THE PEOPLE MAKE THE LAWS

the alrc's 20th anniversary conference

On the 23 August 1995 the Australian Law Reform Commission held a conference in Canberra to mark its twentieth anniversary. **Michael Easton** reports.

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The aim of this conference was to take a step back, to view the work of law reformers from a variety of perspectives. Rather than exploring particular issues, the delegates analysed the processes of law reform itself — from identifying new priority reform topics to the final implementation of law reform recommendations.

Discussion was arranged around four themes:

- what laws do people want? — developing the law to take the different needs of the community into account
- assessing the value of laws — evaluating law from different perspectives
- making law reform happen — how do proposals for change become reality?
- best practice law reform — getting the process right.

The wide range of speakers including politicians, lawyers, science and consumer advocates, journalists, business representatives and bureaucrats explored many aspects of law reform. The four themes mixed and merged in various ways to produce many insights into law-making.

A consistent theme that emerged during the conference was that well researched reports are simply not enough — political nous and effective public consultation are essential to the work of a successful law reformer.

The people make the laws — what laws do people want?

The people make the laws: Law which reflects the will of the people is the aspiration of all democratic societies. Of course in reality laws are made at the top of the political structure. Attempts must be made to fashion laws which meet the many and varied demands of the community, demands which are often contradictory and difficult to discern.

The keynote address by the federal Attorney-General, the Hon Michael Lavarch MP, emphasised the value of consultation:

> *Consultation means the Australian law reform process is a truly participatory democracy where the development of law is influenced by those it affects. This emphasis on consultation is also pragmatic. Laws that derive from consultation are more likely to function effectively and to be accepted by the community.*

Indigenous Australians — still waiting for their chance

Consultation has not been a conspicuous feature of the relationship between the law and indigenous Australians. Brian Butler, from the Secretariat for National Aboriginal and Islander Child Care, provided graphic examples of the consequences when law is made with little or no regard for the wishes or interests of those it affects.

> *Our experiences continue to inform our scepticism & feed our cynicism, yet we continue to demand legislation that will in all probability be enacted by a parliament that has no aboriginal representation. That is why the laws we want must be designed by us.*

Despite a history of broken promises and ineffective legislation, indigenous people still see the law as an important measure in safeguarding their rights he said. Legislation must be culturally relevant:

> *We do not want legislation to make us into museum pieces. Just to legitimise our contemporary day-to-day practices and social systems which are quite different to yours.*

The Native Title Act was, he said, an example of indigenous representatives working with government legislators for a common purpose. Brian Butler also pointed out that many laws are especially oppressive to indigenous people, particularly children. Previously law has worked to encourage segregation and assimilation. Today complex, inconsistent laws, an abundance of jurisdictions, laws based on alien concepts and harsh laws which punish poverty instead of addressing it, all create problems.

He ended by calling for strong and clear national policies, strategies and legislation to tackle the problems of the present child welfare and juvenile justice systems. 'The solutions proposed by others have simply not worked. The time has come for our ideas to be tested'.

Assessing the value of laws — science, consumers and social justice

Public consultation forces law reformers to venture forth from the traditional legal, bureaucratic and academic circles. Scientists, activists and the media play an important role in spotlighting areas in need of reform. Law reformers can benefit from the fresh ideas they bring as three speakers — Karina Kelly, John Millard and Robert Fitzgerald — demonstrated.

Science often comes out second best after emerging from the courtroom or legislative process explained Karina Kelly, presenter of *Quantum* on ABC Television. She gave the example of DNA fingerprinting — which uses variations in genetic material as a method of identification — popularised during the OJ Simpson trial. Its value derives from the fact that the chance of two persons sharing the same DNA fingerprint is approximately one in 170 million.

When discussing such techniques a conscientious scientist will take pains to qualify their work, outlining factors which might affect the reliability of the sample or the measurement. They do this because they want to express their observations accurately and understand what they are studying, not just win an argument. It is this characteristic that puts them at odds with the courtroom lawyer. Who wins, she said, might depend on the most eloquent expert, not on the eloquence of their science.

She also discussed the patenting of human genes to demonstrate the difficulty that legislators have in matching the pace of scientific discovery. Research into human genes has revealed enormous possibilities for medical science — and medical profits. Since 1983 there have been 293 applications for patents on human and genetic material submitted to the Australian Patent Office.

Patent law is meant to stimulate research by providing protection for intellectual investment. In this case many say that research competition and the development of new disease treatments is being stifled by the granting of patents. There are also considerable moral and ethical concerns raised by the commercial use of substances derived from human bodies.

Despite these concerns, the patenting of human genetic material is occurring in a legislative void. The government drafted a bill in 1993 but this has not yet been passed. Voluntary guidelines provide the only regulation. It is vital, she said, that the law closes embarrassingly large gaps such as this. The legislators and law reformers must be able to inform themselves, and adapt to deal with scientific developments.

John Millard, another ABC TV journalist from the programs *Hot Chips* and *The Investigators* talked of the role the media plays in filling this gap between technological developments and the law — the advance guard of law reformers as it were. He also outlined the role of 'trial by media' in addressing consumer problems that are not corrected by the legal system

His experiences working on *The Investigators* convinced him that the law was not providing consumers with adequate protection in a number of areas. The regulations applying to many industries such as building and motor mechanics were inadequate. Self regulation was generally inadequate, industry dispute tribunals were inaccessible and many companies, especially in the finance and insurance industries were prepared to use the high cost of justice to prevent people from enforcing their rights. Consumer affairs services are suffering from reduced funding and now provide less help.

The community should not be embarrassed about asking for more regulation, he said. However, in the meantime 'trial by media' could play an important role, highlighting these injustices and inadequacies. The media attention had often been instrumental in achieving a solution. He had also found that many lawyers were happy to use media attention to help their clients.

He discussed his experiences working on *Hot Chips* — a show which explored advances in computer and information technology — to argue that the media had a vital role in contributing to informed public debate about the consequences of technological developments. Privacy, fraud, equity of access and consumer protection were all issues that required informed consideration. Too often ignorance on the part of the public, and lawmakers, meant that this area was also inadequately regulated.

Robert Fitzgerald, President of the Australian Council of Social Service, began by surveying some recent legal developments in Australia that he believed threatened the position of low-income and disadvantaged citizens — restrictions on legal aid, 'law and order' campaigns, inaccessible justice and denial of appeal rights against administrative decisions. He noted the disturbing trend in public debate that now makes one feel apologetic whenever one uses terms like social justice, access or equity.

Disproportionately represented in the justice system, subject to complicated and inaccessible laws (the *Social Security Act* is now larger than the *Income Tax Assessment Act*) the disadvantaged see the law as oppressive. Law must be considered with regard to social as well as economic policy. He called for a number of general reforms that are vital if equity and social justice are to be achieved.

Law and legal services must be made accessible and effectively delivered. Uniformity of laws would ensure that justice does not depend on the state in which you live. Those that enforce the law must respect the law. The special needs of certain groups must be recognised and catered for.

He emphasised the value of consultation in ensuring that laws are relevant to the disadvantaged, who do not have the influence of economic interests. He criticised the *Legislative Instruments Bill* for mandating consultation only when it directly affects business. Bodies such as the ALRC were important he said, to ensure that the needs of the disadvantaged were heard and taken into account.

Best practice — process and outcomes

After the consultation process has taken place what do you do with the material that is gathered? Can all the opinions expressed in the consultation process end up in the final recommendations?

Consultation — not just a straw poll

David Solomon, former chairman of Queensland's Electoral and Administrative Review Commission (EARC) commented that all submissions had some value although they can be of varying quality.

> *There are submissions you really wouldn't want to take any notice of, but even they are important because they let you know of some of the prejudices and problems that you must respond to.*

Is there a clear distinction between law making by consultation and populism? Some delegates raised the problem of surveys which continue to show that many Australians support the re-introduction of the death penalty. Many simplistic laws are proposed, and sometimes even enacted, following campaigns by radio talk show hosts and other electronic populists. The dangers of this are demonstrated by the law and order campaigning throughout the last NSW election. In a similar vein, one must guard against raising unrealistic expectations through the consultation process.

The Attorney-General explained the government's approach to consultation in his keynote address:

> *Every effort must be taken to ensure that the final recommendations reflect the material that has been collected. Widespread acceptance of these recommendations will be the best measure of this. Ongoing consultation allows this level of acceptance to be gauged and for finetuning to occur.*

Sustainable law reform

The importance of sustainable law reform was emphasised by Malcolm Starr, Policy Director, Government and Legislative Affairs at the Sydney Futures Exchange. The consensus that exists at the time reform proposals are devised must be maintained well into the future so that the proposals remain appropriate once enacted. Even though achieving a wide consensus might delay the implementation of proposals this will often be outweighed by the benefit of increased sustainability that results from this consensus.

He discussed the long campaign to reform the corporations law to illustrate some of the considerations that law reformers should bear in mind:

> *It is often worth persevering to develop a consensus on the structure of a new legislative regime so as to provide the platform for introducing subsequent reforms more easily ... at the same time, some self-restraint needs to be exercised by law reformers if they are not to lose bigger achievements in an attempt to win every last victory on small issues.*

The attempt to replace State-based regimes of company law and securities market administration with a single nationwide scheme went through several variations before the current version succeeded in the early 1990s. This now provides a platform for the valuable simplification exercise now under way. The wresting of control away from the States may have failed, he said, if the reforms now being undertaken in the name of simplification were mooted at the same time.

Sustainable law reform can often be achieved by conferring wide powers on courts and administrative agencies to update legislation. The power to grant exceptions or to modify provisions may be granted as long as these powers are exercised in a way that is consistent with the underlying objectives of the legislation. If this method is used, he warned, law reformers needed to be careful to articulate carefully the objectives of the legislation and express them as criteria for the exercise of power.

Making it happen — the politics of law reform

'I should have brought a camera', remarked comedian Hung Le, 'I'm from Victoria, we don't see many of you guys around. The only one we have is a stuffed one in a glass case next to Phar Lap with a sign saying "The Victorian Law Reformer: A gifted amateur with a big heart"'.

Hung Le's comments reminded delegates that political support is crucial for effective law reform to take place. Well-researched reports, even when written with the benefit of extensive consultation, may not be enough on their own.

David Solomon expressed the dilemma faced by law reformers:

> *Is it the role of a law reform body to support the ideal law or the one most likely to get adopted? Should law reform bodies set high apolitical standards, or go for the reform they are most likely to get?*

Mr Solomon, along with many other speakers, expressed a preference for the latter — law reform that is effective:

> *The most important element of the role of law reform bodies is getting the politics right. The ideal situation is to get a commitment to implement from the politicians before hand.*

He compared the experiences of two Queensland law reform bodies. EARC had been fortunate in that it was working in the reformist atmosphere following Labor's 1989 election victory. This enthusiasm soon cooled and the other major body, the Criminal Justice Commission was much less successful in securing changes: recommendations on marijuana, prostitution and police powers were rejected.

The point was reinforced by ALRC President Mr Alan Rose

> *Timing is of the essence. Law reform is about what politically achievable at that point in time. In other words it is something that the mob will cop.*

The bureaucratic processes of law reform were described by Fiona Tito, chair of the Federal Government's review of professional indemnity insurance in the health sector. Law reformers will, she said, 'come into conflict with those who are perfectly happy with things as they are'. She discussed some of the inevitable reactions: 'we don't have the constitutional power', 'you've missed the timetable', 'let's have an inter-departmental committee'. However, there was a positive side:

> *Bureaucratic inertia can actually work for you. You have to roll the rock up the hill, but once you are over the top, bureaucratic inertia will carry it all the way down. the trick is to judge when to let go. If you are too soon, the rock will roll back over the top of you.*

Once a legal aid lawyer, Daryl Melham is now a Federal MP and Chair of the Parliamentary Standing Committee that reviewed the operations of the ALRC. He described the political processes of law reform as 'a difficult plod':

By law reform I mean progressive law reform — it is very difficult in the present climate unless you are a hanger or a flogger or you are taking away peoples' rights.

Politics is, he said an integral part of the law reform process:

... you need to be inclusive, you need the bureaucrats and ministers, the Members of Parliament, legal practitioners, all working together and in the end you have to make compromises. You have got to make balanced decisions. You have got to make political decisions.

On the question of how a Bill becomes law, law reformers are treading a minefield. You have got to negotiate your way through. You have to know the politics of a particular party, and who the particular personalities are, whether you can go public or whether you do it in private.

The role of politicians was defended by Senator Amanda Vanstone who expressed frustration at criticisms of experts with little knowledge or respect for the political process. 'They don't have to get elected, we do' she said. 'Politicians are not just salespeople. They get elected to make the laws'.

Conclusion

The 20th anniversary conference was a valuable exercise in cross fertilisation, casting light on the process of law reform from a wide range of perspectives. All speakers emphasised the value of law reform and endorsed the work of the ALRC. The Attorney-General expressed the Government's view in the conference's keynote address.

Change and reform must occur with regard for the continuity and preservation of longstanding principles that safeguard the rights of every Australian.

The community, or various sectors of the community, are of course often vocal in pressing upon the government the needs for reform of one sort or another. And Government is not short of ideas for reform itself.

What is needed is an opportunity for different groups to comment on proposed reforms, and an examination of the various ways in which a desired end can be achieved, before Government legislates. In this, the Commission is invaluable as a bridge between the people and the law.

Some of the papers presented at the conference are available from the ALRC. Please contact Michael Easton on (02) 284 6332 if you are interested.

Equality — recent developments

The ALRC's 1994 report *Equality before the law* (ALRC 69) continues to make a difference. In June 1995 the *Sex Discrimination Amendment Bill* (Cth), which implements many of the changes to the *Sex Discrimination Act* recommended by the ALRC, was introduced into federal Parliament. The ALRC's recommendations have also influenced consideration of two other Bills — *The Family Law Reform Bill 1994* (Cth) and the *Family Law Reform (No. 2) Bill 1994* (Cth).