THE INSTITUTE OF DIRECTORS IN AUSTRALIA

QUEENSLAND BRANCH

ANNUAL DINNER, TUESDAY 20 APRIL 1982

THE BRISBANE CLUB, BRISBANE, QUEENSLAND

FOUR FORCES FOR LEGAL CHANGE

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

April 1982

THE INSTITUTE OF DIRECTORS IN AUSTRALIA

QUEENSLAND BRANCH

ANNUAL DINNER, TUESDAY 20 APRIL 1982

THE BRISBANE CLUB, BRISBANE, QUEENSLAND

FOUR FORCES FOR LEGAL CHANGE

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

LINKS WITH QUEENSLAND

The Australian Law Reform Commission is one of ten permanent law reform bodies in Australia working on the reform, modernisation and simplification of the law. Ours is a century of great change. It is a measure of the comparative rate of change that from the first year of the 19th century to the last, the rate of inflation of the English pound was less than one percent. We have not enjoyed stability either in money values or in other values in our century. On the contrary, our lot has been change. Ours has been a century of wars, depression, inflation, nuclear fission and, lately, the dilemmas of computing and biological science.

It is precisely because of the challenge of change that the Federal Parliament and the State Parliaments of this country have established law reform commissions. The Chairman of the Queensland Law Reform Commission, Mr. Justice Andrews, heads a distinguished body whose previous Chairman was this State's present Chief Justice, Sir Walter Campbell. I am delighted to see present Mr. John Nosworthy CBE, who was recently reappointed as a part-time Member of that Commission. We in the Australian Law Reform Commission have had Queenslanders of great distinction amongst our Members. The first Queensland Commissioner appointed to the Australian Law Reform Commission was the then Mr. F.G. Brennan QC, at that time a member of the Queensland Bar. In fact, he was appointed on the very same day as Mr. John Cain, now Premier of Victoria. Mr. Brennan went on to become Sir Gerard Brennan and is now a Justice of the High Court of Australia. He maintains his keen interest in the reform of the law.

Another 'Queenslander' appointed to the Law Reform Commission was our Governor-General, Sir Zelman Cowen. Now, I know that some people in a southern State would claim him as their own. But when he was appointed to the Commission, he was Vice-Chancellor of the University of Queensland. I know of his great affection for and many links with Queensland. He has a life-long, abiding interest in the reform of the law.

One of our current Commissioners is the Honourable Mr. Justice Fitzgerald. He is the first Judge of the Federal Court of Australia located in Queensland. He was appointed to the Commission from the Queensland Bar, as was Mr. Justice Brennan. Indeed, appointment to the Commission has become a perilous course for barristers. Mr. Justice Fitzgerald's appointment to the Bench followed within a matter of months his appointment to our Commission. I am glad to say he is continuing his interest in our work and membership of the Commission. You will see we have important associations with Queensland lawyers. Through our work on the reform of the law in matters of Federal concern in Australia, we seek out the views of Queenslanders. We have had a great deal of co-operation and assistance from colleagues in the Queensland administration. One of our reports, on human tissue transplants, was accepted in substance by the Queensland Government and Parliament. The legislation based on the report now forms the law of Queensland on this topic.

The Australian Law Reform Commission has engaged in a number of tasks which concern directly or indirectly, business operations in Australia. We are a small body comprising eleven commissioners, three only of them full-time. We work only on the tasks assigned to us by the Federal Attorney-General. We have a research staff of eight. At any given time we generally have eight major projects of law reform.

A TIME OF CHANGE

As I have said, we are living through a time of unprecedented change in Australian society. The watchword for our time is change. The law, its procedures and institutions are changing. In part, the demands for change which build up are accommodated by our busy Parliaments, which every year, between them, enact more than a thousand statutes for this continent. In part, the judiciary, armed with the innovative powers of the common law of England, stretch and develop old precedents to apply to new times. In part, the Executive Government, administratively, develops laws in practices in tune with today's needs. The pressures for change have tended to outstrip our lawmaking institutions. The law today must address more sensitive, complicated, controversial questions from a starting point of fewer certitudes.

The modern Australian Parliament has been described as a 'weak and weakening institution'.[1] The courts are less inclined today than they were in past centuries, to develop new laws. They tend to leave this task to Parliament and the Executive Government.[2] Yet Parliament and the Executive Government, distracted by recurring elections and diverted by the heady controversies of political life and personality politics, turn away from the hard issues of adjusting the legal system, inherited from earlier times, to our times. In this coincidence of unprecedented pressures for change and institutional disinclination to meet those pressures, there lie many dangers. Lord Hailsham has said that the 'banner' of Western countries is the rule of law.[3] That is, we live in a community in which, ultimately, disputes and differences may be resolved by reference to given rules, defined impartially in independent courts and applied to all, high and low, government official, big business or little citizen, 'without fear or favour, affection or illwill'.[4] If this is the unique feature of our form of society (as I think it is) and if it is a feature worth preserving (as I am sure it is) we must consider the implication for it of our time of change. We must seek to identify the chief forces of change and address the consequences those forces have for the laws by which we are all governed. It is a statement of the obvious which must constantly be made that the endeavour to impose a better educated community, unacceptable rules and values of times gone by will lead to a breakdown of respect for the law and endanger the rule of law itself. In a better educated and better informed community, abject, unquestioning acceptance of the law (particularly of outmoded rules) can no longer be assumed. The courts of Australia do not have armies waiting at the ready to enforce their decisions. Orderly government and peaceful resolution of conflict in society (ultimately, in the courts) depends very much upon community consensus and the willingness to accept the judgment of the independent umpire. It is now time for me to state my theses. They are two.

- First, that the unprecedented changes in society also impact the law, its institutions and rules. Society should face up to this impact and so adjust the law that it is brought into harmony with the society of today. Not as it was. Not as some would wish it had remained.

- Secondly, our better educated citizens have a right to a fuller appreciation of the institutions of the law and at least their chief legal rights and duties, than was thought necessary in times gone by. A society which acknowledges this proposition will act to put it into practice.

FOUR FORCES FOR CHANGE

What are the chief forces of change that are at work in the legal system? I would identify four main themes.

- the growing importance of the role of government in the lives of all of us;
- the growing importance of 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.

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 of different political persuasion. It has produced what has been called 'the new administrative law'.[5] 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 enacted which confers on people in Australia affected by Federal administrative discretions, a legal right to have reasons given to them by Commonwealth public servants.[6] 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. Clearly, these are legislative measures that should be known by Directors and company officers in Australia. A Freedom of Information Act has now been passed by Federal Parliament. Although there has been some criticism concerning the areas of exemption from the right of access, critics should not lose sight of the fundamental change which the legislation envisages. 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 generally be the subject of independent review.

Growth and Change in Business. The second force for change in the law is the changing face of business. The mass production of goods and services gathered momentum from the automobile 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.

I suppose that of our current projects, four stand out as being specially relevant to business and commerce in this country:

- Debt Recovery. The first is a project designed to modernise the law of debt recovery. Every businessman knows of the inconvenience of bad debts and the inefficiencies of some of the legal procedures for the recovery of debts. In a sense, these inefficiencies are inevitable. The credit society, the proliferation of credit cards and Bankcard, the introduction of mass consumer credit and, now, the advent of electronic fund transfers, all make it unlikely that the laws and procedures of the past could cope with the new social situation. The Law Reform Commission has put forward tentative proposals on this subject, designed to strike a fair balance between the rights of creditors and the needs of debtors to come to grips with their basic problem, which is often plain incompetence in the handling of credit. These proposals are still under consideration in Canberra.

- Privacy. A second project upon which we hope to report this year is in some ways related. I refer to our inquiry into privacy protection. One of the issues being dealt with is the proliferation of direct marketing so-called 'junk mail' procedures, including telephone marketing and other intrusions which some people regard as invasions of their privacy. The collection of computerised personal information,

including blacklists and credit records, may necessitate legal regulation to ensure that these are accurate, fair and up to date, given the profound effect which an adverse computerised record could have upon an individual or business.

. Class Actions. A third project is our inquiry into class actions.[9] Rarely has a mere legal procedure caused so much agitation and concern in business circles. The class action is an invention of the greatest mass-production economy of them all : the United States. If you mass-produce a product with a defect giving rise to a legal action, American jurists regard it as unreasonable to insist that the law should continue to deliver justice on an individual case-by-case basis. The problem was mass-produced. So, it was said, the delivery of justice should be mass-produced, not confined to expensive craftsmanlike procedures of earlier times. The difficulty with aggregate litigation, however, is that it could be used to 'blackmail' business and to 'rope in' people who would never ordinarily have brought a legal claim. Nevertheless, American proponents of class actions declare that they represent the 'free enterprise alternative to government legal assistance'. Certainly, they amount to a form of 'litigious self-help' which we have not so far seen in Australia. The Law Reform Commission has been asked by the Attorney-General to say whether this procedure should now be introduced into Federal courts in Australia.

. Insurance Contracts. Fourthly, the Commission has been asked to look at insurance contracts law reform. Just as the credit economy has expanded, so too has consumer insurance. Laws created in an earlier time of insurance between more equal bargaining parties, may not be appropriate to an age in which insurance is sold to ordinary citizens by radio, newspaper and television. The rules that have grown up over 200 years must be rescrutinised to see whether they are suitable for today's insuring society. If they are not, the question remains, what, if anything, should be done?

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, the subject of your last Annual Dinner address. There has been talk of the rights of the child, a matter considered in the Law Reform Commission's latest report on Child Welfare Law Reform. Last year was the Year of the Disabled Person. I predict I predict that the growing numbers of the aging 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 they 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 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 there are so few women in the judiciary of Australia?[10] Why some laws still discriminate against migrant newcomers?[11] 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 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 acquiscance 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 of a number of children conceived in vitro heralds remarkable developments in biology that pose dilemmas for science and the law. According to public opinion polls, the majority of Australian people support the in vitro program. Some ask : who could possibly oppose the technique that simply overcomes a physical obstruction and may bring parenthood to more than 30,000 couples? Yet it is now increasingly realised that there are problems to be addressed:

- Some commentators, particularly those starting from a traditional religious point of view, are absolutely opposed to the new techniques:
  - They are seen as 'laboratory procreation' -- a dehumanised, unnatural manufacture of man as if he were a mere product : the elevation of the scientist to God-like power. This, roughly, is the reason that led Pope Pius XII to condemn the technique as absolutely illicit.
  - Other opponents point out that IVF requires masturbation to produce the sperm. It is said that this admittedly widespread practice is evil. In the absence of married love at the time of conception, it is thought that no good can come of it.
  - Other opponents fear the process of freezing of the human embryo — a technique utilised because of the wastage of embryos in the process of fertilisation — will all too readily lead on to experimentation with embryos and foetuses. The spectre of the foetal farm, developed to provide tissue for the relief of adult diseases, is one that horrifies some observers, but not others.
  - If embryos are frozen and not needed for future use, should they be discarded or would this act involve killing a form of human life?
  - Other opponents of the whole program simply say that, whatever your religion, there are better things to be done with the scarce medical dollars that would bring help to more fellow citizens. According to these people, this is an exotic, extremely expensive program benefitting relatively few.
- Even amongst those who positively support the IVF technology, there is now an increasing recognition of the need to consider particular social and legal consequences. Take the following, for example:
  - Should IVF be available only to married couples or also to single people, such as, say, a lesbian woman who wanted a child?

- .. Should we permit surrogates, ie if a woman cannot carry a baby full-term, should her sister be permitted to do so? If so, who is the true mother? Who, if either of them, has the say in abortion decisions?
- .. What happens to the law of incest? Could a daughter carry the child of her parents?
- .. Should parents be able to chose the gender of the embryo they select?
- .. Should it be lawful to retain a frozen human embryo for hundreds of years as is said to be technologically possible? If so, what is to happen to the distribution of property? Is the child's identity one of our generation or the generation into which he is born?
- .. In the case of frozen embryos, what is to happen on the death or divorce of the donors?

These may sound exotic questions. Looking at the smiling babies we may prefer to put them out of our minds. But unless we provide the answers and the laws, we may be delivering our society to the Brave New World which Huxley wrote about 50 years ago this year.

The rapid developments of computerisation, particularly as linked to telecommunications, present many problems for society. 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.

Such developments raise questions which the law of the future will have to answer on behalf of our 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? 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 requirement should be imposed for the supply of data in one computer to another? Is the systematic matching of computer tapes a permissible check against fraud or 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.[12] 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.[13] 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.[14] 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.[15] Even our most recent project on reform of the law of evidence requires us to rescrutinise 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.

THE MORAL?

Ignorance, fear, a fealing of remoteness, costliness, inaccessibility. All too often these are the reactions of good decent Australian citizens to their law, its institutions and procedures. We are living through a time of transition. I have sought to identify the chief forces that are at work for the change of the law. It is important that Directors, both for their professional tasks and as citizens, should be alert to the forces for change and should consider their implications for the future of the corporation in the life of our country. We should be doing more than we are to identify the forces for change. We should be doing more than we are to inform citizens about their rights and duties in a time of change. We should be doing more than we are in consultation with the community affected to adjust our laws, institutions and procedures to the changes that are taking place.

FOOTNOTES

1. See G. Reid, 'The Changing Political Framework', Quadrant (January/February 1980) 5. See also [1980] Reform 45.

2. See e.g. Government Insurance Office v. Trigwell (1979) 26 ALR 67 (Barwick CJ and Mason J). Cf [1980] Reform 5.

3. Lord Hailsham, Robert Menzies Inaugural Oration, 1978 How Free Are We? mimeo, 22.

4. This is the language of the Judicial Oath.

5. G.D.S. Taylor, 'The New Administrative Law' (1977) 51 Australian Law Journal 804.

6. Administrative Decisions (Judicial Review) Act 1977 (Cwlth), commenced 1 October 1980. Note that an amending Bill was introduced into the Australian Parliament in May 1980.

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

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

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

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

11. 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.

12. 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. See now Criminal Investigation Bill 1981 (Cwlth).

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

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

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