

**THE LAW REFORM COMMISSION OF IRELAND
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI**

DUBLIN CASTLE, DUBLIN, IRELAND

TUESDAY 17 JULY 2007

**MORE PROMISES OF LAW REFORM - AN ANTIPODEAN
REFLECTION**

The Hon Justice Michael Kirby AC CMG*

AN ENORMOUS PRESUMPTION

Law is full of presumptions. Some of them are innocent enough, although often they involve quite fantastic notions to which judges and lawyers solemnly give effect.

One such presumption paid us a visit in the High Court of Australia recently. It happened in *Neilson v Overseas Project Corporation of Victoria Ltd*¹. The case involved a person from Western Australia, married to an employee of a corporation formed in Victoria, injured in a university facility in China. We all solemnly sat there struggling with the suggestion that inherited English law required us to

* Justice of the High Court of Australia (1996-) and one-time Chairman of the Australian Law Reform Commission (1975-84).

¹ (2005) 79 ALJR 1736.

presume that the applicable law of China was the same as the applicable law of Australia - whatever that might be. Justice McHugh and I dissented, not being willing to presume so much². However, the majority were untroubled. They found no offence to reason in the notion that the good people of Wuhan (although oblivious to the fact) were living under the blessings of the same law as Australia, indeed of a particular Australian State, yet to be ascertained.

I do not much like presumptions. It is a distaste that I have inherited from Justice Lionel Murphy, a Justice of the High Court of Australia who, like me, derived from Ireland³. In the end, the law (a practical business) must not lose its link with actuality and realism - and that means with the sources of its power.

Yet here I am, once again, as an Australian judge, given the privilege of speaking to a conference in Ireland, with a star-studded cast, assembled to ask questions about Irish law and Irish institutions. What a big presumption. There may be some present who will suggest that I am not practising what I judicially preach.

² *Neilson* (2005) 79 ALJR 1736 at 1744-1745 [36]-[37] per McHugh J; 1733 [203]-[204]. See also at 1741 [16] per Gleeson CJ.

³ *Calverly v Green* (1984) 155 CLR 242 at 264. cf M D Kirby, "The Power of Lionel Murphy's Ideas" in *Through the World's Eye* (2000), 127 at 140-141 citing *Stivactas v Michaletos (No 2)* [1993] NSW Conv R ¶55-683; *Brown v Brown* (1993) 31 NSWLR 582 at 595.

3.

Presumptuous though it may be, therefore, in fulfilling this invitation, I must offer some thoughts for your consideration. I do so as someone with a great love and respect for Ireland and its people and its law.

A THRESHOLD PROBLEM

If we start at the beginning, both Ireland and Australia have, at the source of their legal systems (down there with what Kelsen called his *Grundnorm*) a paradoxical feature that made law reform essential, although for a long time we each failed to see this, or denied it when confronted with its actuality.

I refer to the mighty presumption that one could pick up a body of law that had developed over nearly a millennium (sometimes in a somewhat haphazard way) and transplant it in different societies with different cultures, values and societies.

Only an Empire at the height of its political, military and economic power, as the British Empire was, could have had such a presumption as to assume that the law of the home country would be generally (almost totally) suitable for packaging and immediate transplantation into the rustic, awkward and sometimes violent societies far away in the antipodes, with indigenous peoples whose cultures, languages, values and attitudes to life and society were utterly different from those "at home".

In fairness, the "mother country" had learned some lessons as a consequence of the loss of the wealthy American settlements in the unexpected Revolution of 1776. Britain moderated somewhat the heavy-handed rule that it had tried to impose on the American settlers. It eventually adopted a more benign attitude to governance so as to avoid the irksome necessity of fighting repeated insurrections even further from home than Philadelphia had been. As the High Court of Australia was to discover in the early native title cases⁴, the colonial administrators in London were actually much more defensive of the rights and dignity of the indigenous peoples than the settlers in Australasia would often be. The settlers were pushing forward their hegemony and thus, as they saw it, the boundaries of British power and law⁵. In Australia and to some extent in Ireland, we have embraced and copied English law, despite the differences in the societies in which it then had to operate.

In part, the borrowing of English law came about originally because of the immediate need for law of some kind and the ready source that English law provided. We should not sniff at this. When I

⁴ See eg *Wik Peoples v Queensland* (1996) 187 CLR 1 at 227 quoting from the communications by Earl Gray, Secretary of State for the Colonies, to the Governor of New South Wales, Sir Charles FitzRoy.

⁵ *Yougarla v Western Australia* (2001) 207 CLR 344 at 381-383 [105]-[109].

served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, one of the constant complaints of the judges in the post-Khmer Rouge nation, was that all laws of the earlier era had been burned and destroyed. There was no written law. The Cambodian judges' solution was to telephone the Ministry of Justice for guidance on what the law should be. The solution of the Australian settlers, and sometimes in Ireland, surely preferable, was to borrow from the statute and common law of England.

In part, in the early days, this happened because of smug self-assurance that was common even when I was still young in Australia that "British justice" was the best in the world; that it expressed universal values suitable everywhere in the world as a gift of the Empire; and that the sooner the map of the whole world was painted British pink, basically, the better. The Irish Republic showed that this was not a universal belief and dissent soon spread everywhere.

Only now do we see how these approaches sometimes led to unthinking attitudes towards law; to complacency about the way imported law sometimes fell unjustly on local people; and how we ignored for so long the denial of basic respect for the differences in the culture and values of different lands.

In Australia, it took our law even longer than in most settler societies to give proper consideration to this "dimension". When it came in the *Mabo Case*⁶ and the *Wik Case*⁷, it was extremely controversial. It was sharply contested⁸. I sometimes wonder whether, without the stimulus of those decisions of my Court, the democratically elected legislatures of Australia would, in my lifetime, have faced up to the need for a new legal beginning in the relationship between the ethnic majority of settlers and their descendants and the indigenous peoples of Australia. Sometimes, the judicial branch has an important role to speak for minorities, to uphold their basic rights and dignity, and to re-express the law for those purposes. We saw this earlier in Australia in the *Communist Party Case*⁹. We have seen it since in refugee law¹⁰. Democracy involves a curious and sometimes messy interaction of majoritarian rule that still ensures respect for minorities. All of the branches of government have their different functions to perform.

⁶ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

⁷ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁸ J D Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar Review* 110; cf M D Kirby, *Judicial Activism* (Hamlyn Lectures, 2003), 2004, 50, 79.

⁹ *Australian Communist Party v The Commonwealth* (1954) 83 CLR 1.

¹⁰ *Minister for Immigration and Multicultural Affairs v Kahwar* (2002) 210 CLR 1; *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

Although English law would not be regarded as applicable in Australasia if it were unsuitable to the conditions of the colonies, all too often moral blindness, imperial infatuation, self-satisfaction and conservatism in the legal profession prevented adjustment where it was necessary. A vivid instance of this in Australia was the belated invocation, in *Dugan v Mirror Newspapers Ltd*¹¹, of the English law doctrine of "corruption of the blood" and the "civil death" of convicted felons. It was held there that Darcy Dugan, once sentenced to death, could not sue for damages for defamation because, in the eye of the law, he was already dead. He was a non-person. He had no access to the courts. His property was forfeited to the Crown. As late as 1978, a majority of the High Court of Australia found that the old English law in this respect, so offensive to fundamental notions of individual human rights, was perfectly suitable to be treated as part of the law of modern Australia. Justice Murphy was alone (as was often the case) in dissent. Ironically, now, after having abolished such common law doctrines by statute, later lawmakers in Australia are enacting new deprivations of the civil rights of prisoners¹².

¹¹ (1978) 142 CLR 583.

¹² See eg *Baker v The Queen* (2004) 78 ALJR 1483; *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519. Federal legislation was enacted in 2006 to deprive prisoners of the right to vote in federal elections. See *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), s 2(1), Sch 1, para 4, 15, 109. The constitutional validity of the law is under challenge.

The abject respect paid to English statute law shown by legislatures in Australasia until quite lately was exceeded, if anything, by the conservatism of the courts. In the antipodes more than most, there was a "slavish"¹³ copying of English decisions and laws well into the second half of the twentieth century. This was so despite the existence of multiple and well-reasoned local decisions often supporting different outcomes¹⁴.

Such was the mind lock upon those who made our laws. It was a kind of blindness to the unsuitability of unquestioningly copying conclusions reached far away, and often long ago. Little wonder that Lionel Murphy regarded the inflexible obedience to English precedents as an attitude of mind suitable for nations, such as ours, where the majority of living creatures were sheep¹⁵. Yet this was the approach that was strongly defended at the time when I was first appointed to a law reform agency. At that time, the Chief Justice of Victoria, Sir John Young, declared that there were great dangers in appointing people who were *paid* to work on law reform. According to his view, the wisest and most experienced lawyers knew that, generally, it was better to leave the

¹³ Quoting P B Carter, 1954 *Annual Law Review of Western Australia*, 68.

¹⁴ See in *In re Rayner* [1948] NZLR 455 at 506.

¹⁵ L K Murphy, "The Responsibility of Judges", Opening Address for the First National Conference of Labor Lawyers, 29 June 1979 in G Evans (ed) *Law, Politics and the Labor Movement* (LSB, 1980).

law well alone¹⁶. There are still lawyers of this persuasion, although fortunately their sun has now probably set.

Such, then, were the features of the legal system when I first joined the legal profession in the 1960s. They reflected an attitude of mind that was partly prideful, partly complacent, partly arrogant and overwhelmingly conservative. Yet at that very time, two different stimuli of great power intruded into our legal tradition. Like so many other things in those days, they came packaged for us, a gift from lawyers in the United Kingdom. Specifically, they were highly influenced by the thinking of two great judges who dominated the English bench at that time and competed for the intellectual supremacy of their notions. I refer to Lords Tom Denning and Leslie Scarman.

Denning advanced the bold idea that the judges should themselves be more active in the cause of justice, more sensitive to instances of irrationality, unfairness and outmoded principles. For him, the judiciary was divided into "bold spirits" and "timorous souls"¹⁷. Basically, he urged the judges to be more active in fixing the law up, as their great predecessors in the early common law had done. He had no

¹⁶ J Mcl Young, "The Influence of the Minority" (1978) 52 *Law Institute Journal* 500. See M D Kirby, "Are We There Yet?" in B Opeskin and D Weisbrot, *The Promise of Law Reform* (Sydney, 2005), 433 at 434.

¹⁷ *Chandler v Crane Christmas & Co* [1951] 2 KB 164 at 178; see also M D Kirby, "Lord Denning: an Antipodean Appreciation" [1986] *Denning Law Journal* 103 at 108.

time for subservience to precedent in an age of such radical social, economic and technological change. His powerful writing, his central judicial position in England, his captivating personality, his visits to our part of the world and his optimism undoubtedly had an impact on the judiciary and other lawyers in Australia in the last four decades of the twentieth century.

For Leslie Scarman, there were institutional problems with Denning's judicial approach. It depended entirely upon the chance factors of litigants, judicial personality, ability and inclination as well as cases, appeals and bench composition. Moreover, it seemed to Scarman to be out of harmony with the obligation to uphold the central role of Parliament in the reform of the law. For this purpose, Scarman embraced the idea of institutional law reform. Subsequently, he endorsed the idea of human rights legislation - basically as a stimulus in each case for the often lethargic parliamentary process¹⁸.

Generations of lawyers, in Ireland and Australia, have now grown up with leading lawyers who have acknowledged the faults and injustices of the old attitudes and the institutions as they formerly operated. Despite the efforts of the conservatives in the law, who still demand a restoration of the "former state of things"¹⁹ and media

¹⁸ M D Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 ALJ 299 at 311-315 (hereafter "Scarman Lecture").

¹⁹ cf M D Kirby, *Judicial Activism*, Hamlyn Lectures, 2004.

ideologues who want to turn back the clock, I do not believe that we will go down that path in Ireland or Australia. We have come too far. Too many wrongs, inefficiencies and injustices have been identified. The continuance of institutional law reform, at least, seems assured. However, the continuing refinement of the mechanisms of law reform is a challenge that is still before us.

Of Scarman's second essential stimulus - a legal statement of fundamental human rights - much could be said. In most jurisdictions it rides in tandem with the role of institutional law reform²⁰. Ireland was the second common law country after the United States of America to embrace the adoption of constitutionally entrenched rights. Later, at first reluctantly, Canada, New Zealand, South Africa and the United Kingdom have, in their differing ways, embarked upon the human rights enterprise²¹. Even in Australia, we have now begun this journey²². For Australians, the embrace of fundamental rights remains far from complete. Yet, although clearly relevant to our institutional malaise in law reform, this is subject for another day. Despite the critics who rail

²⁰ M D Kirby, Scarman Lecture (2006) 80 ALJ 299 at 310.

²¹ *Canadian Charter of Rights and Freedoms*; *New Zealand Bill of Rights Act 1990* (NZ); *South African Constitution 1996*, Ch 2; *Human Rights Act 1998* (UK). See I Richardson, "Rights Jurisprudence - Justice for all?" in P A Joseph (ed) *Essays on the Constitution* (1995), 61 at 69ff; G Palmer and M Palmer, *Bridled Power* (1997), 264ff.

²² *Human Rights Act 2005* (ACT); *Human Rights and Responsibilities Act 2006* (Vic).

against the embrace of human rights laws²³, Irish judges and lawyers have much to teach lawyers in Australia in respect of this legal development. Nevertheless, it will be enough for me to concentrate on institutional law reform. To consider where we have come from; where we are; and where we might be going.

THE LAW REFORM JOURNEY

Where we have come from: Anyone in doubt concerning the common resistance to law reform in the judiciary and legal profession before quite recent times needs a refresher course in the manner in which inadequacies, inappropriateness, injustice, confusion and outmoded provisions in the law were dealt with (or more often not dealt with) in earlier generations.

Where we are: The Irish Law Reform Commission was founded in the same year as the Australian Commission. I came to know and admire its first President, Mr Justice Brian Walsh. I have followed not only his work in the Commission but his marvellous writings as a Judge of the Supreme Court of Ireland. The intervening years, and the examples of Australian, British and other law reform agencies, virtually ensured the creation of a permanent, better-resourced, national law

²³ J Allan and G Huscroft, "Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts" (2006) 43 *San Diego Law Review* 1 at 22.

reform body when the moment seemed right. There was a growing appreciation, in the literature, that the major defect of the traditional part-time committees was not so much what they did but what they could not do; or do thoroughly and with proper speed²⁴. Full-time permanent commission were designed to change this.

By 2000, a certain malaise had appeared in many of the institutional law reform commissions around the world. Many of the recommendations of these Commissions were not being implemented²⁵. Some proposals, apparently too large and complex for easy parliamentary absorption, seemed trapped in the legislative doldrums. How could this be changed? In New Zealand, where the picture was similar to Australia, a thorough review of institutional law reform, conducted by Sir Geoffrey Palmer in 2000, identified the need for a new climate of opinion concerning the priorities of law reform recommendations and changes to the attitudes proper to their consideration²⁶. Without a change of attitude, Sir Geoffrey warned, the work of the Commission would suffer²⁷. The Canadian national law

²⁴ G Palmer [1986] NZLJ 104 at 105.

²⁵ G Palmer, Address to Law Society, p 2. See also J B Robertson, "Tradition and Innovation in a Law Reform Agency", NZ Centre for Public Law, Victoria University of Wellington, Occasional Paper No 11, July 2002, 2 where the author states that the implementation is "not a brilliant hit record".

²⁶ "Change needed in attitude to law reform" (2000) 541 *Law Talk* 12.

²⁷ G Palmer, Law Society Address, 17.

reform body was abolished for the second time. Others felt the cold wind of questioning attitudes.

What can be done about the apparent log-jam that remains as much an impediment to law reform action today as it was in earlier times? What can be done to address this systemic obstacle to institutional effectiveness? Consistently with our notions of a democratic and responsible parliament, it is impossible to alter the means by which law reform reports secure their appropriate share of parliamentary time? This is the central issue that requires, and deserves, our attention. Beside it, all other institutional problems of law reform seem readily capable of solution.

THE WAY AHEAD

Market response and law reform: Before offering some thoughts on the way ahead, it is necessary to dig a little deeper so as to understand more clearly the essential nature of the problem. It is certainly not one confined to the antipodes. It is found in virtually every nation. Democracies probably do better in responding to the needs of law reform than autocracies and old-fashioned dictatorships.

When I studied economics, forty years ago, a lecturer shocked our class by expressing an opinion of a kind that would now be commonplace in the writings of Judge Richard Posner in Chicago. He suggested that, in the then undeveloped democracy of Indonesia, where

the law was often out of date, difficult to find and unsuitable when discovered, corruption of officials actually played a very useful economic role in helping the economy to operate efficiently. If the legislature could not update the law, so as to keep it in harmony with society's needs and current attitudes, a little bit of corruption was a thoroughly good thing. At least it was so, looked at from an economic point of view.

This was a shocking proposition to me at the time. Yet had I been mature enough, and knowledgeable enough, I might not have been so affronted. In Sydney, just down the road from the University where I received this lecture, prostitution, gay venues, sly grog shops, off-course gambling and obscene magazines were readily available although certainly in breach then of some law or other. In the 1960s, one did not have to go to Indonesia to find illustrations of the consequences of the breakdown of the parliamentary law-making process. It was happening right under our nose.

Of course, the insidious affect of corruption cannot be evaluated solely by reference to the provision of relatively harmless goods and services prohibited by laws out of tune with market requirements. The long-term effect of corruption on society is much more serious. In fact, it should stimulate reasonably prompt attention to law reform so as to defend the law enforcement machinery of the State and the very integrity of government within it. Now, many of the laws that encouraged such corrupt practices in the 1960s have been changed; but not all. Failures

of law reform have an undoubted economic, personal and political price-tag.

Inexplicable inaction: Yet failures there are and sometimes they seem completely inexplicable and indefensible.

In *Coventry v Charter Pacific Corporation Ltd*²⁸, the High Court of Australia, in 2005, was called upon to give meaning to the provisions of the *Bankruptcy Act 1966* (Cth), s 82(2), which provided that "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy". The Court was asked to decide whether a party's entitlement to unliquidated damages for the contravention of a statutory provision, namely s 995(2) of the *Corporations Law* (Qld) which prohibited misleading and deceptive conduct in relation to dealings with securities, was a debt provable in bankruptcy. It was unclear whether a claim for damages arising under statute fell within the exception in s 82(2) of the *Bankruptcy Act 1966* (Cth), given that such a claim did not strictly arise under a "contract, promise or breach of trust".

A majority of the Court²⁹ resolved the ambiguity by a close scrutiny of the 1869 English Act from which the Australian statutory

²⁸ (2005) 80 ALJR 132 ("*Coventry*").

²⁹ Gleeson CJ, Gummow, Hayne and Callinan JJ.

provision was ultimately derived and, as well, 19th century English case law. I found that an unsatisfying approach to the meaning of an important provision of contemporary Australian federal legislation, enacted in 1966, designed to operate in the present world of Australian economic relationships. Canadian and New Zealand statute law on the subject had been reformed respectively in 1949³⁰ and 1967³¹, each in similar terms. We could not find any identical Irish laws. By the reformed laws, all demands in the nature of unliquidated damages were provable debts and thus included in the bankrupt's estate. In 1988, the Australian Law Reform Commission in the report in its *General Insolvency Inquiry*³² noted the ambiguity in the Australian statute and urged passage of legislation along the same lines as had since been adopted in Canada, New Zealand and the United Kingdom. In respect of corporate insolvency, Australian legislation had fixed the problem³³; but remarkably, not in the case of individual bankruptcies.

In the end, I came to the same conclusion as the other members of the Court, although taking my differing route through the maze of statute and judge-made law. But what a shocking waste of court time and what inefficient lawyering was involved. Why had nearly twenty

³⁰ By the *Bankruptcy and Insolvency Act* 1949 (Canada), s 121. See *Coventry* (2005) 80 ALJR 132 at 157 [137].

³¹ *Insolvency Act* 1967 (NZ) s 87(1).

³² ALRC 45 (1988), Vol 1, pp 316-319.

³³ *Corporations Act* 2001 (Cth) s 553(1).

years passed without action since the ALRC reform proposal? Why especially, given that a like reform was meanwhile enacted in the corporations field? Why such neglect and apparent indifference? Why, especially, in a matter that must arise dozens of times in any given year, add to costs and uncertainty for bankrupts, creditors, credit agencies and citizens and produce outcomes reliant on judicial reasoning from nineteenth century case law on statutes overtaken virtually everywhere else?

As judges and lawyers, we all know of many such cases. There is just no acceptable explanation for the inattention and inactivity of the lawmakers. The only true explanation is the breakdown and failure of a nation's lawmaking machinery in a highly practical, technical and (one would think) uncontroversial area of the law. Fortunately, lay clients and litigants very rarely know of such defects. If they did, they would rise in anger against the law and those who make and administer it, even more than they already do. Perhaps they would lay the blame where it properly belongs - with the officials who fail with due speed to advise governments and with ministers and members of parliament who fail to pay heed to well-reasoned law reform reports.

One can understand divisions of opinion in government and parliament, over controversial contemporary issues of potential legal reform. Such issues exist and sometimes they require a due interval of gestation before action emerges. We have recently witnessed an instance of this kind in Australia in the current political and public

controversies over the legally permissible use of embryonic stem cells for therapeutic cloning for human beings³⁴. But where there is no action, and no explanation, in an apparently innocuous area of technical law, the failure of our institutions (and of the law reform process) is maddening. In *Coventry*³⁵, I ended my reasons with these words:

"The chief point in the appeal is the need for urgent legislative action. The reforms enacted long ago in Canada and New Zealand show what can be done".

I have no confidence that these words will have any more effect than the report of the ALRC twenty years ago. The fact is that alterations to the *Bankruptcy Act* are not interesting enough. People with the relevant power just do not appear to care enough. The subjects are not political. They will win no votes. They are not part of a government's election-winning agenda. The Opposition is indifferent. The officials are not pressing for change. Nothing is done. The institutions of lawmaking are not grinding slow. In this respect, they appear not to be grinding at all.

³⁴ Following the Australian Government, *Legislation Review: Prohibition of Human Cloning Act 2002 and the Research Involving Human Embryos Act 2002*, Report, Canberra, December 2005 ("Lockhart Report"). Reforming laws were enacted by the Federal and State Parliaments.

³⁵ (2005) 80 ALJR 132 at 159 [145].

When I hear political leaders, media pundits and even some law professors who should know better denouncing Bills of Rights and so-called "judicial activism" in the name of an infantile faith in the "sovereignty" and "supremacy" of Parliament, I sometimes wonder if we are living on the same planet³⁶. Clearly, they are not being faced, as the courts commonly are, with the unattended imperfections and unjust defects of the law, including in cases where law reform bodies have recommended perfectly reasonable, well-argued, well-tried and seemingly uncontroversial reforms to the law.

A NEW ACTION PLAN

What can be done?: There are various initiatives that might be taken by permanent law reform commissions, to avoid the doldrums in which reports get lost, overlooked, forgotten, neglected or unaccountably ignored. Some of them are more attractive than others:

- (1) *Getting closer to government:* One idea suggested by a New Zealand Minister is that of getting closer to government and departmental officials³⁷. In fairness, she emphasised that this would have to be done in ways consistently with the

³⁶ Scarman Lecture (2006) 80 ALJ 299 at 311-315.

³⁷ Hon Marian Hobbs, above n 28, 2. See also "Law Reform Must be Collaborative" (2006) 662 *Law Talk* 1.

independence of the Commission and its role as a body established by Parliament.

This suggestion is a tricky one. True, appropriate liaison with ministers, their personal staff and departmental advisers, is a process that all institutional law reformers observe. Sadly, they are often reduced (in my memory) to snatched encounters in which hoped for suggestions are planted in the recipients' ears, for the most part passing through the intervening space into forgetfulness. It is not quite the encounter on the White House lawn on the way to the helicopter; but it is often not all that different.

There is no offence to independence in seizing the moment to attempt to lobby ministers and their officers to remember the claims on their attention, and parliamentary time, of law reform reports. Conferences and official dinners, book launches and even funerals, have been known to be pressed into this worthy service. But the process is delicate because no official (and certainly no judge) will want to overstep the line that marks off political territory.

This point was made to me, early in the life of the ALRC. I was desperately keen to demonstrate that the Commission was a body both practical and useful to government. For this purpose I explored ways by which we could get very close to the

departmental officials who seemed to hold the key to rapid implementation of our proposals. A very wise federal public servant, Sir Clarrie Harders, Secretary of the federal Attorney-General's Department, gave me the contrary advice. He pointed out that proximity to political power had a tendency to be contaminating. He explained why it was the very independence of the Commission that gave it a distinct voice and a viewpoint valuable because it was different and could tap new blood. With reference to the then recent and unexpected dismissal of government in Australia in November 1975, he indicated that the Commission must speak with a longer term of reference in view. In any case, what was acceptable, even desirable, to politicians and officials at one time might, under a different government, quite soon, be quite unpalatable; and vice-versa.

This was wise counsel. The ALRC has adhered to it. If it sometimes means that the Commission does not get the inside running that departmental officials can secure in ministerial attention and slots in the legislative programme, it does assure a longer term perspective. A particularly fruitful period, we found in the ALRC, was when a new government came to office. Before their own programme was ready for implementation, Bills prepared in the ALRC could be considered, adopted and found a place in the parliamentary agenda. It was in this way that the

ALRC reports on *Insurance Contracts*³⁸ and *Privacy*³⁹ were accepted by the new Hawke Labor government in 1983 and began their passage into federal legislation. This was so, although each was a major feat of legislation, a significant alteration of the preceding law and attended by various antagonistic lobbies and opposition.

- (2) *Governmental initiation*: Another suggested means of ensuring the relevance of law reform activity is to confine the tasks of an agency to references provided by the law minister of the day. Such is the provision under the ALRC statute. It is not the exclusive way in which projects may be initiated. In Ireland the Commission works on Programmes of Law reform prepared by the Commission in consultation with the public, government departments and interested parties as well as the practising profession. The Attorney-General can also provide requests to examine specific areas of law. Might there be a danger in the initiation of inquiries by lawyers who can, let us admit, sometimes become out of touch with government interests and priorities⁴⁰?

³⁸ *Insurance Contracts* (ALRC 20, 1982); cf *Insurance Contracts Act* 1984 (Cth).

³⁹ *Privacy* (ALRC 22, 1983). See *Privacy Act* 1988 (Cth).

⁴⁰ J B Robertson, "Initiation and Selection of Projects" in Opeskin and Weisbrot, *The Promise of Law Reform*, above n 28, 102 at 113.

Are there criteria that should be observed in initiating a project of law reform that does not originate in the government of the day⁴¹?

In practice, this issue may not be very significant. Most law reform bodies have a constructive official working relationship with the minister and the civil servants that assures an interchange on the subjects suitable for attention in the law reform programme. Some Ministers are bristling with proposals. Others have few ideas of their own and always rely on the commissioners for suggestions. Ministers of the latter school tend to be lethargic and apathetic (even sometimes antagonistic) about law reform reports when they come. Such Ministers can be a menace, whatever was the origin of the law reform inquiry.

In my view, there is merit in the present Irish arrangement for self-starting. It is similar in New Zealand. It allows the Commission to look into the future and to suggest programmes that are objectively important for the long-term health of the law. If those projects do not immediately appeal to the present government, they may appeal to their successors. Second guessing politicians is always fraught with danger. Naturally, law reform bodies will tend to respond most energetically to tasks suggested by the government or government departments. The prompt delivery of

⁴¹ D Baragwanath, "The Role of the New Zealand Law Commission", Occasional Paper No 2, NZCPL (March 2001).

reports on such topics may fit comfortably into the priority of the government that assigned them. The prospect of enactments based on such reports are thus enlarged. The challenge for the Commission in such matters is to retain distance and objectivity. If a quick and limited political job is needed, it is generally better that it be performed within the permanent government bureaucracy. Law reform agencies usually march to a different drum.

- (3) *Cost implications:* One possible impediment to the implementation of reform proposals is the cost that would be involved in carrying them into practice. It would be a naïve law reform agency that did not now assess the costs, financial and otherwise, of implementing its proposals for this will be the first question that potential opponents in politics and the bureaucracy will raise. In the past, the costs of the implementation of reforms have often been unspecified. In these more frugal times, with pressures for out-sourcing of formerly public activities to the private sector⁴², law reformers must be more transparent and candid in their consideration of the cost implications. A failure to be so may result in their proposals being consigned forever to the back-burner.

⁴² cf *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277; *Griffith University v Tang* (2005) 221 CLR 99.

On the other hand, costs include opportunity costs. For instance, the innovative New Zealand accident compensation scheme might seem to someone from a different country an expensive reform. However, the net savings in litigation costs and in the administration of claims disputed on common law grounds must be offset against the costs of the reform. Costs therefore include opportunity costs.

- (4) *Lawyers' law*: Should law reform be confined to so-called lawyers' law? Or should it include big projects, controversial inquiries, social investigations and politically sensitive tasks? Is there a place for the "larger more profound" tasks that have been an important aspect of the ALRC programmes over the past thirty years. There is no doubt that such big projects carry risks. Governments today are often averse to risks. The closer they get to elections, the more it is so. Yet, as I have shown, even the purest lawyers' law can sometimes prove too hard for action. A modest reform of the Australian *Bankruptcy Act* seemingly proved too difficult to digest. Like so many others, this problem presents a tricky issue. If the subject is too technical, it may be boring. If it is too controversial, it may be unacceptably sensitive. All of this suggests the need for a better, institutional procedure for consideration of reports so that they are not dependent on so many chance factors and *ad hoc* initiatives for successful follow-up.

- (5) *Draft Bills:* In the early days of the ALRC, we followed the tradition of the English Law Commission and annexed draft Bills to our reports. Certainly, that facilitated ease of implementation (with or without amendment) if the governmental will was there. The assistance of recently retired first parliamentary counsel in our work helped us in this endeavour. As well, the presence of draft legislation was an assurance that the law reformers had focussed on the practical questions and the details - and not been content with comfortable esoteric conclusions typically written in the passive voice. Resources for the hard discipline of drafting legislation are difficult to come by. But if this is to be part of the work of law reform, those resources must be made available to the Commission⁴³. As everyone recognises now, there will be instances where proposals for law reform can be implemented without the need for legislation at all⁴⁴. There is enough cluttering up of the statute book without adding needlessly to its pages. Sometimes the final conclusion of the Commission, on a hotly debated topic, may be that no change at all is justified. This was a conclusion reached by the ALRC in its major review of the adversary trial system as it operates in federal courts in

⁴³ G Palmer, "Evaluation of the Law Commission: Report for the Associate Minister of Justice and Attorney-General, Hon Margaret Wilson" (Wellington, 28 April 2000), 356.

⁴⁴ M D Kirby, "Are We There Yet?" in Opeskin and Weisbrot, (Sydney, 2005).

Australia⁴⁵. The much debated question of whether (if that be constitutionally possible) a more inquisitorial procedure could be substitute for the adversarial and accusatorial process traditional in our courts, was answered in the negative. Law reform bodies today are much more willing to conclude, without embarrassment, that the law is sometimes *best left alone*. Occasionally, the solutions worked out by courts and legislatures in the past constitute the least worst way for the law to tackle a given problem. Law reform bodies should no longer feel an obligation to deliver legislative solutions and draft statutes in all of their enquiries. An important strategy for avoiding the log-jam of legislative implementation is sometimes to examine the possibility of shifting some, at least, of the suggested changes into subordinate lawmaking designed by the Executive Government.

- (6) *Catching the wave*: An important consideration for the timely implementation of law reform reports is the need for law reform agencies to catch the wave of current governmental parliamentary and departmental concerns. These may include the growing moves towards globalisation of trade with consequences for law⁴⁶; the response to the dangers and perceived dangers of terrorism;

⁴⁵ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000). See M D Kirby in Opeskin and Weisbrot, above n 45, 438.

⁴⁶ D Baragwanath, above n 42, 18.

and the need to implement the international principles of human rights and other treaty law⁴⁷.

- (7) *Use by courts:* Sometimes, even if governments and parliaments neglect law reform reports, it is possible for judges, in discharging their own creative functions, to develop common law principles in harmony with the reasoned approach of law reform bodies. Recent investigations have shown the growing inclination of courts, particularly in Australia, to have regard to law reform reports in this way. Naturally, I frequently do so. Often law reform reports give the best and most accurate and detailed picture imaginable of the state of the law at the time of the report. The recommendations for change can sometimes, but not always, be reflected in judicial accretions where Parliament's log-jam has proved impenetrable⁴⁸.

A delegated legislative procedure: The foregoing is all very well. But it does not attack the *basic* obstacle. Neither law reformers nor judges can ultimately do so. Only legislators can achieve the change that is necessary to make the formal enactment of statutes, where that is deemed necessary, more responsive to the needs of reform in the current age.

⁴⁷ cf *Al-Kateb v Godwin* (2004) 219 CLR 562.

⁴⁸ See eg *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at 89 [104].

In Britain, with the support of the Law Commission, the Legislative and Regulatory Reform Bill was introduced into Parliament in 2006. It was designed to introduce a procedure of delegated legislation in a speedier and more streamlined way, apt to institutional law reform. Clause 3 of the Bill proposed a suggested procedure that would permit Law Commission proposals, as approved by the government, to proceed, with such amendments as the government introduces, but without substantive parliamentary debate. Under the procedure, Members of Parliament would not have been able to propose amendments.

Remarkably perhaps, this clause survived the passage of the Bill through the House of Commons. However, it then came under heavy fire in the House of Lords. The Delegated Powers Committee (chaired by Lord Dahrendorf) and the Constitution Committee (chaired by Lord Home) both condemned it. In the Lords, it was attacked by one Peer after another on the Second Reading. The general consensus was that something needed to be done to cure the problem at which the clause was targeted. But that clause 3 was not acceptable and shifted too much power from Parliament to the Executive Government in selecting reports and proposals for the limited, fast-track, legislative procedure.

In consequence of the debate the Minister (Baroness Ashton) announced that clause 3 was being withdrawn. However, she has remained in discussion with Opposition parties, cross-benchers and the

Law Commission itself to try to find an alternative procedure upon which everyone can agree. This is an institutional development many law reform bodies will be watching closely.

Obviously, the need is for a mechanism that will be applicable to appropriate, ie non-politically controversial, law reform Bills. Plainly, any such fast-track procedure would not be apt for a report on a major project (such as the entire reform of insurance contracts law); a sensitive project (such as a report on privacy law); or a politically controversial one (such as sedition law). But one would imagine that modest reforms of bankruptcy law adopted in many other jurisdictions and consistent with an analogous reform in corporations law might be suitable for such treatment.

It may be that one single parliamentary procedure for all of these issues would not be sensible or achievable. A Parliamentary Committee, or Joint Committee, in which the law reform agency could play a larger, invited, role might be one way forward. This could help the development of an effective working relationship between the chairperson of the Parliamentary Committee and the head of the law reform agency. Once established, such a Parliamentary Committee might have the potential to grow as a champion of orderly reform within Parliament. In most countries, today, there is no such reliable champion. And there are always political and professional critics.

The forces of politics, elections, media and lay interest need to be mobilised in a way better than occurs at present. Anyone in doubt about the need should reflect carefully on the institutional weaknesses that have developed in how countries such as ours are now governed⁴⁹. The legislature, as a vital, central and ancient institution, must find within itself the means to repair the institutional defects in law reform implementation. They are endemic. They are serious. They have been called to attention for at least fifty years. It is not too much for citizens to expect that Parliament and Executive Government, will look at themselves and offer real, workable solutions. It is noble for legislators to defend their institution from encroachments and to insist on scrutiny of every clause of all proposals without exception. But it is not unreasonable for law reform agencies and their personnel to point to the failings in attention, time and action and to say, in effect: Parliament, heal thyself.

If it does not, judges will sometimes try to provide changes where that is lawful, just and proper. Officials will sometimes be tempted to turn a blind eye to outmoded laws. Individuals will sometimes try to find their ways around the law. The economics of the market will try to

⁴⁹ A F Mason, "Democracy and the Law: The State of the Australian Political System" (November 2005) *Law Society Journal* (NSW) 68 at 69; J Laws, "Law and Democracy" (1995) *Public Law* 72 at 81; S Sedley, *Freedom, Law and Justice* (Hamlyn Lectures, 1998) 10; E Thomas, "The Judicial Process" (Cambridge, 2005) 49-52; M D Kirby, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty" (2006) 30 *Melbourne University Law Review* 1 at 18-19.

discover ways to circumvent the problem. Improvement of the machinery of governance is a preferable, and now an urgent, option. Yet nowhere has it been tackled with complete success. It is a major institutional defect in the law-making procedures of contemporary democracies. Only governments and legislators themselves can cure it. But is there the will?

From the judiciary and the law reform agencies of Australia, I bring greetings and congratulations to the Law Reform Commission of Ireland, meeting in this famous place. Many law reformers in Australia have been Irish by derivation. It is something of a tradition. In a way, to be Irish is to be interested in reform. History teaches the need for it. Society, technology and changing values demand it. Institutional law reform is a rational solution to a central dilemma of law itself - how to maintain the order and predictability in the law whilst making sure that it constantly evolves, changes and adapts to new times.

**THE LAW REFORM COMMISSION OF IRELAND
AN COIMISIÚN UM ATHCHÓIRIÚ**

DUBLIN CASTLE, DUBLIN, IRELAND

TUESDAY 17 JULY 2007

**MORE PROMISES OF LAW REFORM - AN ANTIPODEAN
REFLECTION**

The Hon Justice Michael Kirby AC CMG