

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

DUBLIN CASTLE, DUBLIN, IRELAND, 17 JULY 2007

LAW REFORM - TEN ATTRIBUTES FOR SUCCESS

The Hon Justice Michael Kirby AC CMG*

AN AUSTRALIAN GREETING

I express thanks for the privilege of addressing this important consultation in Ireland. For those who, like me, trace their ancestry to Ireland, the invitation could not be more precious. I am specially grateful to Justice Catherine McGuinness and to the Attorney-General, Paul Gallagher SC, for their welcome and hospitality. I pay tribute to the strong links that exist between the peoples of Ireland and of Australia and between the lawyers of Ireland and Australian lawyers.

We gather in Dublin Castle, with a history that dates to the days of King John. Not content with the Norman Conquest of England, he attempted to subject Ireland to his Lordship. In such a place, one is naturally prone to think, momentarily, in terms of commands. Not satisfied with preparing one paper for this consultation, I have also

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prepared this separate, different address. Inspired by the surroundings, I thought of calling it the "Ten Commandments of Dublin". However, I have opted for another, more modest title to avoid upsetting religious sensibilities. I wish to address myself to the requirements that institutional law reformers must observe if they are to be successful in their endeavours. Success in translating law reform proposals into effective reform of the law, is the subject that law reformers tend to dream about and to talk about whenever they get together. Dublin will be no different. Nobody wishes to waste valuable time on law reform that goes nowhere.

If, by any chance, listeners and readers of these words disagree and do not think they are worth much, I make no apology. In a very Irish way, I point out that my travel to Ireland to fulfil this invitation, was made in the course of undertaking other duties and at the cost of the High Court of Australia. So my participation is virtually costing nothing. Complaints about value for money will not, therefore, be entertained.

From the Chief Justice and Justices of the High Court of Australia, of whom four, the majority, derive from this island (and also for the others), I bring greetings and respects to the judges, lawyers and citizens of Ireland.

TEN REQUIREMENTS

1. *Be aware of fundamentals:* The first requirement for the success of institutional law reform is to be conscious of the place that the Law Reform Commission plays in the institutional arrangements of one's country.

Ireland, like Australia, is a constitutional democracy living under the rule of law upheld by independent courts. These are great blessings. We both follow common law traditions. These traditions mark our system of law out as highly pragmatic. Not for us the strong rationalistic and conceptual tradition of the civil law. Ours is a very practical legal tradition that develops law in a somewhat messy way to address particular problems. Whether this is done by parliamentary legislation, executive government rules or judicial decisions, it means that laws are laid down which may become out of date and new problems present to which the old laws give no answer.

In so far as our legal systems rely on the judges to provide new solutions to new problems, they are highly dependent on chance. In part, they depend on the inclination of the judges to reformulate the law. Sometimes a great creative judge comes along, with confidence and ability, who provides reform in the course of deciding cases. In England, such a judge was Tom Denning. In Ireland, Brian Walsh and Niall McCarthy were judges of this tradition. Bold spirits. Yet for every bold spirit there are more judges who wear with pride the banner of "timorous

souls". For them, law reform is not the business of the judiciary but of Parliament. In England, Leslie Scarman was of this view. In Ireland, Ronan Keane, past-President of the Law Reform Commission, probably held that approach. It was precisely out of respect for Parliament that Scarman helped to establish the Law Commissions in England and Wales and in Scotland. Parliament needed help. Help could be provided in the shape of institutional law reform.

The difficulty of reliance on Parliament for law reform is that many problems in need of reform are either too hot or too cold to secure Parliament's attention. In Australia, we have seen many failings and unexplained delays in the parliamentary process because of these reasons.

The report of the Australian Law Reform Commission (ALRC) that has attracted the most hits to the Commission's website is its report on *Aboriginal Customary Law*¹. That report sought to tackle the interface between the laws of the settlers and the laws of the indigenous peoples of the Australian continent. However, it has proved an extremely sensitive and hotly contested topic. In the result, there has been no comprehensive response to the Commission's report. Put bluntly, the subject is too hot. If anything, the passage of time has resulted in a growing reluctance to accord any recognition to the customary laws of

¹ *The Recognition of Aboriginal Customary Laws* (ALRC 31), 1986.

the indigenous people and a belief that some of those laws are unacceptable for application to Aboriginals who are also Australian citizens.

An illustration of a subject that is too cold is found in suggestions of the ALRC for reform of one small aspect of bankruptcy law. The law in question concerns proof in bankruptcy of a party's claim to unliquidated damages for contraventions of statutory prohibitions on misleading and deceptive conduct. The matter has long since been tidied up in the bankruptcy laws of other countries. In Australia, it has even been addressed in the analogous circumstances of corporate insolvency. However, a recommendation by the ALRC for statutory reform has so far fallen on deaf ears². It cannot be because the topic is too politically sensitive and socially disturbing. The real explanation seems to be that no one cares about it enough, so that it cannot secure parliamentary time.

Proponents who praise the capacity of parliaments to reform the law, and the operation of democracy to secure necessary reforms, often fail to recognise the serious logjam that exists in our lawmaking processes. Gaining attention for law reform reports that are too hot or too cold is a major institutional challenge for law reformers. Various suggestions have been made to address the lawmaking logjam. They

² *General Insolvency Inquiry* (ALRC 45, 1988), 316-317.

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include the provision of machinery for forms of subordinate legislation. However, such changes are slow in coming. Institutional law reformers know that this is the reality of the lawmaking setting in which they operate. It is vital that they recognise and express not only the institutional impediments that they face but also the critical importance for an effective democracy of their success.

2. *Be consultative:* The one common feature of the methodology of all institutional law reform bodies of the modern era is that they consult relevant stakeholders before finalizing their proposals. In England and in Scotland, the Law Commissions, from the outset, devised consultative documents in the form of discussion papers. However, generally speaking, in part because of the nature of the topics under review, the consultation was substantially with judges, practitioners and other members of the legal community.

When the ALRC was established it received, from the start, the assignment of projects by the Attorney-General which were controversial and sensitive. Thus, the early projects included the handling of complaints against police (ALRC 1); the redesign of the federal laws on criminal investigation (ALRC 2); the reformulation of the law on debt recovery (ALRC 6); the preparation of a novel law on human tissue transplants (ALRC 7); and so forth. Because of the nature of these projects, the ALRC reached out to a wider community. It held public hearings in all parts of Australia. It used the modern media. Consultation is the special feature of institutional law reform. It is

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therefore important that it be done effectively and that it avail itself of the most modern techniques.

What is effective depends on the nature of the law reform project and an appreciation of the purposes for which the consultation is carried out. Where a Commission is engaged in an inquiry on a purely technical subject of little human or social interest (such as revision, and proposals for repeal, of old but still applicable Imperial laws), it is unlikely that the subject matter will engage widespread public input. On the other hand, an inquiry into laws on genetic privacy or into the handling of sexual abuse of minors is intensely controversial. Designing the process of reform will take the nature of the topic of reform into account.

A main purpose of consultation is to secure information and perspectives from those who are potentially affected by any reform proposals. Yet there is another reason. It is to stimulate expectations that Parliament will address the proposals when they are made; that lobby groups with relevant interest will form and activate themselves; and that society as a whole will become more engaged in (and responsible for) the course of law reform.

There is an important principle behind the process of public consultation that necessarily goes beyond the judiciary and the legal profession. In Ireland, it derives ultimately from the concept, encapsulated in Article 6.1 of the Irish Constitution, that all powers, legislative, executive and judicial, "under God, derive from the people".

In Australia, this *Grundnorm* of the Constitution is not spelt out in the same way in our constitutional instrument. However, the casebooks recognise that the ultimate foundation of the Australian Constitution is the will of the Australian people. Thus, it is not now, as such, the fact that the Constitution was originally annexed to an Imperial statute of the Parliament of the United Kingdom³.

The value of an attitude of consultation is that it helps to supply information and stimulus to the preparation of the Commission's report. But it also assists in detecting mistakes or oversights in reform proposals. It affords a kind of insurance against inaction or the build-up of resistance or the forces of inertia. The Commission's consultations in Ireland, before this one in Dublin, that have already taken place in Galway and Cork indicate the corrective value of the process in which we are engaged. As reported, the earlier consultations have identified areas of the law which those members of the public attending have called to notice in the fields of family law, criminal law, planning law and the law of genetics.

Many lawyers give a disproportionate focus of attention to issues of commercial law - largely because that field of law can usually pay to attract the best legal minds having regard to the money at stake. However, it is important to consult the general community to be

³ See eg *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485, 486; *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

constantly reminded of the significance of those areas of the law (sometimes professionally unfashionable) which are of true importance to most citizens.

Demands are sometimes made for the appointment of non-lawyers as members of law reform agencies on the footing that law is too important a subject to leave to lawyers, certainly alone. There is some truth in this. As in Ireland, the ALRC can be constituted to include non-lawyers. When the initial Commission was established in Australia in 1975, one of the five foundation Commissioners was Professor Gordon Hawkins, a criminologist who was not specifically legally trained. Generally speaking, however, the ALRC has found it sufficient to appoint panels of consultants with a range of non-legal skills and to engage in widespread consultation with the legal profession, the public and interested groups and organisations. In Commissions that are few in number, the need for trained lawyers of high capacity at the helm often effectively excludes the appointment of Commissioners with different skills. But that should not silence such viewpoints in the Commission's deliberations.

3. *Be empirical:* From the earliest days of the ALRC, the Commission adopted an empirical approach to its work. Thus, in the early work on criminal investigation, the Commissioners travelled in police vans; they went to the remote parts of the country to see law enforcement in operation; and they included consultations with

vulnerable groups such as Aboriginals, migrants with languages other than English and children.

Similarly, in the investigation of debt recovery, the ALRC worked closely with debt counsellors and participated in telephone "hot lines" to observe typical cases of people, in the credit society, who got out of credit depth. In the project on sentencing of federal offenders (ALRC 15), the Commission undertook the first major national survey of Australia's judicial officers to secure their perspectives. It also consulted prisoners and legal practitioners. In the project on privacy protection (ALRC 22), the Commission worked closely with computer interests and with credit reference organisations and surveillance bodies so as to understand the practical problems of protecting privacy in the current age.

One weakness of the common law legal system is its attraction to verbalism. Often, issues are reduced to verbal formulae which mask the real difficulties of legal regulation. In an age of science, law reform itself needs to be more scientific. It needs to tackle the actual issues that are presented for regulation in society. This will be done more effectively, with more long-term solutions, by a close examination of how the law works on the ground. Hunch, intuition, guesswork and verbal formulae are imperfect foundations for effective law reform. Empirical research can, of course, be expensive. But it is essential to the achievement of lasting reform of the law.

4. *Be international:* Just as the economy, the internet and technology have become increasingly global in recent decades, so ideas in the law are increasingly global in their dimension. In part, institutional law reformers can take advantage of the work done elsewhere in the world because many of the problems faced in countries such as Ireland and Australia are very similar to those faced in other English speaking democracies.

I was pleased, on my arrival in Ireland, to learn how the review of pre-1922 laws in Ireland has been able to draw not only on useful work performed on the same subject in the United Kingdom but also upon similar projects on Imperial Act applications, carried out in Australia. Thus, work by the Tasmanian Law Reform Commission was specifically mentioned for its utility to the project of the Irish Commission⁴. By use of new information technology, we can sometimes draw on projects of law reform conducted far away.

Moreover, some new topics of law include those which are of general application and which require fresh thinking. When the ALRC received its reference to prepare a report on the protection of privacy in Australia, this coincided with the establishment of an Expert Group of the Organisation for Economic Cooperation and Development (OECD) in Paris. I was elected Chair of the OECD Group. It produced Guidelines

⁴ See also ACTLRC (1973); NSWLRC 4 (1967); SALRC 54, 55, 59, 61 (1980); VSLRC D4 (1922), VSLRC D3 of 1978).

which ultimately afforded a basis for the Australian federal law on the subject (as for the law of New Zealand, Japan, the Netherlands and elsewhere in the OECD). With many new topics, we cannot perform the task of reform on our own. The integration of technology and the economy oblige us to work closely with colleagues in other lands. Increasingly, institutional law reform is assuming an international and regional dimension.

We must be aware of how technology itself is changing legal problems and presenting new ones. Thus, the High Court of Australia had recently to consider the operation of security mechanisms in a playstation distributed world-wide by an electronics manufacturer⁵. The inbuilt code effectively sought to bypass local law because it operated directly on the relevant technology. Ensuring that global technology is accountable to the democratic process is a major challenge that is before us. The nature of law is changing. Law reformers must be alert to this dimensions, and aware of the limitations, that now exist on purely local regulation of some global activities.

5. *Be realistic and flexible*: From this consideratio it follows that it is important for law reform agencies to undertake a mix of projects. Some such projects need to address the subject areas that tend to get neglected in the Departments of State, simply because their

⁵ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193.

officials work under the tremendous pressures of political demands and administrative burdens. The long-term review of old statutes is a case in point. Such subjects certainly fall into the "too cold" class.

Apart from these, there are other topics in the "too hot" class which can often be handled more effectively and expeditiously by a law reform agency. In Ireland, the problem of institutional sexual assault has been investigated by the Irish Commission. It has addressed the problems of process and the institutional questions presented by the very large number of cases. It has extrapolated from the experiences recounted to it. It has been able to tap individual and community concerns in a way that a department might not so readily be able to do⁶.

In addition to a mix of projects, a law reform agency must be able, where necessary, to respond to urgent tasks and to produce reports quickly. Sometimes a particular project, where public consultation would be useful, may be deemed suitable for an urgent inquiry by a law reform body. If a Commission can respond promptly and effectively to such needs, it can mark out for itself a most useful reputation that will make it precious to the lawmaking process and helpful to its institutions.

6. *Be independent:* The major pressure of all organisms is to survive. In a world of economic prudence and constant institutional

⁶ See C O'Mahony, "Setting an agenda for the next decade" (The LRC of Ireland), *Reform*, ALRC No 90, 2007, 68-73.

scrutiny, law reform agencies need to demonstrate all of the time their utility to the body polity. This necessity sometimes put pressure on them to work closely with government officials. It is here that care must be observed not to endanger the independence of the agency and to keep a distance both from politicians and officials.

Soon after I was appointed to the ALRC, I conceived of a way by which we could ensure that the reports of the Commission were quickly passed into law. It involved, effectively, embedding the ALRC in the federal Attorney-General's Department. In this way, I hoped to break the logjam which earlier law reformers in Australia had reported in translating their proposals into action (or at least securing consideration for them).

A wise federal official, Sir Clarrie Harders, Secretary of the federal Attorney-General's Department, cautioned me about this plan. He suggested the need always to ensure an appropriate product differentiation between the Commission and the Department. If the Commission were not distinguishable from the Department, he pointed out, it would risk abolition on the ground that it should be subsumed in the Department and the relevant cost savings secured.

The need for independence, and for such product differentiation, helps to define the type of project that is suitable to be undertaken by a law reform agency. Of its character, the project will be one appropriate for an independent body. Thus, if a project is extremely political, in the

partisan sense, it will often be unsuitable for inquiry by a law reform agency. In such matters, governments will naturally, and legitimately, want to influence the outcome. They will commonly be unable to restrain their desire to do so. Or, they will ignore the resulting report if it does not fit within their political agenda.

Where projects of this kind are under contemplation, it will usually be appropriate to limit the participation of a law reform agency to any particular aspect that has a technical character, leaving large political decisions to be made, where they should be, by the politicians themselves (advised by their officials).

7. *Be useful:* In most law reform agencies, usefulness is guaranteed because of the capacity of the Minister to control the projects upon which the Commission is engaged. Thus, in the ALRC, the Minister controls those projects by the statutory requirement limiting the Commission to work on "references" given by the federal Attorney-General. In reality, there is always detailed conversation between the Minister and the ALRC concerning the suitability of a "reference" and the terms that it should take.

The Irish Commission is not limited in a similar way to such references. It devises its own Programme in consultation with the public. However, in practice, it needs to secure the approval of the

Attorney-General and Government for its programme⁷. The net result is therefore, in both cases, a necessity of consultation and a programme of law reform that has secured the consideration and approval of the relevant Minister.

Utility is important because, if it is missing, there is an ever-ready possibility of abolition. A number of law reform agencies in Australia have been abolished (including the Victorian Law Reform Commission and the Tasmanian Law Reform Commission) only to re-emerge later in a like, or different form.

One of the dangers of self-starting is that, unless there is close liaison with Government, a Commission may work on projects that are seen as objectively important for the law but on tasks that are of no interest to the Government of the day. Moreover, governments change. The Canadian Law Reform Commission had a capacity to determine its own programme. With the recent change of Government in Canada, the Commission found itself defunded. Effectively, for the second time, the Canadian Law Reform Commission was abolished. The statute establishing the Commission remains on the books. But the Commission is not functioning. This demonstrates the vital importance of treading the narrow path between institutional independence and

⁷ R Keane, "Thirty Years of Law Reform 1975-2005" (The Law Reform Commission, Dublin, 23 June 2005).

winning the respect and appreciation of changing governments and officials who control the lawmaking agenda.

8. *Be patient:* Sometimes law reform takes time and occasionally it follows an unexpected path. Thus, although the ALRC report on *Aboriginal Customary Law* has not been followed by comprehensive legislation to implement its proposals, there is no doubt that the report, and the most extensive process of consultation that preceded it, contributed to a change in the *Zeitgeist* of Australia concerning the relationship between Aboriginals and the law.

Thus, that relationship was on the agenda of extensive public, judicial and legal consultation and discussion for a decade before the High Court of Australia decided *Mabo v Queensland [No 2]*⁸. It was in that case that Justice Brennan, writing for the majority of the Court, led Australian law to a new legal relationship with the indigenous people of the continent. Specifically, the High Court of Australia re-expressed the common law so that it would recognise the claim by Aboriginals to their native title to land, save where an incompatible interest in that land had been established by law in another person. Law reform, thus, sometimes operates in mysterious ways. Although not enacted by Parliament, the change adopted in *Mabo* was profoundly significant. Some part of the credit for preparing the way must belong to the ALRC report that preceded the *Mabo* case.

⁸ (1992) 175 CLR 1.

Occasionally, a law reform report will propose that no change be made to the law in question. This was the outcome of the ALRC inquiry into the federal justice system in Australia (ALRC 98). Sometimes, the very conduct of an inquiry can result in self-examination by the stakeholders so that they implement, voluntarily, protective mechanisms that fulfil the needs to safeguard persons at risk.

This happened in Australia in the ALRC's inquiry into the privacy of genetic data (ALRC 96). In the very course of that inquiry, the Australian insurance industry came to appreciate the need for new regulations and voluntarily implemented mechanisms to protect the privacy of those insured.

Sometimes law reform can be achieved on a change of government or of the Attorney-General. Thus, when in 1983, the Hawke Government was elected in Australia, the incoming Attorney-General was Senator Gareth Evans QC. By chance, he had been one of the Foundation Commissioners of the ALRC. He telephoned and asked for my "wish-list". I commended to him the reports on insurance contracts (ALRC 20) and privacy (ALRC 22). In due course, legislation on each of these topics was introduced, considered and enacted by the Federal Parliament⁹.

⁹ *Insurance Contracts Act 1984 (Cth); Privacy Act 1988 (Cth).*

On a change of government, the incoming administration sometimes has vacancies in its legislative programme which can be filled by a law reform report awaiting attention. Moreover, sometimes a new and energetic Minister takes the helm with the intellectual capacity, interest and commitment to law reform that is necessary to translate a report (or so much of it as is approved) into law. I observe that the recent elections in Ireland have produced a new government and new Attorney-General. Now may be a good time for the Irish Commission to strike.

9. *Be lucky:* An important ingredient in law reform implementation, as in life generally, is to enjoy good fortune. Every law reformer long in office lives through periods in the doldrums which then give way to fair weather and helpful winds.

I have known Attorneys-General with a strong commitment to law reform and those who are much less interested. Likewise with departmental officials. Institutional arrangements in a democratic nation should not depend on such chance factors. But this is the reality of life.

When, therefore, a law minister comes along who has an interest in law reform, it is a precious time in the life of a law reform agency. It is necessary to make the most of it because I have known ministers and officials over the years who are not only indifferent to institutional law reform but even antagonistic. The secret is to know the difference and

to take advantage of good opportunities when they happily occur. *Carpe diem.*

10. *Be confident and bold:* I grew up in Australia in a peaceful and democratic country living under the rule of law. However, it was a country with many blemishes, as we can now see.

There was prejudice and discrimination in some circles against Roman Catholics and differentiation in support for children attending Catholic schools. There was abiding discrimination against those who did not fit into the ideal of White Australia. There was discrimination against Aboriginals, apparent on the face of the Constitution, evident in the denial of land rights and repeated in the story of the Stolen Generation who were removed from their Aboriginal families for no better reason than that they had fair skin.

There was also prejudice against Islamic people and, in some circles, against agnostics. There was serious disadvantage facing women. And as for homosexuals and other minorities, there were criminal offences until quite recent times.

This consultation in Dublin coincides with the fiftieth anniversary of the *Wolfenden Report* in Britain. A Committee of Inquiry, chaired by Sir

John Wolfenden, delivered its report¹⁰ and recommended abolition of the criminal laws against adult private consensual homosexual conduct. The changes in the law did not come immediately. They took time and sacrifice. In Ireland, I pay tribute to two fine Irishmen who fought against the discriminatory laws. I refer to Jeffrey Dudgeon (in Northern Ireland) and Senator David Norris (in the Republic).

I congratulate the Irish Commission for its report on *Cohabitants*. I was pleased to see the affirmative commitment by the Taoiseach on the new Government's intention to introduce laws to follow up that report. It is a sign of the progress that is being made that one can see such changes happening in so many countries and the prospect of change in Ireland.

I have followed these changes because of my own sexuality, just as I followed publication of the *Wolfenden Report* fifty years ago when I was eighteen. If one has never suffered from the sting of discrimination, the needs for law reform can often seem theoretical, dubious, non-urgent. But if one has been on the receiving end of discrimination in the law and in society, the needs for law reform become more apparent. The commitment to the orderly reform of the law becomes more urgent.

¹⁰ *Homosexual Offences and Prostitution* (Cmnd 247) HMSO, 1957 (UK).

Against the background of the injustices that I have witnessed in my own much blessed country during my lifetime (which we are now, I hope, tackling) it is necessary to ask: What are the injustices to which we are still blind today? Who are those who are on the receiving end of injustice whose plight we should hear and whose wrongs we should address?

A reflection on these thoughts calls attention to the last requirement of effective law reform. It is essential to have law reformers who are strong, courageous and bold. They should be truly committed to the principle of equal justice under law. Where the cause is just, they should stand and be counted in every proper way. They should use their reports, rational arguments and community involvement to ensure that proposals for reform are addressed and considered by the lawmakers.

WISDOM, TRUTH AND JUSTICE

In opening this consultation, the Attorney-General, Mr Gallagher SC, reflected on the need for law reform to be committed to wisdom, truth and justice. I endorse those values. In my experience, they are the guiding stars of law reform agencies throughout the world.

I hope in these remarks, I have identified some further qualities which, if they are availed of, will ensure the effectiveness of institutional law reform. To the Law Reform Commission of Ireland, in the land of my

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forebears, I offer respects and encouragement in the success of their noble mission.

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The Hon Justice Michael Kirby AC CMG