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SECOND NATIONAL CONVENTION

BRISBANE 26 SEPTEMBER 1981

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OR CAN OUR INSTITUTIONS COPE?

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

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DISREPUTABLE FUTUROLOGY

Kenneth Clark, in his book on 'Civilisation' described exercises in futurology as the most intellectually disreputable of public utterances. I shall try to keep that in mind. But as you have chosen as the theme of your convention 'People and Government in the 80s' and as it is imperative that people in the political process should look ahead, even at the risk of mildly disreputable conduct, I will venture a few thoughts about the 80s. They will be limited to the area of operations in which I am presently engaged, namely assisting the community and its lawmakers to come to grips with the changes in the law necessary in a time of rapid social change.

My thesis is basically a simple one. Laws speak to each succeeding generation in the language and of the values of earlier times. It is in the nature of law (and even perhaps expected of it) that it should be somewhat slow moving. It provides a force for stability and predictability in society. In the nature of things, it can rarely move ahead of social change. But this is not the problem. The problem is that often it cannot keep up with social change.

In times gone by, when changes in society came at a somewhat more sedate pace and in quantities more readily digestable by the lawmakers, the disparity between social change and reform of relevant laws did not matter so much. In our time it is the pace of change that provides the institutional problem that I wish to address. My proposition is a simple one. The feature of the 80s which should concern those with

responsibility for people, politics and government in Australia is that the pace of social change tends to outstrip the institutions for absorbing change and adapting the community's rules. These institutions are not always rapid, responsive and flexible enough. Those who seek to make democracy more than a catch-cry, those who seek to make its institutions work, will address this basic institutional problem. Law reform commissions and bodies like them can help to fill the institutional vacuum. But they will only succeed in this endeavour if the institutional problem is recognised and the need for support for the established organs of lawmaking are clearly perceived : whether in Parliament, in the Executive or in the courts.

Let me try to establish this institutional problem by first explaining the chief forces that I see at work in the Australian legal system today. By identifying them, I hope I will establish to your satisfaction the range, complexity and urgency of the problems that lie ahead in the 80s for those who have the opportunity and responsibility of political power, in whatever branch of government.

Of the various forces for change at work, I would identify four in particular:

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

FOUR FORCES FOR CHANGE

The Growth and Importance of Government. Take, first, big government. The common law of England, which is the basis of the Australian legal system, stretches for at least 800 years. But during the first 700 years at least, the role of government was distinctly circumscribed. Naturally enough, the legal remedies that were developed for the citizen reflected this limited conception of the functions of government. It is only really in this century, and indeed in recent decades, that the public sector has come to assume such a significant role in the daily life of virtually every one. Perceiving this development the Lord Chief Justice of England, Lord Hewart in 1930 sounded a warning in his book 'The New Despotism'. He alerted lawyers and law makers to the dangers for the

individual (and for the rule of law) of large numbers of bureaucrats, working without effective judicial supervision and within very wide discretions conferred in ample terms by legislation, frequently designed by themselves.

It is only in the last decade that, in Australia, Lord Hewart's warning has been answered. One of the happiest developments of law reform in our country has occurred at a Federal level and under successive governments and multi partisan support. It has produced what has been called 'the new administrative law'.[1] An Ombudsman has been established. An Administrative Appeals Tribunal has been set up, headed by judges, to review, on the merits, certain Commonwealth administrative decisions. An Administrative Review Council has been established to develop new administrative remedies in a systematic way. An important measure has been passed through Parliament and, with amendment, was proclaimed to commence in October last year. For the first time, it confers on people in Australia a legal right to have reasons given to them for discretionary decisions made by Commonwealth public servants under laws of the Commonwealth affecting them.[2] In the place of bland uncommunicative decisions, the individual will be entitled to a reasoned response. As far as I am aware, only in the Federal Republic of Germany and in Israel is there similar legislation. Freedom of information legislation is before Federal Parliament. Though there has been criticism concerning the machinery and areas of exemption from the right of access, the legislation envisages a fundamental change. In place of the basic rule of secrecy of bureaucratic procedures, will be a basic rule of openness and the right of access. Refusals of access will be the subject of independent review. Privacy legislation, to be proposed by the Law Reform Commission, and a basic code of fair administrative procedures will complete this 'new administrative law'.

The role of government and its employees has increased and is likely to continue to increase. The law has begun the long haul of responding to this phenomenon: providing individuals with accessible, low key effective remedies of review and reconsideration by external and independent machinery. The skill and dedication of the public officer is submitted to the civilising test of 'fairness' on the part of generalists, upholding the rights of the individual. I would not wish to infer either that the new moves are without difficulty and problems or that they provide a complete response. Some of the problems I have mentioned recently elsewhere. They include the need to reconcile ministerial accountability with the wide powers conferred upon independent tribunals to review the policy of elected governments. The programme is also not complete. The issue of damages compensation for persons suffering as a result of invalid government action is just one issue that remains to be addressed. Most of the States of Australia have not ventured far upon the task of administrative law reform. In France, it is perhaps significant that one of the first actions of President Mitterand was to appoint a Minister, specifically for administrative law reform. He is a communist!

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

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

Likewise, the Commission's project on insurance seeks to adjust the law to an age of mass consumer insurance. The law governing the relations between insurer and insured was basically developed in the 18th Century, long before mass produced insurance polices were sold by radio and television to people of varying understanding and little inclination to read the policy terms. The imposition upon consumer insurance of the obligation worked out in an earlier time for different kinds of transactions is scarcely appropriate. Yet unless there is reform of the law, that is what will continue to be the case.[3]

The Australian Law Reform Commission has also been asked to report on class actions: a legal procedure which has been developed in the United States. Class actions permit consumers and others to aggregate their claims into one big action, making litigation between the consumer and big business a more equal proposition than may be the case in an isolated individual claim.[4] These are just a few instances of the way in which proposals are being made to adjust the legal system to the commercial realities of today. But there are many other issues that remain to be considered.

Changing Social and Moral Perceptions. The third force for change is more difficult to describe. It is probably bound up in higher levels of education, longer school retention and improved methods of the distribution of information by radio, television and the printed word. I refer to the changing moral and social attitudes which are such a feature of our time. There are many forces at work. In the space of a few decades we have moved from official acceptance of 'white Australia' to official (and increasing community) support for a more multi-cultural society. We have moved from a devotion to growth at any price to a concern about the environment and the preservation of our history, flora and fauna. The last decade saw the rise of the women's movement, of anti-discrimination boards, of efforts to eradicate 'sexual oppression'. There has been talk of the rights of the child. This year is 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, Aboriginals, the old. Football and cricket still draw large crowds but so now do our theatres, our films and the arts generally. Puritan morality has given way to open advertisement of massage parlors. Nude beaches flourish in at least some of the warmer States.

These social changes cannot come about without affecting the law and its institutions. People, including people in high places, begin to ask why there are so few women in the judiciary of Australia?[5] Why various laws still discriminate against migrant newcomers?[6] Why the criminal law contines to enforce, in the so called 'victimless crimes', attitudes to personal morality which are not now held by the great majority of citizens? In no other Commonwealth Act has the changing community morality been more vividly reflected than in the Family Law Act 1975. That Act substantially replaced the notion of fault as the basis for the disillusion of marriage, replacing it by a new test: the irretrievable breakdown of the marriage. In a time of transition, it is uncomfortable for those who cling to the values and certainties of the past. There are many sincere citizens who bemoan the radical changes, some of which I have touched on. No recent piece of Federal legislation has been so beset by heartfelt controversy than

the Family Law Act itself. Yet if community attitudes and standards are changing, the endeavour through the law, to enforce the attitudes and standards of an earlier time is bound, in the end, to fail, unless it has substantial support or at least acquiscence in the community. Laws of earlier times applying on a social base that has shifted tend not to uphold past morality but simply to bring contempt for the law and its institutions. They breed cynicism and even corruption which undermines the rule of law itself. The moral of this tale is that, whilst the law must necessarily tread cautiously, its rules and their enforcement should never be too far distant from current perceptions of right and wrong. When those perceptions are changing rapidly, as they are just now, it is a difficult time for law makers and those who advise them. In a time of transition, it is also a difficult time both for those who support reform of the law and those would cling to old ways. The attitudes of each must be understood and respected.

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

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

These and other developments raise questions which the law of the future will have to answer on behalf of society. Should human cloning be permitted and if so under what conditions? Is it acceptable to contemplate genetic manipulation, consciously disturbing the random procedures that have occurred since the beginning of time? In the case of artificial insemination by a donor other than a husband, what rules should govern the discovery of the identity of the donor, if this is ever to be permitted? What rules should govern the passing of property and how can we prevent accidental incest in a world of unidentified donors? Should we permit the storage of sensitive personal data about Australians in overseas data bases and if so under what conditions? What requirements should be imposed for the supply of data in one computer to another?

is the systematic matching of computer tapes a permissible check against tax fraud or is it a new form of general search warrant which should be submitted to judicial pre-conditions? Under what circumstances are we prepared to tolerate telephone tapping to combat crime? Is junk mail a passing nuisance or unacceptable invasion of privacy?

Almost every task given by successive Attorneys-General to the Law Reform Commission raises an issue about the impact of science and technology on the law. In our project on criminal investigation, we had to look to ways in which police procedures could have grafted onto them the advantages and disciplines of new scientific advances.[7] In our report on human tissue transplanation, we had to work out the rules that should govern the taking or organs from one person for the benefit of another.[8] We also had to answer the question of how death is to be defined in modern terms. Should young people ever be entitled to donate a non-regenerative organ to a sibling and if so under what conditions? Should positive donation be required or can we legally impute a general community willingness to donate organs after death. Our project on defamation law required us to face the realities of defamation today: no longer an insult hurled over the back fence but now a hurt that may be carried to the four corners of the country.[9] Our reference on privacy requires us to examine the ways in which we can preserve respect for individual privacy whilst taking advantage of the computerisation of society.[10] Even our most recent project on reform of the law of evidence requires us to reserutinise some of the accepted rules of evidence against modern psychological and other studies which suggest that many of the accepted tenets of the law do not stand up to empirical scrutiny.

Again many issues remain. Technology rushes forward. Lawmakers find it hard to keep the same momentum.

BICENTENNIAL CONSTITUTION?

Faced with all of these pressures for change, the question which political scientists and those interested for the welfare of the rule of law in Australia must ask is : can our lawmaking institutions keep pace with the speed, variety and complexity of change in the 80s?

Amongst our lawmaking institutions in Australia, probably the most conservative has been the People at referenda. In a letter written in 1816 Thomas Jefferson declared that some men deemed a written Constitution 'like the Ark of the Covenant, too sacred to be touched'. It may be suspected that some Australian citizens feel this way. Of 36 attempts at formal constitutional amendment in Australia, only 8 have received the required support at the polls. Numerous parliamentary reports and other proposals for constitutional reform, over the years, have simply been shelved and quietly forgotten.

The Governor-General, Sir Zelman Cowan, told a colloquium at the Australian National University on 2 September that the events of recent years had thrown some Australian constitutional issues into sharper focus. Sir Zelman referred to the expressions of hope in some quarters that by the year of Australia's Bicentenary, 1988, we would see a remade Constitution. Earlier last year, Senator Mason proposed legislation for citizen initiative in lawmaking to encourage this process. In August 1981, as many of you will know, an even more comprehensive and ambitious project was announced by the NSW Law Foundation, by its Director, Mr. Terence Purcell. The project is designed to generate a national debate on constitutional reform in Australia, particularly to:

- identify shortcomings in the present Australian Constitution;
- propose lines of reform;
- give a timetable for actual changes.

The Law Foundation project appears to have attracted multi-partisan support. Senator Gareth Evans, who first proposed the initiative now adopted by the Law Foundation, identifies four issues for special consideration:

- the shape and character of basic institutions of national government, especially the role of the Senate and of the Governor-General;
- the future of federalism, the existence of two main tiers of government and the division of powers, responsibilities and finances between them;
- constitutional guarantees of human rights and liberties;
- the question of actual machinery for ongoing constitutional change.

To assist the committee, an advisory body is to be formed, including multi-partisan and apolitical members from the universities, business and the media, the trade unions, Parliament and public life. Some members of the consultative committee, whose names have already been announced, include the Leader of the Democrats, Senator Don Chipp, Mr. R.J. Hawke, Senator Rae, the Commonwealth Ombudsman (Professor Richardson) and Perth businessman, Mr. Robert Holmes a'Court. To provide a focus for the project, Mr. John McMillan, a Canberra legal consultant, is to be engaged to write a detailed review of the Constitution and its problems. This review will be discussed at seminars in most capital cities. The aim of the whole project is to engender a move over the next seven years, before the Bicentenary, to create a wave that will lead on to a renewed Australian Constitution, Senator Evans told the Australian on 11 August 1981.

> The Founding Fathers who wrote our present Constitution bequeathed us a document which is unreadable, some institutions of national government that are now clearly dispensable and a Federal system that is at best irrational and at worst unworkable. The 1988 Bicentenary now looming offers us a marvellous opportunity to make a fresh start. There will be a great temptation to turn the occasion into a tinsel orgy of self-congratulation but I believe we can, and should, aim for something much more constructive — nothing less than a new Australian Constitution'.

Of course, some Australians, true to Jefferson's prediction, see absolutely no reason for changes in the present Constitution. By world standards, it is remarkably brief and at least it has endured. It is curious to think of it as one of the longest surviving Constitutions in the world. On Thursday of this week, the Federal Attorney-General, Senator Durack, told Parliament that no case could be made for 'scrapping' the present Constitution. Though he thought there were areas of the Constitution needing review and though the 'resurgence of interest' in the possibilities of constitutional reform were to be welcomed :

> we have to frame our thinking on the basis that the Constitution will regulate the affairs of our country into the 21st century.[11]

Senator Durack welcomed the initiative of the Law Foundation in establishing the project aimed at a serious national debate on the need for constitutional change. He pointed out that a sub-committee of the Australian Constitutional Convention was still studying draft proposals for constitutional reform. However, it must be said that the Constitutional Convention, which began with trumpets and high hopes, appears to have come, so far, to absolutely nothing.

Unless the results of the recent New South Wales referenda are an indication that the tide has turned, past experience suggests that we should approach the prospects of 'root and branch' constitutional change by the people at referenda, with subdued caution. Yet according to some observers, the regular procedures of lawmaking in the three arms of government : the legislature, the Executive Government and the courts, are also not coping well with the pressures of change operating in Australia today.

CAN THE INSTITUTIONS COPE?

Professor Gordon Reid, Pro-Vice Chancellor of the University of Western Australia and one time officer of the Federal Parliament, has described it as a 'weak and weakening' institution perpetually caught up in constant electioneering. Professor Reid describes the regime of party whips and division bells and the perceived loss of power to

the Executive. In a large country, which plays politics hard and which submits its politicians to a most severe regime, it would be little wonder if the institution of Parliament could not always cope effectively with the detail, complexity, controversy and urgency of law reforming necessities.

The Executive Government is constantly distracted by the controversies that come and go. Pressures on the Cabinet and the Public Service tend to distract them from the needs of fundamental, long term reform. How often have we all heard of the limitations imposed by the parliamentary programme, the limits on Parliamentary Counsel, the already unfair burdens on the Cabinet Government and limitations imposed staff ceilings and other budgetary restraints on the Public Service. It is at the top level of policymaking and decision making especially that these burdens most heavily fall and impede long range thinking and reform action.

In days gone by the courts, true to the traditions of the common law of England, did not hesitate to develop the law : stretching and developing old precedents to meet new situations and the new needs of society. In fact, the common law of England was itself a kind of law reforming institution. Lawyers would help the judges to adapt old precedents to new needs. But since the advent of the democratically elected Parliament, the courts, particularly in Australia, have shown themselves greatly disinclined to embark upon adventures in lawmaking. The reason for this was put most forcefully by the new Chief Justice of Australia, Sir Harry Gibbs, in the speech at the ceremony of his welcome in February 1981:

> Individuals and governments are not prepared to entrust their destinies to the whim of a few persons who will determine their controversies in accordance with their individual beliefs and principles. But they will entrust them to judges who will decide in accordance with the law. It is the proper role of courts to apply and develop the law in a way that will lead to decisions that are humane, practical and just, but it would eventually be destructive of the authority of the courts if they were to put social or political theories of their own in place of legal principles.

The new Justice of the High Court, Mr. Justice Brennan — a man alert to the needs of law reform and himself at one time a member of the Australian Law Reform Commission — expressed his caution about judge-made law reform:

> The ability of the courts to settle disputes between the Commonwealth and the States or between the State and citizen or between citizens depends in the final analysis upon community confidence and respect, not upon coercion. Whatever the consequences, no court will decline to apply the law; and no shouts of indignation will avail unless it be directed to and heard by the legislature.

If my analysis is right, we may have an institutional problem in lawmaking. There are great pressures for legal change. People at referenda, the Parliament, the Executive and the courts may not always be able to cope on their own. The solutions to this institutional malady are few. We could, of course, continue as we are. We could hope that the pressures for change will diminish. We could contend that the community can digest only a certain amount of legal change anyway. The danger of this attitude, as it seems to me, is that the pressures do not appear likely to abate. The problems seem likely to accumulate. Without effective procedures of law reform, respect for the law, its institutions and personnel, and indeed respect for the Rule of Law itself, may be damaged, because the law will be seen in many respects to be out of date, irrelevant, framed for earlier problems or just plain silent.

This is the reason why I see the work of the law reform commissions in Australia — Federal and State — as important to the political process. We exist to serve Parliaments and the Executive Governments in a non-partisan way : presenting to them the options for their choice in areas of the law that may otherwise go unattended because the Parliaments cannot deal with them, the Executive Government has no time, and the courts assert that the task is not for them. In almost every jurisdiction of the Commonwealth of Nations, including every State of Australia, law reforming bodies have been created in the past two decades. They represent, I believe, the earliest phase of a development which is too universal to be coincidental. It is as if our lawmaking institutions have recognised that an institutional vacuum has begun to appear : created by the growing distance between pressures for legal change in the modern world and the capacity of the present lawmaking institutions to 'deliver the goods' on their own.

OF POLITICIANS AND MONKS

It is in the hope of calling this important institutional problem to your notice that I accepted the invitation to address this convention. It is a point I have made to other gatherings of other political parties for it is a point that transcends the party political disputes and affects the operation of the governmental process itself. Consistent with our traditions, judges must play no part in party politics. Having had my say I will, like Cinderella, depart. One judge in England, when asked whether he would not prefer to be in politics, said that he looked on politics as a monk looks on sex :

> Nostalgia for times in his rash youth. A feeling of regret for the opportunities missed. An occasional feeling of relief for the hurts and burdens avoided. And at all times, an unshakeable conviction that he could do better than the current practitioners.

I entertain no such illusions. I appreciate the opportunity you have given me to put a few thoughts before you. I express the hope that your deliberations will be fruitful for the health of the body politic of our country.

FOOTNOTES

1. Administrative Decisions (Judicial Review) Act 1977 (Cwlth).

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

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

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

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

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

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

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

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

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

11. Sydney Morning Herald, 25 September 1981, 12.