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SEMINAR ON ETHNIC ORAL AND LOCAL HISTORY

CONFERENCE ROOM, CAGA CENTRE, SYDNEY

FRIDAY, 12 FEBRUARY 1982

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

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ETHNIC COMMUNITIES AND LAW

My task is to open this seminar and to put into context the subjects you will be examining. It is easy, in a specialist discipline, to become so fascinated by the detail of one's special daily concerns as to miss seeing clearly the social context. This is certainly true of the law. Few institutions are as ancient, as stable and as resistant to change as the law and its practitioners. Yet even the law must adapt to a time of rapid social and technological change. The Australian Law Reform Commission is one vehicle to help Parliament in the process of adjustment.

There is no doubt that the influx of migrants after the Second World War represents one of the most dramatic forces for change that our country has experienced. This force is still at work. No country, save Israel, has so actively encouraged the arrival and settlement of people from so many different lands, bringing so many diverse cultures and languages, as Australia. Unlike Israel, this country is based on no received cultural or religious orthodoxy. People from over a hundred lands, speaking at home over eighty different tongues, have come to Australia and are welcomed to its citizenship.

Australians of my age and older : those born during or before the Second World War, can scarcely imagine the variety of cultures of those who have made Australia their home. We were brought up in the Indian Summer of imperial rule : the Union flag, medals for Empire Day, visits of the Governor-General to the school, speeches for the Empire, cricket on the playing field, the whole paraphernalia of fine British values. Let there be no doubt that these values still contribute to the core values of Australian society. I am not one to denigrate the liberal, tolerant traditions we have inherited from the British Isles.

By the same token, there is a need for our institutions, whether they are libraries, the organs of government or the law, to adjust to the influx of the ethnic communities into Australia. They represent, according to Dr. H.C. Coombs, the 'third wave' of immigrants to this continent. Power, and the institutions of law and government, still remain very much in the hands of the second wave, the British immigrants. The 'first wave' of Aborigines are only now laying their claims to the rights and privileges that are justly theirs.

What are we doing in the law to adjust to this third wave? Legislation has been enacted to forbid discrimination¹ but it is one thing to enact laws on this topic and quite another to modify settled institutions and ways of doing things, to the legitimate expectations of a large community of immigrants and their families. Little things, such as the practices of police, are different. A breakdown in the understanding between police and members of the migrant population is not unusual. For example, a particular difficulty in police/migrant relations is the unfamiliarity of many migrants with some established Australian police procedures. By way of example, fingerprinting in Italy is used only for the most serious crimes. In Australia it is a more routine practice. For an Italian, the experience of fingerprinting can be quite traumatic. Likewise, bail is unusual in most European legal systems. Many migrants have mistaken the payment of bail for the payment of a fine and have been surprised by subsequent arrest for non-appearance in court.

One of the earliest tasks of the Australian Law Reform Commission involved an inquiry into the reform of criminal investigation procedures by Federal Police.² A Bill based upon the Commission's report is at present before Federal Parliament.³ The Bill contains important provisions to ensure that non English speaking suspects are informed of their rights in the language in which they are fluent. Furthermore, provision is made for the presence of interpreters or other persons or means to ensure that the ethnic suspect, who is not fluent in English, has a proper understanding of what is going on.⁴ One might say that this is a rudimentary requirement in a country with a large ethnic population. However, it has not been a legal requirement until now.

In several of the Law Reform Commission's inquiries we are looking to European legal systems for ideas for the positive improvement of the Australian law. Until now, law reform in our country has been very largely the captive of English ideas and English procedures. Nowadays, we are looking to the rich field of European law in the development of proposals for Australian law reform. For example, in the recommendations made by the Australian Law Reform Commission for the reform of defamation laws in Australia⁵, proposals were made for providing remedies for defamation based upon the French, German and other European legal systems.

There, in substitution for the English obsession with money damages, the remedy for defamation is more frequently a right of reply or a right to correction of facts found to be false. A moment's thought will indicate how much more apt these remedies are to correct public mis-statements of fact and to ensure the public's right to know. Yet until now, we have simply gone along with the lump-sum verdict, often years after the event, and frequently ignoring the community interest in the correction of mistakes or the statement of an alternative viewpoint. The Standing Committee of Attorneys-General recently announced its acceptance, in principle, of the right of correction as a remedy in Australian defamation laws.⁶

A second area in which the Australian Law Reform Commission looked to European legal systems was in the project on Human Tissue Transplants.⁷ Designing a law to deal with the use of human body parts raises fundamental questions which know no territorial boundary. We had to ask ourselves whether we were, in Australia, as venturesome as French and Czechoslovak legislators, who had enacted legislation under which all persons were deemed donors unless in their lifetime they expressed publicly a desire not to donate organs and tissues on their death.⁸ Likewise, in a project we had to deal with the universal problem of intoxicated driving, the Commission looked to European, and specifically Scandinavian laws, to evaluate their effectiveness in combatting the antisocial conduct of driving whilst under the influence of alcohol or other drugs.⁹ In a more recent report on the reform of Sentencing of Federal Offenders¹⁰ the Commission referred to many overseas attempts to grapple with the punishment of convicted offenders. One idea, from Sweden, was reserved for later study: the so-called 'day fine'. Instead of notions of 'equal justice' requiring a similar fine on millionaire and unemployed alike, the Swedes have developed the concept of a 'day fine' so that fines are levied according to the calculation of the nett daily income of the offender. One Sydney newspaper denounced the idea as 'Robin Hood justice' — a typical harking back to Englishon mythology. On the other hand, a more recent New Zealand Committee of Inquiry in Penal Policy picked up the idea from our report and commended it for consideration in New Zealand.¹¹

In the current project of the Law Reform Commission on reform of the law of evidence, we are looking closely at the European system of judicial inquiry, which contrasts so significantly with the adversary system we have inherited from Britain. Migrants coming to our courts are often astonished at the neutral, silent role of the judge or magistrate, which is so different to the active, inquisitorial function of the European counterpart. We may think our system preferable in some respects. But it does depend more heavily than European systems do, upon the presence and skill of advocates. It sometimes puts a price on justice that prevents ordinary citizens getting to the umpire.

The Law Reform Commission's inquiry into insurance contracts requires us to say whether the test for reasonable conduct in relation to the insurer is the test of what was reasonable for an Anglo-Australian or even or average Australian brought up in our language and traditions, or whether courts, conscious of the greater variety of the Australian community, should be required to consider what would be reasonable for a person in the actual position of the insured.¹²

One could continue instancing these cases and the changes that are coming about. Sufficient has been said to show that even so cautious and conservative an institution as the law — still overwhelmingly in the hands of Anglo-Celtic Australia — is adjusting to the presence in our midst of so many people from differing legal and cultural origins.¹³ It is not surprising that librarians and historians should also be reacting with greater sensitivity to the variety of our culture since the third wave brought the reality of ethnic Australia.

ETHNIC HISTORY IN AUSTRALIA

It must be said that the collection of ethnic local and oral history is in its infancy in Australia. This does not mean that information and documentation about the history and experiences of Australia's ethnic communities is not available from the existing major information agencies. The National and State archival bodies hold a wealth of material about such matters as immigrant arrivals, naturalisation, the housing, education and medical care of migrants and so on. The National Library and the major State libraries hold books, newspapers, pamphlets, manuscripts, pictorial material — in some cases even oral history tapes — relating to the experiences of ethnic organisations and individuals.

By the same token, documentation produced by ethnic organisations and individuals is less readily available. The significance of such ethnic records has only recently been recognised. The evaluation, arrangement and description of material in languages other than English can create difficulties. In the absence of written documentation, if we are to capture this part of our history, much needs to be recorded in audio or video tape.

Franca Arena, in her recent interesting piece on ethnic archives, began with a quote from President John F. Kennedy. Citing the noted Harvard historian Oscar Handlin, he said:

Once I thought to write a history of the immigrants in America. Then I discovered that the immigrants were American history.¹⁴

Franca Arena says that immigration has been the historic raison d'être of the United States and that the same can be said of Australia. Australia, Canada, the United States and some other countries have set about the task of documenting the ways of immigration. The documentation has spread the wealth of this material amongst many collections:

- . Government Archival Agencies. These have been responsible for the acquisition and custody of government records. Especially at a Federal level, with the Department of Immigration, these records form a marvellous source of raw data.
- . National and State Libraries. These are the major repositories for printed, microform and audio visual materials today. They also acquire manuscript material in original or copied form, though normally as part of a general rather than a specific ethnic collection. State libraries can act as repositories for external projects such as the oral histories project of the New South Wales Ethnic Affairs Commission. To date only one State, South Australia, has announced plans for a specific ethnic collection (the Migration History Centre).
- . Research Centres. Specific purpose research centres have acted as repositories of ethnic material. For example, the Ethnic Affairs Archives of the University of New South Wales or the Ethnic Heritage Collection of Monash University represent important collections of material on ethnic history attached to centres of learning.
- . Community Collections and Programs. A number of ethnic communities in Australia have collected records of their own history or are developing programs for acquiring both written and oral documentation. Since the acceptance of the concept of multiculturalism, there has been a growing willingness of ethnic communities to organise themselves in such a way as to collect and retain records of their past members. The willingness to do this has come, often, too late to preserve much material, but just in time to capture important elements of the history before time erodes the human sources of it.
- . The Australian Institute of Multicultural Affairs. This new Institute was established by the Act of 1979 of the Commonwealth Parliament. I am a Member of it. One of its objectives is:

establishing a repository of literature and other material relating to the diverse cultures of the Australian community.

The Institute has a clear responsibility to investigate the feasibility of the objective and to determine the role it can play in promoting the preservation of the documentary record of Australian multiculturalism. I have no doubt that Dr. Wilkinson will explain options for action in a session later this morning. I am proud to be associated with the Institute and will be keen to study the outcome of your discussions with Dr. Wilkinson.

WHY SHOULD WE CARE?

Why should we care to collect the oral reminiscences and documentary memorabilia of migrants and their families? Some will say that history has its own justification: that we find the reason for our being and the explanation of things as they are and things as they will be, from the history of our people. Others contend that there is a more practical usefulness. The history of individuals and families makes up, in aggregate, the history of the country. A country so dependent upon immigrants must look to their personal experiences to understand itself:

Human thoughts, feelings and actions become patterned and organised over generations into webs or constellations of meanings covering all the various domains of culture. Thus they constitute the objective data of the group's social and cultural life. Every individual member, however, must be seen as a distinct centre of experience and activity so that the sum total of such centres becomes the group social system or the living framework within which the group's culture exists. It is conscious human agents who play the decisive role in the creation and disintegration of the group's cultural systems, in their continuity and termination. All cultural data, therefore, must be considered as belonging to somebody, and not as an impersonal abstraction, existing in isolation and related to nobody.¹⁵

My personal conviction of the worth of collecting the oral history of migrant people was reinforced by the recent experience of reading the book by Dr. Jerzy Smolicz and Mr. M.J. Secombe 'The Australian School Through Children's Eyes'. This book provides a Polish-Australian view of school and life in Australia. Because it is Polish, it has a special significance just now. A series of Polish schoolchildren of differing ages and class and cultural background were interviewed and asked to explain the experience of moving from a fairly homogeneous Polish culture into a much more complex, multicultural, Australian environment. The analysis offered by Smolicz and Secombe is enlivened and activated by extensive quotations from oral conversations with Polish schoolchildren. Take a few, offered at random:

It is a rule in our house that we speak Polish. My parents say it is only fair that we speak Polish because on a normal schoolday from 8 o'clock till 5.30, I speak completely English. But I only speak Polish to my parents, and to their dislike, I talk to my brothers and sisters in English because it doesn't sound right when I talk to them in Polish.¹⁶

The school's influence has been very small on my Polish origin and background. ... I have retained my loyalty to Australia ... because she has given me so much. But my first turn is always to the Poles, to those people who have done so much to form my personality and ways of thinking. And trailing second will come Australia. ... For the future of the Australian culture, I sincerely hope that the Polish cultural characteristics never die out or are never suppressed. I see a harmonious blend of Australian and Polish cultures as Australia's happy future. ... Please accept my apologies for my staunch Polishness, but that is how I feel, a feeling which is slightest biased towards Poles, yet not really prejudiced against Australians.¹⁷

Being born in Australia of Polish parentage thrusts a child headlong into a highly perplexing situation. He has to contend with the discord between two differing lifestyles, their respective cultures and mental attitudes. ... There will never be a pure Pole in Australia, as there can never be a pure Aussie. ... There are no prototypes. Children of Polish parents are born into both a Polish and Australian environment, so both influence them, each to a greater or lesser degree, colouring them with the appropriate shade of grey.¹⁸

Lessons can be learned from the experience of migrants told in a frank and personal way. We can learn about the problems of transferring from a familiar language, culture and religion to an unfamiliar land on the far side of the world. We of the Anglo-Celtic majority can hardly begin to understand the trauma and disruption which migration can involve and the special sadness which abandonment or modification of an earlier culture causes to the older generation. Smolicz and Secombe appeal for the development of a community of secure 'biculturals'. These are people who feel safe and comfortable with a duality of cultures : a happy blend of the best of the Anglo-Irish inheritance of Australia and the challenging, novel features of the cultures of so many other lands. What a mistake it was to seek to suppress other cultures in a dull blanket of conformity. How much more interesting and lively our country will be following the acceptance of the merit of multicultural diversity. It is a good thing that just before it was too late, we have embraced seriously the effort to keep the history of the individual migrants who made up the mosaic of Australia's migration explosion.

I commend most heartily the project. I welcome this seminar and in my capacities as a member of the Library Council of New South Wales, Member of the Institute of Multicultural Affairs and Chairman of the Law Reform Commission, I will look forward to reading your conclusions.

FOOTNOTES

- * The views expressed are the author's personal views only.
- 1. Race Relations Act 1975 (Cwth).
- 2. Australian Law Reform Commission, Criminal Investigation (ALRC 2) (Interim), 1975.
- 3. Criminal Investigation Bill 1981.
- 4. *ibid*, clause 28.
- 5. Australian Law Reform Commission, Unfair Publication (ALRC 11), 1979.
- 6. This was announced by the spokesman for the Standing Committee of the Commonwealth and State Attorneys-General in Perth, November 1981.
- 7. Australian Law Reform Commission, Human Tissue Transplants (ALRC 7), 1977.
- 8. The Law Reform Commission concluded that Australia was not yet ready for a regime of 'opting out'. Instead it recommended a simplified regime of donations.
- 9. Australian Law Reform Commission, Alcohol, Drugs & Driving (ALRC 4), 1976.
- 10. Australian Law Reform Commission, Sentencing of Federal Offenders (ALRC 15) (Interim), 1980.
- 11. New Zealand Penal Policy Review Committee, Interim Report, 1981. See [1982] Reform 11.
- 12. See Australian Law Reform Commission, Insurance Contracts (ALRC 20), forthcoming.

13. Cf. M.D. Kirby, The Australian Community and Anti-Heroes, Lalor Community Relations Address, Canberra, 3 December, mimeo, 1980.
14. O. Handlin cited by J.F. Kennedy, 'A Nation of Immigrants', 1958. See F. Arena, Ethnic Archives, in Archives and Manuscripts, Vol. 8, No. 1, June 1980, 22.
15. J.J. Smolicz and M.J. Secombe, The Australian School Through Children's Eyes, 1981, 4.
16. *ibid*, 79.
17. *id*, 111.
18. *ibid*.