reform

A regular bulletin of law reform news, views and information
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Too Much Reform?

> "Moderation is a fatal thing. Nothing succeeds like excess."
>
> Oscar Wilde, 1879.

The dinosaur is a constant reminder that increase in size and amount can be a terrible mistake. The public discussion about the law, lawyers and reform has never been so audible as now. Lately, a number of cautionary pronouncements have been made by judges of the Supreme Court of Victoria. They deserve the close attention of law reformers.

Speaking on his retirement in June 1977, Mr. Justice Dunn put it this way:

> "I am leaving the law at a time when I think you will have to devote your minds to preserving its stability and its coherence. Not only are there seven legislatures busy at work with the law, but there are sixteen law reform commissions and committees operating in Australia —three of them in Victoria. Those who operate in Victoria have done so—if I may respectfully say so—with commendable caution, but the fact is that a citizen is expected to know the law, he is required to observe it and he is entitled to know what rights the law gives him. It is going to be extremely difficult for him to keep trace of the law if it is in a continual state of major alteration . . . It is difficult, even for a Judge, to keep himself up to date."

Speaking of his retirement in May 1978, Mr. Justice Gillard expressed concern (as reported in *The Age*) that ordinary citizens were threatened with being trapped by a "vast net of laws".

> "I look forward to the year 2000 . . . when the individual will be so encased and enmeshed by legislation that he will feel like a little larva in a cocoon and will be able to do nothing."

Sir Oliver Gillard was Chairman of the Victorian Chief Justice's Law Reform Committee until his retirement. He urged the legal profession to question the trend to "ever increasing volumes of legislation" and the burdens which it creates. In one of the last reports of the V.C.J.C. signed by him, there are posed certain "principles of law reform":

> "It may be that in solving problems it becomes necessary to be innovative. On the other hand, if a simple solution based on past experience

> can be achieved then such simple method should be adopted. Lord Sankey, when appointed as the first Labor Chancellor in the United Kingdom, was challenged as to the necessity for law reform. He remarked that we should not let our house be pulled down until we have a better one to live in. A recent example of statutory amendment, both in the United Kingdom and in Victoria in relation to limitation of actions should remind us very strongly of the necessity of not creating new problems of interpretation in attempting to remove earlier ones. There is always a temptation to adopt language of a striking character thereby creating future problems of judicial interpretation."
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> V.C.J.C. *Commercial Arbitration* 1977.

The strongest reservations, however, were expressed by the present Chief Justice of Victoria, Sir John Young, in his Stawell Oration *The Influence of the Minority* (3 May 1978). In the course of the Oration the Chief Justice made the point that, as laws are no longer made by a minority of "educated people" speaking substantially the same language, we must be on guard against laws made "not by an educated minority but by a minority bent upon imposing their views upon the community . . . on the silent majority".

Acknowledging that there is some truth in the contention that the legal profession is "a conservative profession" the Chief Justice explained that this was because lawyers "know better than most others the dangers inherent in meddling with the law":

> "The better the lawyer the less likely he is to propose or promote extensive or substantial reforms. This is not because he is not interested in law reform, nor even because he is too busy in his daily practice to direct his attention to such matters, but principally because he knows that to draft an Act of Parliament altering the law on any particular topic is fraught with difficulties and dangers and that the law as reformed is quite likely to be worse than the law before the reform took place."

The Chief Justice assailed the myth that life can always be improved by an Act of Parliament:

> "The extent to which the myth . . . is fostered in this country is illustrated by the fact that there are no less than twenty-five official and semi-official law reform agencies . . . Any law reform agency will necessarily feel obliged to keep producing recommendations for reform in order to justify its existence. I would not have you believe that I am opposed to reform of the law or that I do not think that there are many areas of law in which reform is required. But what I would reform and how I would reform it might be different to what others would wish to do."

The Chief Justice urged community debate of law reform proposals:

> "Laws are apt to reach the statute book which do not really represent what the community wants or needs or at any rate what the members of the community would want if the laws could be fully explained to them. In other words there is a danger that the influence of a minority will be felt in the sphere of law reform . . . A society such as ours in which there is no ruling class is particularly susceptible to being influenced by a vigorous minority."

If the Chief Justice's lecture is addressed to the need for caution in reform, it is a point well made. Reform is not taken in Australia to mean "change" as such. It implies change "for the better". Of course what is "better" will sometimes be a matter of opinion upon which people of good will may differ. The need for the fullest possible community debate of law reform proposals is therefore an imperative. It is perhaps fair comment that the Chief Justice's own committee on law reform has not sought public debate, doubtless because of the kinds of projects it has tackled . . . in the past. Former Attorney-General Ellicott once said that law reform, on an Australian level, was now being taken "into the living rooms of the nation" through the media promoting public discussion. The Australian Prime Minister, Mr. Fraser, has described this process thus:

> "We have taken quite a new direction in law reform in Australia, a direction entirely in keeping with our traditions . . . We have deliberately set about promoting what I might term 'participatory law reform'. If the law is to be updated, if the advances of science and technology are to be acknowledged and accommodated and if our traditional liberties are to be protected, it is vital that the community governed by the law should take part in helping to frame reforms in that law . . . The Australian Law Reform Commission has actively sought to engender public interest in the tasks assigned to it by the government . . ."

On the day of the Chief Justice's Oration, the Australian Law Reform Commission was conducting busy public sittings and seminars in Melbourne in connection with its reference to reform the *Lands Acquisition Act*. Large numbers of citizens and "experts" took part (see p. 49). Law reform is not a prerogative of lawyers only. Perhaps lawyers are the last to learn of the problems and injustices which

require reform. The language, pace and methods of a time when there was a ruling class, an educated elite, seem scarcely appropriate for meeting the challenges of science and technology and the problems of today's Australian society.

The modest sums spent on law reform and the Parliamentary pigeon-hole are, in the opinion of the more ardent reformers, more than adequate protection against over-enthusiastic reformist zeal.

Busy New Zealand Law Conference

> "Reading maketh a full man, conference a ready man, and writing an exact man."
> Francis Bacon, *Of Studies.*

2,000 lawyers from New Zealand, Australia and many other countries gathered in Auckland at the end of March 1978 for the New Zealand Law Conference. The intellectual obligations of the conference were taxing. Subject matters upon which papers were written and sessions held, ranged over:

- Reform of defamation law
- Alternatives to criminal prosecution
- The computer and the trust account
- The nuts and bolts of legal education
- Unmet needs for legal services
- Special problems of public service lawyers

In addition to the usual concerns shown in specific topics of the law, conference papers and discussions reflected the increasing interest of lawyers in futurology. This was seen in the sessions dealing with computers and the effect they will have upon office organisation, trust accounting and the delivery of legal information. The computer was described as the great "productivity advance for white-collar workers" which will catch up to the technological changes that have occurred in the factory. At all sessions of the conference, lawyers could be seen poring over up-to-date computing and word-processing equipment. The battle to lower costs and to deploy legal talent more efficiently has clearly begun.

Professor Michael Zander and Mr. P. J. Purton from London described the advances in supply of legal services in the United Kingdom. The establishment of citizens' advice bureaux, specialist advice services and lawyers in salaried employment were all mentioned as a supplement to civil and criminal legal aid. The deficiencies in New Zealand legal services were thoroughly debated. The operation of a Neighbourhood Law Office, with some government assistance, was scrutinised, as was the duty solicitor scheme and legal aid generally.

Sir Owen Woodhouse, a member of the N.Z. Court of Appeal, delivered his paper *Compensation for Personal Injury in 1978.* Sir Owen was the originator of the New Zealand National Compensation Scheme and the Chairman of the Australian National Committee of Inquiry into Compensation and Rehabilitation, 1974. The New Zealand proposal was adopted in October 1972 and has been operating ever since. The Australian scheme has not yet been implemented.

Acknowledging that some problems have emerged (lump sum payments, non-payment for the first week and integration with other forms of social insurance), Sir Owen described these as indications of "growing pains".

> "The present compensation system has been built up during the short period of four years . . . In the end it is right to say that much has been achieved, the scheme is on course, the prospects ahead are for fair weather."

There was a general consensus of practising and academic lawyers at the conference that national compensation had put an end to much meritless litigation, seeking to squeeze compensation for accidents into the old common law torts. Fine arguments about negligence and breach of statutory duty had been removed with a bold stroke. Lawyers had not suffered the mortal damage predicted. They had been released for other work and few would seek the return of negligence and workers' compensation litigation.

One curious offshoot of the national compensation reform has been the tendency of other torts to flourish: defamation, negligent advice and industrial torts. All travellers to New Zealand receive on arrival a notification that during their stay they are covered by the scheme. As the Chairman of the Accident Compensation Commission, Mr. Sandford, said in his paper, it has seen the removal from New Zealand of the "financial tragedy and disaster that often accompanied personal injury or