ALL NATIONS CLUB, SYDNEY

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24 JUNE 1980, 8 P.M.

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

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SIR ROBERT GARRAN

It is not too bold to say, that:

> The life of Sir Robert Garran is a part of Australian history ... he played a vital part in the making of the Constitution, and in the all important matters of draftsmanship and constitutional history the advocates of Federation depended greatly on his legal ability and sound judgment.[1]

The outline of his life is well known and still well remembered. He was Secretary of the Attorney-General's Department from the beginning of Federation. He was the first Solicitor-General of Australia. His role as the fledgling Commonwealth's first public servant was not confined to legal advice. He accompanied Prime Minister Hughes to the Peace Conference at Versailles in 1919. He attended conferences of the Prime Ministers of the Empire. He life was full of achievements and service to the community up to his death in 1957. He is buried in the Parish Church of St. John in Canberra.

Garran's book 'Prosper the Commonwealth' was published posthumously. It takes its title from the Federation Hymn which Garran wrote at the beginning of the Century. In the book he recounts the remarkable early development of our country. He was keenly interested in the newcomers who ventured to Australia, especially after the Second World War. He described the post-war policy of large scale immigration as 'a really great and successful piece of statesmanship'.[2]

He paid a handsome and justly balanced tribute to Arthur Calwell and Harold Holt, successive Ministers of Immigration who laid the basis for this great Australian enterprise. Before his time, he questioned the policy until quite recently accepted of the submergence of cultural diversity in a blanket of Anglo-Saxon conformity.

> One question which has been asked is how far the assimilation of immigrants was consistent with retaining some degree of national grouping. It was quickly recognised that it would be a mistake to try to submerge altogether their interest in their homelands from which they had come, and that this to some extent made it impossible to discourage their setting up national clubs and associations for the practice of their national cultures and skills which were expected to be an enrichment to the cultural life of Australia.[3]

In this connection he tells the tale of the ambitious enterprise of Pierre Stuart-Layner, a French theatre manager, partly of Scottish Quaker descent who conceived the idea of an All Nations Club. Garran accepted the presidency of the club and described its purposes as a happy blend of humanitarian outlook upon the transplanted new citizens but also a recognition of the fact that this country profited from their arrival and had a duty, in return, to help them feel at home.[4]

Australia has come a long way since the establishment of this Club. Inevitably, the great influx of migrants and their growing diversity and number has produced pressures for changes of attitude, government policies and even the law. In some ways the law is the 'last fortress'. In many ways it is the social discipline least affected by the influx of immigrants into Australia. This is the right place and this is a suitable time to reflect briefly on the need for law reform which the changing composition of the Australian population presents. Within the last few days the Federal Government has announced an important amnesty for illegal immigrants. According to this morning's press more than 2,000 people around Australia made application yesterday under the new scheme. Also yesterday, the Federal Opposition Leader, Mr Hayden introduced the Labor Party's proposals for 'a total change in the immigration program' if a Labor Government is elected later this year. So migrant issues are rightly in the news. It is appropriate to honour Sir Robert Garran, a distinguished Australian lawyer and a man interested in the rights of migrants by looking at the law. How has it coped with the post-war influx? The answer, I am afraid, is 'not particularly well'.

TO A NEW WORLD

The legal system has implications for almost every aspect of a citizen's life. The Australian legal system, inherited with all its strengths and imperfections from Britain, is inextricably mixed with the organisation and operation of day-to-day Australian society. Most people, citizen and non-citizen, do not fully understand the legal system. Relatively little is done in schools to teach children of their rights and responsibilities. Living here over many years, the general idea is supposed to be absorbed, as it were, by osmosis.

For the newcomer, arriving from a non-British culture, there is a distinct risk of a legal culture shock. Mr Frank Galbally, who conducted an inquiry into the problems of post arrival migrants put it well in a speech:

> Few Australians in their lifetime have to solve such a cumulative series of difficulties as migrants must so quickly and under such pressures before even the question of happiness can arise.
>
> Let us just list a few of them now. From the moment a ship docks, migrants are under a tough assault by salesmen - often ruthless, unscrupulous - to sign papers to buy everything from furniture, cars and houses to courses in English ...
>
> Almost immediately, apart from the traps of hire purchase, they meet difficulties in housing, employment, trade unionism, health, work and social relations with Australians and other migrants; education; adjustments to many strange laws, regulations and conditions; social welfare rights; motor licenses and registration; traffic laws; public service; political systems from Federal to local level; recreational involvement with Australians and other migrants; divorce and family breakup problems; delinquency among the children, and much else besides ...
>
> The inherent tragedy is that at every stage it is difficult acclimatising to a new land. Something can go wrong and usually does. And whenever something does go wrong, the migrant is thrust at once against the restrictions of our alien culture.[5]

The provision of interpreter and translation services, important though it is, is inadequate to overcome the problems of a new culture. Especially as more migrants come from the Middle East and Asia, the needs of adjustment are much more sophisticated. Literal translation of what is happening is merely the first step in communication. A range of measures is required to ensure that migrants understand at least the rudiments of the Australian legal system and that those involved, whether judges, police, lawyers,

court clerks, social workers and others, are made sensitive by their training to the cultural characteristics and differences of a very large minority of the population of this country.

There is a great deal of evidence that the experiences and expectations of migrants concerning police and legal procedures make it difficult for them to understand the way we do things in Australia. For example, Australian courts have adopted the adversary system of trial. In most countries of the non-English speaking world, a different system of court trial exists under which the judge or magistrate is in charge of a judicial inquiry. Under this system, the defendant can rely on the judge to protect and even advance his interests. Under our system the judicial officer is, to a very large extent, a neutral umpire. We use juries in serious cases. In most of the countries from which we now draw our immigrants, jury trial does not exist.

Apart from institutional differences it must be frankly acknowledged that the difficulties are not all on the one side. Cultural stereo-types about various migrant groups undoubtedly exist in the minds of many Australians, including educated Australians. The behaviour of those who work in the legal system can be distorted by such stereo-types.

It cannot be said too often that even with the inadequate data we have on the incidence of crime in Australia, it appears quite clear that migrants do not breach the law more frequently than non-migrants. Compared to people born in Australia, surveys that have been undertaken point to the fact that people born overseas tend to be much more law abiding. Proportionately, they are under-represented in our prisons. This fact is of particular interest since migrants, as a whole, come from a slightly lower socio-economic status group than the average Australian born. Crime indices tend to be higher in lower socio-economic groups, other things being equal. Yet news reporting frequently lays emphasis upon ethnic background of an offender. Specific attention is called to his or her ethnic origin, distorting the reality which more balanced examination of the data will disclose.

MIGRANTS AND POLICE

Migrant contacts with the police can pose difficulties for both. In the post-war years, police in Australia had to cope with many and rapid changes in Australian society. They were confronted, often for the first time, with members of the public whose lifestyles and values were at variance with the traditional Anglo-Celtic concepts or who were unfamiliar with the procedures accepted as routine in this country. A breakdown in understanding between police and the migrant population was not unusual. For instance, a particular difficulty in police/migrant relations is the unfamiliarity of many migrants with some Australian police procedures. By way of example, fingerprinting in Italy is used only

for one most serious crimes. In Australia, it is a much more routine practice. For an Italian, the experience of fingerprinting can be quite traumatic. Likewise bail is most unusual in European legal systems. Many migrants have mistaken the payment of bail for payment of a fine and have been surprised by subsequent arrest for non appearance at court.

Suggestions to overcome some of these difficulties have included the specific recruitment into police forces of more migrants, providing police with an opportunity to learn other languages, in-service training of police officers and production of information in various languages to help migrants understand their rights. The Australian Law Reform Commission suggested important safeguards in the criminal investigation process, designed to equalise the position of non-English speaking persons being interrogated by Federal police. The Federal Government adopted these recommendations in the Criminal Investigation Bill 1977.[6] However, the Bill lapsed with the last Parliament and has not been introduced in this Parliament.

MIGRANTS AND THE COURTS

A study undertaken at the Central Court of Petty Sessions in Sydney has indicated that all migrant groups, except the Creeks, were represented in court substantially less frequently than Australian born accused in the same interval.[7] A clear association has been shown to exist between having legal representation and the outcome of criminal proceedings. A person who is represented has six and a half times better chance of securing an outright decision in his favour than an unrepresented accused. A person who is not represented appears to have a three times greater likelihood of being sent to prison than one who is represented. The New South Wales Anti-Discrimination Board has drawn attention to the importance of representation in proceedings under the Mental Health Act. Under that Act, a hearing before a magistrate determines whether or not a person involuntarily committed to a psychiatric centre, will be held for treatment and if so for how long. If further treatment is considered, the magistrate decides if the patient is to be released or detained. In the case of non-English speaking patients it is often difficult for doctors to secure a history and make a diagnosis, because of the problems of communication. Yet in practical terms, a person's liberty can depend upon his ability to communicate in such circumstances.

THE OPERATION OF THE SYSTEM

Sometimes without intending it, our legal system can operate unfairly upon persons from a different cultural background. In the criminal trial especially, the impression which the accused may make on a magistrate, judge or members of the jury may be critical. Yet people from different cultural backgrounds and with different accepted modes of behaviour may act in a way that seems quite alien for the simple

reason that it is alien. Witnesses may appear excited. The fair administration of justice requires that migrants' cultural and linguistic backgrounds should be taken into account in assessing their conduct and their later evidence in court. But without regular contact with migrants and familiarity with their ways how is this fairness to be achieved?

In criminal cases, legal punishment, especially of confinement, can have an aggravated affect if the sentence is imposed on a person not able to communicate adequately in English. To be removed from an environment which is culturally familiar and from those with whom one can communicate, and imprisoned in an Australian gaol can add a special, exquisite punishment which the non-migrant prisoner may not suffer. Furthermore, the migrant removed from his or her family may leave close relatives alone, isolated, resulting in profound punitive effects that fall unequally upon innocent parties: wives, children and the old. This is not, of course, to say that migrants must be exempt from punishment for wrongdoing. It is simply to call to attention the way in which the criminal justice system, particularly, operates unevenly in its punishments in a country with a large migrant population.

Quite apart from procedural matters, there are areas of the substantive criminal law which may need to be changed to reflect our new society. One instance relates to the defence of provocation to a charge of murder. Should the standard of provocation be an objective or a subjective one? This issue was dealt with in a working paper by the Victorian Law Reform Commissioner 'Provocation as a Defence to Murder'. The Commissioner said:

> In this State, where there is a considerable cultural mix and where it has been asserted, for example, that Melbourne has the largest Greek population of any city outside Athens, it would seem an insoluble problem to pin-point the qualities or characteristics of the ordinary man when considering such a man's (or woman's) ability or propensity to lose his (or her) self-control.

What may provoke an Italian or Frenchman or Vietnamese beyond endurance may not be the same as what will provoke an Englishman. The time is fast approaching, if it has not already arrived, when it is quite unsafe in Australia to judge the 'ordinary man' by the characteristics of the 'ordinary Englishman'. Such an approach is perfectly valid in a society of Englishmen. It was acceptable in a community of transported, antipodean Englishmen. It may be doubted, however, whether it is still the fair standard for an Australian society whose cultural composition has so radically changed.

MIGRANTS IN GAOL

Particular problems are also faced by migrants in prison in Australia.

* Language. An inability to write or speak English with fluency can cause problems, such as the misunderstanding of directions or orders or the inability clearly to complain about a legitimate grievance.

* Religion. A migrant who is the follower of any religion except Christianity may have difficulties in the practice of his religion, especially in such matters as diet.

* Isolation. In both New South Wales and Victoria, the general rule is that migrant prisoners and their visitors must converse in English: a rule which frequently makes supportive links with the outside world difficult or impossible to maintain.

* Prisoners' Mail. Most prisons require correspondence to be written in English for the purpose of censorship. Letters written in other languages may be banned or long delayed whilst they are being translated.

* Prison Discipline. The Poverty Commission draw attention several years ago to the fact that rule books placed in prison cells are produced only in the English language. This rule can lead to injustice, given that breaches of prison discipline can affect a prisoner's chances of remission, parole and so on.

MIGRANT WOMEN

Other migrant groups, perfectly law abiding, suffer special problems. Many migrants, in coming to this country, lose the support of an extended family. Women may be subject not only to the inequalities and discrimination suffered by women in many societies, including Australia. Their status as women in their own societies may conflict significantly with the status and roles expected of them in this country. A recent newspaper report revealed that many New South Wales Government funded womens' refuges in Sydney are catering increasingly for women migrants. Half of the Marrickville Women's Refuge, for example, is said to comprise migrant women.

The family and employment disadvantages of women often force them into a cocoon of their own language and culture, causing crises when they are exposed to ours. In cases of domestic violence, police in our culture (unlike others) may generally be reluctant to intrude. Yet where they do intervene it is not a criticism of the police to say that they may be more likely to accept what is said by a man able to communicate in English than by a woman who has little or no ability to speak the language. The frustration

and injustice caused by this predicament is not difficult to imagine. The distress experienced by women in illegal migrant situations, where there is a family breakdown, violence or abuse is even more acute. These women are a silent group who through fear and sometimes through ignorance are unable to go to recognised authorities for protection and guidance. They are susceptible to blackmail, including from amongst their own number. It is for that reason that amnesties may be specially desirable to remove the causes of such injustice.

Migrant women may be particularly disadvantaged in understanding the Family Law Act of this country. It embodies principles which are often quite at variance with the law and customs of their country of origin. For example, in custody matters, migrant women may often assume that their husband or his family would be more likely to be granted custody of the children, as is frequently the case in other cultures. Ignorance about our legal system compounded by an inability to communicate and an ignorance of where to start is all too often the tale of the migrant in Australia with legal problems. The fear which many people have about the law and its institutions is magnified by assumptions brought from other countries and an inability, by communication, to remove misapprehensions.

THE LEGAL PROFESSION

In addition to all these problems, misunderstandings frequently arise between lawyers and migrants. A number of studies have indicated that migrants are more likely than native born Australians to think that lawyers are dishonest, that they are mainly interested in making money and that they tend to take the side of authority rather than their client. In many cases, there is a serious communications breakdown between a migrant and his legal advisor. One confusing aspect of the legal profession in most parts of Australia is the divided profession: solicitors and barristers. This division is simply not known in most countries from which non-English speaking migrants are drawn. In the case of migrants, the trust and understanding that may be built up over a long period of time with a solicitor must suddenly, and their view unaccountably, be transferred to a barrister, whom they see briefly before the case, in circumstances generally of great stress and confusion.

Many studies have shown that lawyers in Australia continue to be drawn predominantly from families with high education and income backgrounds. A study of the legal profession in Victoria revealed what a small proportion of migrants make their way into the legal profession. The Bench in Australia, whether the magistracy or the judiciary is still overwhelmingly Anglo-Saxon. The legal profession is overwhelmingly Anglo-Saxon. The law has been called the last Anglo-Saxon bastion of our country. One is faced with the situation that an important profession in society, integral to the orderly running of

society, does not reflect the composition and diversity of society. I can see no ready solution to this problem. But it must be kept steadily in mind for it is unhealthy for a profession so important to the just ordering of Australia to be so little affected by the radical cultural changes that are felt everwhere else. At the very least, it behoves lawyers and courts to be alert to the changes in the general Australian population and the need to review our laws and procedures to take account of those changes.

CONCLUSION

I am not saying for a minute that we must abandon our inherited legal system because of the migrant influx. Especially in the post-war period, large numbers of migrants came to this country precisely because they could find here the protections of a country that lives by the rule of law, upheld in independent courts and with democratic machinery to change and reform the law where needed. Many of the newcomers are in the front ranks of those who praise the English legal system for the high priority it places upon upholding the individual and defending personal liberties against public authority. In many ways, the English legal system is becoming specially relevant to the society of the late 20th Century, where more effective protections will undoubtedly be needed for individualism against the risks posed by big government, big business and big technology.

Having said this, it is important that the law should reflect and serve the country as it is, not as it was. A third of all Australians either themselves came or are the children of those that came as migrants to this country since the last War. No country other than Israel has such a high proportion of ethnic minorities. Our legal system must be sensitive to such an influx. Its substantive rules, its procedures and its personnel should reflect and respond to the changes that have taken place. The Australian Law Reform Commission is one means of assisting government and Parliament in the difficult tasks of adjustment. But in the end, it is the lawmakers who must effect the changes that are necessary if the Australian legal system is to meet the diverse requirements of our diverse, more interesting and multi-cultural community.

Footnotes

1. Publisher's note, R.R. Garran, Prosper the Commonwealth Angus and Robertson, Sydney 1958.

2. Garran, 388.

3. ibid., 390.

4. loc cit.

5. F. Galbally, Speech to Loss Adjusters' Convention, October 1974.

6. See the Law Reform Commission (Cwlth) Criminal Investigation, AGPS Canberra, 1975. The relevant provisions of the Criminal Investigation Bill 1977 (Cwlth) are clauses 18 (notification of rights in a language in which the accused is fluent); 22 (communication with relatives or friends); 27 (presence of a competent interpreter).

7. Bureau of Crime Statistics and Research, 1973 Pilot Study of Central Court of Petty Sessions, Sydney, cited in Jakubowicz and Birchley, Migrants and the Law, AGPS Canberra 1975, 25.