

464

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SIR ZELMAN COWEN'S PAPERS

LAW AND SOCIETY

FOREWORD

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

VICE-REGAL SAMPLING

Sir Zelman Cowen's speeches as Governor-General of Australia pursued relentlessly a number of vital modern themes. In the nature of my own functions, I attended many functions at which speeches were delivered by him, whilst Governor-General. Some of them appear in this collection, although many, alas, have been ousted by the pressures of space.

Of the educational speeches, I will say nothing. They are collected elsewhere in this series. My task was to examine the formidable output of this most prolific Vice-Regal representative on the topics of the law and a changing society and to select a sampling for a permanent record. There are woven through Sir Zelman's speeches, on the topics of my attention, a number of heartfelt concerns:

- * A great love of the law and of the fine and sometimes towering figures of our legal tradition. Foremost amongst these have been the Judges, the great teachers of the common law of England, now transplanted in North America, Australasia and everywhere where the Union Jack once flew.
- * A concern, as a person in a central and potentially controversial role under the Australian Constitution, with the modernisation and reform of the constitution and public law generally. With that concern, there was an accompanying anxiety about aspects of judicial reform and administrative law reform which have so marked the Australian scene in recent years.

- * Growing out of this anxiety, a determination to articulate the cause of law reform. No Vice-Regal champion before Sir Zelman was ever so formidable, eloquent and determined in his support of law reform. Scarcely an opportunity was missed to tell professional audiences — whether of lawyers, doctors or others — of the necessities of reform and of the steps being taken in Australia to achieve reform. Sir Zelman was a past Commissioner of the Australian Law Reform Commission. He proved a doughty warrior for law reform. And he brought his own intellectual distinction, as well as the infinite respectability of his office, to the aid and support of the worldwide movement for reform and renewal of the law.
- * Hand in hand with this was a concern about the changing face of the professionals in modern Australia, and beyond. Many of the invitations received by a Governor-General are to address meetings of professional groups. In this, Sir Zelman was no different. But he accepted more invitations than his predecessors. He travelled the length and breadth of the country, speaking to every section of the community but with special feeling when he addressed the professions. Here it was that his background as an educator, his training as a lawyer, his experience in public life and his devotion to our country's institutions, were marshalled at their very best. No self-satisfied orator speaking of the glories of the professional past, Sir Zelman constantly reminded his audiences of the changing place of the professional in the world and the need for the professions, from the judiciary down, to adapt and adjust.
- * His long-standing interest in the free press, and indeed in the media of communications generally, are also reflected in the selection. This interest has led on to his notable recent appointment as Chairman of the English Press Council — a distinct tribute to him and a fitting recognition of his anxious concern about the balances to be struck between press freedom and competing social claims.
- * His deep anxiety about some of the developments of modern medicine — human tissue transplantation; in vitro fertilisation; genetic engineering; clinical trials, propelled him into a series of thoughtful and reflective comments on the interaction between bioethical developments and a democratic society and its laws.
- * Aggregating these comments, he was moved in many speeches to talk of law in a changing society and particularly law under the stimulus of technological change : whether from computers, new energy sciences or biological developments.

FAMOUS JUDGES

These general themes are woven through the selection of Sir Zelman Cowen's papers offered here. Inevitably there is some overlap. Indeed, one would expect this for the consistency of his concerns, the commonality of his audiences, the relative brevity of his term of office and the relentless pace he set himself (and those working with him) in the unprecedented number of addresses he delivered.

In selecting the collection of speeches included in this volume, a number of painful decisions had to be made. First, a very large number of speeches had to be omitted, though individually worthy of celebration. In some cases this was an especially difficult task. For example, on 29 June 1978 at a glittering ceremony in the Wilson Hall of the University of Melbourne, which I attended, he delivered the second Daniel Mannix Memorial Lecture. It was a sparkling piece on 'Sir Isaac Isaacs'. Sir Zelman Cowen was the biographer of Sir Isaac Isaacs. His life of the great politician-judge-Governor-General was published in 1967. In many ways the life of Isaacs offered parallels to Sir Zelman Cowen's own life : as an Australian Jew, as a lawyer risen to Governor-General and as a person intensely interested in public life and the workings of government. The Mannix Memorial Lecture was also fascinating for its reflections on the work and character of that formidable Archbishop and the contrast of his life and attitudes with those of Isaacs. However, in December 1981 at Wangaratta in Victoria, Sir Zelman delivered 'The Pioneers' Memorial Oration' in honour of two great lawyers — Sir Isaac Isaacs and Sir Robert Garran. Which of these speeches should be chosen? The more detailed essay on Isaacs or the lesser known scrutiny of Isaacs and Garran, the latter, the first public servant of the Commonwealth? In the end, a choice was made to include the latter. The Mannix Lecture is published elsewhere. The book on Isaacs is available. Essays on Australian legal figures are relatively hard to come by. Sir Zelman is one of the small band of contributors. Shortly after the death of Sir John Latham, one-time Deputy Prime Minister and Chief Justice of Australia, he wrote an essay on that fine lawyer. Put together with his book on Isaacs, it is already a notable contribution in Australian legal biographies. In this volume, there are further contributions. They involve Sir Zelman Cowen's obvious skill and interest as a biographer. But they also show his clear appreciation of the specially important role of the Judge in our legal system.

There is an interesting essay on Sir William Blackstone, not a distinguished Judge but an important contributor to the common law because of his commentaries on the Laws of England. This speech was delivered at the meeting of the American Bar Association in Sydney in August 1980. It was an elegant, brief and timely essay. The ABA had chosen to remember Sir William Blackstone because 1980, the year of their meeting, marked the 200th anniversary of his death. Furthermore, Blackstone's writings had been, at the outset of the American Republic, the constant source book of the laws of England by which the new nation chose to be governed. Sir Zelman offered the participants a tour de force. In a brief review, he left no-one in doubt as to the significance of Blackstone for the common law, for America but also for the other inheritors of its tradition, including Australia.

There follows essays on three important Australian Judges. One of them is Sir Redmond Barry, a Judge of the Supreme Court of Victoria. He died in November 1880. Sir Zelman Cowen celebrated his life in an address at the University of Melbourne in October 1980. For many Australians, Barry is simply the Judge who presided at the trial of Ned Kelly. Without ignoring this celebrated occasion in Barry's life, Sir Zelman, drawing on biographies of the great man, painted a vivid picture of the remarkable story of colonial Judges in Australia. Though Barry emerges as a man with human faults and human frailty, he also appears as a formidable lawyer, Judge and university personality.

Of the speech on Isaacs and Garran, I have already written. In this essay, Sir Zelman tells the tale of the appointment of Isaacs as the first Australian-born Governor-General. The controversy seems remarkable today. But it was vivid and dramatic as is disclosed.

In December 1980, Sir Zelman Cowen was present at the dinner given by the Herbert Vere Evatt Memorial Foundation. He took the occasion to review the life of Dr Evatt — another politician-judge. Evatt had been an industrious Justice of the High Court of Australia and a notable constitutional historian before he resigned his judicial seat to participate in the Labor Government during the Second World War. Fittingly, Sir Zelman outlined with perfect neutrality the controversies that surrounded the life of this most enigmatic Australian public figure.

There follows the happy essay on Lord Denning. There are many references to Lord Denning in Sir Zelman's speeches. There is no doubt that Denning is a towering figure of the common law in our century. His fascination for Sir Zelman Cowen appears to lie in his willingness, as a Judge, to develop the law to meet the problems of the times. Indeed, if there is one theme through all these essays it is this one. Society changes. Technology changes. Law and government must change if they are to remain relevant.

CONSTITUTIONAL AND ADMINISTRATIVE CHANGES

The essay at the opening of the Australian Constitutional Convention in July 1978 makes sobering reading. A number of remarks on the changes in the Canadian Constitution have been deleted for reasons of space. But whereas Canada has achieved notable constitutional reforms in the last decade, Australia is still, constitutionally speaking, 'the frozen continent'. True it is de facto reforms have been achieved by interpretations of the Constitution offered by narrowly divided Benches of the High Court of Australia. Furthermore, governments continue, whatever their political persuasion, to press forward the functions and powers of the Commonwealth. Yet frankly grappling with constitutional change — through the Constitutional Convention and the democratic process of referendum, seem to have eluded the Australian populous. Sir Zelman's successor as Governor-General, Sir Ninian Stephen, has commented on the remarkable fact that the Australian Constitution is a document enacted in 1901, written in the 1890s and reflecting the social values and attitudes of men, formed (for the most part) in the 1870s. Sir Zelman's appeal for 'good, hard headed, practical' approaches to constitutional change — to make the Australian Constitution meaningful for Australia as it approaches the 21st century — were passionately uttered. They remain largely unheeded.

There then follow two speeches, separated almost by the period of his office. The first is part of an address at the opening of a Conference, 'Australian Lawyers and Social Change', at the Australian National University in May 1979. It was in this address that Sir Zelman referred to the remarkable and innovative developments in the Federal administrative law, which remain among the most important contributions to the statute book of the Fraser Government. One can see nagging him in these comments a concern about the directions in which administrative law reform was taking Australia. Would it diminish the powers, responsibilities and functions of Ministers? This question was stated more frankly and openly at the last conference of lawyers and Judges Sir Zelman addressed as Governor-General. He confessed at that time that the occasion was 'a little sad' because it was the last such occasion. But in this address, he asked bluntly whether the administrative law reforms had 'gone too far'? The question, sounded at the opening of the South Pacific Judicial Conference, reverberated through the halls of government. It is a question that is still before the Australian community, as it seeks to strike the correct balance between true accountability of public servants, on the one hand, and ministerial responsibility and democratic influence, on the other.

LEGAL REFORM AND RENEWAL

At the opening of the International Bar Association in Sydney in September 1978, Sir Zelman, standing at the outset of his term as Governor-General, made a determined call for attention to law reform. He had been a Commissioner of the Australian Law Reform Commission. He had participated actively in a number of its projects. It is plain from reading this speech and a number of others that he was greatly affected by that experience. He spoke proudly to the audience of lawyers from many lands, of the initiatives that had been taken in Australia to bring law reform to a wider public — no longer the privy concern of Judges and lawyers meeting behind closed doors.

Towards the end of his term as Governor-General, in July 1981, he opened the 21st Australian Legal Convention in Hobart. I well remember the occasion. He reflected on law reform once again. The capacity of the Judge to reform the law is limited. He is 'a crippled lawmaker' as Lord Devlin has described him. Yet the needs for change are great. And this provides both the challenge and opportunity to law reform commissions. Sir Zelman spoke of the satisfaction he felt on signing law reform legislation into law. Indeed, in the case of the legislation based on the Human Tissue Transplants report of the Australian Law Reform Commission, he had virtually seen it through every stage — been there 'at the creation', as it were. Yet in Hobart, at the Legal Convention, he mentioned his concern about the effectiveness of law reform machinery in Australia. Only if proper attention were given to law reform reports, would the process of legal modernisation and renewal be successful. This was an entirely proper use of the Vice-Regal role to warn and to counsel the lawmakers. The then Federal Attorney-General was present during this address. And so were the cream of the Australian judicial and legal systems.

Earlier, in July 1979, Sir Zelman Cowen had opened the 20th Australian Legal Convention in Adelaide. On this occasion, he spoke about professionalism and the accountability and regulation of the professions in modern Australia. He also took the occasion, as a law teacher of great distinction, to alert the assembled legal profession of Australia, to the developments of administrative law which were on the agenda for study at that Convention. More clearly than most, Sir Zelman saw the importance of the development of the new administrative law and the political, philosophical and jurisprudential questions posed by that development.

MEDIA LAW

Of the numerous addresses he gave on the law and the media, only two could be included in this collection. The first is an important review of the law of contempt as it affects the media. This review was offered as the Southey Memorial Lecture delivered also at the University of Melbourne on 12 October 1978. Clearly this subject was of great interest to Sir Zelman Cowen. In fact, it brought together a number of threads of continuing concern to him : the law, the media and bioethical issues of thalidomide. The lecture has been published in the Melbourne University Law Review but it is clearly worth reproducing here. It shows Sir Zelman Cowen's capacity, as a lawyer and law teacher, to analyse closely the details of a particular case. The drama and social consequences of the litigation are demonstrated, as is the significance of the law for its impact on our freedoms — in this case the freedom of free expression in the press.

A shorter piece is his address at the Commonwealth Press Union in October 1981. But this is an interesting and reflective essay, the more important now because of his assumption in 1983 of responsibilities as Chairman of the English Press Council. It shows that this is no uncritical gladiator for the press. It is a person concerned that the press should put its own house into order. It is not enough that there are remedies of recourse to the courts or the Press Council, he says. These are merely the places of last resort. The press itself must look into its own activities and ensure high standards and the constant quest for a proper balance between the free flow of information and other competing social claims : privacy, respect for reputation, truth, due process in criminal trials and so forth.

BIOETHICAL DILEMMAS

There then follow a number of essays selected from a very large collection of speeches to medical conferences. It seems to be the fate of Governors-General to open legal and medical conferences. Sir Zelman did more than most. Yet he shows deftness and attention to detail and research in the preparation of his speeches. Through these essays too runs the common theme : adaptation to change. In most he refers to the opportunity which the Australian Law Reform Commission provides for addressing the needs of change in the bioethical area. In Australia, that Commission has made notable achievements in its procedures of public consultation. The report on Human Tissue Transplants has now become the basis of the law (or proposed law) in all jurisdictions of the country, save Tasmania. The enterprise in which Sir Zelman Cowen took part in the Commission and of which he spoke frequently in his addresses, was not purely an academic one. It was an interesting exercise in multidisciplinary participation in the development of the law to

meet entirely new situations and a new legal frontier. In his Jubilee Oration of the Australian Academy of Science, Sir Zelman Cowen turned to a scrutiny of the constraints that exist in a world of tissue transplants, genetic engineering, DNA technology and in vitro fertilisation. When the mind of scientists takes us down paths hitherto unimagined, what is the proper, limited function of the law, speaking on behalf of the general lay community?

Although in most of these speeches, for reasons of brevity and editorial style, personal reflections at the outset have been deleted, they have been left in for the speech on the occasion of the Inauguration of the Australian College of Rehabilitation Medicine. This small extract (only part of which is reproduced) gives the flavour of the introductory reminiscences that generally preceded the substance of Sir Zelman Cowen's addresses. No-one could read his speech at the inauguration of this important new College without realising his deep compassion and concern about the development of professionals into new fields, relevant to the problems of the time. That concern also comes through his address at the opening of the Sixth Australian Medical Congress in Launceston. That too was a glittering and elegant occasion. It was made more memorable by a Governor-General who offered a number of serious and thoughtful comments on contemporary medical professional issues and issues that went beyond the concerns of any one profession.

The same could be said of his Copplestone Oration for the Australian Post-Graduation Foundation in Medicine, delivered in April 1982. In this, he reflected on new medical problems — beyond in vitro fertilisation and human tissue transplants. What of neonaticide, a problem highlighted by the trial of Dr Leonard Arthur? What of the treatment of mentally retarded neonates? What of amniocentesis and the screening out of life of persons with physical or mental defects? These questions, a Governor-General was rightly saying, are questions that should 'concern us all'.

THE AGE OF TECHNOLOGY

But his anxieties about technology were not confined to bioethical questions. Of the other two great technologies of our time (nuclear and other energy sciences and information technology) he spoke often and eloquently. His speech on Einstein, included elsewhere, dealt with the former. In a number of speeches, not produced, he dealt with the general impact of energy technology, including the situation following the oil crisis in the early 1970s. But when he received the honour of Degree of Doctor of Laws (Honoris Causa) from the University of Western Australia, he turned to reflect upon the Myers Committee Report on Technological Change in Australia. The impact of the new technology for privacy and for other social concerns were brought to the attention of the

general audience. His speech, 'Law and Social Change', delivered at Deakin University in Victoria in March 1980, took him through a review of the general impact of science and technology upon the legal order. Part only of that speech is reproduced. But it shows his concern about the way society was changing, the way technology was stimulating social changes and the way in which institutions must be developed to permit a democratic society to respond.

The final essay collected here is a piece offered as the Presidential Address at the 52nd ANZAAS Congress in 1982 at Macquarie University in Sydney. It was entirely fitting that the Australian and New Zealand Association for the Advancement of Science should ask Sir Zelman Cowen to be the President. This was one of his last speeches as Governor-General. But he was able to point out that the seventh Governor-General, Lord Forster, was 'Patron' of ANZAAS in 1921. As early as the 1892 Congress the Governor of Tasmania, Sir Robert Hamilton, was President of the Fourth Annual Session of the Australasian Association for the Advancement of Science, which met in Hobart. Apparently Hamilton 'took his duties very seriously'. He gave an Inaugural Address 'of considerable length and learning'. Indeed, Sir Zelman revealed that that address went on for '30 closely printed pages'. His speech in May 1982 sufficed with 18 pages. But the problems dealt with by him were much more complex, more puzzling and unsettling than anything the Tasmanian Governor dreamed of at the turn of the century.

A GOVERNOR-GENERAL FOR OUR TIME

And that brings me to the concluding remark. Sir Zelman Cowen discloses in these essays how he was a Governor-General for our times. I do not comment on his contribution to 'a touch of healing', so necessary after the painful events of November 1975. He and Lady Cowen worked with formidable diligence and incredible industry to restore the Vice-Regal office to a position, above politics and esteemed in the eyes of the Australian people, whatever their political persuasion. He carefully avoided party political involvement. He confined most of his activities to civic groups and professional associations. In the latter especially he was at home. A scholar, a teacher, an educated Australian, he was always able to add stimulating, worthwhile thoughts. He was a man of the realm of ideas in an age of ideas. But he was not merely a man of letters, as so many lawyers have been. He was a man of letters interested in social change and technological change. These two great forces of our time clearly fascinated and captivated him. He did not shirk controversy, whilst steering clear of political controversy. He did not content himself with bland statements of generalities. He came straight to the heart of modern developments and posed puzzling and challenging questions which should

engage all of us. Sometimes, he asked boldly whether this or that direction was desirable. Generally, as Vice-Regal representatives must, he left it to the audience to respond, insisting only that they should pay attention to contemporary issues and avoid complacent self-congratulation.

A printed page cannot capture the vigour, forcefulness, relentless energy of this formidable teacher turned Governor-General. But it can recall to mind, and permanently record, an important period in Australian public life, when the man in Governor House, Canberra was a scholar who spoke often and always relevantly to the problems of a time of implacable change.

M D KIRBY

NOTE ON EDITORS

THE HON JUSTICE M D KIRBY CMG

The editor of the collection of papers on legal, professional and social themes generally is the Honourable Justice Michael Kirby. Between 1976 and 1977 he was associated with Sir Zelman Cowen when Sir Zelman was appointed a part-time Commissioner of the Australian Law Reform Commission. During that period, Sir Zelman participated in the Law Reform Commission's projects on privacy protection and human tissue transplants. The subject of privacy had been dealt with in his Boyer Lectures. The subject of the law and transplants had been dealt with in an important legal essay written by him when he was Vice-Chancellor of the University of New England. Accordingly, it is not surprising that a firm friendship and close professional relationship was established between Sir Zelman and Justice Kirby.

Michael Kirby was born in Sydney in 1939. He was educated at Fort Street Boys' High School and Sydney University, where he took degrees BA, LL.M, B.Ec. He practised for a time as a solicitor and later as a barrister. In 1974 at the age of 35 he was appointed a Deputy President of the Australian Conciliation and Arbitration Commission. In 1975 he was appointed first Chairman of the Law Reform Commission, an appointment that was extended for a further three years in 1982.

Justice Kirby holds many official and community posts. He is Deputy Chancellor of the University of Newcastle, a Member of the Administrative Review Council, a Member of the Executive of the Australian National Commission for UNESCO, a Member of the Australian Institute of Multicultural Affairs and a Member of the Executive of the CSIRO. He is also President of the National Book Council and a Member of the Council of the Australian Opera.

In 1983 he was appointed CMG in the Queen's Australian New Year's Honours Lists. Shortly afterwards he was appointed to the Federal Court of Australia. In 1983 he followed Sir Zelman as Boyer Lecturer for the Australian Broadcasting Corporation.

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SIR ZELMAN COWEN PAPER

VOLUME II -- LAW, SOCIETY AND CHANGE

LIST OF SPEECHES

I. GREAT LAWYERS

1. Blackstone: An address on the occasion of a meeting on the American Bar Association, Sydney, 11 August 1982.
2. The Redmond Barry Centenary Oration, Address Wilson Hall, University of Melbourne, 14 October 1980.
3. Two Great Lawyers: Sir Isaac Isaacs and Sir Robert Garran, address at Wangaratta, Victoria, 4 December 1981.
4. Herbert Vere Evatt, address Evatt Foundation, Sydney, 8 December 1980.
5. Lord Denning, address to the Lord Denning Commemorative Dinner, University of Queensland, 1 April 1982.

II. CONSTITUTIONAL AND ADMINISTRATIVE LAW CHANGES

6. Address at the opening of the Fourth Plenary Session of the Australian Constitutional Convention, Perth, 26 July 1978.
7. Address at the opening of the Law Conference 'Australian Laws and Social Change', Australian National University, Canberra, 18 May 1979.
8. Address at the opening of the Fifth South Pacific Judicial Conference at the High Court of Australia, Canberra, 24 May 1982.

III. LAW REFORM

9. Address at the opening of the Seventeenth Biennial Conference of the International Bar Association, Sydney, 11 September 1978.
10. Address at the opening of the 21st Australian Legal Convention, Hobart, 4 July 1981.

IV. JUDGES, LAWYERS AND THE PROFESSIONS

11. Address at the opening of the 20th Australian Legal Convention, Adelaide, 2 July 1979.

V. MEDIA AND THE LAW

12. The Southey Memorial Lecture 'The Press, the Courts and the Law', University of Melbourne, 12 October 1978.
13. Address at a dinner of the Commonwealth Press Union, Melbourne, 6 October 1981.

VI. MEDICINE AND LAW

14. Address at the occasion of the opening of the Annual Scientific Meeting of the Royal Australasian College of Physicians, Melbourne, 10 May 1978.
15. 'What are the Constraints?', Jubilee Oration of the Australian Academy of Science, Canberra, 28 March 1979.
16. Address at the Inauguration of the Australian College of Rehabilitation Medicine, Sydney, 23 February 1980.
17. Address at the opening of the Sixth Australian Medical Congress, Launceston, 12 February 1981.
18. The Victor Coppelson Oration 'Questions for Us All', address Sydney, 23 April 1982.

VII. TECHNOLOGY AND LAW

19. Address at the University of Western Australia, 30 April 1981.
20. 'Law and Social Change' Public Lecture, Geelong Lecture Series, Deakin University, Victoria, 28 March 1980.
21. Presidential address as President of the 52nd ANZAAS, Sydney, 10 May 1982.