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AUSTRALIAN BROADCASTING COMMISSION

INTERVIEW OF MR. JUSTICE KIRBY

CHAIRMAN OF THE AUSTRALIAN LAW REFORM COMMISSION

FEDERAL LAW REFORM : ACHIEVEMENTS AND PROSPECTS

January 1982

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FEDERAL LAW REFORM : ACHIEVEMENTS AND PROSPECTS

LAW REFORM REPORTS DELIVERED

1. Complaints Against Police, 1975-1977 (two reports, ALRC 1, ALRC 9)
 - . Implemented in whole by Federal Parliament. See Complaints (Australian Federal Police) Act 1981. The Act will be proclaimed to commence in 1982 in respect of the Australian Federal Police.
 - . Implemented in part in NSW. Minor aspects adopted in other states.
 - . The basic aim was to provide an independent system of handling complaints against police who should have the confidence of good citizens but still protecting the police against malicious, diversionary complaints.
 - . One of the complaints made about police in Lord Scarman's recent report on the Brixton riots in London was the inadequacy of a current complaints procedures in Britain. Reports of corruption, violence and discourtesy will only be reduced by a fair complaints system. Integrity of the police force is vital to the rule of law.

2. Criminal Investigation, 1975
(ALRC 2)

- . A Bill to enact most of the proposals in this report is currently before Federal Parliament. Criminal Investigation Bill 1981. When originally introduced as a Bill in 1977, it provoked much police opposition. The Commissioner of the Federal Police (Sir Colin Woods) has said he can operate the 1981 Bill. The Bill provides the first attempt in an English-speaking country to state the rights and duties of citizens in respect of a time when these matter most, namely during criminal investigation. This is a matter of taking rights seriously. Amongst important provisions are:
 - . tape recording of confessions to police;
 - . interpreters for non-English speaking suspects;
 - . prisoner's friend for Aboriginal suspects;
 - . parents to be present for child suspects;
 - . strict rules to control arrests and searches;
 - . photography of identity parades;
 - . power for judges to exclude evidence unfairly obtained by police.
- . The Bill will originally apply on Federal Police only, but it will provide a model for the States. It is a major reform measure and probably the most important report of the ALRC.

3. Alcohol, Drugs and Driving, 1976 (ALRC 4)

 - . This report proposes reforms of the motor traffic laws of the ACT. It was implemented by the Federal Government in 1977 in the ACT. It introduced novel procedures:
 - . automatic Breathalizers which provide a printout to the suspect;
 - . power to take body samples to deal with intoxicants other than alcohol;
 - . wider powers to stop people outside hotels;
 - . random breath testing was rejected by the ALRC.

4. Insolvency : Regular Payment of Debts, 1976 (ALRC 6)

 - . This report is still being studied in the Federal Department of Business and Consumer Affairs. It proposes a method by which people who get into debt could aggregate their debts or receive a short moratorium, receive counselling on financial matters and advice on the repayment of total debts in instalments. Already there has been some progress based on the report:
 - . a Bill to implement the report was passed in South Australia;
 - . the Federal Bankruptcy Act was changed to reduce the period before which a consumer bankrupt may be discharged from bankruptcy from five years to three years (the ALRC recommended six months, as in the United States).

5. Human Tissue Transplants, 1977
(ALRC 7)
 - . This report dealt with such controversial subjects as:
 - . the definition of death (brain death);
 - . whether consent should be required for body parts from dying or dead persons or their relatives, or whether all people should be 'deemed' to be donors, as in France;
 - . donations by children to siblings;
 - . taking of body parts from coroners' bodies for serum manufacture etc.
 - . Despite controversies, the legislation has been adopted in the ACT, Queensland, Northern Territory. A Bill is before the Victorian Parliament. Ministers of Health of SA, WA and NSW have announced the intention to introduce legislation based on the report. It shows that difficult sensitive problems can be tackled by law reform procedures.

6. Unfair Publication: Defamation and Privacy (ALRC 11)
 - . This major report proposed a new national law defamation for Australia. Significant reforms suggested were:
 - . a single uniform national code
 - . truth (rather than truth and public benefit) to be the uniform defence;
 - . new expedited procedures;
 - . less emphasis on money damages provision of a right of reply and rights of correction;
 - . limited, defined protection for individual privacy.

- . The Federal Government has adopted the report in principle and is negotiating with the States in the Standing Committee of Attorneys-General for a uniform Act. Progress has been announced, including acceptance of the concepts of new remedies such as rights of correction.

- 7. Privacy and the Census, 1978 (ALRC 12)
 - . This suggested numerous additional precautions for the security of the national census to protect individual privacy. Some recommendations were accepted by the Government. Items rejected included:
 - . retention of the national Census data under strict conditions of security, as in the United States and Britian. The Government decided to continue the practice of destroying the original data once transferrrd to statistics;
 - . individual rights of access to the Census return.

- 8. Lands Acquisition and Compensation, 1979 (ALRC 14)
 - . This proposed new and more approachable procedures by which people could secure compensation from the Federal authorities in the event of compulsory acquisition of their property eg for a road or airport. It also proposed, for the first time, compensation for people suffering 'injurious affection' of their property values because of Commonwealth activities eg people in a flight path of an airport.

9. Sentencing of Federal Offenders
1980 (ALRC 15)

- . The report is still under consideration by the Federal Department of Administrative Services. A Government reaction is expected soon.

- . This report proposed important changes in the procedures for sentencing of Federal offenders in Australia to bring greater uniformity and consistency to the process of punishment of criminals. Among suggestions made:

- . use of imprisonment only as a last resort, because of the great costs and the inefficiencies of prison;
- . use of community service or work orders, weekend detention etc. for Federal offenders;
- . an inquiry into means before a person unable to pay a fine is sent to gaol;
- . establishment of a National Sentencing Council to promote greater consistency in judicial punishment;
- . reform or abolition of parole;
- . compensation for victims of Federal crimes.

- . The first items have been accepted by the Federal Attorney-General. A Bill is currently before Federal Parliament to implement them. Crimes Act Amendment Bill 1981

10. Insurance Agents and Brokers, 1980 (ALRC 16)
 - . This report proposes that insurance brokers should have to comply with trust accounts of client funds and other regulations. The report was rejected by the Federal Treasurer. However, its basic notions were supported by the recent Campbell Committee Report. A Private Member's Bill to implement the report recommendations passed through the Senate without division in November 1981 and is currently in the House of Representatives.

11. Child Welfare, 1981 (ALRC 18)
 - . This major report deals with the whole range of child welfare laws in the ACT.
 - . new methods of dealing with child offenders;
 - . abolition of antique procedures of charging a child with being neglected;
 - . new provisions for dealing with children neglected by their parents or otherwise 'in need of care';
 - . creation of the new office of Youth Advocate;
 - . compulsory reporting of child abuse;
 - . regulation of child-minding centres.
 - . The report was only lately delivered and is under consideration in Canberra.

CURRENT PROJECTS

Privacy. The ALRC will report in 1982 on new Federal laws to cover:

- . privacy of personal information in the Federal Public Service;
- . privacy of telephone tapping and other eavesdropping;
- . privacy of telephone or mail canvassing ('junk' mail);
- . privacy and computers;
- . privacy and the right of Commonwealth officials to enter property.

Standing of class actions. On standing and class actions, the ALRC hopes to report in 1982 on wider rights of representative groups to bring proceedings in Federal and Territory courts (eg class actions for the victims of Agent Orange).

Insurance contracts. The ALRC will report in 1982 on basic reforms of the law governing insurance contracts, including the idea of the provision of standard cover to ensure that there is a basic cover for all persons taking out regular standard forms of insurance eg householders, fire, motor vehicle, travel insurance. Variations from the standard would have to be specifically drawn to the attention of the insured.

Aboriginal Customary Laws. The ALRC will report in 1983 on the issue of whether Australian law should recognise Aboriginal customary laws.

Federal Evidence Law. The biggest project yet given to the ALRC deals with the reform of the law of evidence in Federal courts in Australia. This involves such matters as:

- . modification of the rules against hearsay evidence;
- . the compellability of spouses to give evidence in criminal trials;
- . consideration of whether the rules of evidence should be modified because of modern psychological knowledge about memory, recall, distortion of testimony etc.

HOPES FOR THE FUTURE

Community Education in Law. The ALRC, with the help of the media, already plays a part in raising community and legal professional debate about the defects of the law and a feeling of responsibility about injustices that appear in the law. In the past there has been a tendency to leave it to others to correct injustices. The ALRC hopes to provide a routine method by which injustices can be regularly and systematically cured in Federal law in Australia.

Law Reform Suggestions. The ALRC has commenced, with the approval of the Federal Government, listing in its Annual Report to Parliament complaints about the law and suggestions about law reform made by judges, parliamentarians, media editorials and ordinary citizens. This provides a program for law reform action by government and Members of Parliament. It also provides a scorecard for action or inaction. It is hoped that a regular method of ensuring attention to law reform suggestions by Parliament can be discovered.

Law Reform Implementation. A review of the ALRC reports delivered to date will show that there is a good level of implementation of ALRC reports, though sometimes after a number of years during which the reports are considered departmentally. The Senate recently decided to refer all reports of the ALRC, as they are produced, to the Senate Standing Committee on Constitutional and Legal Affairs (Senator Missen, Chairman). This may provide a method of ensuring routine and rapid consideration of reports, departmentally, under the scrutiny and stimulus of Members of Parliament. There is support for the ALRC in Parliament, in all political parties because of the realisation that Members of Parliament need the assistance of expert bodies which engage in thorough community consultation.

Better Community Participation. The ALRC hopes that in the years ahead, with the help of the media, it will be able to engage, even more closely, ordinary members of the community in its work. In part, this could be done by public opinion polls. But in part it will be done by talk-back radio programs such as 'City Extra', television interviews and so on. In the work of law reform, lawyers (and even judges) will have to 'come out of the woodwork' and explain issues and debate them with the interested community.

Future Specific Projects. Matters which might be suitable for reference to the ALRC in the future include:

- . 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.

MAJOR ACHIEVEMENTS

Major achievements of the ALRC include:

- . a good proportion of its reports have been or are being implemented by the federal government;
- . a number of reports have been implemented by State Governments;
- . Parliament is working toward a systematic way of processing all law reform reports so that the ALRC becomes a regular routine part of the lawmaking process to help Parliament with the 'too hard tray';
- . widespread community interest in participation in the work of the ALRC so that the business of law reform has gone beyond the lawyers and is now seen as the responsibility of the community concerned that the law should be modern and just.