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LAW FOUNDATION OF NEW SOUTH WALES

WORKSHOPS ON LAW REFORM

INAUGURAL WORKSHOP, MONDAY 5 JULY 1982

THREE ISSUES FOR LAW REFORM

PHILOSOPHY - METHODOLOGY - ACHIEVEMENT

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

April 1982

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THREE ISSUES

The Law Foundation of New South Wales is to be congratulated for taking yet another initiative in law reform that has significance beyond New South Wales. I hope that these Workshops become a regular procedure for useful liaison between bodies in Sydney concerning in law reform.

Participants in these Workshops will be invited to offer short papers on the principal issues which they consider are currently facing law reform in Australia. I propose three issues of general importance : the identification of the philosophy or basic principles upon which law reform agencies should work; the methodology that should be adopted by law reform bodies and the procedures or institutions that should be adopted to ensure the successful achievement of law reform. The purpose of this paper is to place before the Workshop, these three issues which are, I suggest, of concern to everyone engaged in institutional law reform in this country:

- The philosophy of law reform. The identification of the fundamental values of law reform agencies (or other bodies engaged in the reform of the law) is something that is generally avoided or neglected. Professor Eugene Kamenka and Professor Alice Erh-Soon Tay, in a recent essay in the book 'Teaching Human Rights', 1982, suggested that law reform commissions, though they have increasingly turned their attention to basic issues of civil rights 'tend to do so without expounding a philosophy of law reform'. A consideration of the guideposts or fundamental values that should underlie the work of law reform bodies would be a task worthy of the Workshop.

- The methodology of law reform. On his recent retirement, Sir John Minogue, Victorian Law Reform Commissisoner, complained about the apathy of the public, political parties and indeed most sections of the Australian community about law reform. It would be useful to discuss the ways in which the community, experts and the relevant bureaucracies could be brought into the process of law reform in a way more effective than at present.
- The achievement of law reform. Much consultation and effort goes into the preparation of law reform reports. But Australia does not have a fine record in the implementation of law reform proposals. Consideration could be given to why this is so and what steps ought to be taken by law reform bodies, the administration, Parliament and the community to ensure that effective institutional law reform becomes a reality in Australia.

THE PHILOSOPHY OF LAW REFORM

English-speaking people tend to be uncomfortable with discussion about 'fundamental values' or 'philosophy'. They tend to boast of their pragmatism and practicality. This boast is reflected in political institutions. It is also reflected in the work of the highest courts. Although it has lately been criticised (see eg W.T. Murphy and R.W. Rawling, 'After the Ancien Regime : The Writing of Judgments in the House of Lords 1979-1980' (1981) 44 Modern Law Review 617) the avoidance of 'broad concepts' and 'deep principles' is a distinctive feature of the common law of England which we have inherited in Australia. Our legal system, at least at common law, proceeds in a way that is almost bound to avoid the search for fundamental underlying principles. Instead, the task of the court is to determine a particular case. In doing so, it may (if it is a superior court) lay down a principle which becomes binding and becomes part of the definition of the law. Only case by case does this common law methodology tend to inch its way towards broader principles. Only after decades, perhaps over centuries, do these broad principles edge their way towards a concept. The methodology is almost inherently anti-conceptual. Its redeeming characteristic is that it solves problems proffered by the litigants. This practical quality is doubtless the reason why the common law of England flourishes in the legal systems of about a third of mankind. It is basically a problem-solving legal system rather than one that establishes broad principles, encapsulated in brief ringing phrases.

Both in the common law and in the statute law, particularly as they have developed in Australia, we have a legal system of great specificity and detail. In this regard, our legal system contrasts with the fundamental nature of most continental

European legal systems where, particularly with codes, there is a search for a general principle, stated in broad outline and then applied by a professional judiciary in ways that amply implement the broad principle.

The approach of our legal system, in its fascination with great detail, has certain advantages. But one disadvantage is that it tends to deflect attention from consideration of the basic aims which the legal system is seeking to attain. Law reform bodies (and others preparing laws) must, in offering suggestions for reform, be guided or influenced by fundamental philosophical objectives. Until now, Kamenka and Tay are basically right. These fundamental objectives have not been identified and articulated any more by law reform bodies than they have been by the courts of our tradition. Instead, particular problems of the law are identified, various solutions canvassed and a particular solution offered, with reasoned argumentation. It is rare indeed that any law reform body canvasses at any length the fundamental values that have led its members to a particular conclusion. It is possible that this modesty in the discussion of fundamental values is because:

- the fundamental values have not been thought out sufficiently to be articulated;
- the fundamental values are different between members of the same commission, though leading to the same conclusion and hence divisive and possibly destructive of the achievement of practical law reform;
- the participants, trained in the English common law, see no great value or relevancy in dallying with such philosophical questions. Most law reform commissioners are lawyers brought up in the practical legal tradition of solving today's problem.

Increasingly, as the Australian Law Reform Commission has been engaged in tasks requiring interdisciplinary participation, questions are raised by people of a scientific, philosophical or theological background as to what are the fundamental values that led the Commission to a particular conclusion. Are they, for example, to be found in:

- utilitarianism;
- natural law;
- democracy and popular opinion;
- pragmatism : nothing more than what we can get through parliament.

Illustrations of unarticulated fundamental values can be found especially in matters upon which ALRC Commissioners have dissented from the majority recommendation offered in a report. Instances that can be cited are:

- ALRC 2 : Criminal Investigation. Mr. Justice Brennan dissented (ALRC 2, p.32) from the majority of recommendation that, following certain warnings, the police should have a period of four hours (extendable) within which to question a suspect rather than having to rely on 'voluntary co-operation'. Mr. Justice Brennan thought that the warnings went too far and that whilst in police custody, the accused was at an unacceptable psychological disadvantage.
- ALRC 7 : Human Tissue Transplants. Mr. Justice Brennan and Sir Zelman Cowen dissented on the issue of whether, with precautions including judicial authorisation, a sibling ought, if under age, ever to be permitted to be a donor of non-regenerative organs or tissue for another member of the family. The majority thought that with proper protection, the law should not forbid absolutely such donations. The minority (p.51) thought there should be no exceptions.
- ALRC 15 : Sentencing of Federal Offenders. In this report, dealing with the problem of proved disparity in the punishment of offenders against Commonwealth laws in different parts of the country, the majority thought that it would be adequate to graft on to State courts, prisons and other agencies handling Federal offenders, certain institutions and procedures designed to promote greater evenness in punishment. Professor Duncan Chappell, the Commissoner in charge of the reference, was convinced (p.101) that the only effective way to ensure that offenders against a law of the Commonwealth were treated uniformly was to establish an entirely separate Federal criminal justice system with separate police, prosecution, court, correctional, probation and other personnel.
- ALRC 16 : Insurance Agents and Brokers. In this report, the question arose as to whether an insurance broker should be obliged to inform the insured and the insurer of any remuneration or other benefit he received or would receive in relation to the contract. A majority of commissioners believed that such an obligation should exist and it is argued out on the basis not only of the avoidance of improper arrangements but also to ensure that the free market can operate effectively, with the information readily available to the purchaser of insurance. One Commissioner, Mr. J.Q. Ewens, disagreed considering the information to be disclosed would be of little value to most insureds, that it would be costly and inconvenient to supply and would normally be supplied on request and ought not to be required by law to be volunteered (p.54).

The identification of the 'fundamental values' that led to the differing conclusions is rarely attempted, either in in-house argumentation or in written law reform reports. Different views about the proper limits of the law, the fundamental rights of man and the basic objectives of any legislation, are subjects that could merit serious

discussion. Law reform commissioners are obliged by their statutory duties to offer their opinion and advice in the reports prepared under their name. They have neither the time nor, usually, the inclination or the training to 'flush out' the basic values that are motivating their ultimate decisions. The need to be alert to these basic values and a consideration of what they are and how they can be discovered would be a task worthy of the Workshop.

THE METHODOLOGY OF LAW REFORM

The methodology of law reform is not, perhaps, so difficult a topic but it is one which warrants careful study. Consultation is the sine qua non of law reform commission inquiries. But the mode of consultation differs. Some bodies simply distribute, to a very small number of recipients (usually judges and lawyers) detailed working papers written in a language that would not be understood or read by the layman. Other agencies have prepared documents in different formats in order to try to evoke popular interest and participation in law reform projects. In part, the difference of methodology depends upon the nature of the tasks assigned to a law reform commission. Whatever the methodology used, it is hard to imagine being able to engender much public concern about the Rule against Perpetuities.

The comparative value of various forms of consultative procedure could be discussed and evaluated. New methods include:

- public opinion polls;
- open house hearings;
- informal public hearings;
- industry and professional seminars for lobby groups;
- talkback radio;
- television programmes;
- distribution of cassettes to remote areas;
- issue of media releases;
- short-form discussion papers and pamphlets widely distributed;
- law review articles;
- after-dinner and conference speeches.

A number of problems of this methodology could be considered and discussed. The problems include:

- How can we be sure that we are tapping a cross-section of community opinion, if that is our aim?
- Within scarce resources, how can we secure submissions across the whole face of the Australian continent, particularly in outlying areas and provincial cities?

- Should there be such concern to get community opinion?
- Can the community debate be counter-productive:
  - by provoking noisy minority interest groups on particular issues;
  - by provoking political jealousy;
  - by provoking professional opposition to perceived 'grandstanding';
  - by giving the false impression of activity in law reform which is not reflected or equalled in law reform implementation;
  - by raising false hopes of comprehensive law reform not matched by subsequent follow-up and by giving a false picture of the resources devoted to law reform, out of proportion to the media coverage.

A consideration of the misuse of law reform and Royal Commission inquiries by government, recently addressed by Professor Sackville, and the apathy of the Australian community to law reform, lamented by Sir John Minogue, should attract the attention of the Workshop.

THE ACHIEVEMENT OF LAW REFORM

Consideration of the practical achievement of law reform involves attention to a number of topics:

- Are law reform bodies the best way to achieve law reform and if not, what is their proper function when compared to the achievement of law reform through:
  - Departments of State;
  - party political platforms;
  - the judicial process;
  - Royal Commissions and other committees of inquiry;
  - parliamentary committees.
- What procedures and methodology should law reform bodies adopt in order to maximise the chance of achieving law reform, as distinct from preparing interesting and well-argued reports?
- Should politicians somehow be more closely engaged in the process of preparing law reform recommendations and if so, how should this become compatible with the independence of the law reform body?
- Should new institutional arrangements be adopted to ensure that law reform reports do not languish in a bureaucratic pigeon-hole but are systematically considered by the law-making process?
  - by automatic implementation as suggested by Sir Anthony Mason;
  - by automatic reference to an appropriate parliamentary committee as suggested by the Senate Standing Committee on Constitutional and Legal Affairs (Senators Missen and Evans);
  - by automatic reference to the Senate Standing Committee on Constitutional and Legal Affairs (as adopted on the resolution of Senator Missen in October 1981);

- by government announcement of arrangements concerning handling of the report;
- by better procedures of interdepartmental committees.

- A further consideration that is often neglected is that a law reform report can rarely be the final word on a topic assigned to it. Social conditions, including technology, change. Proposals, even if enacted, may have consequences quite different to those envisaged. We have traditionally had no ongoing procedure for considering the impact of a law reform report and its success in achieving its stated goals. Should the functions of law reform bodies be expanded to include monitoring of this kind?
- Above all, there is the issue of resources. Law reform in Australia is uniformly poorly funded and ill-resourced. The achievement of law reform, the pace, quantity and quality of the production depend on the investment in the endeavour.

The participants should consider the ways in which this investment could be increased and the whole process improved to keep pace with the pressures of change.

THE TASK FOR THIS WORKSHOP

It would be my hope that the Workshop will give some consideration to the possible need for and identification of a framework of principle (I deliberately avoid the word 'philosophy) by which law reform agencies in Australia could be guided towards making their particular recommendations. The achievement of such a framework of principle (or even a checklist) will be difficult. Some may think it to be undesirable. But without such an identification of fundamental values or principles, it is likely that Australian law reform bodies will continue to be criticised (as Professor Kamenka and Tay have already criticised them) as bodies moving from one report to another, without the guidance of a consistent set of aims or values which they are willing and able to identify, debate and justify.