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VICTORIAN ETHNIC AFFAIRS COMMISSION

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COMMUNITY RELATIONS SEMINAR, MELBOURNE, 14 JULY 19

SOCIAL CHANGE AND INTRACTABLE ATTITUDES

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

HIDEBOUND APPROACHES AND REFORM

You have asked me to speak on the subject of instutitional problems in effecting changes as they concern the ethnic communities in our country. I wish to approach the subject by a sidewind. I hope that you will consider it a relevant endeavour. Family law reform is probably the most audacious effort of recent years, at least on the part of the Federal Parliament in Australia, to reflect and mould keenly-felt and highly personal behaviour and attitudes. A study of this great reform has lessons for the analogous realm of community relations in our changing society.

The Australian Constitution committed the great bulk of family law to the Federal Parliament. However, until Mr [later Sir Percy] Joske in the 1950s introduced a Private Member's Bill to secure a Federal Act, the law on divorce in Australia was governed by a miscellany of State statutes and common law principles. The Joske Bill was later taken over by Sir Garfield Barwick, a notable reforming Attorney-General. His legislation became, for 15 years, the basis of Australia's first national divorce law.

But our society changed. Attitudes to personal morality changed. Attitudes to privacy of personal, sexual and family life changed. Attitudes to religion and to the role of Christian conceptions of personal relationship in the law changed. All of these changes took place. Yet the divorce law remained unchanged. It reflected very much a Christian conception of marriage in a secular community. It placed impediments in the way to the dissolution of marriage, even where the parties wanted dissolution. It required the proof

of fa . It condoned salacious and front-page coverage of the most private and intimate matters of personal relationships, as an extra legal sanction against dissolution of marriage.

With the election of the Whitlam Government, the new Federal Attorney-General, Senator Murphy -- also a remarkable reforming Law Minister -- determined to secure renewal of this area of the law. He looked to a committee in which Mr Ray Watson QC took a leading part. That committee, in turn, was influenced by the development of a new 'no-fault' principle which traced its origin, ultimately, to Sweden. This principle allowed the dissolution of a marriage upon proof of the irretrievable breakdown of the relationship involved. No longer were persons to be shackled unwillingly together by the law. The law was to catch up to changing times. But securing the change was more easily said than done. The Senate (usually a more intellectual and often a more radical House of Parliament) quickly accepted the reforms of the Family Law Bill. In the House of Representatives, on a conscience vote, it was a close-run thing. Ultimately, however, the Family Law Act was proclaimed to commence in 1976.

A separate Federal Family Court of Australia was established. In fact its establishment came about, in part at least, because of the hidebound attitudes of a number of State Supreme Courts. Until that time those Courts had handled the much smaller docket of divorce. But a number of the Courts refused the invitation to take part in the new reforms. They disliked the more informal procedures. They were uncomfortable in the proposed relationship of counsellors to the judge. They declined to appear in court without robes — a reform designed to take irrelevant stress out of the occasion. They also declined to sit in private as the legislation insisted, in an understandable reaction to the excessive publicity of the old regime. It was for these and other reasons that the separate Federal Family Court was recommended by the Senate Committee and adopted in the legislation. But the occasion was taken to build a new and 'caring' court. Its objective would be a more compassionate and modern approach to the inevitably painful business of sorting out the problems created by the breakup of an intimate personal association that had begun, normally, in happiness and deep affection.

The critics of the new Act were legion as are critics of community relations law reform. There were some in the legal profession, grown used to the old way of doing things and sometimes harkening back to those old ways. In fairness, the organised legal bodies gave support to the reforms and some individual members of the legal profession who were critical saw problems in the new Act from the prospective of their clients. No institution, particularly a new institution reflecting volatile changing social attitudes, is beyond criticism and improvement.

The reforms of family law and the ongoing process to improve the reforms represents an analogous social challenge to Australian society, when compared to the challenge also posed by the changing ethnic composition of the community. There is an old way of doing things. It is long established. Times change. There is resistance to reform, much of it deep-felt and perfectly sincere. We have seen evidence in the last few weeks of the difficulty of bringing about lasting reforms in family law. How much more difficult is it in adjusting the legal system to an entirely new racial and cultural composition of the entire Australian population.

SIMPLISTIC VIEWS

In recent weeks in Australia, there have been significant attacks on multiculturalism and on family law-reform. Though there have been notable champions for each, perhaps more significant has been the deafening silences on the part of those who might have been expected to speak out.

For example, it is appropriate, I believe, to express regret that the notable silences of the legal profession in defending the Family Court, despite the outrages of the attacks on that court and its personnel in recent weeks. In the wake of the attacks on judges of the Family Court I would have expected a more vigorous, articulate and outspoken defence of the Court, its notable reforms and modern contributions to the better administration of justice in Australia from the legal profession. Instead, despite the terrible events of recent weeks and with one honourable exception in Victoria, sniping from the sidelines at the Family Court has continued from hide-bound traditionalists. They naively think that the wicked acts which threaten all stable legal institutions in Australia could be simply cured by:

- the simplistic response of dressing the judges and lawyers up in 17th century wigs and robes;
- elevating the height of the bench to restore the usual physical attributes of court room formality; and
- returning to concepts of fault in marriage breakdown which had been the scourge of earlier divorce courts, with their salacious concentration on adultery, spies in the bedroom and front-page stories on the most intimate aspects of personal life.

The sorriest features of the media coverage of the tragic events of recent weeks has been:

- the lack of balance and fair presentation of the innovative reforms introduced by the Family Court and its efforts to reduce, as far as possible, the pain of marriage breakup;

.ne widespread coverage given to pejorative statements by a few lawyers concerning the judges of the Family Court who 'do their vital, stressful and often thankless work, day after day on behalf of society';

- the coverage given to every variety of critic of the Family Court and the Family Law Act in the wake of the bombing. I would single out the widespread attention given to the reported statement of the Dean of Sydney, Dean Lance Shilton — that good could come out of the evil of bomb attacks on the homes of Family Court judges if they led to community discussion about deficiencies in the Family Law Act. I confess that if Dean Shilton has been accurately reported, I find his statement an untimely and a dangerous one. I also question why the Sydney Morning Herald chose to give front page coverage to the disaffection of one particular divorced father of three under the headline 'Why Silvana Mariti Hates the Family Court'. In a society in which one marriage in every 2.6 breaks down, it is unreasonable to give undue coverage to every disaffected litigant and critic without injecting some balance in respect of the good things done by the Family Court.
- and then there is the new suggestion of an ethnic element in the bomb attacks on the Family Court judges. In the current issue of the Bulletin magazine it had been suggested that there is a 'racial thesis' for the bombings. The only evidence proposed is that the bombings were associated with judges in the Parramatta Registry of the Family Court which is 'situated in an area of great racial mix' where there was a greater likelihood of clash between the system and people from another culture. Flimsy evidence with which to slur our ethnic communities but not, I am sure you will agree, unique in Australia!

PRAISE FOR INNOVATIVE REFORM

All of these pejorative reports contrast significantly with the innovative reforms introduced by the Family Court since its creation in 1975. It is worth listing some of those reforms to illustrate the fact that important achievements can be made in Australia, whether in family law or in community relations, yet remain unsung in circles that concentrate on the negative:

Are not these achievements worth celebrating — just occasionally?

- the abolition of offensive front-page publicity concerning the private crises of individual citizens;
- the removal of 'salacious' grounds of divorce such as adultery, cruel beatings and incest and substitution of a simple principle of 'irretrievable breakdown of marriage';

the introduction of a major service of court counselling that often solve problems amicably or at least by agreement;

- the extensive conciliation services offered by the Registrars of the Family Court that have been successful in settling many disputes about family property;
- the information services provided, including the provision of information in major ethnic languages, about family law procedures;
- special attention to the rights of children of broken marriages, including in counselling and, where necessary, separate legal representation;
- the decentralisation of the sittings of the Family Court;
- the provision of child-minding facilities in the courts, videotape advice for litigants, improved legal aid and other assistance 'unthinkable in the more long established courts';
- the removal of unnecessarily intimidating trappings of fear and intimidation associated with court procedures elsewhere;
- the provision of ongoing review of the Family Law Act by parliamentary committees, the Family Law Council, the Institute of Family Studies and the Law Reform Commission;
- the 'active' participation' of the judges of the Family Court with the Law Reform Commission, and other bodies, in self-critical analysis of the operation of the Family Law Act with a view to its constant improvement. I would single out the present active involvement of all of the Judges of the Family Court in inquiries by the Law Reform Commission on the improvement of the law on matrimonial property, domestic violence and contempt law in connection with the Family Court.

It is the same with our achievements in community relations in Australia. They are rarely catalogued and celebrated publicly. Instead, undue attention is invariably given to the critics, the fanatics and the prophets of doom and disruption.

ATTACK ON INSTITUTIONS

Every member of the Australian community, whether of the majority community or the ethnic communities of Australia should certainly condemn with one voice attacks on the Family Court judges and their families as the acts of a disordered mind and an assault upon the free institutions of a democratic country. It was for these free institutions that many migrants came to this country. It is for this reason that I am specially disappointed that there have not been more public statements from the legal profession and indeed from leaders of the ethnic communities in support of the Family Court and the arduous, innovative and sensitive work being done by the Court. Instead, all we have heard from most spokesmen of the legal profession are from the critics, with their naive and simplistic view about wigs, robes and a return to the bad old days.

They fail to recognise the enormity of the social problem which the Family Court copes with day by day. They fail to acknowledge that our society has changed radically and that the Family Court must serve the society that exists, with a high level of marriage breakdown. There can be no going back to the bad old days of fault, adultery, bedroom raids and so on. Critics of the Court do not make the point that the attack on the Family Court is an attack on all of our stable institutions and our system of justice under the law. Now, we are even seeing the ethnic communities being blamed with unsubstantiated suggestions based on the flimsiest evidence that the criminal and disturbed actions are those of some unidentified ethnic minority, refusing to accept the changes in cultural norms. This kind of irresponsible journalism deserves to be condemned. I have searched the media for the defenders of the innovative Family Court of Australia. Instead, with the one exception I have mentioned all I have found are the reports of every critic and crank. It is time somebody sought to redress the balance. It is also time that somebody gave the lie to the irresponsible suggestion that an ethnic minority must be involved in the murderous attacks on the judges. This is just unsubstantiated speculation which is unworthy of a multicultural society.

RACIAL HATRED AND GROUP DEFAMATION

The reforms of the Family Law Act illustrate in a vivid way the scope but also these limitations of achieving social reform through the law in our country. Similar limitations exist in respect of law reform affecting community relations in Australia. Let there be no doubt that reforms are necessary to adjust Australian society to the presence of large numbers of persons from different cultures, many of whom are not fluent in the English language. I would mention as urgent, necessary reforms the following:

- the need for a legal right to interpreters in police investigations;
- the need for a legal right to interpreters in court procedures;
- the need to adjust insurance law to take into account differing expectations of non English speaking insured persons;
- the need to review substantive criminal law to take into account differing cultural reactions to stressful situations;
- the need to train lawyers fluent in foreign languages and sensitive to differing cultural norms;
- the need to review a wide variety of laws and practices developed in an earlier 'Anglocentric' time.

However, not every legal change is worthy of the name 'reform'. For example I would express personal reservations about proposals made by the Human Rights Commission in a report issued in November 1983 that the Racial Discrimination Act should be amended to:

make it unlawful to incite to racial hatred; and

. provide remedies for defamation of ethnic groups.

While such laws have been enacted in some overseas countries, they are rarely effective, are generally hedged about with so many exceptions as to make them virtually useless and, if effective, they could sometimes amount to an unreasonable impediment upon legitimate free-speech in a free society.

The Australian Law Reform Commission's report on defamation law reform illustrates the ambivalence about this kind of issue. The majority of the Commissioners, including myself, recommended against a procedure of group defamation for slander of an ethnic group. Two Commissioners thought there should be such a remedy, and so, now, does the Human Rights Commission. The reasons the majority of the Law Reform Commission recommended against group defamation still seem valid to me. Courtrooms are unsatisfactory places to resolve community relations issues and sensitive questions of racial attitudes. Furthermore, group defamation might be misused in relation to inter-ethnic or intra-ethnic community battles in which the courts would be unsuitable arbiters. Education, responsible journalism, community discussion and leadership in racial tolerance from our politicians and other public figures seem much surer ways to achieve racial harmony than invoking criminal or defamation laws. In courtrooms, one party must generally lose. As the recent tragic events in the Family Court show, this can lead to frightful bitterness and even terrible, murderous irrationality.

The aim of a multicultural, tolerant pluralistic community in Australia will not be achieved by law reform alone. But new laws and practices have a place, even if a limited place. It is important that we keep the limitations clearly in mind. But we should also explore the potential of the law sometimes to help shape community attitudes and contribute to a more tolerant, kindlier and just society.