

THE AUSTRALIAN NATIONAL UNIVERSITY

LAW SOCIETY MAGAZINE

CHANGING TIMES, CHANGING VALUES

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

January 1981.

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FUTURE DIRECTIONS

The watchword for our time is change. Yet the role of the law is overwhelmingly conservative: frequently speaking to each generation of law students and lawyers, administrators and judges, indeed to the public itself, in the language and of the attitudes of earlier times. In its dynamic phase, the common law of England had a definite law reforming element. Judges and lawyers worked together to develop new principles and to adapt old decisions to new times. Since the advent of popularly elected parliaments, judges have become more circumspect in their law making. Repeatedly, we are told, reform is a matter for Parliament. But Parliament is all too often ill-equipped, disinclined or uninterested. In times of rapid change, the coincidence of the pressures for change and institutional inability to meet those pressures, represents, potentially, a serious challenge to a stable and just legal order.

At the opening of this decade, Sir Paul Hasluck, writing of the 'very great and widespread social changes taking place in Australia' questioned whether the Australian community today could still be described 'as it might have been 50 years ago as Anglo-Saxon, Christian, egalitarian, self-reliant, democratic and moved by a spirit of mateship'.<sup>1</sup> Sir Mark Oliphant has even gone so far as to suggest that our convict origins and the avaricious migrants who came in search of gold, may have left our nation with a genetic blemish which has led, in a land of wealth, to a lack of compassion and to perceived national characteristics of selfish materialism:

The convicts who were sent from Britain to Australia were not all the victims of harsh laws. ... Among them were criminals of the worst type, men and women too, without pity or remorse, who took every possible opportunity to advance their own interests, whatever the effect upon their fellows. I don't believe that the genes of acquisitiveness, of utter selfishness, died out altogether as the convict blood was diluted by immigrants of normal type.<sup>2</sup>

Whether one subscribes to this genetic theory, and Sir Mark is a nuclear physicist, many young lawyers may agree that our early history left its mark on the national heritage of character.

Quite apart from our situation at home, Australia's place in the world has changed enormously since the Second War. We are no longer an important piece in the worldwide British mosaic. According to Professor W. MacMahon Ball<sup>3</sup>, we do not even enjoy the same strategic importance to the United States as we had in 1942. We are a westernised country in the Asian region: a kind of post-colonial anachronism. Realisation of our situation and of this new vulnerability must teach all of us, including lawyers, the importance of securing new relationships with near neighbours.

Though our country approaches the 21st century with great advantages (ample energy reserves, great food growing capacity, attractive and varied climate) there is abroad an insensitive philosophy of 'she'll be right, mate', 'no worries' and that most apathetic of words, 'anyhow'. The changes that are at work in society suggest that the 'anyhow' philosophy is dangerous when applied to the law and its institutions.

#### LAWYERS IN A SCIENTIFIC AGE

Quite apart from the pressures for legal change arising from the rapid growth of the role of government, the changing methods of business and developing social and moral attitudes, science and technology alone present the law with tremendous challenges upon which we cannot long remain tongue-tied and silent. In the lifetime of every young lawyer entering practice today have occurred technological developments about which most lawyers are woefully ignorant but which will have profound implications for our discipline. Amongst the most dynamic areas of scientific change are the fields of nuclear physics, biological science and informatics (computers linked by telecommunications).

The birth in June 1980 in Melbourne of a child fertilised in vitro heralds remarkable developments in biology which pose the most acute dilemmas for society and the law. The birth this year in the United States of a child carried by a host or surrogate mother extends this development. Cloning, which has been developed in plants and more recently in mammals, will shortly, we are told, be feasible for human beings. Human tissue transplantation is occurring regularly in all parts of Australia as scientists overcome the body's natural immune rejection of organs and tissues from other persons.

The developments of computerisation present many problems for society, including its law makers. By a remarkable combination of photo-reduction techniques, dazzling amounts of information can now be included in the circuit of a tiny microchip. The computerised society may reduce the needs of employment, increase the vulnerability of society, magnify our reliance on overseas data bases and endanger the privacy of individuals. Is the law to stand idly by with nothing relevant to say on these problems of our time?

The impact of the microchip will not be confined to automobile workers. I predict that before the century is out, registered land conveyancing will be overwhelmingly computerised. Yet surveys disclose that land conveyancing accounts for between 40 and 50% of the work, employment and fee income of the legal profession in Australia and Britain.<sup>4</sup> Computerisation will force the pace of Australian lawyers seeking out new, adequately remunerated fields, where they exist, of unmet needs for legal services.

#### PESSIMISTS OR OPTIMISTS?

When one surveys the pressures for change and our institutional arrangements for meeting those pressures, it is easy to be pessimistic. In a scathing comment on short-run politics, Sir Paul Hasluck pointed to the temptations of superficiality and short-term vision:

The use of new methods of public persuasion, whether in politics or commerce, and the level of argument on public issues suggests a falling away from the faith that what is stated clearly, exactly and reasonably will carry conviction. Parties try to win national elections by engaging public relations experts rather than re-examining policy. Packaging and a sales campaign are given more attention than the product. By and large ... the Australian community today gives much less attention to principles than to practice and many of our political leaders reveal the shortcomings in their pride in being 'practical' or, as they say, 'getting on with the job' even if it means acting without thinking.<sup>5</sup>

Lawyers themselves have not been innocent of this charge. Our inherited legal system tends to boast of pragmatism and to reject the grand principle or the search for fundamental values. Our mode of drafting statutes, our compartmentalised approach to the law<sup>6</sup>, the 'mercantile' criterion of right which permeates so many areas of the law, the adversary system itself and the methodology of precedents can discourage those lawyers who see our discipline as serving high social ends. For my part, I remain optimistic. The system has been around for upwards of

eight centuries. It has strengths, not least in judicial independence and the check this can sometimes put on the committed enthusiast in a powerful position, whether in government or the private sector. Institutional law reform has been established to help Parliament. Though its resources are still puny and its relationship to the actual law making process still tenuous, there seems little doubt that the Law Reform Commission model is on the right general track. Furthermore, it does search for principles and in a community debate between lawyers, experts and laymen. Moreover, it does search out fundamental principles that will ensure that reforms, once adopted, may endure.

Finally I am optimistic because, ironically enough, against much professional resistance, I believe our technological age will actually force change upon the legal profession and legal institutions. Our discipline alone cannot escape the implications of the mighty micro. On the contrary, there will be a great shaking up. Though this will make the life of the next generation of lawyers distinctly uncomfortable, there is a more than even chance that the net result will be beneficial. Lawyers will be released from many routine tasks to search out relevant modern activities worthy of lawyerly talents in a sceptical and fast-changing world.

#### FOOTNOTES

1. Sir Paul Hasluck, 'The Aimless Society', in The Age (Melbourne) 8 December 1979.
2. Sir Mark Oliphant, 'The Way Back to a Decent Society', in The Age, 12 December 1979.
3. W. MacMahon Ball, 'Act, or be the Poor Whites of Asia', in The Age, 10 December 1979.
4. J. Disney & Ors, Lawyers, 1979, 106-7. See also report of a study by Dr. R. Tomasic in The Sydney Morning Herald, 10 October 1980, 3.
5. Hasluck, op cit.
6. One example of this is to be found in the approach to standing. See The Law Reform Commission, 'Access to the Courts - I, Standing : Public Interest Suits', ALRC DP 4, 1977. Cf. Australian Conservation Foundation Inc. v. Commonwealth of Australia (1980) 54 ALJR 176.