Australasian Christian Legal Convention Ormond College, Melbourne

"Some thoughts on the place of law and lawyers in the new millennium"

Saturday 3 February 2001 9.15am-10.30am

Chief Justice Paul de Jersey AC

I begin by adding rather captiously to the debate about when a new millennium begins. Rationally, it began 34 days ago. Conventionally, it began one year and 34 days ago. But historically, neither of those dates sits comfortably with the intention basing the modern calendar.

It was the Venerable Bede who popularised the Anno Domini system, through his work "De Temporum Ratione", produced in 725 AD. He utilised the Easter calculations of a 6th century scholar, Dionysius Exiguus, or "Denis the Little". Dionysius persuaded Pope John the First to redraw the Easter calendar, which had been based on a pagan calendar of the Romans; to retreat from a calendar which had been in vogue from the days of Emperor Diocletian, an emperor who persecuted Christians; and to select instead, as the commencement date of the Christian era, the birth of Christ. But then unfortunately Dionysius fell into error.

The scholar selected, as the year of Christ s birth, a year which actually fell four years after the death of King Herod. Herod, as we know, survived the birth of Christ, an event which caused him no little dismay. It seems historically reasonably certain that Herod survived the birth of Christ by four years or more. And so, it is contended, had Dionysius properly implemented his intention, endorsed by Pope John the First, we should have celebrated the second millennium of Christ s birth in 1996 or 1997! (R Lacy and D Danziger: The Year 1000, Little Brown & Co, 1999, p14.)

Conceding the pedantry of that point, which I hope you may nevertheless have found a little diverting, may I dwell for a short time on the progress of the world as the millennia clocked over? I will do so recalling CS Lewis s disparaging reference

to the "snobbery of chronology", which emboldens us people to conclude that because we are the most recent products of the human race and able to draw on the vast wisdom of the past, we therefore know best (cf. Lacy and Danziger: supra, page 201). The human achievement in any age obviously must be seen in the light of prevailing conditions.

An immediate contrast may be drawn between Bethlehem at the beginning of the Christian era, where a profusion of visitors meant there was "no room at the Inn", with the Bethlehem at the commencement of the third millennium: "closed" for reasons of political necessity, a reflection of the alarming escalation of conflict between the Israelis and the Palestinians.

One thousand years after the birth of Christ, an intensely devout "western" world was acutely conscious of St John s "Revelation" (ch 20 v1-3):

> "Then I saw an angel coming down from Heaven with the key of the abyss and a great chain in his hands. He seized the dragon, that serpent of old, the Devil or Satan, and chained him up for a thousand years; he threw him into the abyss, shutting and sealing it over him, so that he might seduce the nations no more till the thousand years were over. After that he must be let loose for a short while."

This was the era of church congregations trembling in response to "fire and brimstone" sermons, in England from Wulfstan of York, for example, who has been described as the Billy Graham of the year 1000 (Lacy and Danziger, supra, page 48). It was a harsh, pinched era, where slavery was the norm and by our modern standards, everyday life was extraordinarily inconvenient. As the new century, the new millennium, approached, people were first dramatically exposed in the year 989 to what we now call Halley s Comet. Despite high public anxiety, civilisation endured and it seemed the Devil may not have been let loose at all!.

Speaking in the year 2001, one accepts the vast changes wrought in just the last century render virtually incomprehensible any meaningful comparison between ours and the world of a thousand years ago. World population has increased from 1.6 billion in 1907, to almost 6 billion today. Over the last century, European imperial reigns ended in Britain, France, Belgium, Portugal, Holland, Japan and Italy: from 50 independent nations in 1900, we now have more than 190. Over that period the world embraced the discovery of electricity, the advent of the motor car, the aeroplane, the telephone and the computer. Women acquired "rights", socially, politically and professionally. (See Sir Ninian Stephen: "International Criminal Law and its Enforcement" (2000) ALJ 439.)

One of the most dramatic developments over the last few hundred years concerns communication. In the year 1000, a person s words generally reached no further than the range of the human voice. Kings and churchmen, who could rely on others to spread their edicts, were really the only exceptions to that. The rolling centuries brought revolutionary technological change: Gutenberg s cast metal printing press of the 15th century, three centuries later the telegraph, the telephone, the radio, television and ultimately the web. Allied to those developing

methods of transmission were other changes, in transportation, which accelerated the dissemination of information: railways, ships, postal services, aircraft. As the centuries moved on, the world thereby became much more aware of major social issues. The spread internationally of news of slavery in America provides a good example. Newspapers became influential to the point where governments feared them: they sought to censor, or to limit distribution through financial impost. Monarchs and churches had earlier sought to suppress the spread, through books, of views different from their own.

Today, a millennium on, we have a free press, free media, substantially unhindered in their provision of information: and individuals may supplement the cubic metres daily available through those means, by personal access to the internet. It took 38 years of radio to achieve 50 million listeners; 13 years for 50 million to be viewing television; but a mere 4 years from the commercial birth of the internet before 50 million users were logging on (US Commerce Department s statistics, see "Ottawa Citizen", 16th April 1998 referred to in "Media Awareness Network"). ❱ A world in which fear and power limited the passage of information, transformed by the imprint of technology into a world where the capacity to learn and inform is virtually boundless.

Yet have these powers for good in fact beneficially transformed the human condition? We lawyers stress the primacy of the rule of law as the guarantor of civil society, what has been described as "the first engine of healthy social growth the idea that no man can be above the law" (Lacy and Danziger, supra, page 198). Yet examples of modern collapses of the rule of law proliferate, most recently in Fiji and the Solomon Islands. The world struggles efficiently to bring, to international justice, leaders who have committed, against "humanity", crimes of extraordinary gravity. Geoffrey Robertson tells us that 160 million people died last century through war, genocide and torture (Crimes against Humanity, 2000, Penguin Books Australia, page 454).

And notwithstanding the modern facility for communication to which I have referred, locally, nationally and internationally, ignorance substantially prevails: witness the AIDS epidemic in Africa. World economic imbalance, religious intolerance, endemic inter-racial hatred, poverty: factors like these have frequently overwhelmed the more civil urgings of sophisticated modern communities to the point where, notwithstanding some very positive recent developments, like the fall of communism and the Berlin wall, we still inhabit a globe riven by turbulence.

And so I emphasise Lewis s warning about the "snobbery of chronology". The humility urged by the prophet Micah (ch 6 v 8), while often the most challenging goal for lawyers in particular, is a wonderful ideal no doubt achievable with solid application; and one should not confuse "meek" with "weak". The preamble to the Australian Constitution records the people s "humble" reliance on the blessing of Almighty God. Chief Justice Gleeson recently suggested the modern comparator

as confident self reliance! (Christmas Service for Lawyers, St James Church Sydney, 29 November 2000.)

The three qualities prophetically advanced by Micah, justice, mercy and humility, do helpfully encapsulate a modern lawyer s desirable approach, frankly whether Christian or not. As Mr Justice McPherson, the President of the recently formed Christian Lawyers Society in Queensland, interestingly reminded us at its launch, the display of those qualities was considered by Micah the sufficient offering of a faithful disciple of Our Lord: rather than the very interesting, challenging collection of other qualities put to the prophet as possibilities: "burnt offerings with calves of a year old ❱ thousands of rams ❱ ten thousands of rivers of oil ❱ (culminating with one s) first born".

But, you ask, how can a lawyer embrace the abstract notion of "justice" to which Micah referred: a lawyer with a predominant duty to the administration of justice according to law, that duty surpassing even the important duty owed to the client.

In the most immediate sense, Judges are absolutely constrained by the law. But the application of the law should, to the Christian lawyer, rarely become a source of moral discomfort. That is because, with probably few exceptions, the law in this civilised democracy, which reflects conventional notions of morality, thereby betrays the Christian inspiration basing those notions. The law of negligence is an obvious example. In "The Enforcement of Morals", Lord Devlin said (p25), that "no society has yet solved the problem of how to teach morality without religion". Defining the morality which bases current law depends on community values. Religion has proved to be a very "convenient" way of developing those values; and to the adherents, it is of course more than a matter of mere convenience.

Modern Australia is shy about conceding the role of history, lest doing so disturb comfortable complacency. Some, perhaps many Australians revelling in the most-modern secularity of our 21st century nation, rebel against any acknowledgment of the beneficial contribution of historic ties and other influences. One of those influences is certainly that of Christian philosophy. Gleeson CJ in the same address mentioned the outrage when our first Prime Minister Edmund Barton, in 1902, visiting London, called on the Pope in Rome, provoking a petition of protest signed by 30,000 Australians. One may perhaps exaggerate in suggesting such current attitudes are of recent development.

Though now rarely acknowledged as such, because it would certainly be considered unfashionable to do so, the Christian influence, very pronounced at, say, Federation, shaped our laws and our morality. It still does so, although probably more subtly, and as I say, generally without acknowledgement. Ironically, probably were it not for the unabashed surge of other more fundamentalist faiths, one wonders whether secular Australia would, for example, still invite witnesses in courts to take oaths on the Holy Bible. It is reassuring to see Parliaments still

beginning their sessions with Christian prayer. The immutable truths expressed in Christian form 2000 years ago still guide us, however reluctant some may be to acknowledge that.

Hence my contention that modern day Australian lawyers, including judges, should rarely be discomforted in seeking to do "justice" while nevertheless constrained by the framework of the law.

That aside, a substantial part of a judge s work, and a substantial part of the supporting work of litigation lawyers, is of a discretionary character. This aspect of a lawyer s work extends to the advising which occurs in non-contentious affairs in lawyers officers or chambers. In that area, the discretion vested in the judge or lawyer is substantial. While it falls often to be exercised in accordance with well established legally chartered approaches, there is scope generally for the application of the individual s concept of what is honest, what is good, what is right. In those cases, the underpinnings of the particular lawyer s personal morality may assume great significance.

There is no doubt that modern Australia is marked by trenchant secularity. There is marked decline in formal Church adherence, although of course that does not establish that people lack religious faith or personal moral conviction. It is said however that moral consensus is fading. As that happens, people turn to law (cf. Bork: "Thomas More for Our Season" 1999 First Thing 94 (June/July) 17-21). Part of a properly motivated lawyer s goal should be to do his or her best to promote public confidence in the courts as stable enduring institutions which counter, or act as a foil against, the turbulence of modern civil society.

There is certainly, and possibly consistently, increasing interest in the courts of law, institutions run, as some tend to emphasise, by unelected judges wielding potentially enormous power. These are bodies which sometimes determine issues of dramatic social significance, issues of human rights and social policy, the rights of indigenous people especially. The courts have taken on the large and challenging burden of reviewing some administrative decisions of the executive organs of government. As an interesting particular example, courts may now even be called on to review decisions concerning the treatment and management of prisoners.

Recognising the significance of this judicial role, the public is expressing much more interest in who the judges are: there is growing interest in the blend of gender, background and ethnic origin on the bench, and of course especially at the level of the High Court, the question of where judges might be expected to stand on the issues of the day conservatively, or liberally? Advance assessments on those matters are of course not necessarily reliable, and it is often good that

judges be seen to disappoint expectations: their honest independence must prevail.

Apart from the nature of the issues for determination, and the composition of the courts, the public is increasingly willing to criticise decisions which it perceives inappropriate. Judges, and to a lesser extent litigation lawyers, are subject now to unprecedented scrutiny in the way they actually carry out their work. They are subject to trenchant wounding in the media, especially in relation to decisions in the criminal jurisdiction, and with a novel degree of generally unfriendly criticism. The judges work on patiently and responsibly, correcting error where necessary to forestall the development of inaccurate public perception, and retreating from the strict isolation hitherto felt essential in order to maintain respect for the institution; although in becoming more forthcoming and accessible, judges recognise that, like it or not, they are authority figures who "lay down the law". There is a subtle and difficult balance to be struck between the so-called "ivory tower" and becoming "one of the pack".

Where does the professional Christian lawyer sit, or swim, in this pressure cooker? Subject to any applicable constraint of the law, he or she must seek to advance the "common good". The common good is a reasonably well known ethical and jurisprudential notion, notwithstanding post modernist coyness. St Thomas Aquinas, credited as its foremost proponent, said that "as parts of the full life of a community, all human beings fall into subordination to the common happiness in a way properly expressed in law". Spiritual matters aside, all "adherents of the common good hold that human beings, given their nature, can expect to be fully happy only within a community of shared benefits and shared risks" (L.Becher: Encyclopaedia of Ethics vol 1, St James Press, Chicago, 1992, page 177). How does this concept of the common good impact on legal practice?

Put simply, the legal profession is, must be, primarily concerned with serving the public interest. That is indeed the necessary essence of any "profession": what distinguishes a profession from other callings and the provision of services. Of the legal profession in particular, one notes that in the interests of the common good, the community has devised a set of rules, being the law, which Dean Roscoe Pound uncontroversially described however as "merely the skeleton of the social order" (as quoted by JL Dennis: "For the Common Good" (1990) Trial (September) 55,56). In other words, the law delineates the limits of socially acceptable behaviour. Over time, society s legal framework, even allowing for that limitation, has nevertheless become so extensive and complicated that it is incomprehensible to most people. Lawyers, specially trained to understand and apply the law, have become essential to ensure that the law operates to maintain social order, and they thereby advance the common good.

Judges apply law, and exercise discretions based on conventional notions of morality within any applicable legal framework. Lawyers assist them to do so. Non-litigators advise within the framework of the law. They likewise have scope to offer moral guidance to their clients. Christian lawyers seek to be alive to the stresses of

21st century Australian life: moral dilemmas, possibly subtle difficulties spawned by modern conditions. Faced with such issues, the lawyer does his or her best to assist the client to a morally defensible position.

The current broad challenge for all lawyers concerns the inaccessibility of justice. Access to justice is a human right of fundamental importance, of essential constitutional significance. There are countless members of the community who lack access to legal solutions, for lack of knowledge of their rights and resources to pursue them. Legal aid is endemically under-resourced by executive governments. I suspect technological advances provide our greatest current hope of generally increasing access to justice. I refer particularly of course to the worldwide net, and the streamlining of court processes through modern technology.

Lawyers will advance the common good if they are astute to ways of dealing with the very real problem of inaccessibility to justice, and if they are prepared to lend their considerable weight to taking the necessary steps to improve it. I am not talking just about commercial clients who will be less than excited about litigating in courts which cannot match the technology of their own offices. I am talking more about those who cannot, financially, afford access to the courts.

It is important generally for lawyers to lend their learning to the development of important social programs with legal complexions. The treatment of intractable drug addicts is a good example.

It must not be thought that most lawyers thoughts stop at the case immediately in hand. Lawyers are jurisprudentially educated to grapple with broader community issues. It is no accident that they frequently find themselves in positions of community leadership: school boards, councils, community organisations that is the result of recognition of the usefulness of their finely honed skills and their well developed social consciences.

Accessibility of justice is one of those broader issues, and that issue falls within the broad spectrum of general human rights. One question which interests many lawyers is the protection of those rights, which brings me to another issue of long term currency.

In this country we have no constitutionally enshrined bill of rights. We are nevertheless plainly a free and secure society, a robust democracy with wide statutory protection against such things as racial and other discrimination and other forms of unequal treatment; our press is free, our judiciaries are independent; we have statutorily guaranteed freedom of information; and the High Court has been able, through an ordinary common law approach, to confirm and secure particular rights, as with the fundamental right to a fair trial through Dietrich s case.

Recent polling may suggest, however, that many Australians would nevertheless

favour a statutorily enshrined bill of rights as such, and the potential utility of such a thing, at least as an aspirational charter, would be obvious enough although whether "aspirational" statements have a place in this area is itself debatable: many commentators say that such charters are the place for precise and enforceable provisions, not expressions of hope at risk of being dismissed as merely platitudinous. Whether the common good would be served through an enshrined bill of rights would greatly interest most thinking lawyers.

Through valuable contribution to public debate in these sorts of areas, lawyers may and do play an important public role. This is, I believe, to be fostered, not so that lawyers may "direct" the debates, but aid them through the injection of their wide experience. I find it disappointing when lawyers, who do as an aggregation of people display this broader public interest, are criticised for general insularity. I am not persuaded the public generally abhors lawyers, as the public media would have it. I think lawyers public roles should be made more public.

We must as professionals remember our duty to the public, and our capacity to make valuable contributions in addressing issues of immediate concern to the litigating public, especially in relation to accessibility of justice, but more generally also, in areas of major social policy. And even if the public reaction in other respects, for a time, "appears" unsympathetic.

The public orientation of conscientious modern lawyers recalls for me the words of JB Priestley s "Inspector":

> "We don t live alone. We are members of one body. We are responsible for each other, and I tell you that the time will come soon when if men will not learn that lesson, then they will be taught it in fire and blood and anguish. We don t live alone."

Sobering sentiments, although I acknowledge that the legal profession does in this country recognise public service as the root of its professionalism; and that despite what sometimes seem the best endeavours of the popular press to persuade the people otherwise. That public service potentially carries further significance in current times.

The word "globilisation" will I fear, through overuse, soon enter the well established category of cliches, a category which now includes other expressions some might be tempted to utter at a convention like this, like, dare I say it, "new millennium" and "paradigm shift". I understand this rather amorphous concept essentially to denote an increased international focus.

The thrust took on after World War 11, gaining impetus with the establishment of the United Nations, and it has certainly intensified markedly over the last ten years or so. The reasons include, plainly enough, the information technology revolution

and the lowering of international trade barriers. What is the place of law, and lawyers, in this progressive development? For reasons so obvious they may remain unexpressed, no one would sensibly advocate universal uniformity in the law. Yet, I believe beneficially, legal systems are becoming more interdependent, and more susceptible to influences inter se. Witness the role of European law, especially by its injecting, into national legal systems, particular standards of human rights. Consider similarly, in relation to the Australian State and Territory systems, the impact of international human rights directives and drug control imperatives, as two examples.

Yet just as there cannot reasonably be a universally applicable system of law, so in a comparable way, there cannot be a universal lawyer trained to operate effectively in all jurisdictions. Lawyers are these days nevertheless recognising the usefulness of a broadened international outlook: a capacity to understand foreign systems and to adapt to them, which necessitates also a sensitive appreciation of the cultural nuances of other societies.

There is no doubt that lawyers are, increasingly, important agents for national and international development. To illustrate, Australian lawyers are, I understand, currently working to help establish a worthwhile new legal system in liberated East Timor. Lawyers from the United States in particular, one reads, have been instrumental in facilitating the production of constitutions and legal codes in areas of the now fragmented former United of Soviet Socialist Republics. Simply, the complexity of modern society demands the finely honed, sophisticated talent of lawyers for the resolution of some of its most complex problems. The raw talent must, though, be accompanied by an appropriately international attitude, rising above the rather more parochial approach generally tolerable on the domestic national scene.

It has been interesting to note recent mergers of large UK and US law firms, and the way Australian firms are establishing sibling centres in other parts of the world. Lawyers in this country are increasingly interested in providing effective legal services to foreign nationals stationed in Australia, and as well, in acting, from Australia, for foreign nationals in relation to their problems at home. By way of response, law schools are encouraging international student exchange programs, and their curricula are being re-examined with a view to the development of a more precise focus on comparative law: but not the generalised subject taught in my student days. Current interests, I understand, rest on more particular subjects, such as comparative corporations law, comparative torts law, and the like.

One particular inquiry current in this country, concerning a matter more commonplace internationally, relates to the mutli-disciplinary partnership and corporatisation of legal practice. These models raise ethical twists for a system where the lawyer s overriding ethical duty is owed not to the client, but to the court and the administration of justice. Our determination to work through these difficulties suggests a realisation in this country that for our local practitioners to

remain competitive locally, and to become competitive internationally, we must, with appropriate safeguards, be prepared to embrace generally acceptable international trends.

But this is not simply a matter about remaining or becoming commercially competitive: that thrust cannot be permitted to dim the enduring ethical principle which is based on acceptable morality. Christian lawyers should become involved in these debates.

From the Christian lawyer s perspective, this sort of public involvement can carry a particular significance. It raises obviously the prospect of a particular Christian influence on the debate, and into the crafting of new initiatives.

I have dwelt on the public orientation of the modern Christian lawyer. At the more personal level, the challenges remain fairly constant: not yielding to the cynicism which seems to attach to many of us in this area of human endeavour; upholding the highest standard of personal ethics notwithstanding the ravages of what I have termed a trenchantly secular society; exuding balanced attitudes which, through their attractiveness to others, become exemplars; seeking to assist others wherever possible, especially through pro bono work and a willingness to carry clients financially through speculative arrangements with inadequate publicly funded legal aid facing little prospect of relief; doing what one can, and in no merely token way, to assist the poor, the marginalised, the friendless. These would be viewed as reflecting the justice, mercy and humility to which Micah admonished the people of Jerusalem and Samaria: and which are equally compelling criteria today.

It helps, too, if Christian lawyers are prepared to share with others their particular approaches, especially as to the ethical twists thrown up by modern practice. Last year saw the launch of the book, "Living Faith in Public Life", published by Open Book Publishers in which 52 Australians, including I might point out, my counterpart the Chief Justice of South Australia, speak of the influence on their daily work of their Christian faith. The Governor General has written the foreword to the book. It is refreshing to discern this degree of retreat from the more traditional, utter withholding of such essentially private experiences, experiences which, when disclosed, many undoubtedly find inspiring. Clearly others will be helped, if at all, by the discreet offerings illustrated by that book, rather than table-thumping, unduly up-front presentations, albeit that they may work in other arenas.

I have spoken of the modern Christian lawyers public role, and most recently of his or her personal role. What of the role directly towards God? I may quote in that regard from the Archbishop of Brisbane s Advent letter of last November:

> "❩ The millennium celebrations are a reminder to us that we are the inheritors of a long and rich inheritance as members of the Church of

> God down the ages ❱ We stand at the intersection between the past and that which is to come ❱ Our primary vocation as Christians is to respond to the call to grow together in unity and holiness as we wait patiently for the coming of Our Lord. Part of our wait has always meant being put to the test by events in the world around us. We are able to accept such adversities in the sure knowledge that we are constantly being strengthened in our resolve, even as God demonstrates in Christ the ultimate power to save ❱ Our primary duty ❱ as the Apostle (Paul) reminds us, is to "abound in love", to be strengthened in holiness of life and renewed by the Holy Spirit of God."

Those people inclined cynically to condemn the legal profession generally, as a worthless collection of material self-seekers, should, if prepared to yield to rational assessment, be most encouraged by the fact of this Convention, and the very substantial number of lawyers attending it: not to holiday in Melbourne, not to gain a tax deduction, but genuinely to explore deep issues of personal and public commitment, with the ultimate view, through keen devotion to Christian precept, of better serving the people.

May I have the audacity to conclude this contribution, to a Christian legal convention, by quoting the response, of all people, of Karl Marx, who, when asked for a final word for the sake of posterity said: "Last words are for fools who haven t said enough already": which I most certainly have !