by the 'experts' working alone. In not a single one of its tasks has it receded into the backrooms of the legal office to work out its ideas about the defects in the law and how they should be cured. Each and every project of the Law Reform Commission of Australia has involved a close symbiosis between the commissioners, experts from various disciplines inside and outside the law and the general community. If there is anything original in the methodology of the Australian Law Reform Commission, it is its determined endeavour to raise a community debate about law reform and to involve community groups, leaders and ordinary citizens in its work. This effort originated in the recognition that the tasks assigned to the Commission, first under the Labor Government and later under the Liberal and National Country Party Government, were all tasks involving a high policy content. It was not the fate of the Australian Law Reform Commission to receive purely technical

law reform tasks. It is possible that, had the Commission been asked to examine the Statute of Limitations in the Commonwealth's sphere or the application of the Rule Against Perpetuities or the Statute of Mortmain in the Australian Capital Territory, it could have done this with minimal consultation with the community. Not so for the numerous controversial, sensitive and difficult projects that have been assigned by successive Attorneys-General.

THE ALRC PROGRAM : REFORM AFFECTING PEOPLE

This obvious truth can be illustrated by listing the kinds of projects that have been given to the Commission since its establishment. Under the Labor Government, the Commission was asked to look at and report upon two matters, closely connected:

- Complaints against Federal Police.
- Criminal investigation by Federal Police.

After the change of government, Attorney-General Ellicott required the Commission to report upon the following matters, each of them of equal controversy and difficulty:

- The alcohol and Breathalyzer laws of the A.C.T.
- Reform of the law affecting consumers in debt.
- The development of laws on human tissue transplants.
- The laws governing privacy protection in the age of computers, electronic surveillance and increasing official powers of entry and search.
- The development of a uniform defamation law.
- The creation of a modern law to govern compulsory acquisition of property by the Commonwealth.
- The review of insurance laws.
- The consideration of the reform of the law governing Standing and class actions in Federal courts.
- Scrutiny of Aboriginal customary laws and whether they should, at least, in some respects be recognised in Australia.

The present Commonwealth Attorney-General, Senator Peter Durack, has also assigned to the Commission tasks of great dimension and extraordinary difficulty. They are also the tasks of very considerable controversy. They involve laws affecting ordinary people, not laws affecting the privileged few. The projects assigned by Senator Durack are:

Reform and modernisation of child welfare laws in the A.C.T., a matter upon which the Commission is about to report.

- Reform of sentencing of Federal offenders in Australia, to secure greater uniformity and consistency in the punishment of those offenders, though convicted in different parts of Australia.
- Reform and modernisation of evidence laws applicable in Federal courts throughout Australia and the development of a single law of evidence and a simpler system, in keeping with the needs of today and the pressures on our courts.

A review of the above list of topics will show that it has been a merit of the projects assigned to the Federal law reform agency in Australia that it has not been sent off to deal with topics of minor concern to ordinary citizens. On the contrary, each of the projects given us is an area of law in which large sections of the Australian community would have a legitimate and personal interest. It is for that reason that the Commission has not found it difficult to engage the community in a vigorous debate about the areas of the law assigned to it, their defects and the available options for the improvement of the law.

ALRC PROCEDURES : CONSULTING PEOPLE

Let me now interpose a few words about the Australian Law Reform Commission itself. It was established in 1975 when the first commissioners were appointed. Some of the most distinguished and able lawyers in Australia have been amongst the commissioners.

Both to supplement our small numbers and to avoid the bias of a lawyer's perspective of the problems of law reform, the Commission has engaged in many efforts to secure the help of other disciplines and the participation of the community. In all of the tasks a team of consultants are appointed to sit around the table with the law commissioners and to debate from differing perspectives the problems with current laws and the options for reform. Thus, in the task on consumer indebtedness, the Commission had the assistance of the Inspector-General in Bankruptcy, the Executive Director of the Australian Finance Conference, Ms. Ruth Mushin, a Project Officer with the Victorian Council of Social Service, the supervisor of the Budget Advice Service of the South Australian Department for Community Welfare, and university lecturers aware of the problems of consumers in debt and conscious of the importance of the credit industry for the economy.

Early in every project, the Commission publishes short discussion papers which set out the problems we see in the area of the law under investigation. These brief papers also try to summarise in simple straightforward language the tentative proposals we make for improvement of the law.

These discussion papers are widely distributed, not only through the legal profession and official channels, but also to interested community groups. They are sent to all subscribers to the Legal Service Bulletin. Public hearings and seminars are held. These are conducted with informality to encourage ordinary people to feel able to come forward and have their say. The media of communication are encouraged to report on the Commission's work. Of course, this secures many more responses and citizen suggestions and criticisms than would any cold advertisement calling for submissions. We have not hesitated to use talkback radio, television programmes and the like to explain our work and our concerns to a large national audience. Thus, I recently appeared in the Mike Walsh Show on mid-day television and have been known to give interviews to the Women's Weekly and the Woman's Day and even, recently, Playboy magazine. It is important that law reformers, funded by the whole community, should not confine their message and appeal to the A.B.C., the print media or scholarly journals.

Lately, the Commission has been utilising surveys of specialist and community opinion. Statistics and public opinion polls are a means by which ordinary people can speak to government. These are procedures by which citizens who would never dream of coming forward to a public hearing or even writing a letter will be able to have their say. Of course, like any mode of communications, sampling has its problems in the costs involved, the possible bias of questions and the size of samples tested. With the assistance of the Melbourne Age and, more recently, other public-spirited organisations, we are now going out to get public opinion in a more scientific way. I have no doubt that the future of law reform will involve a much greater readiness to use surveys of public and expert opinion in the development of legal principles. This is not to say that improvement of the legal system should be turned over to the dull blandness of superficial response to inevitably brief survey questionnaires. Nor should law commissioners forfeit their own judgment to the results of the opinion poll. They have their separate responsibility, possibly based on better information, to report to Parliament and to explain reasons for difference.

Having said this, it does seem clear to me that law reform of the future will depend increasingly on the study of public attitudes, elicited in a more scientific way than we have tended to do to date. Furthermore, I am sure that the direction for law reform in the future will lie down the track of better empirical research. We have already ventured on this. One of my colleagues, Mr. Bill Tearle, a senior research officer, is currently analysing computer studies of the debt recovery process in New South Wales courts. Rather than simply base our proposals for reform of debt recovery laws on hunch and guesswork, we have gone out to analyse the debt recovery process as it actually operates. Our proposals will be built on a thorough and detailed understanding of how current laws are affecting consumers in debt.

I have spent this time informing you about the Australian Law Reform Commission so that you will understand both its potential for helping in the improvement of our legal system and its limitations. Its limitations, I frankly acknowledge. They include:

- The small size of the Commission and its limited resources.
- The limitation of the Commission to projects specifically assigned to it by the Attorney-General.
- The limitation of the Commission to Federal areas of law, although, through the Territories, the Commonwealth can take initiatives that may be of help in the development of State laws.
- The need to strike a balance between proper consultation and thorough study, on the one hand, and the desirability of reasonably prompt reform in areas of the law where actual injustice is being done.
- The ultimate dependence of the Commission upon Parliament and the Executive Government for action on its reports. The logjam in law reform proposals can only be attended to by the initiative of our elected representatives.

There are doubtless many other limitations. We seek to supplement the size of the Commission by the participation of many other interested citizens. The lawyerly bias of the Commission, we seek to avoid by interdisciplinary consultants and by exhaustive processes of public debate, with a cross section of the interested community. The Commission is an interesting experiment in multi-disciplinary development of the law and in community involvement in that development. But whether it will succeed depends, in the final analysis, upon the adaptability and desire of Parliament to cope with the enormous pressures for change in the law which attend a time of rapid social change and profound technological and scientific developments.

PARTICIPATION IN THE PROCESS

One of the issues before this conference is the exploration of ways in which people can participate in and use the legal system. Doubtless much of your time will be devoted to the consideration of the bringing of cases before the courts, the testing of current rules, the exploration of the meaning of current Acts of Parliament and the dramatic 'test case'. But it has always seemed to me that this is a second best and frequently chancy way to secure large-scale and long-term improvements of the legal system. So much is left to fortune. Can the parties afford the litigation? Will they get legal aid? Will they have the courage to see it through, for litigation can be a stressful and taxing experience? Will the lawyers have the skills and courage to put the issues to best advantage before the courts? Will the courts feel obliged or be inclined to 'grasp the nettle' where difficult issues of social policy are involved? Will the courts simply wash their hands of the social question, leaving it to the elected Parliament to remove identified injustices? Will an appeal be lodged, even if the case is won? How far will the appeals go? Will the appeal judges differ? Always there is the possibility of a legal 'technical knockout'.

Citizens should certainly be encouraged to use the law and the courts to achieve their legal rights. Occasionally the courts may provide a vehicle for social change. An unexpected, dramatic judgment may help change social attitudes. Alternatively, it may force the legislators to sit up and pay attention and attend to areas of the law long neglected. The judges themselves, very occasionally, take the difficult issue in hand and get on with the business of reforming the law in the courts. The original genius of the common law of England was in its dual respect. Not only could it secure predictability and certainty through the doctrine of precedent. The capacity of judges to develop the law by stretching old precedents to meet new circumstances was the reason why the adaptable common law of England proved so resilient in the four corners of the world where it was planted by the English colonial administrators. Lately, the innovative aspect of the common law in the courts has fallen upon hard times.

Having pointed to the chancy nature of courtroom litigation as an instrument for social change, the other vehicles for citizen initiative or pressure for law reform lie in the direction of the Executive Government (the Prime Minister, Cabinet and the Permanent Public Service) and the elected Parliament. Political parties, lobby groups and representative organisations, broadcasters and others, all play a part in influencing what happens in these areas. The very development of consumer and community groups is one of the reasons why this conference has been called, in the hope of mobilising them, possibly, in a more efficient way.

One more efficient way in which community groups could participate in the processes of lawmaking would be assisting the law reform agencies in their work, by:

- preparing detailed submissions;
- attending public hearings and seminars to argue for proposals;
- arranging the attendance of other groups and individuals who can speak up for their interests and ensure that these are properly, fairly and fully articulated to the inquiry;
- arranging the attendance of people who have had special problems with the present law and who can explain and 'personalise' those problems and thereby illustrate the need for law reform;
- securing publicity for the viewpoints advanced;
- expressing to ministers, members of Parliament and administrators considered views on law reform reports, when finally published, including by detailed scrutiny of draft Bills attached to those reports; and
- taking part in publicity to support or oppose reports and generally to ensure that the democratic processes work in practice and are not left to the vagaries of political theory and the timetables of overworked or uninterested public servants and politicians.

It does not require a political scientist to point out that one of the chief impediments to law reform, and broad-based improvement of the legal system is the force of frank opposition to reform. In part, this forces relies upon the ally of inertia : always a strong reason for doing nothing where the law is concerned and where rules are complex, sensitive and politically 'tricky'.

But there are other forces that stand in the way of the effectiveness of law reform bodies. They include the powerful and determined interests that can sometimes oppose reform where this is designed to secure greater fairness to poorer, less fortunate, more inarticulate groups who do not have ready access to the decision-maker or to the public media of communication and who therefore cannot argue as forcefully on the public stage their case for change in the law.

OVERCOMING THE INERTIA

It would seem to me to be important that consideration should be given to the means of making our democracy work more effectively in promoting laws that will encourage a more compassionate society. Better co-ordination among those who speak for the poorer, less articulate and less vocal and influential groups in the community would further this end. There is no doubt that the various Councils of Social Service already do extremely valuable work here. They could do well to add to their burdens the obligation of expressing clearly at all stages of a law reform project, their views.

If community and consumer groups take an active part in law reform inquiries and maintain their interest through the whole process to the point of lawmaking, they may very well be mobilising their scarce resources in a most effective way. They may harness their personnel and ideas in a way that will attack the 'macro' problem by contributing to the long-term improvement of our laws, procedures and institutions. I realise the daily pressure that is upon all of you to solve the immediate problems of fellow citizens and to respond to their daily needs. However, if any long-term improvement of the legal system is to be secured, it would be a good investment of time, resources and personnel to devote some of your energies to attacking the basic problems. Otherwise, you continue to deal with symptoms. The disease remains untreated.

Now, I realise that law reform bodies offer no panacea for all these problems. There is no certainty that they will secure appropriate references. There is no certainty that they will agree with your submissions. There is no certainty that government will act on their recommendations. For all that, in the case of the Australian Law Reform Commission, the references have been relevant. The recommendations have typically been supportive and, I hope, sensitive to your interests. And if all of the recommendations of the Commission have not yet been implemented, some have and many more are still under consideration. The Commission's open procedures represent one very useful way, I suggest, by which:

- people and their representative organisations can take part in and use the legal system to long-term good effect;
- they can influence the capacity of lawyers and their discipline to respond to people's needs; and
- we can mobilise the scarce resources of consumer and community groups to good advantage and influence in the lawmaking and law improvement process in Australia.

ACCESS TO THE COURTS

I want, finally, to make a short reference to the current project of the Law Reform Commission on Access to the Courts. It is plainly relevant to the subject matter of this conference. It was the subject of a very useful public hearing of the Commission conducted by me in Melbourne on 17 May 1981, preceded by a well-attended seminar organised by the Australian Conservation Foundation.

I have said enough already to show that I am certainly alive to the many impediments which stand in the way of using court-room litigation as a procedure for achieving law reform and social change in Australia. May I recapitulate some of the chief impediments:

First must be counted the costs of litigation. In the United States and in most legal systems outside the Commonwealth of Nations, the principle is adopted that each party to litigation must pay its own costs. That is not so in Australia, Britain or other Commonwealth countries where the principle of 'winner take all' has been adopted with few exceptions. The winner gets his costs. Litigants must therefore bear in mind not only their own costs but also the potential of having to pay the costs of the opponent should they lose. Furthermore, even if they win, the amount of costs they can recover from the other party rarely indemnifies the successful litigant completely for the costs of going to court. It is an expensive business. Unless there is legal aid or some other form of assistance, it must be frankly acknowledged that it is frequently beyond the pocket of the ordinary Australian to assert his rights in a court of law. Much voluntary service is offered by the legal profession. I am aware of the proposed establishment of a so-called 'poverty law firm' in Melbourne, lately approved by the Victorian Law Institute Council. Individual lawyers frequently offer their services free of charge in a good cause. But the burden of costs remains. Legal aid in Australia has remained fairly steady and, in real terms, is said to be declining. Moreover, the great bulk of it is absorbed in family law litigation which, though individually very important, does not often afford the opportunity for a curial improvement of society through clarification and enforcement of its laws.

Secondly, litigation is a time-consuming, daunting and emotionally taxing business for all but the repeat performers or the specially courageous. The notion of foolhardy busybodies seeking to raise academic questions in courts of law may overlook not only the difficulty of getting lawyers to take the case and the costs of doing so. It also overlooks the special burden which litigation places upon everybody involved in it. Time must be sacrificed to the imperatives of the court's sitting. I have always believed that lawyers under-estimate the stress and ordeal which going to court involves for the ordinary citizen, even in a simple case where there is no great risk of loss. Surveys in West Germany have shown that most people regard going to court as worse even than going to the dentist. I doubt if things are very different in Australia.

Thirdly, there must be a basis upon which a claim is to be made out. There must be some breach of the law which is to be argued or some claim of right giving rise to a legal action maintainable in court. The absence of a Bill of Rights in the Australian Constitution has deprived the Australian courts, for good or ill, of the opportunity of considering the burgeoning legislation of the statute book against general

principles stated in the Bill of Rights. Furthermore, especially in the Federal sphere (which is my concern) there are few causes of action which give rise to a claim maintainable by an individual citizen. It is not good enough to have funds for litigation and the will to go to court and the lawyers willing and ready to do so. The first prerequisite of litigation is that there must be a justiciable issue to be argued in the court. We have not yet reached the point that people can go to court to seek some homogenised form of general justice. The courts of Australia do not dispense palm tree justice according to general notions of fairness and equity. It is necessary for litigants to be able to point to a law upon which they rely in asserting their claim. In comparison to the United States, there are simply not so many opportunities where this can be done. In the Federal sphere, there is no general Bill of Rights nor are there the many Federal statutes that have been adopted in the United States and which permit the bringing of actions by individuals, frequently for money damages, in respect of such matters as sex discrimination, employment discrimination, discrimination against the disabled, environmental damage, civil rights deprivation and so on.

Fourthly, there is the issue which is before the Law Reform Commission in its inquiry into Standing. Standing is a legal expression meaning the entitlement of a particular person to commence a particular action. Normally, the English legal system which we have inherited in Australia revealed its strong mercantile bias by asserting that only persons with some financial or other close personal interest in the subject matter of the case could be heard by a court to raise questions as to the legality of action. Thus, a group of concerned people would not have the 'Standing' to dispute the legality of the interpretation by the Director-General of Social Security of the legislation governing the payment of pensions to school leavers or other claimants. A concerned environmental group, having no ownership of property in the vicinity, would not have 'Standing' to bring a test case concerning the legality of a particular development alleged to be damaging to the environment but also in breach of the law of the land. A consumer group or individual would not have a claim to be heard by a court to complain about breach of consumer law or product standard or safety laws, unless an individual had actually suffered loss by reason of the alleged illegality.

The aim of the Standing law was to define the parties who could bring actions before the courts. It sought to exclude busybodies. It sought to ensure that those people who brought actions before the courts had something to lose if the court determined the case against them. In this way, it was hoped that litigation would only occur where there

was an assurance that the parties would be fighting hard to win the case. In some ways the rule represented a protection against sham actions seeking a legally binding judgment. But as interests diversified in the 20th century, the mercantile test of the 19th century and earlier became unsuitable. It is in the nature of things that a complaint about the legality of action by government or private concerns involving a wilderness may not affect any particular person over and above ordinary citizens. In the nature of a wilderness, there may be no person with property likely to be affected. The only present redress may be political. Yet that may be available only when it is too late. Accountability of government and private concerns to the law may not work because of the impediment of proving Standing and because no particular person can be found with a greater interest than that of the ordinary citizen to bring to court the alleged unlawfulness of the conduct complained of.

The Australian Law Reform Commission delivered a discussion paper on this topic. It has been widely debated throughout the community. Under the leadership of my colleague, Commissioner Bruce Debelle, we hope to complete our report on this subject before the end of the year. Subsequently we will turn to the associated but distinct question of class actions, a representative procedure for aggregating like claims and thereby getting them to the courts.

In the Commission's discussion paper on Standing we advanced the proposal that a new formula should be obtained to release courts from the 'mercantile' approach of the past. It was suggested that a test of 'genuine concern' should be substituted for current tests so that unless it was determined that a person did not have a 'genuine concern' in the issues, courts should not strike matters out on the ground that, for want of personal financial stake, the litigant did not have an 'interest'. This proposal has been criticised around Australia as merely substituting one formula for others. It was said to be ineffective as a means of ensuring that courts release themselves from the approach of the past. Many consumer, environmental, civil liberties and other representatives groups have urged upon us a so-called 'open door' policy. It is said that if people can leap the hurdle of legal costs, can secure lawyers to mount their claims, can tolerate the delays, inconvenience and other impediments of litigation and can find a true legal issue to litigate in the courts, then the courts should hear them and not send them away because they have no financial interest of their own in the issues for trial.

On the other hand, opponents of this change have urged that no case has been proved that there is a need for change. They contend that there will be rash of hypothetical and vexatious cases which, though a nuisance to courts and though inconvenient to business and capital interests, may not be able to be dismissed under the rules which currently permit courts to strike out vexatious litigation. Opponents contend that wider Standing rules will lead to extended hearings which will be costly to the parties and ultimately to the community. It is urged that a wider Standing rule will permit political and social issues to be brought into courtrooms rather than solved through the political process. It will permit non-genuine litigation, sham actions and litigants who 'run dead' simply to get an issue estoppel or a binding judgment which will affect others who come late. Above all, it is contended that the lack of a prerequisite 'interest' in a tangible sense will deprive the adversary process of our courts of the assurance that the issues for trial will be sharpened in the litigious battle. The fear is frequently mentioned that litigants who have nothing more than an emotional stake may not have the wherewithall and motivation to fight the case as will occur where the litigant has something tangible to lose.

This sounds a technical issue. But it is not. It raises questions concerning the purpose of the courts, their proper function in our society, the importance of enforcing the law (which we must all acknowledge is often less than perfect) and the suitability of relaxing the Standing rules in a court system which depends so highly upon the adversary process.

I hope that participants in this conference will adopt a realistic approach to the potential of courtroom litigation to achieve reform. In doing so, I hope they will give consideration to the reform of the law on Standing and to the way in which that law can be changed for the better.