

MORALITY AND THE LAW — “COMPLEX, PAINFUL” ISSUE

The law was an imperfect was an imperfect mechanism for enforcing morality, but there was a danger that political procrastination would inhibit essential reform.

The use of the law to enforce perceptions of ‘sin’ through the criminal law was a sensitive, controversial, complex and even painful issue for politicians to tackle, according to Mr Justice Michael Kirby, Chairman of the Australian Law Reform Commission.

Justice Kirby urged help for politicians to confront the question of “Morality and Law” when he addressed a capacity audience at the Tenth Walter Murdoch Lecture.

“Hotting Up”

He said the overwhelming bulk of the law was morally neutral, but in the small area where the law and morality did intersect the debate was ‘hotting up’.

Decriminalisation of homosexuality among consenting adults; legalisation of the use of marijuana; gambling; prostitution; pornography and establishment of areas for nude bathing were just some areas where, it seemed, the legislators had failed to keep the law in tune with community attitudes and practices.

“Those who seek to hold the line for the old morality — that the law is some kind of elaborated set of instructions on morality — will rejoice in the ineffectiveness of our institutions,” Mr Justice Kirby said. “But this satisfaction must surely be tinged by a realisation that the distance between what the law says and what is actually happening in the Australian community is a formula for individual injustice and institutional erosion.”

In the personal realm, private conduct did not readily adjust to legal rule where the participants did not feel that what they were doing was the proper province of legal prohibition or truly ‘wrong’.

Seductive

“If politicians are left to resolve the issues by themselves, I fear the quest for a short-term political advantage will all too often be too seductive. It will overwhelm the dispassionate scrutiny of both sides of the argument for which Sir Walter Murdoch called,” said Justice Kirby. “Doing nothing is always the easiest course in politics. Removing disparities between the criminal law and modern morality is a painful duty — but a duty nonetheless of a legislature relevant of today’s needs.”

There were, he said, areas of morality which were not the law’s business.

“People of liberal persuasion are asking with increasing insistence what business it is of the State to enter into bedrooms? What business is it of the police to burst into a domestic cottage to break up a nine-member card game? What right is it of the State to prosecute people watching porno television in a



Mr Justice Kirby

country motel? What warrant has the State for punishing people for pursuing their sexual preference?” Justice Kirby said.

For every person caught in these cases, thousands went free and looked on the law with contempt — asserting their belief that the law should keep out of their private lives.

Quandries

“As if these questions were not controversial enough, now our generation is faced by numerous bioethical quandries,” Justice Kirby said. “Should we permit in vitro fertilisation or is this an ‘unnatural’ creation of human life in a test tube? Should scientists be permitted to take us down the track of cloning the human species? Should we permit the growing of the human foetus to provide body parts for people in need of body parts? Should we permit manipulation of DNA, genetic engineering and the ownership and patenting of life forms?”

These and many other issues demanded answers, but the law was often silent on these matters. And, in the interim, the debate created more heat.

Political Cloud

“The political spokesmen of the so-called ‘moral majority’ are now better organised, more vocal and more aware of the political clout that comes to minority parties in closely contested electorates,” Justice Kirby said. “In a politically polarised community they may enjoy an importance far beyond their actual numbers.”

The answers to these dilemmas should be found in democratic parliaments rather than in the unelected judiciary or the enthusiastic bureaucracy. But unless the Parliaments were given help, they were likely to put these issues to one side.

The full text of Mr Justice Michael Kirby’s Walter Murdoch Lecture will be available shortly in a booklet. Please contact the Information and Publications Section of the University Secretary’s Office if you require a copy. (332) 2491.