EDUCATION DEPARTMENT OF VICTORIA

CAMBERWELL HIGH SCHOOL

DR A V G JAMES LECTURE 1983

TEENAGERS AND THE LAW

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The Hon Mr Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission

DR JAMES AND PUBLIC SCHOOLING

I am honoured to deliver the 1983 Lecture named in honour of Dr Albert James. The Lecture Series was established on the occasion of this School's 40th Anniversary in 1981. Dr James was the foundation Headmaster of this School. He was born almost exactly 100 years ago, in August 1882, into the very different world of the high noon of Empire. In the manner of those times, he was appointed a school 'monitor' in September 1899 in the State's school system. In March 1901 he became a pupil teacher on probation. He spent his early years qualifying himself in gymnastics, Euclidean music, the new-fangled electricity and magnetism. He started a degree, part-time, at the University of Melbourne and continued his university studies for about 20 years. His early teaching assessments were sparing. One, in 1902, described him as 'somewhat improved'. However, a later report declared that he was 'inclined to wander a little'. I hope I will earn the first award from this audience and be spared the assessment 'he wandered a little'.

In 1927 Dr. James went to the Continuation School, staying with it when it became Melbourne High School. He was appointed to a number of country headmasterships. For a short time he was headmaster of Camberwell but then the school was taken over for wartime defence purposes. In February 1945 he resumed duties as headmaster of this school. His permanent service in the department finished in 1947, though he continued work as a temporary teacher for some time afterwards.

How apt it is that we celebrate the life of this fine public school teacher. How many other unsung heroes and heroines of public education deserve recognition in this way? I am myself a product of the public school system in New South Wales, from the local State kindergarten through what was called an opportunity school and on to Fort Street High School. I often reflect upon my debt to my teachers.

From time to time I revisit my own high school. The honour boards at Fort Street High bear the names of famous and influential public figures of our country : Edmund Barton, the Evatts, Barwick, Spender, Kerr, Wran and so on. In celebrating Dr James, we pay tribute to the past and present educators of the public school system in Australia. They still attend to the intellectual awakening of the overwhelming majority of Australia's schoolchildren — 67% or thereabouts. As in any profession, there are lapses and failures. Doubtless there are things to be improved. But I am sure that everyone associated with the public school system will be pleased to know of the commitment offered by the new Federal Government and the new Federal Minister for Education, Senator Susan Ryan, to public education.

And do not let people call them 'government schools' or 'State schools'. These expressions can too easily become pejorative words : suggesting that somehow the public schools are merely part of an anonymous bureaucracy or somehow associated with the government of the day. They are rightly and accurately called the 'public schools'. The other systems are systems of private education. Wrongly, I believe, some of these have borrowed the term 'Public School'. But only the public schools such as this and the one I attended are properly so described. They alone are available to all members of the public, regardless of race, religious affiliation, intellectual attainment, parental acceptability, social status or the other indefinable qualities that are preconditions to entry into private and religious schools. There is certainly a place in Australia for variety in education, as in other things. But let not the private or religious schools presume upon the adjective 'public'. That is the promise of the school system of the overwhelming majority of Australians. It is a proud adjective. And it should be zealously guarded. Public schools are the schools for all : including the poor, the underprivileged, the agnostic, the non English-speaking migrant child, the Aboriginal and the average child — as well as the alert achiever and the intellectually privileged.

THE LAW REFORM COMMISSION

I must set the context for my substantive comments by telling you something about the Australian Law Reform Commission. That Commission was established in 1975. It is a small, permanent, national body with functions to advise the Federal Attorney-General and Parliament on the reform and modernisation of Federal laws. It works only on tasks specifically assigned to it by the Federal Attorney-General. Under three successive governments and seven Attorneys, the Commission has addressed with painstaking care the problems assigned to it. Just to listen to the variety of tasks given to the Commission will indicate the kinds of challenges that stand before the Australian legal system today:

* How should we handle complaints against the police?
* How can we modernise procedures of criminal investigation, including (for example) by the use of tape recording of confessions to police?
* Should we have random breath tests and how else can we combat the shocking toll on the roads?
* How do we modernise the law of debt recovery, to tackle the basic problem of credit incompetence and innocent loss of income?
* How should we define 'death' in terms of brain function? What laws should be made for human tissue transplantation?
* What reforms are needed in our defamation laws?
* How do we translate the vague constitutional promise of 'just terms' into specific and practical protection, for people who have their property compulsorily acquired by the Commonwealth?
* What protection should there be for privacy in the conduct of the national Census?
* How do we introduce greater uniformity and consistency in the punishment of Federal offenders?
* Should there be regulation of insurance brokers?
* How do we modernise the law of insurance contracts to make it more appropriate for the age of consumer insurance where, try as the law might, people will simply not read their policies?

In addition to those reports of the Commission, we are presently working on a varied program of great importance for the legal system of Australia:

* The development of new laws for the protection of the privacy in Australia in the age of the proliferation of computers, surveillance devices and telephonic interception.
* The development of new laws of evidence in Federal courts, in order to make these courts more understandable to the litigants, efficient and modern in their procedures.
* The recognition of Aboriginal tribal laws, in order to prevent Aboriginal Australians from suffering a double punishment, first under our system and then under their own.
* The examination of the law on 'standing' and the development of class actions in our courts.
* The examination of new laws on Admiralty jurisdiction so that Australian courts will no longer be 'colonial courts of Admiralty' — which is their present legal position.
* Modernisation of laws on Sovereign State Immunity and Service and Execution of Process.

These large programs, any one of which in North America would probably command a research team of 30, must be tackled, in Australia, on the cheap. The total staff of the Australian Law Reform Commission is 20 officers only. There are 11 Commissioners, of whom only four are full-time. So the working unit for the efficiency audit of Australia's Federal law is very small indeed.

Small it may be. But, happily, the Commissioners of the Australian Law Reform Commission are lawyers of distinction, importance and influence. Among the past Commissioners has been Sir Zelman Cowen, Sir Gerard Brennan (a Justice of the High Court), Mr John Cain and Senator Gareth Evans. Senator Evans was one of the foundation Commissioners of the Law Reform Commission. He is now the Federal Attorney-General. At the age of 38 he brings his enormous energies and powerful intellect to the tasks of legal and constitutional renewal. He has not forgotten his early work in law reform. In the law and justice policy of the new Federal Government, there are numerous commitments:

* To implement the unimplemented reports of the Law Reform Commission.
* To provide an immediate increase in the resources of the Commission.
* To ensure better parliamentary processing of law reform reports.
* To establish new national machinery to help promote uniform law reform and a better use of scarce resources.

Changing the law does not, without more, improve society. At the same time, changing the law can remove injustices. It can also help to educate society and to promote a more tolerant, equal and kindlier community. I am sure that Dr James, through whose hands passed so many lively young Australian schoolchildren, would applaud the optimistic notion which lies at the heart of the law reform ideal. It is a notion that the law can play a part to improve our society and its people.

TEENAGERS AND THE LAW

I must now come to my assigned theme of 'teenagers and the law'. I must do so quickly lest, unlike Dr James, I am condemned not for tending to wander 'a little' but for actually wandering 'a lot'. The general law on children is, by the Australian Constitution, the responsibility of State Governments and Parliaments. I am a Federal officer. Accordingly the involvement of the Australian Law Reform Commission in this topic has been limited. However, two projects issues, relevant to young people and the law, came before our notice:

* Privacy. The first was as a consequence of an enquiry into the law on privacy protection. This project is being led by Professor Robert Hayes. The Commission expects to deliver a general report on privacy protection before the middle of 1983. The report will address many imporant and topical issues, including increasing powers of entry on to your property by government officials, the maze of developments of intrusive listening and optical devices and the growing computerisation of personal data, with its potential for privacy intrusion. It was in this lastmentioned connection that an issue of teenages and the law arose. One of the key provisions in privacy protection laws overseas has been the enactment of a statutory right of access to data about oneself. Australian privacy laws will follow the same course. But what is to be done in the case of a young 'data subject'? What is to happen in relation to a claim for parental rights of access to private records about a young person held either by a school or by a doctor or some other confidant? The Australian Law Reform Commission, in a discussion paper[1], suggested that a three-pronged approach should be taken:

** to the age of 12 there should be an absolute right of access by parents;

** from the age of 16 there should be no such right, without consent of the child and therefore the only person to exercise the right of access should be the child himself or herself;

** between the ages of 14 and 16, it should be left to the record keeper, whether doctor, teacher or otherwise, to decide whether or not to permit access by a parent to a child's secrets.

Never has a proposal by the Australian Law Reform Commission generated such anxious responses. Thousands of letters were sent with petitions signed in churches and elsewhere claiming that the Commission's proposal was destructive of family life. Certainly, the proposal has had to be modified in the report which is now in draft form. The issue illustrates the difficulty, sometimes, of reconciling parental and children's legal rights. The fervour of some of the criticisms of the Commission's proposal was surprising in its passion. Overwhelmingly it came from parents.

* Child Welfare. The second project of the Law Reform Commission which has involved the law and teenagers was the report on Child Welfare laws in the Australian Capital Territory.[2] That project was led by Dr John Seymour of the Australian National University. It involved a major review of the child welfare laws of the ACT. It recommended new police procedures for dealing with child offenders, a new specialised court, the establishment of a Youth Advocate, the

abolition of procedures charging a child with being neglected and the substitution of care proceedings, new regulations on child employment, strict laws on child abuse and detailed proposals for regulation of child care services. The report is a hefty tome. In the time available to me it is not possible nor appropriate for me to summarise the 146 recommendations that were made. Instead, I will take a few specific items of the law and young people, in the hope that they will illustrate the importance of law reform to young people.

THE PROBLEM OF AGE

We derive our general legal system from England. It was not until quite recently that children attracted special legal treatment in the English system. The child welfare laws of this century extended enormously the legal regulation of the conduct of parents, guardians and children. However, the 'age of consent' was coined from judicial practice which developed from an Act passed in the rein of Philip and Mary.[3] This Act was passed by the English Parliament 'to prevent the taking away or marrying maidens under 16 against the consent of their parents'. As one author has pointed out, the place and occasion for the passing of the Act were quite different from the social conditions of today. Yet the provisions of that faraway statute, and the age of 16 it fixed, remain, in one form or another, the law in all of the Australian State criminal statutes.[4]

The next significant mention of children was the 1600 Poor Law, which imposed a duty on parents to look after children. Needless to say this was not for the benefit of the children; but to ensure that the parishes could be reimbursed for expenses incurred in operating poor houses to which abandoned and penniless children were sent.[5] Not too many bleeding hearts in 1601.

Other laws and statutes developed, until today, the law governing young people is mountainous and in something of a mess. The position is true generally throughout Australia. Take the following ages, relevant specifically to the law in the ACT, listed in the Law Reform Commission's report:

6	The age at which a child must be enrolled at school.
8	The age of criminal responsibility.
10	The age at which, subject to parental consent, a child may effect an insurance policy on his own life.
12	The age at which consent to adoption must be secured.

14	The age at which a child is presumed to understand the wrongs of a criminal act.
	The age at which a boy is presumed to be capable of sexual intercourse.
	The age at which a child must be heard in custody or access proceedings in the Family Court.
	The age at which a girl may be given judicial authority to marry.
15	The school leaving age.
16	The age at which, generally, a girl may give consent to sexual intercourse
	The age at which a boy may be given judicial authority to marry.
	The age at which a child becomes eligible for unemployment benefits.
17	The age at which a driving licence may be obtained.
18	The age of majority and voting.
	The age at which a person may make a valid will.
	The age at which it is no longer possible for the Family Court to make a custody or access order.
19	The age at which a young person is liable for registration under the National Service Act.
21	The age at which a young person is entitled to be registered as a tax agent or Minister of Religion.
	The age at which a young person is qualified to be a Member of the House of Representatives under the Australian Constitution.
	The age at which the Minister for Immigration ceases to be the guardian of immigrant children.[6]

This wilderness of different ages fixed for different legal purposes may have some basis in rationality. For example, mere uncomplicated puberty may very well come before that degree of sophistication that is required to understand the Byzantine nature of Australian politics sufficient to vote. Perhaps it is rational to have a younger age of consent for sexual matters than the age for voting. But for many people, given the differing ages at which young people mature and the general tendency for them to mature earlier than in recent times gone by, the differing ages fixed by statute seem to have little connection with modern reality.

Sometimes the arbitrary fixing of age can work unfavourably for the young people whom the law is purporting to protect. Take for example the provision which allows a man to be convicted of unlawful carnal knowledge if he has sexual intercourse with a girl who is under the age of 16. Neither the consent of the girl nor mistake as to her age could, at common law, assist the man unless the girl could be shown to be a common prostitute. Derivation of this provision is to be found in the Act of 1557 when the

'deflowering' of a young heiress was tantamount to her ruin because she could not afterwards make a good marriage. One suspects that the purpose of the statute was more to protect the family estate than the decent feelings of a young woman or even public morality.

The Australian Crimes Acts contain the offence of carnal knowledge framed in similar terms. In some jurisdictions the criminal law even protects young women who are older than 16. Consider the case of Bulan:

> A male aged 28 picked up in his car the girl aged 17 years 11 months who asked for a lift home. The girl made sexual advances and intercourse resulted. The girl was fully developed; but retarded to the extent of having the mental age of a child of about five years. This fact would have become obvious to an average person after a conversation of five minutes. The defendant was charged under the special provisions of the Victorian Crimes Act s.50. He was convicted. His sentence of imprisonment for nine months was reduced to one of four months by the Court of Criminal Appeal.[7]

This case should be mentioned because many people think that the only relevant 'age of consent' is 16. As is so often the case in the law, things are more complicated. Most jurisdictions do restrict statutory rape for females under 16. But Victoria has a special virginity protection crime which applies when a female is aged between 16 and 18. Victorian males above the age of 21 years face a penalty of 12 months' imprisonment if they have intercourse with a female who has not previously had intercourse. Her consent is no defence. The offence is rarely charged. But it still remains on the books. The Court of Criminal Appeal reduced the trial judge's sentence from nine months to four months because it considered it had been too close to the maximum permitted for the offence. But in a world of changing sexual morality, some might be surprised to learn of this law and of this case. Probably no-one was more surprised than the prisoner. I doubt that his discovery of the intricacies of the law would have become excited by the knowledge that his offence could be traced in legal history to the reign of the first Queen Elizabeth and to the protection against 'deflowering' of English virgin maidens, who thereupon lost their hope of marriage and dowry.

In every Australian State, different ages, 10, 12, 15, are marked off as the ages at which having intercourse with a woman will incur a greater penalty. It will be no defence that the girl was willing. Nor will it help the accused if he can show that the girl was content to stay away from her home. Courts will not be interest (except as to sentence) in the fact that the accused made a reasonable mistake as to the girl's age. A recent text on the consequence of this law offers a few pertinent comments:

> 'These statutory prescriptions of the age of consent have meant that, in practice, it is commonly accepted that a girl under the age of 16 cannot leave home without parental consent. It seems that the penalties for meddling with a girl under 16 have become so well-known that few are willing to offer them shelter. The effect has been that girls find it difficult to find anywhere safe to live. The problem has increased in recent years as youth refuges, designed for members of both sexes, have been opened. These refuges offer temporary emergency help to young people who find themselves unable to live at home. Young men are readily accepted into the refuges but young women find that when they arrive on the doorstep, contact is immediately made with the police, welfare authorities or the parents. The reaction of the potential guardian is natural in the climate which the existence of these criminal provisions has engendered but it is forcing young people to avoid the refuges set up for their benefit.[8]

Commenting on this predicament, the Law Reform Commission's report on child welfare laws concluded:

> '[T] he law is unclear and does not provide answers to the questions which those who operate hostels ask about their powers and duties. In particular such persons express doubt whether they are under an obligation to inform a child's parents when a child arrives at a hostel and whether they may provide accommodation for a child when the parent objects and demands the child's return. The Commission has concluded that the law should not explicitly state that there is a certain age at which a child has a 'right' to leave home without parental consent. The prolulgation of such an age could be interpreted by some as an encouragement to the young to leave home. More important...it would be illogical to assert that protective intervention in the lives of persons under 18 is permissible, while at the same time conceding that there is an age, below 18, at which the young may proclaim their independence. Failure to recommend a specific age at which a child may leave home means that procedures must be formulated which those in charge of refuges and hostels may employ when confronted by a runaway. It is not recommended that these people should have a legal obligation in every case to contact the parents of a child who arrives at a hostel or refuge. Such a requirement would soon become known and would simply discourage young runaways from seeking accommodation in refuges. It would cause them to seek less satisfactory accommodation. The person in charge of the hostel or refuge should endeavour to persuade the child to agree

> to contact with the parents being made. If the child will not agree to this, or if, when notified, the parent expresses opposition to the child's residence in a refuge or hostel, the person in charge should be obliged to inform the Youth Advocate'.[9]

The proposal of the Law Reform Commission contemplated that if the Youth Advocate could not secure reconciliation between parent and child, and the parent insisted on the child's return, the matter should be brought before the court for final resolution.

Until recently it was probably assumed that very few young children left home before the age of 15. They are too young legally to leave school and too young legally to obtain work or social security benefits. However, according to experts there are now 'a significant number' of children in this class making the decision to leave home for good. Normally, when apprehended, such a child will be taken home to his parents or to a children's shelter. Because of the 'age of consent' it seems to have been accepted for some time now in Australia that a girl under the age of 16 years could not leave home without her parents' consent. More doubt has existed in relation to boys. In practice, in Australia, police, welfare authorities and the courts seem to have adopted the age of 15 as the general guideline.[10] The reduction in the general age of majority from 21 to 18 in recent years in Australia and the provision in the Family Law Act that 14 years is the age at which children may be asked to state a preference in custody disputes, reflect changing attitudes to the rights of young people in our society. The symptoms of the change could be detected even 50 years ago in a case in the Supreme Court of South Australia:

> A girl left home on her 16th birthday to move to the city to live with an older woman. The purpose of the move was to enable the girl to continue an association with a man twice her age. Her parents did not approve of the relationship and took proceedings in the Children's Court to have the girl declared uncontrollable. The Full Supreme Court of South Australia found the complaint proved. The State Act in force at the time gave parents the right to control their children's conduct until the age of 17. The three judges of the court said that the 'so-called age of discretion is not a fixed quantity ...' There is a good deal to be said in favour of the suggestion that the court may have to reconsider the question what age should be fixed. The [statute] fixes the age of consent at 17 which must be taken to express the present policy of the law in this State and whatever discretionary powers the courts may have ought to be exercised consistently with that policy.[11]

Commenting on these and other cases, a recent Australian text concludes:

> They make it clear that the courts should be influenced by contemporary attitudes as expressed in child welfare and other legislation. At present most States set the upper age of the children's court's jurisdiction at 17 or 18. Until a child progresses beyond the jurisdiction of the Children's Court he is subject to the complaints that he is uncontrollable, neglected or in need of care and protection. Whether the court will act on the complaint will be a matter for its discretion in the circumstances of the individual case. If the child has been responsible and shown himself to be mature enough to live away from home, the court is unlikely to act on the complaint. If, however, the circumstances of the case suggest that the child cannot care for himself adequately, the court may find the complaint proved and order supervision of the child or his return home.[12]

CONCLUSIONS

I have chosen the confusing ages of young people to which the law attaches attention, the age of consent and the right to leave home as three issues to address in this talk. Many different issues could doubtless have been mentioned:

* The adolescent child's 'right' to contraceptives, confidential medical advice and relevant sex education.[13]
* The child's rights of choice in education.[14]
* The reaction of the law to child abuse and incest.[15]
* The child's right to change his name.
* The respective rights of parents and child in the choice of religion.[16]
* Where so-called 'sexual liberation' ends and action by the law begins on the basis that the child, male or female, is 'exposed to moral danger or is uncontrollable'.[17]

Virtually until the last century the law said very little about children, and teenagers especially, because society did not draw a sharp distinctisn between children and adults. After a late weaning, a child, usually after seven years, was simply absorbed gradually into the adult world of the rest of the community. The advent of education and especially of free, secular and compulsory education, ended all that. Now there were categories and the law began to reflect the physical, moral and sexual problems of childhood and teenage.[18] The law developed to reinforce the stable family unit. It reinforced children's duties of obedience to parents. It insisted on compulsory education. It sought to promote extended education and to discourage immature employment.

The problem for society and the law today is that many of the assumptions upon which legal rules affecting young people were drawn are now under challenge or have already evaporated before our eyes. The nuclear family is no longer a stereotype of young Australian life. Single parent families are growing rapidly. De facto relationships have become a commonplace. Sexual mores have changed radically, partly in response to new methods of contraception, partly because of the decline of religious observance and partly through changing community perceptions of right and wrong conduct. Even in education, things have changed. Without a sure prospect of employment, the continued pursuit of more and more education is apparently not attractive to many young Australians. Our figures show it. We have one of the lowest rates of retention in education of any developed country. Inter-personal relations change. Perceptions of sexual morality change. The needs of education change. Prospects of employment change. Who can doubt that there is a need for legal change and law reform to match?

A recent book on 'The Children's Rights Movement' begins with a rather startling assertion:

> A good case can be made for the fact that young people are the most oppressed of all minorities. They are discriminated against on the basis of age in everything from movie admissions to sex. They are traditionally the subjects of ridicule, humiliation and mental torture by adults. Their civil rights are routinely violated in homes, schools and other institutions. They often cannot own money or property. They lack the right to trial by jury before being sentenced to gaol. These oppressions are inherent in being too young in this society. ... 'Lucky' children are of course far better off than the children of the poor. ... But even 'lucky' children are often driven to drugs, and sometimes even to suicide, by the depredations of their 'protectors'.[19]

Before we hear the cheers of the young to these remarks, I should say that we have come a long way in Australia and the process of law reform is continuing. The individuality of young people is increasingly receiving recognition. Stereotypes, whether of the young, of women, of Aboriginals, of migrants, of homosexuals, of the mentally retarded or any other minority group in our society, are now increasingly coming under challenge. If there are still some elements of truth in the assertion of children's oppression, things are certainly changing, for the better. And that is the definition of reform : change, not for its own sake, but for the better. One has only to contemplate the photographs of schoolrooms at the time when Dr James became a monitor at the turn of the century and then to visit a modern Australian schoolroom. In the place of neat rows of repressed and frightened children are places where some, perhaps even the majority, actually enjoy their time at school.

Our society is changing. Education and the law must change too. It is no good yearning for the return of the good old days. They have gone forever — and in most cases one can say good riddance! We are seeking to build a more tolerant, imaginative, diverse and questioning society, with a multicultural population, proud of its variety. These values are not incompatible with intellectual discipline and the pursuit of knowledge, originality and excellence. I am sure that Camberwell High School, whose high reputation goes far beyond Victoria, is in the vanguard of the quest for a happy mixture of continuity and adaptability. I am sure that Dr James, whose own lifetime was spent in resolving the tension between stability and reform, would applaud the interest of the school in social issues, some of which I have raised tonight.

FOOTNOTES

1. Australian Law Reform Commission, Discussion Paper 14, Privacy and Personal Information, 1980, 64 (para 107).

2. Australian Law Reform Commission, Child Welfare (ALR 18) 1981.

3. 4 P. & M. c 8. See also 9 Geo. IV c 31 (1828).

4. H Gamble, The Law Relating to Parents and Children, 1981, 157. For the law in Victoria see Crimes Act 1958 (Vic) ss.48, 49, 59, 61. Much of this discussion draws on Miss Gamble's excellent new book.

5. Gamble, 1.

6. These and other details of relevant ages are set out in ALRC 18, 34.

7. R v Bulan, [1978] 2 Crim LJ 28.

8. Gamble, 159.

9. ALRC 18, 215-6.

10. Re Agar-Ellis (1883) 24 Ch.D. 317, 326; Gamble, 153, 4.

11. Skeer v Byrne, [1929] SASR 378.

12. Gamble, 156-7.

13. ibid, 36.

14. id, 12.

15. id, 147-8.

16. id, 15.

17. id, 161.

18. P Aries, 'A Prison of Love' in B Gross & R Gross (eds), 'The Children's Rights Movement', 1977, 135.

19. B Gross & R Gross, Introduction, ibid, 1-2.