Seven Deadly Constraints of Reform

> "We accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action."
>
> Mr Justice Learned Hand, 1942

The first quarter of the new decade saw a number of ruminations about law reform and how to achieve it. A new publication by Edward Arnold, *Law Making in Australia* (Eds A.E.-S. Tay and E. Kamenka) contains a number of important papers on parliamentary, judicial, governmental and political contributions to law improvement. Specific to institutional law reform, is a paper by the ALRC Chairman, Mr Justice Kirby, titled 'Reforming the Law'. In it, he identifies the 'seven deadly constraints' of law reform in Australia, i.e., the chief considerations which limit the achievement of effective law reform through institutions such as the LRCs. The seven mentioned are:

- *Federalism:* the need always to operate within the intellectual and political constraints of the Constitution
- *Resources devoted to reform:* 10 cents per adult annually
- *References given:* by Attorneys-General who in Australia are always politicians
- *Consultation:* the obligation to consult and debate, which slows the prospect of rapid performance and many quick reports
- *Speed:* the need to balance fundamental reform with the obligations of curing identified injustices in a fast-moving society
- *Processing law reform proposals:* ending the log-jam of inaction on law reform reports
- *Follow-up:* ensuring that proposals which look good on paper, actually work in operation, once implemented

Amongst other interesting papers in the book are those by Sir Anthony Mason on 'The Courts and Their Role in Changing the Law Today' and Professor G.S. Reid on 'The Parliamentary Contribution to Lawmaking'.

Professor Reid's celebrated address to the 1978 Summer School of the Australian Institute of Political Science has now been published in the January/February 1980 edition of *Quadrant.* Titled *'The Changing Political Framework'*, his thesis is stated at the outset:

> "The elected Parliament is a weak and weakening institution; ... the Executive Government is the principal beneficiary of the Parliament's decline; and ... the judiciary is tending to compete with the Executive Government in exploiting the Parliament's weakness but it is having its own independence undermined through the initiatives of Executive Government. The question is "does it matter?"

Professor Reid concludes that:

> "Australia's changing political framework is manifesting a preference to vest more trust in appointed officials than in elected politicians. [This] is tantamount to declaring a distrust of the common man."

In the December 1979 issue of the *Australian Journal of Public Administration,* Professor Peter Wilenski writes a thought-provoking article *'Political Problems of Administrative Responsibility and Reform'* (Vol.38, p.347). Wilenski is well placed to write such an article. Not only did he take a leading part in assisting the Coombs Royal Commission of Inquiry into Australian Government Administration. He is now heading an inquiry of the N.S.W. Government into the public service of that State. He has a few cautionary words about the pre-requisite of far-reaching administrative reform:

> "The first pre-requisite of major reform is a strong political commitment by the Government of the day since in the end, it is only the political leadership which has the resources to win the battle. A government which regards civil service reform as a minor task on its agenda and is not prepared to put political energy behind it and to use up political capital in its achievement, is unlikely to succeed. Unfortunately, the history of many of the major commissions of inquiry, such as Coombs, is that by the time they have reported, the Government that appointed them has lost either interest or office." (p.359).

Wilenski suggests that reformers very often 'accept a managerial and technical framework of discussion rather than a social or political one'. He suggested that so long as reformers

allow opponents of reform to set the terms of the debate, they are likely to lose it.

> "Basically, the resistance to administrative reform is a political resistance. It is not only that administrators are reluctant to change processes and procedures with which they have grown familiar, but rather that those groups who stand to lose their privileged position become aware of this danger and fight to retain it. Since they are in positions of privilege and responsibility, they are the very people who are best able to resist reform. Reformers are therefore likely to be more successful if they can build up alliances for change both within the bureaucracy and within the community." (p.359)

The resistance to law reform proposals was also discussed in a paper delivered by Professor Ronald Sackville (Dean of Law in the University of NSW) to an international conference on alcohol and drug abuse held in Canberra in March 1980. Titled *'Drug Use and Social Policy'*, the paper is a vehicle for Sackville to review his experience as Chairman of the SA Royal Commission into the Non-Medical Use of Drugs. Professor Sackville is a trifle acid about official inquiries.

> "Little is to be gained by speculation as to the reasons which lead governments to establish inquiries into contentious social questions. It is often very difficult to identify the 'true' reason, because a variety of factors are involved or because the publicly stated reasons bear no discernable relationship to the underlying political motivation. In some case it may be true that the dominant consideration is a desire to encourage a process of rational policy formulation free from the pressures inherent in political decision-making. ... It is, however, rare that governments are motivated *solely* by a desire to encourage rational policy-making. More often, the decision to appoint an inquiry reflects an assessment that the issue under consideration is too difficult or sensitive to be resolved by the usual political processes, yet it is sufficiently pressing to require at least the appearance of immediate action. When referring the matter to an inquiry the government may or may not intend in good faith to give the report prompt and sympathetic consideration. The important factor is that the establishment of the inquiry averts, at least temporarily, a threatening political situation."

Professor Sackville supports this thesis with a few examples:

- The SA Royal Commission into Drugs arose out of a disagreement in the then State Government ranks about the legalisation of cannabis
- The N.S.W. Royal Commission into Drug Trafficking followed a public outcry following the disappearance and presumed murder of an 'antidrug campaigner'
- The Australian Government Inquiry into Poverty was 'designed to forestall the then vigorous welfare lobby' which was alerting the public to poverty in Australia
- The Royal Commission on Human Relationships was created to divert from Parliament the sensitive question of the law of abortion

Professor Sackville's thesis is that an official inquiry will rarely be able to 'dissipate the social divisions and tensions' which make an issue unsuitable for political resolution in the first place. All that happens is that the debate is focused by the report and opponents continue their ideological resistance into the Party and Parliamentary arenas.

Not all of the paper is gloom and despair. Professor Sackville acknowledges that a comprehensive and carefully reasoned report may exert a 'powerful influence' on the debate within the community 'at least in the long term'. The information it presents can be used by groups pressing for change. Some issues require more time for acceptance than others. But above all, Professor Sackville cautions that to some problems, there are simply no 'simple solutions'. Neither the criminal law nor the panacea of education will provide the universal answer to society's drug problems. No simple legislative reform or radically different approach to law enforcement, education or treatment will wind up the problem.

> "The most significant function official inquiries can perform is not to recommend short-term changes in government policy but to influence changes in community attitudes ... and to improve public understanding of the issues. ... Misconceptions are reinforced by the media and by political figures who generally respond to community concerns in ways that serve to increase levels of anxiety. Nevertheless, once conventional assumptions have been challenged, the process of changing attitudes has

> begun. Given sufficient time for the challenge to permeate throughout the community, the process may prove to be irresistible."

Of the process of law reform in Australia, the Melbourne *Age* (3 January 1980) had a few, not too sanguine opening decade comments to make. Under the heading 'Winding Road to Law Reform' the Age commented:

> "The Chairman of the Australian Law Reform Commission ... is optimistic about reforming some of the anachronistic and burdensome aspects of the legal system in the next decade. He may be too optimistic. The legal system has been going its laboured, often feudalistic way for a very long time. Proposed changes have been delayed or resisted for a variety of reasons and it is difficult to imagine the legislatures and some sections of the legal profession rushing to satisfy the reformers' wishes in so short a space of time as ten years."

Referring to the suggestion that institutional law reform to channel law reform through public debate and expert commentary into the legislative process might be one reason for optimism, the *Age* acknowledges:

> "increased public awareness of the legal system's shortcomings and ... growing support from some sections of the legal profession, especially in the area of procedural, as opposed to substantive law."

The *Age* was more cautious about the need for procedural change but agreed that the impact of computers and modern information technology would require a complete overhaul of the law of evidence, copyright, patent law, laws relating to white collar crime and so on. The scepticism about parliamentary attention to law reform, mentioned in the editorial, brings together the themes here. Professor Reid says Parliament is losing its power. Professor Wilenski said loss of political will often turns reform proposals over to precisely those who have a vested interest to oppose reform or to leave things be. Professor Sackville said that law reform references can sometimes have a less than entirely pure motivation. But once the genie is out of the bottle, the public debate will never be quite the same.

The report of the Senate Standing Committee on Constitutional and Legal Affairs, *Reforming the Law* (1979) made specific proposals for the routine processing of reports of the Australian Law Reform Commission, to avoid the perils and dangers identified by Sackville, Reid and Wilenski. The government's reaction to the Senate Committee's unanimous recommendation is still awaited. Law reformers in many jurisdictions will be watching closely the Australian suggestion for a routine procedure to process law reform reports and to beat the pigeon hole.

The Meaning Doesn't Matter?

> "The meaning doesn't matter if it's only idle chatter of a transcendental kind."
>
> W.S. Gilbert, *Patience*, I.

There are many commentators who say that one of the most pressing needs of reform of the common law is in the interpretation of statutes. Reasons often advanced, include:

- Rapid growth of statutory law in volume and detail
- Advent of the popularly elected representative Parliament, whose will should be implemented not frustrated
- Encouragement of greater simplicity in statutory language, which will only come about when judges are 'trusted' to fulfil the broad Parliamentary intent
- Bring English language laws and interpretation more into line with European and other legal systems. Continental lawyers can scarcely believe the way lawyers in our tradition confine themselves to the text and are 'blinkered' when it comes to using such ancillary material as Hansard debates and Ministerial statements.

Even in the United States, which otherwise generally follows our tradition, use of legislative materials as an aid to interpretation is largely unrestricted.

In 1969 the Law Commissions of England and Scotland proposed a modification of the rules of statutory construction. In draft clauses attached to the report, *Law Com 21 The Interpretation of Statutes,* they proposed that, in