

332

CANBERRA COLLEGE OF TECHNICAL AND FURTHER EDUCATION

: 53RD ANNUAL GRADUATION

CANBERRA, WEDNESDAY, 28 APRIL 1982

LAW REFORM IN HARD TIMES

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Chairman of the Australian Law Reform Commission

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INTRODUCTION AND CONGRATULATIONS TO GRADUATES

You will all understand that on an occasion such as this, a speaker in my position is obliged by tradition and common courtesy to do certain things. As a judge, following tradition is doing what comes naturally!

The first thing I have to do is to express a proper sense of the honour which it is to be invited by this College to take part in the 53rd Annual Graduation. The College is undoubtedly one of the foremost of the Australian Colleges of Technical and Further Education. It brings experience and instruction in a remarkable range of disciplines to a large number of Australians, most of them on the threshold of adult life. There are few obligations in public office more pleasurable than to stand with new graduates at the start of their careers.

The second thing to be done is to remind ourselves of the significance of an occasion such as this. The ceremony of welcome to Graduates itself is at least as old as the Christian era. Its purpose is to place before the community, in a public ceremony, new recruits who have earned their laurels by a period of application to study and practical experience. Inescapably, in that work, the new graduates have acquired friendships and a degree of personal discipline. Some will also have acquired a measure of wisdom. Some will go on to further their education elsewhere. All are sent forward by this College to the Australian community with the commendation of this graduation. The precise form of the ceremony traces its origins to the Mediaeval Church and the laying on of hands: by which authority was transmitted from one generation to the next. On an occasion such as this, it is fitting that we pause for a moment and reflect upon the variety but also the seamless continuity of education.

Thirdly, I must congratulate the new graduates. It does not seem so long ago that I was sitting in a similar position to them listening to someone giving an Occasional Address and wondering what the future held in store for me. This is a moment when at least one period of study is over. It is therefore a time when the graduates are permitted a fleeting instant of self-congratulation. What began at a local kindergarten is, for most of you, now over.

I am not so far removed from the rigours of education to have forgotten the pressures that are put upon people who pursue tertiary education, in whatever form. When the nostalgia sets in, it all seems an idyllic time. But in many ways, life has become more difficult today, not least in the field of tertiary education : whether in the Universities, the Colleges of Advanced Education or the Colleges of Technical and Further Education. Now, there are special burdens on those who study part-time. Always there is competition to be faced. At the end of the road, there is sometimes uncertainty about securing an appropriate employment. Some of the new graduates have proceeded along the path of education at high speed. Others have adopted a more leisurely pace : stopping to enjoy the scenery and sometimes even repeating sections of the journey.

In most cases the burden has not been borne singly. The family, parents, friends, husbands and wives, children and colleagues, have all played their part. They have helped to share the burdens. The reward is here tonight. It is an occasion for proper, shared pride in which very many members of the community take part. That is why we involve the families and friends in ceremonies such as this. It is a tangible recognition of the contributions they have made to the achievement which is signalled by this occasion here tonight.

Having discharged my primary task, it is now my function to say something of general significance. The only requirement on me is that I must be relatively brief in doing so. For five years I sat on the platform of the Great Hall of Sydney University as a Fellow of the Senate of that university. In that time I attended at least 50 ceremonies such as this. Fifty times an Occasional Speaker rose in his place to address the assembled throng. It is a sobering thought, as I stand here before you tonight, that I cannot call to mind a single utterance : not one item of distilled wisdom, no aphorisms, not a single jest or pearl of any of the 50 Occasional Speakers. People in my position do well to bear in mind the transiency of modern oratory.

HARD TIMES

Let us set aside for a short time our worries about war -- especially nuclear war -- our concerns about the events in the Falklands Islands and other flashpoints of potential conflict. Forget for a moment the problems of declining energy resources and the potential dangers of exploding world population and whether we can feed the growing numbers of the world. These issues apart, I suppose the issue that most concerns Australians today is unemployment. Public opinion polls certainly suggest that this is one of the great political issues of our time. Those of you who read the Australian Financial Review will have seen a sombre editorial predicting that we were on the slippery path to another Great Depression. It is interesting to remember that the First World War, before it became merely one of a series, was known as 'the Great War'. The first World Depression is likewise still known as 'the Great Depression'. Economists and prophets of gloom tell us that we must now learn to count. We have had a recession or two. But now, it is said, we have to face a more serious economic malaise.

You do not have to be an economist to know that there are problems with the world's economy and our economy. To some extent the problems seem even beyond the control of national governments. Even the national government of the United States, with all of the resources and talent available to it, does not so far seem to have the solution to the malady.

In the Australian Capital Territory, reports in the local media show the magnitude of the problem here. A front-page statement in the Canberra Times (9 April 1982) declared that 'adolescents' were 'still the worst hit' in respect of unemployment. Though there was a national decline in the number of people unemployed in March 1982, preliminary unemployment statistics published by the Bureau of Statistics in early April showed that in the Capital Territory, unemployment actually rose during the month. The improvement in picking up the newly released job seekers was said not to be as strong as at the same time last year. The unemployment rate nationally remained highest for adolescents -- 14.1% in the case of males and 21.3% in the case of females. The unemployment rate for adolescents looking for full-time work was said to be drifting upwards. Seasonally adjusted figures were not available but in most cases unemployment rates in the Capital Territory were said to be 'substantially higher' than the national rates during March. Whereas the national average for adolescents looking for full-time work was 17.2%, the national average in the Capital Territory was 28.2%. The Director of the Canberra Association for Regional Development, Mr. Quinane, was reported as saying that the problem could be traced to a lack of private sector confidence and growth. He was critical of some government policies.¹

Those of you who read yesterday's Canberra Times will recall a news item on page 3 that more than 10,000 people in the Australian Capital Territory — about 5% of the population — draw benefits or pensions which were said to be below or near poverty level. The plight of these Canberra people, who live near or below the poverty line, was said to be 'certain to intensify in the near future' as welfare agencies' funds for emergency relief were exhausted. Figures were quoted from various welfare bodies including the Smith Family, the Salvation Army and others, demonstrating what was said to be 'an alarming jump in the number of emergency relief cases attended to'.² A schedule was published comparing a 'poverty line' developed by the Institute of Applied Economic and Social Research with unemployment and sickness benefits and pensions. Especially for under-18-year-old single people and people with a number of children, the difference between unemployed poverty and the pension is significant and growing.

Yesterday's story also carried the tale of one worker with four children who worked as a retail manager in England and Sydney before coming to Canberra. He lost his job soon after moving to the Capital. He has applied for numerous jobs but has missed out either because he is not experienced enough or is too highly qualified for unskilled positions. He told the journalist:

The real problems are the psychological aspects of being unemployed and trying to survive on unemployment benefits. People don't realise what it is like to have to beg. You go to the Department of Social Security and they cannot help you so you go to the welfare agencies and have to beg. You get called a dole bludger by people — you lose your self-respect — and you lose interest, and when you get in this situation, it is easy to do just that — lose interest.³

HARD TIMES AND LAW

Now, I am a lawyer and though I picked up an Economics degree during my university education, I cannot and must not offer, pundit-like, my solutions to the economic problems of our country. The issues are in any case at the heart of the party political debate in our country and it would be quite wrong for a judge and a statutory office-holder of the Commonwealth to proffer to the Executive Government unsolicited and possibly unwelcome views about what should be done. Furthermore, I believe that we must be careful lest we fall into the trap of the depression mentality. Countries are like people. They have moods. A profound bout of depression can have terrible consequences. Just as in individuals, it can sometimes be self-induced. It is not always possible to find a rapid cure. Nor is the doctor always willing or available to propose national shock therapy or a kind of national valium sedative.

My concerns are those of the lawyer. Hard times have implications for the law. These implications are not always fully realised. Poor people, unemployed people are not rich people without money and jobs. Their legal needs may be quite different.

In the civil law, our legal system, inherited from Britain, developed very largely to solve the problems of those with sufficient property to be able to afford to take their case to court. Because our legal system was largely developed by judges in the course of solving practical disputes between the people who could afford to go to court, the civil law was created around the concerns, interests and conflicts of propertied people. The very methodology of the adversary trial — resolving disputes by the competing contentions of highly paid advocates arguing the case on behalf of their clients — tended to keep out of the courts people who could not afford a lawyer's fee. In this way, the common law of England, when it was transplanted in Australia, was profoundly affected by the biases and concerns of property. Thus, when I was at the Law School, not so many years ago, not a whisper was breathed of laws on social security, welfare workers, Aborigines, mentally retarded people, patients' rights and so on. These were areas of 'undeveloped territory' so far as the law was concerned. Instead, I spent the midnight hours studying the laws of land conveyancing, contracts, mercantile law, company law, the laws of probate and succession, the rules of equity and tax law — laws for the well lawyered who could pay the fees.

The two areas of law which tended to affect ordinary folk and which were taught in my day were the criminal law and divorce law. Even divorce law was a relatively recent development. Until the mid 19th century you needed a special Act of Parliament to get a divorce. Pressures of social change and the intense feelings that surround intimate personal relationships led to the development of a general divorce law, later overtaken by the Family Law Act.

So far as the criminal law was concerned, it must be remembered that our country's modern history was itself a by-product of the criminal justice system of Britain. The burgeoning prisons could not contain the overflow of the people of the poorer classes in prison for stealing, sometimes literally to survive in the dislocated world of the first Industrial Revolution. The loss of the American colonies sent the First Fleet south to Australia, brim-full with disaffected victims of the only real connexion most ordinary Englishmen had with courts of law. They were the lucky ones. They escaped the hangman's noose and the other grim punishments that survived up to that time. But they brought with them, in their vessels, the legal system which reflected the property concerns of the Mother Country and whose methodology of dispute resolution in the courts often prevented ordinary people from getting to the umpire or asserting or defending their legal rights.

UNEMPLOYMENT AND LAW

The growth in the number of unemployed must obviously have implications for the law — both in substance and practice. There is a famous story of an encounter between Sir John Latham, then an Australian Minister and later to be Chief Justice of Australia, and the Italian Dictator Mussolini. The encounter took place in the early 1930s. Latham sought to explain to Mussolini the role of the High Court of Australia as a neutral umpire, resolving the ultimate battles over power between the Federal and State authorities or between government and the citizen. Mussolini, so it is recorded, listened in astonishment to the way in which the decisions of our Federal supreme court were simply accepted and faithfully obeyed by all concerned. He then asked Latham a pertinent question : 'Where are the armies which the High Court uses to enforce its decrees?' Latham was able to point out that in our system of law the ultimate enforcement of the law and acceptance of the authority of the courts rests not upon military force, nor even upon police intervention. It depends not upon an army of sheriffs' officers rushing about, fully armed, to uphold the dignity of the judges and enforce their rulings. It depends rather upon the acceptance by the community of the Rule of Law and of the principle that our constitutional machinery is legitimate and deserves the respect (if not always the agreement) of everyone.

One danger of endemic unemployment, short employment, under-employment, unsuitable employment or undesired part-time employment, may be an erosion of this respect for the law and its institutions. If the problem is transient and if relatively few are caught up in the depression of unemployment, we need have little concern and should devote our efforts as a society to ameliorating the predicament of those who are displaced. But if the problem is endemic, if it is worldwide, if it were to last for a matter of years, indeed if it were to set in as a permanent feature of our form of society (as the microchip and other technology displaced workers, particularly from routine employment), we have a much greater social problem on our hands. In these circumstances, we will need to rethink the Calvinist ethic about work. We will have to rethink the standard hours of work. We will have to prepare people for constructive use of leisure time. For many, including myself, a life of much leisure would be death. Yet if a steady and possibly growing number of our people are to be confined to increasing hours of leisure, we must adjust our social moralities and rid our vocabulary of expressions such as 'dole bludger' and 'welfare cheat'. For unless we can either solve the problems of endemic unemployment or revise society's attitudes to non-productive idleness, we are likely to reap a whirlwind of discontent and alienation, particularly amongst the young. They will feel

betrayed by society : condemned for idleness beyond their control and surrounded by wealth and property which they cannot hope to attain. The Brixton riots in London and the confrontation last weekend between the unemployed and police in Brussels stand as a warning — even to us in the lucky country.

In part the answer to this social predicament lies in education. We have a very poor record in Australia in educational retention when compared to the United States, Canada and Japan. They keep twice as many young people at school after 16 as we do. The answer will also lie in more vocational training and retraining for new skills. This is where the TAFE Colleges such as this College will play a vital part. But it seems there will remain a kernel of unemployed, large by the standards of the post-war era. If we are not to alienate this section of our community and create disaffection and resentment, including towards the law and our institutions, we must be sensitive to their predicament. We must design social policies and laws that take their problems into account. I often feel that it is not entirely coincidental that the problem of new drugs in the Australian society has coincided with the economic malaise and the rise in unemployment amongst the young. Whether we should continue to tackle this aspect of social disillusionment and boredom with the criminal law rather than with public education and medical treatment is an important issue that Australia will have to face in the coming years.

UNEMPLOYMENT AND LAW REFORM

The Australian Law Reform Commission works only on tasks that are specifically assigned to it by the Federal Attorney-General. No task has been assigned precisely to deal with the legal issues raised by unemployment and new poverty in Australia. In 1977 we reported to the Commonwealth Government on a new system for handling the problems of people who get into debt. It was not a particularly novel proposal. In fact it was based upon statutory schemes operating for many years in the greatest credit economy of them all — the United States. Put briefly, the report proposed a system by which people who got into financial difficulties could secure a moratorium on all their debts, without the painful necessity of going bankrupt or the expensive business of going to court for individual debts. Procedures were then proposed so that such people could secure rudimentary debt counselling, an organisation of their debts and the establishment of schemes for the regular repayment of their debts. Members of the middle class organise their debts by the use of credit cards or Bankcard. The poor, the unemployed and those who were just not able to cope with the problem of debt may sometimes need a little more help than presently they receive. This proposal of the Law Reform Commission seems to be lost somewhere in the Department of Business and Consumer Affairs. In law reform one must learn to be patient.

The Law Reform Commission is also working on the reform of debt recovery law generally. It is also examining the law of standing in the courts. That law has, until now, frequently confined the power to raise important questions in the courts to those who have a personal and generally a property interest in the issue they want to have determined. The Commission is now seeking to find a formulation that will ensure that community groups who have a genuine concern in a particular issue (but no immediate financial interest) can ensure that the law is upheld in the courts. The problem that was experienced in Canberra with the challenge to the Black Mountain Tower indicates the kind of difficulty that can sometimes arise when it is necessary to establish a property interest in order to have the law of the land tested and upheld. In the United States, legal service advocates have been vigorous in using the law to protect the poor and disadvantaged as a group — working the machinery of the justice system for a wider clientele.

The Law Reform Commission's latest report on child welfare law reform seeks to tackle in a sensitive way the desperately sad cases of young people who become caught up in criminality or who are in need of care because they are neglected or abused or in unsuitable child-minding centres or oppressive employment. To promote the best possible use of the scarce welfare dollar and to diminish the internecine conflicts that can arise in the bureaucracy in this city — a matter with which you are probably not entirely unfamiliar — specific proposals were made so that the reform could operate in practice and not just look good in the statute book. There are many other tasks before the Law Reform Commission in which we are trying to help the Government and the Parliament to modernise and simplify the law and to make it more sensitive to Australian conditions today.

CONCLUSIONS

I hope that these thoughts which I have shared with you tonight have not dampened in the slightest the happiness of this occasion. Everyone here has a reason to be happy tonight. But it is part of our cultural and ethical tradition that even in the moment we enjoy success, we spare a thought for those who are less fortunate. And we should spare more than a thought, for actions speak louder than thoughts. Our society is going through a time of profound change. The dislocation will probably be as serious as that which attended the transformation of rural English society during the first Industrial

Revolution. There will be many innocent victims. The process will put pressure upon the law and upon respect for our institutions. To Mussolini's question it must still be said, we have no armies to enforce the law : it depends ultimately upon the consensus of the people. That consensus will be lost unless the law is sensitive to changing times and hard times. I hope I have said enough to convince you that the Law Reform Commission, serving Parliament, seeks to display that sensitivity. I hope in the daily lives of the new graduates, they will do likewise.

FOOTNOTES

1. Canberra Times, 9 April 1982, 1.
2. Canberra Times, 22 April 1982, 3.
3. M. Nightingale, cited *ibid.*