

305

MELBOURNE UNIVERSITY

GRADUATE SCHOOL OF BUSINESS ADMINISTRATION

ADDRESS TO 33RD ADVANCED MANAGEMENT PROGRAM

TUESDAY, 2 FEBRUARY 1982

LAW REFORM - FINDING THE PROMISED LAND?

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

January 1982

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Seven Years of Law Reform

This week I complete seven years as Chairman of the Law Reform Commission. I embark on a further three years. In ancient scripture we are taught in the Book of Genesis that "seven years of famine" were followed by the years in which we shall "eat the fat of the land". As I embark upon a further term of three years in this post, it can be said that law reform in Australia has not yet found the promised land. By the same token, it is not in the political wilderness. Though there are many frustrations and disappointments, there have been achievements too.

In December 1981 the Federal Attorney-General, Senator Durack, announced that my term as Chairman of the Australian Law Reform Commission would be extended for a period of three years from 4 February 1982, when the current term expires. So I am about to embark on a further three years. This is a time to review progress : achievements and failures.

Reforms Implemented

It is not always realised that Federal and State legislation has implemented a number of reports of the Australian Law Reform Commission dealing with 'controversial and difficult' subjects. I can mention:

- . new Federal legislation, and legislation in some States dealing with the independent handling of complaints against police;
- . reform of laws governing use of the Breathalyzer;
- . provision of new laws on human tissue transplantation;
- . provision of new protections for the privacy of the Census;
- . reform of the Bankruptcy Act to reduce the period of automatic discharge of small consumer bankrupts.

The references that have been given to the Australian Law Reform Commission by the five successive Attorneys-General with whom it has worked have been uniformly controversial and therefore fraught with the danger of the bureaucratic pigeon-hole. There are special difficulties in the way of securing law reform in the Federal Parliament. Attention to such matters must be squeezed into a busy parliamentary program, amongst other pressing national issues. It is often difficult to attract the attention of parliamentarians to reports covering complicated, controversial and sensitive questions. But furthermore, the great administrative empires, and those special enemies of prompt law reform, the interdepartmental committees in Canberra, frequently seem to impede speedy implementation of reform. Difficulties of these kind make successes even more significant. This is especially so when legislation is adopted, as a number of our draft Bills have been, at a State level as well as by Federal authorities.

#### Three Bills in Parliament

In a remarkable burst of activity three important measures were presently before Federal Parliament in its last session based upon reports of the Australian Law Reform Commission. They are:

- . Criminal Investigation Bill 1981. This is based on a 1975 report of the Commission and introduces a modern code of conduct for Federal Police, including tape recording of confessions to police.
- . Crimes Act Amendment Bill 1981. This is based on a 1980 report of the Commission. It introduces guidelines designed to reduce the use of imprisonment for Federal offences and to increase the use of cheaper alternatives, including community service.
- . Insurance (Agents & Brokers) Bill 1981. This Bill, which was rejected by the government, was introduced as a Private Member's Bill and passed through the Senate without division in November 1981. It proposes registration of insurance brokers and trust account requirements to deal with many recent cases of broker default.

When some of my judicial and professional colleagues express disillusionment about the capacity of our lawmaking institutions to face up to the obligations of reform, I reassure them that there is room for optimism:

- . A number of our reports are already in law.
- . States are now turning to the Federal Commission and using reports developed in the context of the ACT for uniform State law reform on matters of common interest, such as defamation and human tissue transplants.
- . There is much more discussion about the law and law reform now, than when the Commission was established in 1975, including amongst ordinary citizens.
- . There is multi-partisan support for the procedures of law reform in Federal Parliament, particularly in the Senate.

Furthermore, in the last few weeks of the parliamentary session, there was a remarkable flurry of activity with the introduction of the three important reforming Bills I have mentioned, based upon reports of the Commission. The Criminal Investigation Bill, is undoubtedly the most significant Federal measure to be introduced based on a law reform report. It is the first effort of an English-speaking country to collect and lay down the rights and duties of citizen and police, when liberty is most at stake, during criminal investigation.

#### Report Rejected

Only one report of the Commission has been rejected by the government in the seven years past. This was the proposal for regulation of insurance brokers. The proposals on regulation of insurance brokers were made by the Law Reform Commission in the light of the loss of millions of dollars of client funds by insurance brokers in recent years. The government rejected the report on Treasury advice. But even here, there has been parliamentary action. The insurance industry wanted the Commission's proposals. The brokers themselves wanted them. The Campbell Committee Report supported them. A Private Member's Bill was introduced in the Senate. It was supported by a number of government Senators. It even passed through the Senate without division. It is now before the House of Representatives. State Governments have indicated that they will act if the Commonwealth does not. Accordingly, in the one report where the government has not accepted the Commission's proposals, no-one can say that the proposals have not attracted parliamentary attention. Law reform works in mysterious ways.

#### Important Reports Under Consideration

A number of reports of the Law Reform Commission are still under consideration. However, the Federal Attorney-General, Senator Durack, has expressed support for proposals in the reports and has taken steps towards their implementation. In this connection, I can mention two in particular:

- . Uniform defamation laws, which are currently being developed, based on a report of the Law Reform Commission by the Standing Committee of Federal and State Attorneys-General.
- . A national Sentencing Council, as proposed by the Law Reform Commission, is being negotiated by Senator Durack with State Attorneys-General. The aim of this Council would be to ensure greater even-ness and consistency in criminal punishments in different parts of Australia.

#### Future Plans

The future work program of the Australian Law Reform Commission is decided by the Federal Attorney-General, who assigns projects to the Commission. At present, the Commission is working on a number of major inquiries. I expect a number of reports to be delivered during 1982. The current program before the Commission includes the examination of Federal laws on:

- . protection of individual privacy;
- . provision of class actions;
- . reform of insurance contract law;
- . recognition of Aboriginal customary laws;
- . modernisation of the rules of evidence in Federal courts.

With the help of the Australian media, the Law Reform Commission will continue in the next three years to seek to raise community and professional debate about defects in the law. Such a debate will promote a feeling of responsibility about law reform. In the past there has been a tendency to leave it to others to correct injustices that appear in the law. The Law Reform Commission hopes to provide a routine way by which injustices can be regularly and systematically cured in Federal law in Australia. Suggestions for law reform made by judges, editorials and ordinary citizens are now brought to the attention of Parliament in the Annual Report of the Commission. We hope that in the years ahead, with the help of the media, it will be possible to engage even more closely ordinary members of the community in the work of law reform.

In part this could be done by public opinion polls. In part it will be done by talkback radio programmes, television interviews and so on. The work of law reform, of lawyers and even of the judiciary in Australia, will have to come 'out of the woodwork' and issues explained to the community and debated with those interested.

#### Problems for the Future

A number of matters could be mentioned which could be suitable for reference to the Australian Law Reform Commission in the future. Amongst these are were reform of the law to deal with:

- . in vitro fertilization (so called 'test tube babies');
- . genetic engineering;
- . euthanasia, and the living will;
- . mental retardation and the law;
- . mental health law reform generally (there are more people in compulsory detention under mental health laws than in prison);
- . reform of the criminal trial (should we move closer to the judicial inquiry system of Europe?);
- . reform of the adversary system in Federal courts in Australia (because of its high cost component);
- . reform of banking law, particularly because of electronic fund transfers
- . solar energy law;
- . law for the vulnerable 'wired society'.

#### Law Reform Takes Time

Many of you will have seen reports of recent statements by the retiring Victorian Law Reform Commissioner, Sir John Minogue, about 'apathy' concerning law reform in Australia. Despite Sir John's lament, I am not pessimistic. Time will see the implementation of most, if not all, of the recommendations of the Australian Law Reform Commission.

The present Lord Chancellor of England, Lord Hailsham, said recently, half in jest, that "it takes at least three successive Lord Chancellors' normal span of office to carry through even those law reforms in which everyone consents". Lord Hailsham says that "truly strait is the gate and narrow the path of law reform leading to the statute book". In the Australian Law Reform Commission, we have now taken the path on a number of occasions. Delays, many of them bureaucratic rather than political, are frustrating, but they must, it seems, be borne. The greatest achievement of the past seven years in law reform in Australia is itself the product of the conscious effort to involve the general community in concern about the state of the 'law.

It is that the political process can no longer ignore law reform proposals indefinitely. Too many people have been involved in their development and are concerned to see the reforms implemented. We have reached the point where, applying Lord Hailsham's test, some of the proposals have been under continuous consideration by three successive Federal Attorneys-General. So I expect that 1982 will be a vintage year for law reform. Everyone who is concerned to ensure that our institutions survive will be working hard to modernise the Australian legal system. It faces a world of profound and rapid change. If law reform fails, the Rule of Law in Australian society will be at risk. Far from being a radical business, law reform is the business of conserving our basic institutions.