

2/13/70

Sixth Supplement to Memorandum 69-124

Subject: Function of Law Revision Commission

Attached is the final page of a long law review article--Conacher, Law Reform in Action and in Prospect, 43 Australian L. J. 513-529 (1969). Mr. Conacher is the Deputy Chairman of the Law Reform Commission of New South Wales.

The article consists of a paper by Mr. Conacher, comments on the paper by eight commentators, and, finally, Mr. Conacher's reply to the comments. The portion attached to this supplement is Mr. Conacher's reply to the comments.

His reply is interesting because it deals with two matters that have troubled the California Legislature. First, "the fear that a law reform commission might appear to dictate to parliament." Second, the fact "that many matters of law reform are not matters solely for lawyers."

With respect to the first matter, Mr. Conacher states that he believes that the legislative body does consider the policy question but, at the same time, does rely on the commission to draft legislation that carries out the policy and accepts the legislation without detailed examination because the commission members know more about the subject than anyone else.

With respect to the second question, Mr. Conacher concludes that, unless the matter is one within the unique expertise of lawyers, the matter is not a suitable subject for the law reform commission.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

Those three dilemmas are always in the minds of people engaged on this task and the answer must be to get good men to work them. It all depends in the end on the human element. If one has first class men at the top you have the confidence of the government and you get a good result but the strain and the stress is always going to exist between these considerations.

MR. CONACHER (in reply): I do not propose to reply on all the points which have been raised, but only to deal with some which I feel do call for a few further words. Mr. Brinsden expressed the fear that a law reform commission might appear to dictate to parliament. This is certainly not so with us in any formal sense. The government through its Minister, the Attorney-General, asks us to work on some subject matter, we make a report which gives our recommendations, the Attorney-General as contemplated by our Act of parliament tables our report in parliament and if the past can be any guide to the future there will surely be a lapse of months before legislation is introduced—if legislation is introduced to carry into force the recommendations. It would be quite laughable to suggest that a body like ours could dictate anything to them. There is one aspect which has sometimes given me at least some concern but it is not confined to a law reform commission. It is the position of power which any expert body or expert person has. The parliament of New South Wales has recently passed a Statute of Limitations, verbatim in the form that we recommended. We had made our recommendations after we had spent many man years of work on the subject. I hope I will not be thought arrogant if I say that I think we know more about it than anyone else who had any concern in the legislation. In that sense,

parliament may find itself doing what we say because the vast majority of members of parliament are not in a position to say that something else would be better. That is not the situation that I like; it gives me considerable anxiety; it is something like advising a client to embark on one course which may lead the client into trouble with the client not fully appreciating the consequences of the advice. That is a *de facto* dependence of parliament on what we say. I think it is a necessary one and it is one that, without liking it, we have to put up with.

Several speakers have said that many matters of law reform are not matters solely for lawyers, and the remedy is put in two forms, one that the Law Reform Commission should have members who are not lawyers, the other is that the Commission should consult with others outside the Commission. As to the first for my part I think it would be unwise. There are many things that are expressed in Acts of parliament which do not depend on lawyers' views. There are many things that can be changed in Acts of parliament on the advice of persons other than lawyers. But in those cases it seems to me that it is not a job for a Law Reform Commission. As to the other matter of consulting outsiders, hitherto we have not made it our practice to do so, but it is open to us to do so and, no doubt, when we think it right we will do so. Certainly we did do so to a minor extent in our work on the law of infancy but that report is not published at present so I should not go into any detail on it. As to the matter of taking evidence or hearing the view of experts in a more formal way, our statute, expressly contemplates that and gives us the powers of a Royal Commission under our *Royal Commissions Act*. Those powers are there, it is just that so far it has seemed to us that the occasion for their use has not arisen.