511

ST ANDREW'S CATHEDRAL

SYDNEY SQUARE, SYDNEY

CATHEDRAL LUNCHEON CLUB

FRIDAY, 13 APRIL 1984

CHRISTIAN OATHS IN SECULAR COURTS?

April 1984

ST ANDREW'S CATHEDRAL

SYDNEY SQUARE, SYDNEY

CATHEDRAL LUNCHEON CLUB

FRIDAY 13 APRIL 1984

CHRISTIAN OATHS IN SECULAR COURTS?

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

FRIDAY THE 13TH

The one place at which I would feel safe on Friday the thirteenth is in the precincts of this splendid Cathedral. How fortunate are we, the citizens of Sydney, to have this fine edifice at the heart of our city. It is a familiar place and, I am sure, not only to Anglicans. It is not so grand as to intimidate. It is a homely Church for a homely and familiar Christian denomination. In this very Chapter House I received instruction from Dean Barton-Babbage as I prepared for confirmation in the Cathedral at the hands of Bishop Hilliard. In the last two weeks I have twice been in the precincts — more, I am ashamed to say than my normal quota. First, I attended a book launch of a recent book by Anglicans dealing with in vitro fertilisation and associated issues.[1] Then on 1 April I took my place as Chancellor of Macquarie University in the University Service at which the Primate of Australia, Archbishop Grindrod, presided. It was a splendid occasion. The Dean announced my forthcoming address. I began to feel like the Scarlet Pimpernel of the Cathedral. But I suppose that is better than being the Hunchback of Notre Dame.

Archbishop Grindrod gave me the theme for my address today. If this were a sermon, it would be my text. In the course of his most thoughtful remarks[2] he referred to an interesting essay in the Roman Catholic Leader published in Brisbane on 25 March 1984. The essay reviewed the thoughts of Professor Hans Mol of the Department of Religious Studies at McMaster University in Hamilton, Ontario, Canada. Professor Mol is the author of the well known book Religion in Australia published in 1971. He is, at the

moment, a visiting scholar in the Department of Demography at the Australian National University. He is preparing another publication titled The Faith of the Australians. In this he will bring together his deep interest in demography and statistics and his scrutiny of the sociology of religion.

According to Professor Mol, as quoted by the Primate, Australia 'in its apparent ignoring of the religious phenomena is the most secular society I know'.[3] How does he reach this view? What are the implications of this view for the law and for law reform in Australia during a time of rapid social and moral change?

As to the reaching of the view, all I have is the summary of Professor Mol's opinion in the Leader. The figures for weekly attendances at Churches in Australia are seen to be at the heart of his conclusions. They tell what he calls a 'quite dramatic story'. According to Professor Mol, the pattern disclosed in all the surveys is the same. The case of the Roman Catholic Church, which has always in Australia had very high Church attendances (rivalled only by the Methodists amongst the Protestant persuasions), after Vatican II, attendances went down. In this, the Catholic Churches of Australia were simply reflecting a world pattern. According to Professor Mol this is merely an indirect reflection of the 'opening of windows' by Pope John XXIII. It seems that when the Church windows were opened, a number of parishioners moved outwards.

In the 1960s, Church attendance for Roman Catholics in Australia was close to 80%. In the following years it markedly declined. Comparison of the Morgan Gallop Poll figures on Church attendances in Australia for 1954 and 1981 give the relevant statistical equivalents. Make all due allowance for errors of statistics. You know what Disraeli said about them. But the general pattern seems indisputable.

Anglican	1954	19%	1981	12%
Catholics	1954	75%	1981	37%
Methodists	1954	33%	1981 (Uniting Church)	5%

Professor Mol describes the 'enormous' pull and success of the smaller sects — the Mormons, Pentacostals, Jehovah's Witnesses and so on. His thesis is that the stricter the Church discipline, the larger the Church attendances. He points to the steep increase in Church attendances by Catholics in the 19th century. He attributes this to Pious IX's Syllabus of Errors published in 1864. Mol believes that when the Church discovered a liberal secular ideology, it found something that was foreign to Christianity and ultimately destructive of strong commitment to the Church. So what are his conclusions?

I regret the fact that the Catholic Church did not realise that its boundaries were going to be loosened after Vatican II. This came as a big surprise but it should not have come as a surprise.

Now Professor Mol is himself an ordained Minister of the Presbyterian Church. He feels that Church attendances have now reached their stable level. But he is pessimistic that there will be any growth or blossoming in Christian life in Australia because he feels that the basis is just not there. I assert that there just has never been the same intellectual tradition to lead such a Christian revival. Revivals in Australia tend to depend upon charismatic individuals visiting us — such as Billy Graham or the Holy Father.

THE CHALLENGE TO THEOLOGY TODAY

If you walk up from St Andrew's Cathedral after this address, to Hyde Park, you will find there a War Memorial. It is simply one of the many memorials to be found in this city. Indeed, they are to be found everywhere throughout the Old Empire, whose flags still fly in the Cathedral Church adjacent to us. Carved in stone on that Memorial is the inscription of the old symbols of unity : 'For God, King and Country'. Although Australia is still profoundly influenced by the Judeo-Christian tradition, it can no longer be said that practising Christians — in the sense at least of those who regularly attend Church — make up the majority of the population. For all that, our laws and our court procedures continue very much to reflect, in many ways, an earlier time. They continue to reflect, in some cases, the links that were established, centuries ago, between the Church and the courts. They continue to reflect the morality of the Christian Churches, though this has admittedly declined in such areas as family law and some areas of criminal law.

In the realm of the concern of the book I launched in Church House on bioethics, the Churches in Australia are rightly asserting a place in the debates. Certainly, there are plenty of debates to be had:

- Should the law facilitate artificial insemination by donor?
- How should the law deal with in vitro fertilisation?
- Two days after the announcement of the first frozen embryo baby in Australia, how will the law react to this?
- Should couples have a right to destroy the frozen embryo if they are later divorced? Or if one dies? What of the distribution of property of the genetic parents of the frozen embryo if they die and the embryo is kept frozen for 100, 200, 400 years? Is such an embryo, when thawed, a child of the natural genetic parents or of the social parents who bring it up generations hence?

- What should the law say about cloning of the human species?
- What should the law say about hybridisation ie the link between human genetic material and that of other species?
- With the advances in DNA research and genetic engineering generally, should the law contemplate the use of amniocentesis and abortion in the case not just of spina bifida and severe mental retardation but also in the case of determined maladies shown to be likely to occur in later life? Are we really to countenance the testing of the foetus by computer-aided DNA research to discover whether the child will be likely to suffer heart disease, cancer or other human maladies early in life, so that we stop and start again with a new embryo?
- Are we to permit the use of foetal tissue in experiments, which apparently has qualities resistant to immuno-rejection or would this run the risk of promoting still further the statistics on abortion, now one of the major operations of countries such as ours?

These are just a few of the issues of bioethics that crowd in upon us. The question I raised in the Foreword I wrote to the book, which is called, provocatively enough, Making Babies, was an institutional one. Will we have institutions quick enough, able enough and sufficiently responsive to the political realities, to provide the answers to these hard questions or some of them? The Law Reform Commission provided a model of how these questions should be tackled. In 1977 we delivered a report on human tissue transplantation. That report[4] has become the basis for the Australian legislation on the topic in every jurisdiction of Australia, save Tasmania. The events of recent days, with the major successes in heart transplantation, indicate the importance of getting our laws on these topics right. But these laws require very delicate balances to be struck. Even in a secular community — one might say even in the most secular community — with declining numbers of practising Christians, those balances should be struck with a good knowledge of the traditions of our Churches and the moral precepts of their teachings. But they must also acknowedge the pluralistic and ultimately secular nature of Australian society. In our project on human tissue transplants, the Australian Law Reform Commission securing the participation of numerous Churchmen from Catholic, Protestant and Jewish faiths. But we also sought the assistance of moral philosophers not specifically connected with any Christian denomination. Finally we put the issues to the community through public discussion and debate.

It is my view that this is a time when theologians can come into their own again. The quandaries before them are no longer as esoteric as how many angels may dance on the head of a pin. Now they are much more relevant. If I can say so, their

problems are much more urgent. This is a time when the modern Theologian can have something of immediate relevance to say to Australian society. He should not be diffident in saying it. True it is, dogmatic assertions, propounded on a 'take it or leave it' basis and grounded in, for example, Papal teachings of 20 years ago, are unlikely to convince. An appeal to logic, reason and due reference to Church tradition and scripture is much more likely to carry the day with the Australian population — puzzled, sceptical and cynical as it sometimes is.

The point for present purposes is that we must not 'gnash our teeth and rent our clothes' like the Prophets of old. Instead, the thinking Churchmen today should rejoice in the opportunity of a newfound relevancy. There is certainly plenty in modern technological society for Churchmen to comment about. I have referred to the realm of bioethics. It is a field I have come to know well. But if you look to the other two great scientific developments of our age : informatics and nuclear fission, you will see plenty of opportunities for a Christian point of view to be stated and to have influence in Australian society. On informatics : the new technology of information, one has only to think of the Age tapes and the quandaries they may pose for Australian society, if they are ultimately authenticated. Are we to permit such a gross invasion of individual privacy? Is evidence secured by such illegal means to be used and bandied about in the community to the damage of reputations? Are the temples of justice to be sullied with evidence gathered illegally, apparently by officers of the Crown sworn to uphold the law? Or does the possible probative value of the material gathered outweigh all these considerations? Striking the right balance here requires much thought about the competing interests at stake. The Law Reform Commission sought to tackle some of these problems in its recent report on privacy.

As for the third technology of our generation : biology, informatics and nuclear fission — unless we can get our international laws on nuclear physics right, we run the risk that the other problems will become redundant, in the destruction of civilisation.

OATHS AND AFFIRMATIONS

If these topics seem as high as the Cathedral vault, I will gladly bring you down to earth. In many of the small questions raised in the inquiries of the Australian Law Reform Commission, the issue of a Christian perspective of the law must be addressed. How should we frame a new law on the division of matrimonial property? Should we recognise in our legal system the customs and traditions of Australia's Aborigines? Does respect for courts and for authority require reinforcement with the law of contempt which may imprison a person for things he has said about a fellow human being, who happens to be a judge?

If the mind rejects as just too complex the issues of in vitro fertilisation, cloning and hybridisation, take the little problem of oaths and affirmations. The Australian Law Reform Commission has been asked to review of the laws of evidence applied in Federal courts in Australia. Those courts, like the State courts and like their English forebears, observe a small, quasi-religious ceremony as a person comes to give evidence. In New South Wales (though not in all States) copy of the Bible is thrust into the hands of the would-be witness. Before he can give his testimony in the secular courts of our secular country, he must invoke Almighty God:

> Do you swear by Almighty God that the evidence you shall give shall be the truth, the whole truth and nothing but the truth?

You have seen this procedure in Perry Mason and in Rumpole. It is standard in courts of our tradition. Nowadays, witnesses in most parts of Australia can alternatively give evidence after an affirmation. In at least one State they must overcome a hurdle and establish that an oath would not be binding on their conscience. Normally, witnesses are in such a state of confusion or fear that it takes a special courage, and possibly some risk, to decline the Book and the oath and to insist upon an affirmation. He is a determined, possibly a foolhardy agnostic who will not just go through this little Christian ceremony. Of course, the ceremony can be varied for other beliefs. The Holy Koran will be produced for Moslems. Saucers are broken, candles are blown out. In the past even chicken have been slaughtered. But this is rare. Normally the whole procedure is a patter of formalistic words. It is so because it has been so for centuries. But should it remain so?

A number of law reform bodies have looked at this question. Some have urged abolition of the oath.[5] Others, including the New South Wales Law Reform Commission, have urged retention.[6] The issue is now before the Australian Law Reform Commission. Recently a report from the Northern Territory Law Reform Committee landed on my desk. Symptomatic of the times, it showed that the committee was divided on the subject. A majority was for abolition. A minority was for retention, though as a subsidiary procedure.

Retentionists urge that the religious oath is still a security for truth. They argue that the oath still has significance for some people. Good reason must be established for changing anything so long settled. Certainly, the court system depends very much upon a serious attempt to find the facts where these are disputed. Anything that aids this search should, so the retentionists say, not lightly be thrown away.

I must now declare my hand. I believe that many Christians (and for that matter non-Christians) will question the appropriateness of making oaths to God in support of the truth of evidence which they are to give in secular courts. I would prefer to substitute for the invocation of the Almighty a simple, secular, uniform procedure which can be followed in every case, with every witness, regardless of belief or non-belief, denomination, religion or conscientious conviction. For the formalistic standard and, let us be frank, often automatic and thoughtless appeal to God, I would substitute two questions asked by the judge:

Q Do you declare that the evidence you shall give to this court shall be the truth.

A I so declare.

Q Do you understand that if you do not tell the truth, you may commit an offence and be punished?

A I do.

Alternatively, if the oath is to be retained in Federal courts, I would retain it only as a subsidiary procedure. The primary procedure should be a secular promise. The oath should be administered only where the witness elects or requests to swear an oath.[7] Although such a facility would retain some of the disadvantages of the present dual system of oaths and affirmations (particularly the risk that special weight might be given by some decision-makers to the evidence of a witness who elects to swear an oath) the reform would at least uphold the primacy of the secular promise and provide a transitional procedure towards abolition of the oath.

I repeat that many Christians question the desirability of swearing oaths in courts of law. Even amongst Christians, including practising Christians, acceptance of notions of Hell, sin and punishment are by no means universal. The notion that the oath is somehow supported by the risk of divine retribution and eternal damnation, is one which many Christians today would doubt.

Australia is not only a secular community, and its courts secular courts. It is also a multicultural society. Adopting an oath which is essentially a Christian observance, does not seem to be consistent to me with the notions of cultural diversity. At the very least, the secular promise I suggest would alert the witness to the legal position that arises by reason of the law of perjury. It would also obviate the rather unrealistic requirement to promise to tell the whole truth. Our laws of evidence themselves often prevent witnesses from telling the whole truth and nothing but the truth. So it is a bit hypocritical of the law to impose such a duty on the witnesses' conscience.

Even if it is conceded that a proportion of witnesses, say the practising Christians in Australia, were influenced to tell the truth by taking an oath, a question would still remain as to whether this marginal advantage is not outweighed by reasons of principle and practicality. It seems wrong in principle to me that secular courts should provide, as a required threshold ceremony for the giving of evidence, an election which may (at least in some cases) result in inferences drawn being favourable or unfavourable to a witness. This conclusion is as true if a favourable inference is drawn to a witness who troubles to require an affirmation as it is if an unfavourable inference is drawn by a religious judge, magistrate or juror from the fact that a person (for reasons of his conscience) prefers a secular affirmation. The Law Reform Commission has been informed of at least one judge who always looks to where a Jewish witness puts his hand on the Bible to see if the witness is touching the Old or the New Testament. Another judge was said to put greater store on a witness who insists on affirming. Retention of the oath in Australian courtrooms facilitates these and other prejudices. They should have no place in Australia today. The formalistic ceremony of oaths involves secular courts in a quasi-religious procedure. It does so despite the increasing proportion of the Australian community which is non-Christian, of no religion or even agnostic or atheist. The principle of equality before the law in the courts and the removal of historical anachronisms that may sometimes tend to diminish that equality, should, as it seems to me, be important principles guiding law reform in matters such as this.

Now, of course, there is always a risk in a reform of this kind that offence will be done to sincere people of religion. They may see a proposal of this kind as yet further evidence of creeping humanism and secularism. I can understand that reaction. I am, myself, a monarchist — possibly because of all those prayers I said from my childhood for the Queen's Majesty. I am ever alert to sleights (suspected or real) to valued institutions. Loyality to institutions is an admirable feature in human beings.

Some might say : 'Look, the risk of upsetting the Churches is just too great. Leave well alone. It is not very important. Stick to the status quo. Non-religious people will just keep taking the oath. What does it matter?'

Personally, I regard this as an unacceptable approach, including unacceptable for a Christian to take. The Churches, as the Lord Chancellor recently reminded the House of Lords in a debate on divorce law, may discipline their members. It is wrong for them, except by example, to endeavour through the law to impose their specific values on non-believers. Christianity, as I understand it, has always placed a high store on the integrity of individual conscience. Though this has not always been observed in practice, it seems to be at the heart of a religion so intensely individualistic and personal.

In these circumstances it does not seem to me that a proposal for the abolition of the oath should be seen as an offence to religion, including specifically the Christian Churches in Australia. On the contrary, oaths as administered in many courts in Australia, tend in my view to trivialise and formalise an appeal to the Deity which should be a very serious and personal business — not a formalistic patter by a court orderly in a court procedure and in aid of civil government. A routine ceremony before witnesses give evidence in court is an inappropriate misuse of personal religious beliefs or lack of beliefs. It may sometimes cause prejudice against individuals for reasons of their conscience. It is for that reason that I believe that the time has come to remove the formal oath from our courts. One would expect that true believers would not need an oath to require them to tell the truth. Unbelievers should not go through a ceremony that is to them a sham. All should be warned that lying to courts is a serious offence.

SUBLIME TO MUNDANE?

You may conclude that the descent from the chancel flags, the War Memorial, 'God, King and Country' and even nuclear fission, the microchip and the frozen human embryo to oaths in courts is a true case of the sublime to the mundane. But the point I make is a simple one. Law reform involves adjusting our laws to rapidly changing times. The Churches have an important place in contributing to law reform, even in this most secular country. In fact, such is the complexity of the problems now being presented that the law reformer and the legislator need all the help they can get.

Many issues of law reform, great and small, concern the Churches. The temptation to a reflex action of holding on to the past is often beguiling. But the need to adjust to the new realities of secular, pluralistic and multicultural Australia is urgent and a taxing responsibility on Church people and their leaders today. A call to the past and the preservation of the status quo may last for a time. But it is likely to melt in the face of the variety and complexity of the issues now facing our society. To say nothing of the variety of the moral and religious convictions, languages and cultures of our population. My hope is that the Churches, including my own, will prove adequate to the challenge of this time of rapid change. In matters great and small, this is a time when the thoughtful Christians may find a new social relevance.

FOOTNOTES

1. A Nichols & T Hogan, Making Babies : The Test Tube and Christian Ethics, Acorn Press, Canberra, 1984.

2. Sir John Grindrod, Sermon preached at a service in St Andrew's Cathedral, Sydney, Sunday 1 April 1984, for the Universities of Sydney.

3. H Mol cited in H Fry, 'Australia — The Secular Society' in the Leader, 25 March 1984, 12.

4. Australian Law Reform Commission, Human Tissue Transplants (ALRC 7), Canberra, 1977.

5. The Canadian Law Reform Commission, The Ontario Law Reform Commission, the Scottish Law Commission, the Criminal Law Revision Committee and the Northern Territory Law Reform Committee.

6. The New South Wales Law Reform Commission, the Victorian Chief Justice's Law Reform Committee, the Canadian Federal/Provincial Task Force on Uniform Rules of Evidence, the Thomson Committee in England and the Scottish Law Commission (Memo No 46).

7. This was the view of the minority in the Northern Territory Law Reform Committee report. The majority favoured abolition of oaths.