AUSTRALIAN COUNCIL OF CHURCHES

AUSTRALIAN CHURCH AND SOCIETY 2000 AND BEYOND

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JUSTICE MICHAEL KIRBY

FIRST, THE GOOD NEWS

According to the Jewish joke, when Moses came down from Mount Sinai, he announced to the people of Israel that he brought good news and bad news. "The good news is that I got Him down to ten". "The bad news is, adultery stays!". I will likewise divide this contribution into good news and bad news. Like Moses of the jest, I must get my discussion down to a short compass. And there is bad news which stays. It will accompany us into the next century. But first let us look at the aspects of our society and its justice system, from which we can take a proper measure of satisfaction.

The fundamental law of any country is its constitution. Typically, that lays down the framework of government by which the people live together under the rule of law. As we approach the year 2000, there will be a great deal of discussion about the Australian constitution. No doubt there will be a lot of loose talk about radical reforms

of it. We heard that talk in the years before 1988. Nothing came of it. The referenda proposals of that year to amend the constitution were defeated in every State. On none of the proposals was the popular vote much more than 30% in favour of change. Constitutionally speaking, Australia has been described as the "frozen continent". This has a down side. But it also provides a degree of stability in our political and public life which we would probably value more dearly if we lived in a more dangerous and unstable society.

Ours is not a country of revolution. We have inherited and adapted the basic constitutional arrangements of the United Kingdom. We share with that country our Head of State (the Queen). Despite some talk of Republicanism, I do not expect to see a change in that arrangement. Opinion polls show a steady support for the constitutional position of the Queen of Australia. Then there is Parliament. Our Parliaments, Federal and State, are modelled on the "Mother of Parliaments" at Westminster. They even copy the green and red benches of the counterpart chambers on the other side of the world. Laws are made, for the most part, by Acts of Parliament. They have to pass under the scrutiny of elected officials. This provides some assurance against rank oppression and the kind of tyranny which unresponsive and unanswerable governments can produce.

The third branch of government is the judiciary. It is not elected. Its members are appointed by the government of the day. Recent instances of judicial officers being charged with criminal offences are so exceptional in Australia that

they naturally hit the headlines. They drew attention to the basic features of the judiciary in Australia. It is made up of men and women who are highly trained and who take an oath, or make an affirmation, to do justice to their fellows "without fear or favour, affection or ill will". There are exceptions of course, but most of Australia's judicial officers strive to perform difficult duties properly, under increasing pressure of caseloads and complex law. Daily, they attempt to provide neutral justice. They perform most of their duties in the open. They can be criticised by the public and the media. In most cases they are subject to appellate review. There is a hierarchy of courts. The ultimate court is the High Court of Australia based in Canberra. Appeals to the Privy Council in London have now been abolished. That abolition has itself encouraged the notion that we should, in Australia, develop our own jurisprudence. We should not be tied to the apron strings of English law. The High Court has lately reminded us that, nowadays, English law has no higher place in the Australian legal system than any other foreign law. Increasingly lawyers and courts are looking to legal principles developed in other countries to provide the ideas that will stimulate our legal system in the search for justice between the parties in the particular case before the court.

We do not have a Bill of Rights in our constitution. There was much talk in the 1970s and 1980s about incorporating such a Bill of Rights. Canada proceeded to do so. So far, Australia and New Zealand have held back. The

endeavour in 1988 to add a small number of apparently uncontroversial entrenched rights to the constitution was defeated at the referendum. Once again, the people of Australia showed themselves very conservative on constitutional change. From time to time attempts have been made to introduce a notion (partly accepted in New Zealand) that there are some basic common law rights that lie so deep in our constitutional fabric that even Parliament cannot repeal them. So far this notion has not found favour in the Australian courts. The supremacy of Parliament, elected by the people, is acknowledged under the constitution. But in other ways courts have developed techniques of long standing for the purpose of protecting and preserving fundamental rights. One of the best known means of doing this is by a rule used for giving meaning to Acts of Parliament. Courts have repeatedly said that, if an Act of Parliament would have the effect of over-riding longstanding and fundamental common law rights, it must be expressed very clearly. Otherwise, courts will presume that Parliament, by the use of general language, did not intend to revoke time honoured liberties. This technique has been used many times to preserve basic rights, such as the right to protection from self-incrimination, the right to confidential consultation with a lawyer and the right to trial by jury not by public inquisition.

Australia ratifies a great number of international human rights treaties. Such ratification does not, of itself, make the principles of the treaty part of the law of

Australia. But there are other means by which such international principles are being translated into our national life to promote a more just society. One such means is through the work of the Human Rights and Equal Opportunity Commission, now under the Presidency of Sir Ronald Wilson. Another is by courts developing the common law with the aid of the human rights statements set forth in international instruments. In many quarters there is a recognition of the fact that we must adapt these basic rules, so grandly stated in international covenants, to the day to day life of the law in our country.

The judiciary is the ultimate arbiter of legal disputes in society. Judges preside over serious criminal trials before juries chosen from citizens of all walks of life. The judge directs the jury on the applicable law. The jury decides whether the prosecution has proved the guilt of the accused beyond reasonable doubt. This system of criminal justice has its defects. Juries can be swayed by passion and prejudice. Such passions can sometimes be worked up in the media, ever anxious for a story. But, by and large, the system works well. It involves ordinary citizens in the justice system. It provides an assurance against a wholly professional system which might become out of touch with the ordinary people whom it serves. It is a democratising influence on our law. Most judicial officers, who know the foibles of each other only too well, tend to recognise the good sense of jury trial, particularly for the resolution of serious criminal cases or cases involving defamation or civil

charges of fraud. But jury trial is now is decline. Relatively few cases outside the serious criminal trial, are now heard by a jury. Most are determined by judicial officers sitting alone. And 90% of the decisions are made by magistrates.

The independence of the magistracy has been gained by a long struggle which is only now approaching completion. There was a time, in human memory, when the lowest rung of the judicial ladder in Australia (magistrates and justices) did not even require legal qualification. Magistrates were part of the Public Service. They were often treated as such by the government. Some of them mixed too closely with the police, whose evidence they then had to evaluate, in contest with citizens charged before them. These unhappy features of the "Police Courts" have been swept away in recent years. Magistrates are now professionally trained. They are as independent of the government as other judicial officers. They keep a neutral position between the State and citizens or between one citizen and another. These are important achievements. It is not much use boasting of the rule of law if the decision-makers are not, and are not seen to be, completely independent of those who come before them for a decision.

The high standards of our judiciary have been asserted and upheld in a series of recent decisions of the High Court of Australia. That Court has insisted that judges should not receive information relevant to a case before them, however well meaning and informative, except in the presence of the

parties. It has insisted that judges who have previously said or done anything that might cause a reasonable observer to apprehend bias or prejudgment on the judge's part, to stand aside so that the case is tried by someone who is manifestly unbiassed. These are rigorous standards. To some extent we just take them for granted in Australia. Yet they lie at the heart of our law and constitution. Of course, they do not guarantee the attainment of justice. But they do promote that end. They may be appreciated when they are contrasted to the systems of justice which exist in other parts of the world where judges are chosen because of their religious or ideological persuasion and make no attempt to disguise the biasses for which they are even applauded by their government.

No system of justice will hope to succeed without a legal profession which includes members independent of the government. Unless there are lawyers (whether in government service or private practice) who, where necessary, will courageously and fearlessly attack government and powerful interests in the courts, the rule of law is a dead letter confined to the lawbooks. It is essential to have talented lawyers who will be ready to bring important disputes to court so that even the mighty interests in society are regularly brought under the discipline of the law. This was expressed in England, hundreds of years ago in the aphorism: "Be you ever so high, the law is still above you". It has been proved in our country by recent events. Judges, senior police officers, politicians, a Minister of the Crown and

others have been put on trial for breaches of the criminal law. These cases help to demonstrate that nobody is above the law.

Most law is made nowadays by Parliament. A great deal of law is made in this way both in the national Parliament in Canberra and in State Parliaments. In addition much law is made by subordinate lawmaking bodies: local government authorities and authorised officials. But some law is still made by the judges. Especially in the highest courts, they have the obligation to adapt and develop the common law (inherited from England). They do this in order to deal, in a reasonable way, with new situations. In a sense, the common law fills the crevices which are left by gaps in earlier common and statute law. The common law - made by judges - is constantly expanding as old precedents are adapted to new situations. Judges generally strive to develop this law in a just way. They seek the fair resolution of the dispute before them. In the course of solving that dispute they may lay down a principle which, in turn, can be adapted when a like case comes before the courts in the future. Judges have an obligation to give reasons for their decisions. Those reasons provide an explanation of how the judge justifies the particular decision arrived at. The public explanation of the lawfulness and justice of a decision exposes the judge's opinion to professional scrutiny and public criticism. This is also an important hallmark of a just legal system. It is an attribute of the openness of the administration of justice which is another of the most

valuable aspects of the system of justice in Australia today. It stands in marked contrast to the secret courts and tribunals of many other lands.

In the never ending wave of laws made by judges, officials and legislatures, there is constant attention to aspects of the law where injustice has previously been exposed. The democratic answerability of members of Parliament ensures that at least the major injustices which come to their notice have a good chance of being tackled by legislative reform. In all jurisdictions of Australia, law reform bodies have been established to help Parliament and the government to expose injustice and to provide remedies for it. In addition to the permanent Law Reform Commissions, there is a never ending parade of Royal Commissions, departmental committees of inquiry, Parliamentary committees and unofficial lobby groups working towards reform of the law. The existence of a media which is not controlled by government ensures that some, at least, of the criticisms of the law will come to notice. If the injustice is serious enough, it will tend to attract news items and editorials. If the injustice persists, the criticism may become more pronounced and vocal. It often takes a long time to organise the Australian people into action against the perceived injustice of a particular law. But it does happen. The large national demonstrations which exhibited, somewhat belatedly, concern about the intrusive potential of the Australia Card (or national identifier) is an example of what can sometimes happen.

In this review of the good news, I have looked mainly at our institutions of lawmaking and of justice. Because formal change of our constitution is so rare, it is unlikely that any of these institutions will change markedly in the decades ahead as we enter the twenty-first century. But the point to be made for present purposes is that there is much that is good in the institutional arrangements which we have inherited. To some extent they are responsive to pressures for change in the detail of the law. They are administered by men and women who undergo rigorous intellectual training, who perform most of their duties in public, who are susceptible to criticism and appeal and who operate in a system whose ideal is the attainment of justice. These judicial officers are assisted by an independent legal profession which fights courageously for its clients. And if, in the course of proceedings, injustices appear in the laws or procedures which come under the attention of the courts, the judicial officers of Australia are usually not slow to expose the injustice and to call for reform. Institutions of reform of the law exist. And sometimes the judges do not wait for Parliament. By the techniques of the common law they attend to the injustice themselves. So, in our system of law, there is much to acclaim.

NOW, THE BAD NEWS

If this picture looks just a little too idyllic, accompany me now into the other vision of the justice system of Australia. This journey will take you from the high plain

on which are found the constitution, Parliament and the highest courts down to the streets of the ordinary suburbs and towns of Australia, into the shanty dwellings of some Aboriginal Australians and the alienation of many of the newcomers from countries that do not share the cultural assumptions of the major ethnic groups of this country.

Start with the constitution. It is a document which the Constitutional Commission's research showed had been read by virtually no Australian. Unlike Americans, who are brought up with the Bill of Rights, few Australians have the slightest notion of what appears in their constitution. If they opened it, they would find much that was obscure and a lot that was positively misleading. There is no mention there of the Prime Minister or even of the Cabinet. The realities of modern "democratic" government are ignored or left to implication. The great power of the bureaucracy is not even mentioned. There is no reflection of the loss of power of Parliament to the Cabinet and from Cabinet to the Prime Minister and his advisers. The Realpolitik of our lawmaking institutions finds little reflection in the words of our constitution.

It is perhaps surprising that no reference is made in the constitution, or in any other constitutional document, to the special position in Australia of the Aboriginal people. Talk of a "compact" with the people who inhabited this land for more than 40,000 years before European settlement, has so far come to nothing. The English law, which is such a source of boasting for lawyers, declared Australia to be an empty

land, despite the patent existence in it of Aboriginal communities living there in harmony with nature. From this extraordinary beginning, at least until very recently, the relationship between the settlers and the Aboriginal descendants has been one of neglect, oppression and cultural cannibalism. In the last decade or so, there have been attempts by successive governments to redress the many wrongs of the past to the Aboriginal people. But these have not yet tackled, effectively, the huge proportions of Aboriginals in custody, the large involvement of Aboriginals in the operation of the criminal law, the destruction of Aboriginal customs, self-respect and culture and the injustice and inequity of health, education, housing and other arrangements for Aboriginal Australians. Although progress has been made, much more is necessary. In hard economic times, the momentum behind moves for a new relationship with Aboriginal Australia appears to be slowing. With our unmoving constitution, it seems unlikely that this fundamental injustice will soon be cured. Perhaps the centenary of the Federal constitution will provide a much needed stimulus which can be embraced by all Australians, where the anniversary of European settlement did not.

Parliament, it is true, is elected by the people. It is also true that the Senate has lately provided an outlet for the representation of a diversity of political viewpoints. But in the powerhouse of the House of Representatives, party politics holds sway. Parties which represent comparatively few citizens and powerful interests,

effectively dictate a large part of the political agenda, including on matters of justice, law and order. There are still comparatively few women in our Parliaments; fewer still in Cabinet. There are few representatives of ethnic communities there. Like the law, the defence forces and the church, politics remains dominated by the Anglo-Celtic communities. But times are changing. To ensure that the justice system is sensitive to the changing racial and cultural composition of Australia, it will be vital that the new communities have a voice that is heard in the places where the real decisions affecting life in Australia are daily made.

It is one thing for courts to say that we may now look to legal systems other than England for the stimulus of comparative law. But getting judges and lawyers to look beyond the English casebooks is difficult to achieve. Sometimes English perceptions of basic rights may not accord with those of other countries. A recent example in the High Court occurred where Sir Ronald Wilson, in the space of a year, changed his decision on the issue of the fundamental right to confidential legal advice when a person was facing a serious charge or official investigation. Sir Ronald acknowledged that he had been too strongly influenced in his initial view by English precedents. When American, Canadian and New Zealand cases were drawn to his notice he, and a majority of judges, rejected the English law. The Court upheld the basic right to legal professional privilege. There are many other examples which show that we in Australia

will do well, in our quest for justice, to search in the English case books, but also beyond.

The grand talk of human rights and of fundamental freedoms will ring rather hollow in the ears of poor people or communities cut off from the hope of real educational opportunities and economic advancement. To them the International Covenant on Civil and Political Rights, if they have heard of it, must seem a faraway dream. As research has shown, the fine notions of the right to silence when confronted by police melt before the flame of actual investigatory practises. All too often such practices put people, for whom English is a second language, at a special disadvantage. They require vigilance on the part of the courts against the risks of injustice which may be done by applying the one law to all people regardless of their cultural and ethnic origins and their linguistic skills. A country that boasts of the multicultural ideal must adapt its legal system more vigorously than Australia has done. The Australian Law Reform Commission is currently examining aspects of Australian law which need adaptation in a multicultural society. Fifty years after the great diverse migrant intake which followed the Second World War, we may at last make fundamental adjustments to our legal system. It will be seen that in matters of fundamental law reform we rarely rush things in Australia.

Whilst it is true that progress has been made in broadening the categories of persons who can do service on juries and in improving the independence and qualifications

of magistrates, for many people living in Australia these remain remote institutions. Still more remote are the judges. Many first generation migrants are excluded from juries because of their linguistic skills. Most only see a magistrate when charged with a traffic offence. Courts may be open to the public. But most courts are deserted. If a member of the public enters the courtroom, he or she may not be able to hear the participants. If heard, they will often seem to be speaking in a special language of their own full of strange words (like "albeit", "heretofore", "deposition") Latinisms (like "inter alia", "expressio unius", "ejusdem generis"). They will be quoting long passages from the writings of judges in England, even centuries ago.

Astonishment might well give way to alarm if the member of the public found that Australian courts today determined the question whether there was a right to speedy trial in criminal cases not by reference to the Australian constitution, nor even by reference to basic human rights, but by reference to the practices of the Justices in Eyre in England in the reign of King Richard II!

There are many odd things about our legal system. It takes an act of will of those trained in it sometimes to remind themselves of its pecularities and even absurdities. All too often the solutions of Australian problems are sought not in fundamental notions of justice and fairness but in a passage of judicial reasoning of an English judge dealing with a different situation perhaps a hundred years ago on the other side of the world. To the Aboriginal living on the

fringe of a country town or the Vietnamese migrant living in the suburb of Cabramatta, the ways of the law must sometimes seem strange indeed.

This, of course, assumes that the Aboriginal and the migrant have access to the law. For the most part they do not. If they are criminal accused they are brought before the law. Fortunately, nowadays, in a serious matter, they will at least have a right to legal advice. It was not so until quite recently in Australia. But the notion of a vigilant and independent legal profession fighting for the rights of all must seem remote to many such people. Indeed, it appears remote to many middle class Australians who do not qualify for the means test for legal aid. They may have a dispute with a neighbour, a claim for an injury, an argument over a contract or a fight with the local council. But unless they have thousands of dollars of their own funds to spend, such people, without legal assistance, often do not have an effective access to justice.

The recognition of this fact has lately led to increasing moves away from the formal court system for the resolution of conflicts. Statutory bodies have been established to allow needy people to assert their rights without lawyers in a more informal atmosphere. Statutory office holders (such as the Ombudsman) have been created to provide guardians for ordinary citizens in their disputes with authority. Community law centres and bodies for arbitration or alternative dispute resolution have been established in various parts of Australia. This has occurred

out of recognition of the inability the courts of law to serve effectively any but the wealthy or those with legal aid. Truly, this is a sorry commentary on the justice system. Yet it is one that is inherent in its traditional techniques of adversary trial and in the use of highly trained advocates doing battle like the gladiators of old. Even for those wealthy enough, legally aided or foolhardy enough to appear for themselves who pursue their causes in the general courts, there are shocking delays. Justice delayed may be justice denied. But it remains a feature of justice in the courts in Australia. Reforms are occurring. But much remains to be done.

As for reform of the law, law reform bodies all too frequently find reports filed by governments and parliaments, with no action to implement their suggestions. All too often, parliaments are preoccupied with political questions. They fail to attend to the injustices exposed in the daily operation of the law. Such matters are often too technical, too complicated, too sensitive or too politically risky to attract the attention of the elected lawmakers.

Even more indifferent to law reform can be the "free media". In matters which concern its own interests, the media will often be outspoken on the subject of legal change. Pages of the press will be filled with the suggested defects of defamation law and the need to rein in juries which, surprisingly, keep awarding large verdicts for defamation by the media. But on the legal and reform concerns of ordinary citizens the media is frequently

phlegmatic and idiosyncratic. There is generally little interest and still less effective follow through. The media in Australia is a doubtful and unreliable champion of justice before the law for ordinary folk.

CONCLUSIONS

Should one be optimistic or pessimistic about justice in Australia as we approach 2000? Will the centenary of our Federal Constitution provide a renewed focus for asking fundamental questions about the government, law and justice in our community? The past history of constitutional change makes it unlikely that fundamentals will be approached. In that regard we will probably just continue to muddle along.

We should constantly scrutinize our justice system by measuring it against systems operating overseas. So measured, there are undoubtedly aspects that are praise-worthy. They should be acknowledged. They include the democratic Parliaments and our right to change our lawmakers, by election, from time to time. They also include the judiciary which is independent and aspires to neutrality, fairness and the observance of the rule of law. But, as I have tried to show, there are many for whom these ideals seem a distance mirage. For them, access to justice is but a pipe dream. And when they gain access, they often find its ways curious, its language odd and its substance perplexing, old fashioned and sometimes alien.

The major challenges for justice in Australia as we approach the new century include the establishment, for the

first time, of an appropriate legal relationship with the descendants of the indigenous people of Australia, the Aboriginals; the creation of a legal order which is more consistent with the multicultural idea of modern Australia; the development of effective law reform machinery which will keep the attainment of justice as a constant goal of our society and the provision of effective means of access to justice for all people with genuine and serious disputes.

Although Australia's national constitution proclaims it to be a secular state, and although secularism and humanism are dominant forces in Australia today, there is no doubt that Christian ideals and culture still permeate many of our institutions and our laws. Some Christian principles are embraced wholeheartedly by secularists and humanists. Above all, the notion of civic love, reconciliation, forgiveness and tolerance are good principles upon which to base a just legal order. The churches, and other organised groups of thinking Australians, have a very important contribution to make to the constant quest for justice in Australia. That quest will never cease. The goal may often seem elusive. But realization of that fact should simply redouble our resolve to continue the search. And never to be content with injustice.