446

LA TROBE UNIVERSITY

BUNDOORA, VICTORIA

DEPARTMENT OF LEGAL STUDIES

2 AUGUST 1983

LAUNCH OF 'LAW IN CONTEXT'

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

OF BOOK LAUNCHES

Launching books has become a distinct peril of people in public life today. To be frank with you, I believe there are only two Australians who can launch books in a really satisfactory manner. The first is Gough Whitlam. His is the face that launched a thousand books. He spends the entire time of the launch talking about himself and it is, accordingly, extremely interesting. The other launcher first class is Dame Edna Everage. I once saw that distinguished Melbournian launch a book, purportedly from notes written on a blouse cuff — like a naughty university student searching for covert ideas in the examination room. It was a devastating and witty performance which I cannot hope to emulate. Indeed, I learned from the essay by Wilfred Prest in this volume that Francis Bacon spent his life trying to get away from lawyers because of their characteristic narrowness. So narrow are they that unless their existence has been enlivened by high political office or unless they have abandoned the law altogether for the stage, they tend (outside the courtroom) to be just a trifle dull in speech. It is interesting to reflect upon the two Maughams. The one, the Viscount Maugham, became Lord Chancellor of all England. The other, his naughty brother Willie, became the author W Somerset Maugham. Of the two Maughams, today it is Willie and not the embroidered Lord Chancellor, who is remembered for his contributions to humanity. Perhaps there is a moral in that tale for lawyers and legal writers.

Having none of the modesty of Mr Whitlam nor the decorum of Dame Edna, and being literally en route to Perth where I must tell an astonished YMCA breakfast tomorrow morning about the law, teenagers and contraception, I will not delay you long with these launching observations. But I do want to put 'Law in Context' in its own context and then to say a few words of commendation about this new enterprise.

LAW IN CONTEXT IN CONTEXT

The first thing to be said is that this is a worthy journal of a thoroughly commendable department in La Trobe University. The Department of Legal Studies at La Trobe University deserves special celebration. I understand that it has about 800 students in first year courses and boasts an array of some 35 second and third year courses. This is a truly remarkable achievement in a city where there are already two fine established professional law schools.

If we are to look for the reasons for the success of the Legal Studies Department at La Trobe in attracting so many students, a number of possibilities stand out:

* the existence of the highly popular and innovative course in Legal Studies in Victorian secondary schools -- a development encouraged by Professor Braybrook, when he was at La Trobe;
* the perceived usefulness to so many other disciplines of a general knowledge of the legal craft. Hence the attraction of Legal Studies to public servants, business graduates, social workers and public and private school administrators;
* the location of this university in an area with a large number of people from different ethnic backgrounds, keen to improve themselves and seeing an understanding of our laws and institutions as one way of doing that; and
* the ability of La Trobe to provide elements of law required for Accountancy students presently constituting about 10% of current enrolments in legal studies.

Since 1971, this University has proved how worthwhile it is to develop a Legal Studies course and how popular the course has been. Overseas, there have also been important moves for the study of the law as a social science. The Center for Socio-Legal Studies at Oxford and the Centre for the Study of Law and Society at Berkeley indicates the academic viability of the exercise and the attraction the studies offer to a wide range of interests. Now, the greatest form of flattery is imitation. I recently saw a

proposal that a multidisciplinary course of legal studies should be introduced at Griffith University in Queensland. It suggests a multidisciplinary social scientific education in matters of law and society, distinct from the professional work of the law schools, as a university course worthy of recognition and introduction in Queensland. The La Trobe example is offered as proof of the ability to draw a significant number of students to legitimate tertiary studies:

* who might not themselves be interested to or prepared for actual entry into the legal profession;
* who are seeking a viable combination of disciplinary knowledge of legal matters and perception of how the law and regulation have a bearing on their own focus of concern; and
* who might be willing to look at the law more critically than students in an orthodox law school.

It is a sign of the times that the success of the La Trobe experiment is now producing its imitators elsewhere in the country. It is my hope that the imitators will flourish. The law is not just lawyers' business. It is and should be the concern of all of us.

THE NEW JOURNAL

Another sign of the success of La Trobe is the advent of this unique journal series. I read the first part of the new journal with great interest. No essay did I read with more interest than the item by Wilfred Prest on 'Lawyers and Culture in 16th and 17th Century England'. Prest concludes, rather kindly I thought, that the apparent decline in the quality and quantity of the contribution by common lawyers to learning and the Arts after the restoration of King Charles II, owed something to the continued rise in the autonomy and self-confidence of the legal profession. This, he suggested, lessened the need for barristers to seek status and respect outside and apart from their own calling. The development of the Inns of Court and the regime of separate occupational training of lawyers in the narrow discipline of the law, the exclusive hold which the Bar (and the Inner Bar at that) had over appointments to the judiciary and the high intellectual quality of much judicial work, all resulted in a rather unself-critical self-perpetuating regime. Lawyers after this model disdained social analysis as much as they disdained poetry and literary allusions in daily practice. Such things were not professionally appropriate. They diverted lawyers from the strict and complete legalism which was their vocation and calling. As we have all heard, the law sharpens the mind by narrowing its focus.

Recently, I had to cross the Tasman to make a few comments in New Zealand. You will not believe that the Prime Minister of New Zealand described me a 'an Australian comic'. If only he had seen Dame Edna at work! In conjunction with my remarks, I looked at some interesting essays on the Judicial Committee of the Privy Council offered by Dr L P Beth. The essay would have delighted Professor Blackshield. It analyses Privy Council decisions according to rudimentary scalogram techniques. Affirmations and reverses were examined to indicate whether this London-based court had a bias towards Federal or State/Provincial rights or a bias in favour of Government intervention or laissez faire economics. The politics of the Privy Council, long suspected in Australia and the cause of our hundred-year history to remove its appeal discipline from this country, were examined by this American author as a matter of course : a sociological examination of our courts.

In the midst of his analysis, the author called in aid one of the members of the editorial advisory board of the new journal, Professor Geoffrey Sawer, doyen of Australia's law teachers. Quoting from his book 'Australian Federalism in the Courts', the author reminded astonished American readers that Australian judges:

> all fall into the category of what ... American [jurimetricians] call 'dogmatic conservatives'. They try to decide cases by formal inferences from a limited set of premises found in the Constitution and in the decisions of the Privy Council and the High Court, and in a high proportion of cases — increasing with the volume of precedents — they succeed.

RESISTANCE IS STILL ALIVE

Anyone who thinks that resistance to seeing the law in context has crumbled should be disabused. When the Australian Law Reform Commission was asked to examine reforms of the law of sentencing of Federal offenders, we undertook many context setting studies:

* the collection of statistics, where none previously existed;
* the conduct of scientifically sampled public opinion polls;
* consultation with prisoners themselves by well-established survey methods.

But the most controversial move was our decision to send a questionnaire survey to every judge and magistrate in Australia involved in sentencing. Happily, nearly 80% of the busy Australian judiciary responded. The results are set out in our report. But a number of complaints were received from the Victorian judiciary, especially, refusing to take part and criticising the whole endeavour. It was suggested that it was not part of the judicial

question either to express views or to answer 'sociological questions' of 'uncertain meaning'. The fact that judicial views and sociological attitudes might affect the exercise of the sentencing discretion did not appear relevant to these respondents. It is the fact that almost all of them were in Victoria that makes the launch of this new enterprise particularly welcome. I hope it will have a flourishing readership in this State — but also beyond.

TO THE SEA OF IDEAS

If one looks at the decision of the courts in the United States and compares them to those of Australian courts, the most remarkable difference of technique is the far greater willingness of United States judges to expose and frankly discuss social policies, state interests and their perceptions of the public policy involved in what they are doing. In decisions on rights to contraception, including amongst young people, for example, there is a frank identification of competing factors that will guide the judicial decision -- from traditional parental rights to guard morality to rising levels of teenage sex, unwanted pregnancies, abortions and venereal disease.

It seems likely to me that more and more social policy questions in the future will be determined in the courts and examined in law reform bodies, manned substantially by lawyers. In these circumstances, it is critical that lawyers should see what they are doing in the wider context of history, philosophy, politics, economics and technology. The work of the Australian Law Reform Commission has been dedicated to such a multidisciplinary approach. That approach will be greatly aided by this new Journal. It will open a few windows : of lawyers to other disciplines and other disciplines (and ordinary citizens) to the powerful instrument of the law.

I am sure everyone will agree that the Journal is well presented with an outstanding first collection of topical essays. Any law journal series that begins with a provocative statement about pornography and law has an eye on market forces and deserves to succeed.

I congratulate the editor, the editorial board, including my teacher Tony Blackshield, and the Department of Legal Studies at this University. For more than 100 years our jurisprudence has been infatuated with the techniques of barren linguistic analysis. Now the stranglehold is being released. In the hope that 'Law in Context' will play its part in this liberation, I launch it upon the Sea of Ideas.