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AUSTRALIAN LAW REFORM COMMISSION

LAUNCH OF *REFORM*

AUTUMN EDITION 1998 - ISSUE 72

TUESDAY, 7 APRIL 1998, SYDNEY

VALUE JUDGMENTS: THE ETHICS OF LAW

The Hon Justice Michael Kirby AC CMG

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BIRTH OF REFORM

I am now so ancient that I can boast that I was present at the birth of *Reform*, the journal. It happened this way. In 1975 my brother, Donald, now a seasoned Sydney solicitor, gave me a beautiful Daumier print. It showed an irascible old judge in France who was sufficiently ill-mannered to wear his decorations into court. In the funny way these things happen, I immediately conceived of how I could share this fine etching with a wide legal audience. The glaring eyes. The downturned mouth. The ferocious appearance. It

* Justice of the High Court of Australia. Sometime Chairman of the Australian Law Reform Commission.

looked remarkably like several judges of my acquaintance. I knew that my reaction would be shared by members of the legal profession. And so *Reform*, like many babies before and since, was accidentally born. I apologised to its readers for "still more literature for the lawyer to read"¹. I stated that the journal, like law reform, must "seek the participation and interest of the profession". "Take heart" I urged the readers. "Remember this: it is designed to be read and thrown away. In due course ... a proper format will be designed and glossy photographs of persons prominent in law reform may even be introduced". Some readers thought I was joking.

The main news item in the first issue of *Reform* was the election of new governments in Australia and New Zealand. Mr Fraser had just been confirmed in office in Canberra. The new federal Attorney-General, with Methodist zeal for law reform, was Bob Ellicott QC.

The basic structure of *Reform* has remained remarkably unchanged since that first edition more than twenty years ago. There is news on the nation and on the world of law reform. There is reference to High Court and other relevant authority. There are reports on the activities of law reform agencies throughout Australia

¹ [1976] *Reform*, 2.

and overseas. Some book reviews of relevance to law reform are noted, together with items on the people playing a part in law reform. There was no Advisory Committee for *Reform* in those days. Most staff members regarded it as the Chairman's folly. The whole thing was actually rather amateuristic. It was dictated, from cover to cover, on the weekend: by me. Remarkable arrogance as I look back on it that I never invited others to contribute. Yet, regular as clockwork, *Reform* came out every quarter. This is the way the great media empires of Randolph Hurst and Rupert Murdoch were born. Who knows what may yet come of *Reform*?

By January 1978² *Reform* was printed for the first time on glossy paper. It maintained the little quotations designed to catch attention to each item in the publication. Many people told me that although the articles were boring, at least the quotations were worth reading. Each quarter I scoured the dictionaries of quotations and the old bookshops for pithy sayings and cartoons to illuminate this unashamed effort to promote the ALRC and its work. To the end of my term with the Commission, *Reform* was just a one-man show. Glancing at the old pages it brings back memories of the work of the Commission in those days. It is a kind of archival record that would be dear to the heart of Dr Jim Stokes³.

² [1978] *Reform*. 77.

³ (1998) 72 *Reform*. 64.

I was rather sad when, after my departure, *Reform* lapsed and then was only intermittently published. I congratulate the Commission for reviving regular publications of the "new look" *Reform*. I congratulate the President, Alan Rose, for seeing the value of this "bridge" between law reformers, the legal profession and the community generally. I applaud the work of the editor, Michelle Weidenhofer. I pay tribute to the Editorial Advisory Committee, distinguished lawyers and citizens. I hope that they will ensure that *Reform* continues to *provoke* as well as to *inform*.

It is invidious to single out any of the Advisory Committee members. But may I be allowed on this occasion to make special mention of the Honourable David Hunt QC, who has just retired from distinguished service as Chief Judge at Common Law of the Supreme Court of New South Wales. I know, from sitting with him in the Court of Criminal Appeal and from reading many of his judgments, what an outstanding jurist he is. In 1978-9, even before his appointment to the Supreme Court, as David Hunt QC, he was a consultant in the ALRC project of reform of defamation and privacy law. I remain hopeful that many of the proposals in that report - especially those envisaging remedies by way of rights of reply and of correction rather than money verdicts - may yet come to pass. Perhaps the recent record of very large jury verdicts in defamation cases may make media interests more receptive to the ALRC proposals than once they were. However that may be, David Hunt QC's life has come full circle. In the twenty intervening years, he has

served the law with great distinction - as, I believe, has the ALRC. I am glad that he is renewing his association with the Commission.

A RULE OF CAUTION

I am sure that you will understand that, in my position, it is necessary now to be even more cautious than I always was in public utterances. A few years ago I joined and subscribed to the Movement for the Ordination of Women in the Anglican Church. Lo and behold, a case concerning that issue came to the Court of Appeal and I had to disqualify myself⁴. The case was decided by two Catholics and a Jew. When the Gay and Lesbian Law Reform Association in Tasmania wrote to me, years ago, to say that they were running out of funds and asked me to contribute to their coffers, I unhesitatingly did so. As a citizen, I regarded their struggle to reform the Tasmanian laws on homosexual offences as one for basic human rights. But then, soon after my appointment to the High Court, a case (arising out of their efforts) came before the High Court⁵. I had to disqualify myself. The moral of this story is to say as little as possible in public, to join nothing and certainly to give no one any money.

4 *Scandrett v Dowling* (1992) 27 NSWLR 483.

5 *Croome v Tasmania* (1997) 71 ALJR 430; 142 ALR 397.

So you will understand why my remarks today must be somewhat circumscribed. Wild horses could not drag out of me a comment on the following provocative items in the current issue of *Reform*:

- * The constitutional validity of the Native Title Amendment Bill 1997 (Cth)⁶.
- * The Government's refusal to implement the ALRC report on reform of the law of standing to sue for public remedies and therefore the possible need for ongoing court reforms in this area of procedural law⁷.
- * Mr Michael Lavarch's interesting article on the Republican Convention with comments on ministerial codes of conduct⁸.
- * Dr Cronen's essay on the adversarial system and whether it should be reformed - an issue that may raise constitutional questions under Chapter III of the Constitution⁹.

⁶ (1988) 72 *Reform*. 3.

⁷ *Ibid*, at 4.

⁸ *Ibid*, at 27.

⁹ *Ibid*, at 34.

- * The several essays by Alan Rose¹⁰, Chris Sidoti¹¹ and Chief Justice Alastair Nicholson¹² on the ALRC report on children in court, specifically in the Family Court. The High Court has reserved its judgment in an important case, argued on one side by another contributor to this edition, Mr Bret Walker SC, concerning the powers of the Family Court to make orders directed to a State Legal Aid body, in relation to the separate representation of children before the Family Court.

All of these are timely and interesting contributions to public debate. But upon them I must keep my opinions to myself. I know how bitterly disappointed you would all be to be deprived of the eventual pleasure of reading my opinions in the *Commonwealth Law Reports* or on the Internet.

For a moment, I thought of a harmless theme when I saw the excellent article by Michael Antrum on children and the legal process¹³. He tells the story of the shock he experienced when, from

10 *Ibid*, at 44.

11 *Ibid*, at 48.

12 *Ibid*, at 55.

13 *Ibid*, at 59.

a home that did not indulge in physical violence, he was sent to a school where he underwent the cane. I thought the ALRC had recommended during my time that corporal punishment at schools should be banned¹⁴. I remember reading at that time that Napoleon had eradicated it from most of Europe in the 1790s and it was looked upon as a quaint English custom, only for export to England's colonies. In my school days, like Mr Antrum, I too was submitted to the cane. But only once. And then for spoiling my copybook, literally. At the Summer Hill Opportunity School in Sydney I had spilt ink on the pages of a departmental exercise book. Even then an obsessive type, I tore the ruined pages from the green covered book issued by the NSW Department of Education. Alas, the headmaster (Mr Gibbons) had a marvellous sense of *avoir du pitié*. He immediately detected my sin. There was no due process. No right of appeal or administrative review intervened. I was given four of the best for deliberately destroying Crown property. My life in the law was launched by this injustice. Perhaps this childhood experience left a deep scar on my psyche. Certainly, I admit to a strong devotion to due process, administrative reform and judicial review. And not only for children.

¹⁴ Australian Law Reform Commission, *Child Welfare*, 308-310 (pars 406-408).

VALUE JUDGMENTS IN THE LAW

The general theme of this issue of *Reform* is value judgments: the ethics of law. On such a theme there is so much that could be said but I will confine myself to three points.

First, the debate about the adversary system and its suggested weaknesses has been stirred up lately by Mr Evan Whitton's book *The Cartel*. Mr Whitton is a very distinguished and experienced journalist. He has seen more of the inside of courtrooms than some barristers. It is important for those inside the system to listen to the criticisms of those who view it from outside. In a sense, this is the "bridge" that *Reform* also endeavours to offer. But a useful companion to Mr Whitton's book is *The Justice Game* recently published by Geoffrey Robertson QC. I feel bound to mention this, not only because the author sent me a copy. But because it was Geoffrey Robertson who, in 1974, urged me to accept appointment to the ALRC when I was actually quite reluctant. Geoffrey Robertson finishes his book on his many litigious triumphs with this statement:

"It struck me that we would do better to recognise that justice is the most serious and important game of all, and the best side will have a better chance of winning if its rules are precise and fair and obeyed. For what matters above all is that the result must never be a foregone conclusion. For all the grandiose descriptions that have been offered about the adversary system of trial, and for all the pomp and self-esteem that tends to affect its professional participants, it is the best method we have yet devised to give the suckers an even break".

Though somewhat inelegantly expressed, for a silver-tongued silk, this summation has substance in the context of the many cases of stupid, autocratic and frankly oppressive criminal prosecutions described in Robertson's book. Critics of the adversary system suggest that it frustrates the discovery of the truth. Sometimes, it is true, that may occur. But it is important to remind Australians that the criminal trial, at least, has purposes in addition to the discovery of what happened at the scene of the crime. The fundamental purpose is rather to discover whether the State, with all of its resources and power, can prove that the person accused is guilty. This obligation, which must often be extremely frustrating to the State, lies at the heart of our liberties. It puts a check on the intrusion of the State in our lives. It defines the kind of free society we are. It distinguishes our country from others which strike a different balance between the individual and the State. It is one of the reasons why Australian freedoms are stronger than in many of the countries where the search for the truth becomes all consuming. If you are in doubt, read Geoffrey Robertson's account of the trial of *Mary Whitehouse v Gay News*¹⁵, the prosecution of the play *The Romans in Britain*¹⁶ and the old-style trials in Prague before the Berlin Wall came down¹⁷. One of

¹⁵ G Robertson, *The Justice Game*. Chatter and Windus, London (1998) 138.

¹⁶ *Ibid*, at 165.

¹⁷ *Ibid*, at 223.

the values of our law is to maintain the high level of personal freedom which Australians enjoy as against the encroachments of official authority. If this sometimes means that the truth is not established in our courts, it may be because we accept that there are other important social values which the law must defend. As in so many matters of law reform, a knowledge of our history is essential to those who would change things. Not a few of our ancestors in Australia survived the hangman's noose, and came instead to this country as convicts, because, flying in the face of the evidence, juries refused to convict for capital offences. They tempered truth with the wisdom of justice.

Secondly, the ethics of law surely include honesty on the part of its decision-makers. I know that there are many who would like to believe that legal decision-making is simple. That the sparse language of the Constitution can have only one meaning. That an Act of Parliament is always unarguably clear. That an old common law precedent applies exactly to every new fact situation - even in the age of the Internet, the genome and rapid global change. Those who sit in judgment in Australia know that the law is rarely so simple. Yet if they have a choice and must select one of two or more competing legal solutions, it is surely more ethical that they should honestly acknowledge this. And that they expose to the criticism of their fellow citizens the value judgments which influence the choice which they select.

Back in my law reform days, in my Boyer Lectures on *The Judges*, I urged this candour and honesty upon the Australian judiciary¹⁸. After a decade in the ALRC, I could no longer believe the mythology that an Australian judge flew on automatic pilot and that all decisions were inevitable and preordained. Unfortunately, I feel that most citizens of our country still think that that is what the law is, or should be. Their view is reflected by not a few politicians and some media commentators. It now has very few adherents in the legal profession itself. They know that often - not always - choices have to be made. We have not yet adapted fully our legal process, court procedures and techniques of advocacy to this new realism. Doing so is a major challenge for the ALRC, the courts and the legal profession of Australia. But that we are in a better shape to confront the ethical challenge of candour is a significant contribution which the ALRC for 23 years has made to our legal culture. In debating matters of legal policy with honesty, empirical data and an acknowledgment of the complexity of legal choices, the ALRC has lifted the Australian legal profession's appreciation of the value judgments which, every day, we have to make. By hiding them, we may avoid some criticisms. We may convince some and pretend to ourselves that there is rock-like certainty in our law. But we will actually debase the ethics of law. Without honesty, ethics will be replaced by cynicism, self-deception and mythology.

18 M D Kirby, *The Judges*. ABC Boyer Lectures 1983, 33-43.

My third comment is a personal one. In a few weeks a most distinguished Australian lawyer and past member of the ALRC, Sir Gerard Brennan, will stand down as Chief Justice of Australia. Glancing through the early pages of *Reform* I was reminded of his magnificent contribution in the early days of the ALRC and in the Administrative Review Council, to law reform in this country. I have recently paid tribute to his energetic support for the use of information technology in the High Court. This is, I suppose, the most obvious technological change which distinguishes our early time in law reform and the Commission of today - with its Website and constant focus on technological themes. For an ethical life in the law and in law reform it would be difficult to find a finer exemplar than Chief Justice Brennan. Not by accident is he shown in his portrait at the High Court with volume 175 of the *Commonwealth Law Reports*. That volume contains the *Mabo* decision¹⁹ which he wrote in 1992.

Today, a life in the law is a life living with reform. That is why *Reform*, the journal, is vital reading for the modern lawyer. I have much pleasure in launching Issue No 72. It has come a long way since the one-man show of 1976. And its best years lie ahead.

19 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.