Australian Lawyers and Social Change – 30 Years Later

By

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Thirty years ago David Hambly and I were delegated by the Dean of the Law Faculty at ANU to follow up some ideas that arose out of a discussion between the then Chancellor, Dr Coombs, and Sir Anthony Mason about law and society, and specifically legal education. The focus of the conference was the role of law and lawyers in society, and specifically in social change. It was a success, and the papers, with a summary of discussion, were published.[1] The Law Faculty has decided to revisit some of the issues after 30 years, and asked me to contribute. I will not be able to attend the 2004 seminar, but thought it worthwhile jotting down some reflections.

We adopted a view of "social change" that was in some ways prescient, but which, in other ways, demonstrated a significant ("lawyerly?") lack of awareness of society and the way society would change over the following years.

"Let's kill all the lawyers!" – keeping them out of social change

Over the intervening thirty years, among the major social changes we have seen are moves by governments at all levels in Australia to exclude or limit the role of law and lawyers (and, lest it escape attention, the Rule of Law) from as many areas of social and economic activity as they can. That process affects the relationship between law, lawyers, and social processes. Perhaps the 2004 "Australian Lawyers and Social Change" seminar might consider whether this is in fact true, and if so, why.

Of the areas we chose for discussion at our seminar in 1974, some topics remain relevant, and law and lawyers still make important contributions to society and social change.

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[1] A D Hambly and J L Goldring, editors, *Australian Lawyers and Social Change*, Sydney, Law Book Company Limited, 1976 (henceforth "ALSC")

The role of the High Court as interpreter of the Constitution has changed little, though its interpretations may have. Much of what Mr Evans, and the commentators on his paper, said then remains pertinent today.

Professor Sawer's observations on the "Instigators of Change and the Obstacles Confronting Them" also remain relevant. His remarks on a Law Reform Commission were followed, almost immediately, by the establishment of the Australian Law Reform Commission, of which both David and I were privileged to be full-time members. Institutionalised law reform, though waxing and waning, has become a permanent fixture and remains a means by which law and lawyers have both reflected and influenced, and continue to reflect and influence, society, though indirectly, because their efforts usually require political action before they become actual. More of that later.

Professor Harding chose to discuss two areas where law and policy interact closely: company law and securities regulation on one hand, and consumer protection on the other. These are areas where, after 30 years, the problems and the solutions advanced or adopted raise very similar questions today. In both these areas the phenomenon of "globalisation", and the resulting decline in the relative significance and power of nation-states and their legal systems make these questions, in the overall scheme of things, less significant in the overall picture,[2] though they are still important within the increasingly limited area of national affairs.

Professor Brunt's paper on competition policy is probably as relevant today as it was 30 years ago, if not more so, because of the adoption by the Keating government of a National Competition Policy and its imposition of that policy, by threat of financial strangulation, upon the States. Despite the wishes of many economists, law and lawyers remain important in the enforcement of competition policy.

Dr Isaac's chapter on "Lawyers and Industrial Relations", sadly, is now largely of historical importance. Governments, both state and federal, have succumbed to political pressure, especially those associated with, or purporting to rely on, the pressures of "globalisation" and "international competitiveness". As a result the role of lawyers and

[2] I have considered these issues more fully in "Consumer Protection, Globalization and Democracy" (1998) 6 *Cardozo Journal of International and Comparative Law* 1-83.

formal legal institutions in the area of industrial relations has been reduced significantly. This is an area in which, in its time, the system had succeeded in raising the living and working conditions of Australians to a very high level, without demonstrably weakening the Australian economy.

The decade after 1974 saw some very significant changes in Australian society and politics. Many of those changes involved law and lawyers closely. Three were mentioned in the introductory paper of *Australian Lawyers and Social Change*. Dr Coombs mentioned the exclusion of Aboriginal people from the operation of many areas of Australian law and society although then, as now, they were over-represented in the criminal justice system. Sir John Kerr mentioned the absence of an effective legal aid system. Both Dr Coombs and Sir John referred to deficiencies in the goals and content of legal education. I would like to say something about each of those areas.

Some major changes in both law and society were not mentioned. Of the 50 participants in the 1974 seminar, 3 were women. One even presented a paper! That was a higher proportion of women than among the Australian judiciary for several years. There was no suggestion that women in general, and women lawyers and feminist legal scholars in particular, have influenced the way Australian law and society operate. Need I say more?

In constitutional law terms, the events of November 1975 completely rewrote the principles, admittedly somewhat hazy, governing the place of constitutional conventions and the relationship between the Governor-General and the Parliament.

Administrative law has become more important, and changed the face of Australian public administration in ways that were, perhaps, not foreseen. However, as the size of the administrative machinery has become smaller, administrative law has become, it has been argued, less important.

Family law has changed almost beyond recognition since 1974 as a result of legislative change, and has generated some major controversies.

International law has become a significant factor in the development of Australian municipal law, both because Parliament has recognized and incorporated it into

municipal law, and because the courts have also considered and, indeed, applied, international law to an extent which probably could not have been foreseen in 1974. This is particularly true in so far as international law relates to the protection of human rights and to the environment. It is perhaps significant that some recent criticisms of recent actions of the Australian government focus on an apparent disregard of the principles of international law by that government. Specific examples of areas where this debate has occurred include the apparent (or at least arguable) disregard of the principles of international law in relation to the assistance which nation states are required to provide to persons in distress at sea (the "Tampa" incident), the detention of persons (particularly Australian citizens) abducted and detained without apparent lawful authority (the Guantanamo Bay detainees), the commitment of Australian armed forces to the invasion of Iraq without United Nations sanctions, the disregard of international legal obligations regarding refugees, particularly children, and the alleged failure to protect such parts of the world heritage that lie within Australian boundaries (such as the Great Barrier Reef and the Tasmanian "old growth" forests.)

Another area where there has been recent significant change in law -- possibly resulting from some social change -- is so-called "tort reform" by which parliaments have either abolished common law rights to claim compensation for personal injury resulting from the unlawful act of another, or severely restricted such rights.

In my view, the most significant change in Australian society has been its growing polarisation: of rich and poor, of urban and rural, of young and old. Close behind are awareness of the environment, and the revolution in information and communications technology. Polarisation has influenced law, but law and lawyers seem to have to struggle to adapt to the demands of the environment and information technology.

Over 30 years, there have been many more significant changes in law and society. Without dealing in detail with every subject mentioned, it seems to me that it would be worthwhile for the 2004 Australian lawyers and social change seminar, without unnecessarily dwelling on the past, to consider a few of the areas where law and society have changed most, and consequently, the role of law and lawyers has also changed most. It is vitally important that those exercising power (and that includes lawyers) should look forward rather than back, but to do so with the benefit of the lessons of history.

Power, economics and justice

Dr Coombs[3] described law as the product of politics. Mr Evans, quoting Finer,[4] described the Constitution as "the autobiography of a power relationship". Dr Isaac[5] suggests that, in many areas, power has replaced justice as the driving force of law. A cynic might say that this idea was not new, but in the years immediately before 1974, society did demonstrate a concern, possibly unprecedented, with the use of power to achieve both individual and social justice.

The reaction against a concern with "social" questions seems to have been driven by followers of particular economic theories, but adopted with relish by business interests and Conservative political forces generally.[6]

Ross Cranston, who after joining (and leaving) the ANU went on to become Solicitor-General for England and Wales, warned in 1977 (the year before he arrived at ANU) against what he calls "creeping economism".[7] He perceived that, following such influential works as Professor (as he then was) Posner's *Economic Analysis of Law*[8] in 1973, the study of law was increasingly influenced by economic doctrines. The notion that law should draw from the social sciences goes back at least as far as Justice Oliver Wendell Holmes and was a very important tenet of the "legal realists". Legal realism became important in Australian legal studies mainly because of Julius Stone and Geoffrey Sawer,[9] who influenced generations of Australian law students. Those two outstanding academics influenced the teaching and learning of law in many Australian ways; but it was always their view, and that of the realist school, that economists and their theories, like other social scientists and *their* theories, should be "on tap" to practitioners and students of law, rather than "on top".

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[3] ALSC 7.
[4] ALSC 15.
[5] ALSC 325.
[6] Michael Pusey, *Economic Rationalism in Canberra*, Cambridge University Press, 1991.
[7] "Creeping economism: Some thoughts on law and economics" (1977) 4 British Journal of Law and Society 103.

[8] *Economic Analysis of Law* (1st ed.), Boston, Little, Brown, 1973.

[9] e.g. Stone, *Law and the Social Sciences* University of Minnesota Press, 1966.

Cranston's interest, like my own initial interest, came from our common concern with consumer protection law. After more than 30 years' studying and writing about this area of law, I perceive that the law is very much an instrument of social policy when it is used for the protection of consumers. It is an embodiment, specifically, of a policy that recognizes and seeks to correct the clear failures of the market. It is therefore typical of most statute law, which is almost always an embodiment of a policy given statutory force by the legislature. The criticism that Cranston made of "economism" in this area was that the economists' theories of the free market have little, if any, relation to reality.[10] While an understanding of economics could assist in understanding the behaviour of the market, it was not always a sound basis for policy, let alone policy enacted into legislative form.

The criticism of "creeping economism" in the area of consumer protection law could be applied equally to many other areas at the intersection of law and policy, where politicians have been persuaded, in whatever interests, to enact economic theory as legislation.

During the last 30 years there has been an almost cyclical rise and fall of what has been referred to as "grand theory" in all the social sciences, including law (and almost certainly to the same extent, in the area of politics).[11] The grand theory that has dominated in Australia over the last 30 years is the theory of the market, also known as neo-classical economic theory. The proponents of this grand theory usually have an axe to grind: whether it be a left- or a right-wing axe, the politics are usually of an extreme variety. It is my very strong view that grand theory is of little use in the practical world; it deals with generalizations. Areas where grand theory can predict or determine (rather than assisting, in retrospect, to explain) what happens within a society, be it local, national, or global, are very few, if any. General theory deals with abstraction and prediction. Law deals with specific cases, and lawyers tend to be concerned immediately with specifics.[12]

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[10] As Murphy J said in *Bistricic v Rokov* (1976) 135 CLR 552 at [9], "Any theory which has no relation to realities is suspect."

[11] Skinner, Q, ed., *The Return of Grand Theory In the Human Science,* Cambridge, UK, Cambridge UP, 1985.

[12] This is by no means a new idea. See Paul D Carrington, "Aftermath", in P Cane and J Stapleton eds, *Essays for Patrick Atiyah,* Oxford, Clarendon Press, 1991, at 148-149.

It is easy to gain an impression that, over the past 30 years, much legislative policy has been, little more than the enactment of free market economic theory, with little, if any, regard to other social factors -- most notably the interests of justice.

As Jesting Pilate said, "What is justice?" I certainly hope that the second "Australian Lawyers and Social Change" seminar will not neglect this question. I am not suggesting an answer; I am not even suggesting that it is only a rhetorical question. I would not seek to proffer an answer, because I am sure that there is no single answer, and even if there were, it would not be revealed by any "grand theory"; in most cases the content of "justice" will depend very much on the particular circumstances in which it is sought. The major "grand theories" that have influenced the *study* of law in Australia – namely "Law and Economics" and "Critical Legal Studies" – certainly do not offer a satisfactory or universal explanation.

Preoccupation with enacting their specific version of economic theory may explain why those who hold the reins of power in Australian society have tended to exclude law and lawyers from, or marginalise them in, many areas of social change and social policy.

The fact that we are a **constitutional** democracy means that law and lawyers cannot be excluded completely: the most that can be done is to reduce the role of law and lawyers.[13]

In the remainder of this paper I hope to provide some examples where this has happened. In doing so, I am not seeking to re-establish (if it ever existed) what Ronald Dworkin has, perhaps naively, called "Law's Empire";[14] I do assert that in any society, law has a legitimate place; that it is important both as an influence on and an instrument of social policy, and therefore in the shape and functioning of society. I suppose that expresses the vision the organisers of the 1974 seminar had of the role of law, though then I had certainly not examined that vision, or why it was my vision.

[13] As Professor Sawer pointed out at the first ALSC seminar (and his previous works), though the Constitution is a political document, law, lawyers and the courts play an essential role in its operation.
[14] *Law's Empire,* London, Fontana Books, 1986.

Control and management of the economy; regulation of commerce

As I have already indicated, much of what was said in 1974 about these matters remains true today. The legal problems have, perhaps, become more complex and sophisticated, without much changing the way the courts deal with commercial matters. Lawyers remain intricately involved in the resolution of commercial disputes and, increasingly, in planning commercial activities.

There have been many reviews of the operation of the laws relating to competition and corporations, some of which have generated a degree of controversy. In part this stems from the different values and assumptions of lawyers and economists, some of which were examined by Professors Harding and Brunt in 1974, and by the commentators on their papers. It seems, however, that lawyers remain important actors in these areas. For those reasons I do not propose to deal in detail with them. They are not areas about which I retain any detailed knowledge, but they are so important that I expect that speakers at the seminarwill cover them comprehensively.

There are, however, two areas in which there have been some important developments, closely involving law and lawyers, over the past 30 years, which I consider to merit special attention.

"Deregulation"

An important aspect of the new policy framework in the 1980s and 1990s was the element of "deregulation". This policy also was an ideologically-driven effort to remove as many constraints on commercial activity as possible. The forces of the free market were to have full range, so that the inefficient, dishonest, or inferior participants would be driven from the marketplace. This assumption ignored the fact that markets are not and never have been perfect. They always will be this way, because in practical terms it will never be possible that consumers will have equal access to adequate information about the markets, or, if they get access, they will not be able to comprehend or use that information effectively. Consumer protection laws date from at least the 13th century in England and possibly back to Greek and Roman times before this. I refer specifically to the laws against adulteration of food. These laws have always been necessary, because markets have always failed to prevent unscrupulous operators from taking advantage of

the ignorance of others, thus producing death, injury, or financial harm to individuals, all of which are symptoms of short-term market failure. It may be that in the long-term such unscrupulous operators were forced out of the market, but as Keynes pointed out, in the long run we are all dead. In the case of dangerous products this has always been, and still is (often literally) true. Market forces do not operate until it is too late; and those who advocate market forces almost always ignore the cost of human life and well-being.[15]

Those who advocate deregulation suggest that the main reason for supporting regulation is that it makes entry to the market for new entrants far more difficult. Many regulations *designed* to further public health or public safety have been enacted in totally good faith, but are attacked as "protectionist" measures. There are cases where undoubtedly the *effect* of such regulatory law is to exclude products that are cheaper, produced outside Australia, or both. Those goods may be cheaper because they are unsafe, or because the places where they are produced lack proper safety standards. Whether or not one favours global free trade, I find it difficult to agree with the argument that the interests of unfettered world trade should trump the interests of the health and safety of the national community. Since 1974, Australia has become a member of the World Trade Organisation, and has been subjected to sanctions because of its regulatory laws governing such matters as the safety and wholesomeness of cheese and fresh salmon.

Deregulation is also the reason why the legal framework of a great deal of other social activity has changed since 1974. Up until that date and beyond, financial markets, and particularly banking, were subject to very close legal regulation. That is no longer the case. There are some regulatory controls on financial markets, but these are significantly fewer than they were.

"Deregulation" is a term also applied to the market for labour. The Commonwealth Parliament had enacted laws pursuant to the Constitution, s 51(xxxv) setting up a system of judicial or quasi-judicial tribunals for the prevention and settlement, by conciliation or arbitration, of industrial disputes extending beyond the boundaries of any one state. In the course of preventing and settling such industrial disputes, the Conciliation and Arbitration Commission (as it was after 1956) had been able to manipulate a system of

[15] Goldring, J, L Maher, J McKeough and G Pearson, *Consumer Protection Law in Australia* (5th Ed) Sydney, Federation Press, 1998, Chapter 1, expands this position. The substance of what we wrote

laws, in the form of awards, which prescribed in detail the working conditions of employees in a wide range of industries. Indeed, the Commission gave to the word "industry" a wide meaning, so that it covered many forms of employment, including employment in the public sector and in the provision of goods and services. The States established similar machinery. It was therefore unlawful for any employer to employ persons other than in accordance with the appropriate award, or for any person to work other than according to those conditions.

By restricting the matters which fell within the jurisdiction of the Conciliation and Arbitration Commission (renamed the Workplace Relations Commission), the Parliament was able to allow employers to employ people under individual contracts, which might establish working conditions different from (and often significantly more onerous on the employee than) those contained in the relevant award. This process has the effect of allowing a market for labour in which employers and employees are, in theory, free to establish the terms of the individual contracts and that can be seen as being free of regulation. A corollary of this process has been a quite deliberate attempt to exclude industrial unions from the processes of negotiation of conditions of work at any level.

In theory, the individual employment contracts are as open to legal interpretation and litigation as were the awards. Contracts, however, are enforced in the ordinary courts, and therefore the parties may need to be legally represented. In practice, the cost of legal representation for employees makes it unlikely that they are represented unless they are members of a union that can assist them, and for that reason there are very few contested disputes. One of the objects of the legislation is to discourage union membership. The practical effect of labour market deregulation has been to reduce the role of law and lawyers in what are now called "workplace relations".

Outsourcing of services

The prevailing ideology of governments since 1982 is that "big government" is undesirable and that, as mentioned above, the private sector will inevitably deliver services more quickly, cheaply and efficiently than the public sector. As one example of this policy the Commonwealth Employment Service, which had operated reasonably successfully for decades, was abolished and the task of placing unemployed people in

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there has changed little since the first edition of the work in 1979.

work was contracted out to private sector organisations, some operated by churches or charities, but many operating purely from a profit motive. The benefits of this, if any, have yet to be demonstrated.

The public law problem arises where the government makes a choice to delegate the implementation of public policies to private individuals and bodies, usually by the process of "contracting out". The traditional accountability mechanisms provided by administrative law no longer apply because they operate only on individuals and organisations in the public sector.[16]

Competition policy and "privatization" -- telecommunications and media

I have already mentioned the "national competition policy" which was established during the 1980s. Coupled with this policy, or as part of it, came a process of "privatising" or "corporatising" various undertakings, principally utilities, which were operated either by statutory authorities or by government owned corporations. The rationale for this policy wars, in part, a desire on the part of governments to reduce public sector borrowing, and was enhanced by an ideological view, apparently untested by empirical observation, that private enterprise is necessarily more efficient than publicly owned enterprises. The rationale also incorporated the ideologically, rather than empirically, based assumption that all businesses should concentrate on their "core" activities, and contract out other, or peripheral, activities. The assumptions upon which these policies were based flew in the face of the empirical evidence: Qantas, the Commonwealth Bank, the Commonwealth Serum Laboratories, the Australian National Railways and Telecom Australia were all publicly owned enterprises which over many years returned significant profits, while providing important services for Australians. The economic theorists argued that if the operation of these businesses included an element of subsidisation of unprofitable activities, it was better to make the subsidies "transparent" and to provide them by way of payments to private contractors. This is not the place to take issue with the underlying assumptions, or with other arguments about who should own natural monopolies. Here I propose to concentrate on the way in which law and lawyers have influenced, and have been affected by, these changes.

[16] The Administrative Review Council has considered some of these questions, and there has been some (but surprisingly little) academic comment. See Administrative Review Council, Report No. 38,

The most obvious effect is that many of the enterprises that were previously owned by government fell within the "shield of the Crown" and were therefore amenable to administrative law remedies. The fact that their activities, if they are carried on at all today, are carried on by private enterprise under contractual arrangements with government, means that they may no longer be within the reach of administrative law.

One reason why, in theory, the provision of services by private enterprises, rather than government-owned enterprises, is said to be preferable is that that this process requires, from time to time, a competitive tendering procedure, so that government is assured that the services are provided at a cost rendered as low as possible by the competitive process. This assumes, of course, that the competition laws are working, that the tendering processes are fair and open, and that the participants compete as equals on a "level playing field". There are indications that these assumptions are at best questionable.

This makes the operation of the competition laws, particularly the *Trade Practices Act* 1974, Part IV, crucial to the effectiveness of competition policy. That Part seeks to ensure fair competition.

The current Commonwealth government, from time to time, has sought to privatise part or all of the telecommunications infrastructure in Australia. Its motivation is the same motivation that underlies the general process of privatisation. The fact that it has been unsuccessful is due largely to the public perception that the purpose of the telecommunications network is to provide a *public* utility or service, rather than an opportunity for capitalists to make *private* profits. Those who favour privatisation have taken the view that the development of new technologies means that a whole range of previously disparate activities -- radio, television, computers and information technology, and entertainment -- have all "converged". This makes it very profitable for an entrepreneur to control a number of different media within the same market. Perhaps the most obvious example of this is the conglomerate business organisation controlled by Silvio Berlusconi (who appears to have added the Italian State to a business empire which already included radio, television, book publishing, telecommunications, computers, and

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Government Business Enterprises and Commonwealth Administrative Law, 1995, and **Report No 42**, *The Contracting Out of Government Services*, 1998.

professional football). The situation has not yet reached the same situation in Australia, although one cannot help but suspect that some of the large media entrepreneurs would welcome a similar situation here.

One reason why they have not been able to do so is that Australia still has a quite extensive legal regime of regulation of electronic media. For example, there are restrictions on who may hold radio and television broadcast licences, and considerations in the granting of such licences include the ownership of the specific medium, the geographical reach of that medium, and the total number of radio and television outlets controlled by a single person. Not only are media businesses subject to the general competition laws, but there is also a specific set of rules directed to media ownership. Because of the profitable nature of media business, the laws regulating media have been the subject of significant political pressure. Following the Bond media litigation in the late 1980s and early 1990s, media laws were changed to make them less onerous on media-owning businesses.

National development

After 1972 the Whitlam government adopted a conscious policy of national development that included the establishment of the Department of Urban and Regional Development. In part this aimed to bypass the States, at least to an extent, and to recognise and elevate local government. It also established statutory bodiesto develop new urban centres in Albury/Wodonga and in South Australia. This meant that, in order to maintain the level of Commonwealth government intervention, a legal basis was necessary to manage the interaction with the States, with local government, and with individual landowners. This promised to be a fruitful field in which law and lawyers would become involved with processes of social change at a very practical level. While there has been some examination of the way in which this department was intended to operate,[17] it was abolished immediately after the dismissal of the Whitlam government in 1975.

Commonwealth governments over the years have always had policies towards primary industry and mining that have been politically sensitive. In general, many agricultural and other primary industries have been "deregulated", in the sense that the statutory

[17] E.g Troy, P.N. (ed), (1978) *Federal Power in Australia's Cities,* Hale & Iremonger, Sydney; Troy, P.N. (ed), (1981a) *Equity in the City,* George Allen and Unwin, Sydney. Patrick Troy was Deputy Secretary of the Department.

marketing schemes and price maintenance devices, which were the hallmark of the Country (later National) Party, have been reduced in scope and in some cases disappeared entirely. However, legal frameworks were established for new ventures in the oil and mining industries, such as uranium mining and the development of offshore oil and gas fields.

Aboriginal people and Australian society

In 1974, the voice of Aboriginal people was being heard after years of silence. This silence was partly the result of policies designed to remove, assimilate, or otherwise silence Aboriginal people. The 1967 referendum, which removed some discriminatory provisions from the Constitution, marked the beginning of a growing confidence of Aboriginal people. By 1974, the "Tent Embassy" was established outside (Old) Parliament House, and the Whitlam Government began to recognize some Aboriginal rights. The principal claim then by Aboriginal people was for recognition of their land claims. As a general rule, this was not done legislatively, but rather came with the decisions of the High Court.[18] Parliament has legislated to regulate and restrict the rights of traditional occupants of land; but the Native Title Tribunal remains an important instrument for the recognition and enforcement of land rights.

The social status of many Aboriginal people has not, however, changed. Commonwealth funding of legal and medical services has risen and fallen; bodies set up to "represent" Aboriginal people have been established and abolished. Aboriginal legal aid services have been established, modified, and, more recently, lost significant parts of their funding. Aboriginal people represent a vastly disproportionate number of prisoners, accused in criminal cases, and patients in the health system. There are relatively few in high-status jobs, and even in secondary and tertiary education. The position has improved since 1974, but still shows that the original owners of the land remain socially and legally disadvantaged. The pioneering work of Elizabeth Eggleston[19] shows a situation that is still valid.

[18] In *Mabo v Queensland* (No. 2) (1992) 175 CLR 1, and later in *Wik* (*The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40).
[19] *Fear, Favour or Affection*, Canberra, ANU Press, 1976; see also Hanks, P and B Keon-Cohen, *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston,* Sydney, George Allen & Unwin, 1987.

Social welfare

The framers of the Constitution may originally have intended to leave matters such as social welfare (a concept which would probably have been quite alien to the members of the first Commonwealth Parliament) to State and local government, but it became apparent that the Commonwealth would play an increasing role in the provision of benefits to various members of the community: war veterans were the first objects of Commonwealth bounty, but this was extended in time to war widows, the elderly, people who all suffered from disabilities which prevented them from working, the unemployed, civilian widows and deserted wives, and ultimately to those who chose to care for others (children, people with disabilities and aged and infirm people). Later, students and aboriginal people also became entitled, in certain circumstances, to receive Commonwealth benefits. A large and complex legal structure was established to make sure that the benefits reached those for whom they were intended.

Migration

Australia has always been a nation of immigrants and immigration policy (usually of a very restrictive nature) has always been very important politically. The years of significant expansion of immigration after World War II (which were also years in which the White Australia Policy was enforced with full rigour) survived without any complex legal structure, but relied instead on wide and administrative discretions. In the 1970s, 80s and 90s, the number of refugees from East and Southeast Asia increased markedly and people aggrieved by, or disappointed with, the administrative processes by which such discretions were exercised, began increasingly to use the courts to obtain administrative law remedies. The extension of legal aid and community legal services was important, because it provided legal resources to enable legal challenges to administrative decisions concerning migration. Such challenges were not unknown in the past and, indeed, had given rise to some significant developments in Australian law,[20] but in the 1980s and 1990s they became more common.

[20] *Toy v Musgrove* (1888) 14 VLR 349; *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; *Koon Wing Lau v Calwell* (1949) 80 CLR 533.

Governments, both Labor and Conservative, became concerned with, if not resentful of, the resources they were required to spend meeting legal challenges to immigration decisions, and made extensive changes to the law. They also established administrative tribunals to review immigration decisions, almost certainly in the hope that this would reduce the amount of litigation. These hopes were unfounded, and further changes in the law lead to the enactment of some highly restrictive "ouster" or "privative" provisions, designed to ensure that refugees, in particular, were not able to challenge administrative decisions in the courts. These efforts have certainly not been entirely successful and those who seek legal remedies in Australia are still, in some cases, able to obtain them.[21]

Family law

The area of family law, in terms of its impact on human activity, is probably more significant than any other in that probably one in three Australians are affected by its operations at some stage in their life. In the early 1960s, over significant opposition from Conservative politicians and the Christian churches, the Commonwealth assumed the responsibility to enact a national system of divorce laws under the power given by the Constitution, s 51 (xxi) and (xxii). Until the enactment of the Commonwealth *Matrimonial Causes Act* in 1964, there were 8 different systems of divorce laws in Australia: different grounds for divorce, different regimes dealing with custody of and contact with children, and division of matrimonial property.

By 1974 Australians had accepted the benefits of a single system of family law, although there were still some problems, for example, with ex-nuptial children. The Whitlam government was committed to simplifying the system of law, reducing the costs of divorce, and making the legal system more accessible to those whose family lives had been disrupted. The matter had such priority that when the first legislative attempts at reform were frustrated by a hostile Senate, the government sought to proceed by way of subordinate legislation. Some who sympathised deeply with the objectives of the new laws objected strongly to the procedure adopted. When the Family Law Act assumed its final shape, hostile interests subjected it to delay in parliamentary committees. Opposition to the legislation was based not so much on political as on religious ideology.

[21] e.g. *S157/2002 v Commonwealth of Australia* [2003] HCA 2.

The Family Court of Australia was established in 1975 and commenced operating in the following year. Initially, it appeared to be quite different from other courts, in that some of its procedures attempted to be less formal. Judges and counsel wore street clothes rather than wigs and gowns. The procedures of the court incorporated an extensive counselling service designed, not so much to prevent the breakup of marriages, but to ensure that the best interests of the children were catered for in the outcome of proceedings in the courts concerning custody of and contact with children.

It is fair to say that the parties to a broken marriage often used the legal process (whatever it may have been at the time) to attack each other and to make the resolution of disputes over property, custody and access more difficult. This was true when divorce was a matter of State law, under the *Matrimonial Causes Act* 1961 and under the *Family Law Act,* and it continues to be the case. The first Commonwealth *Matrimonial Causes Act* had allowed divorce on the ground of a stipulated period of separation between the parties. Critics attacked this as "divorce by consent" and the removal of the culture of blame that surrounded the old divorce law was seen as fostering the breakdown of traditional families. The *Family Law Act* made a period of separation the only ground for dissolution of marriage. It was no longer necessary for parties to go through the degrading and expensive process of proving some element of "fault". Practitioners were required to explore non-adversary ways of resolving disputes about custody, access and property.

At the time the prevailing view was that only a court could pronounce the types of the decrees and orders necessary to resolve family disputes: decrees of dissolution of marriage, and orders relating to maintenance, custody of and access to children. These were orders that traditionally had been made by courts and fell within "the judicial power of the Commonwealth" so that under the *Boilermakers* doctrine, such power could only be exercised by a court established under Chapter 3 of the Constitution.[22]

The Act also established the Family Law Council, which had an ongoing charter to review the law and practice of the system. This represented a commitment to a permanent law reform body in the area.

[22] *R v Kirby; ex Parte Boilermakers Society of Australia* (1956) 94 CLR 254; (affirmed on appeal (1957) 95 CLR 529.

While there were criticisms of the Family Court, predictably from the conservative churches, and less predictably from fathers who were aggrieved by court decisions relating to custody, access and child support which they saw as unfair, the establishment of the Family Court was generally seen as a success.

Some people always saw family law as an area from which courts and lawyers should be excluded, and the arguments of these critics are understandable. Not only are there ideological objections to the involvement of the State in the most intimate of human relationships -- those between partners and between parents and children -- but there are also criticisms on the basis that an adversary system is not well fitted to resolving issues which can seldom be decided in terms of one side being totally right and the other totally wrong.

There have been continuing inquiries into various aspects of family law, by the Family Law Council, but also by other bodies such as the Australian Law Reform Commission, on an almost ongoing basis since 1975. The resources available to the Court have been reduced, and there have been suggestions that the counselling service should be "privatised" or "outsourced" from time to time; at the time of writing there is a suggestion that disputes about children should be resolved by an administrative body rather than the court. Already the Federal Magistrates Service, a type of intermediate court established by the government on the basis that might prove less expensive than a full-blown court such as the Federal Court of Australia or the Family Court, deals with a great deal of family law work.

Because of the constitutional requirement that only a *court* should make certain types of orders, it seems unlikely that any administrative machinery could satisfy the constitutional requirements. However, it seems that the current Commonwealth government is so opposed to the involvement of law and lawyers in family matters that it will do its utmost to exclude lawyers from this area, despite constitutional risks.

Law reform

For as long as the common law has operated in Australia, there have been criticisms that its rules are inappropriate or inadequate to cope with conditions in the community. During the 19th century there were numerous committees established to examine the operations of particular areas of law; Sir John Harvey, later Chief Judge in Equity, rewrote and consolidated most of the common law relating to property and conveyancing in NSW during the first decades of the 20th century.

In the United Kingdom the Labour government of Harold Wilson created the Law Commission and the Scottish Law Commission in the early 1960s.[23] The Lord Chancellor in that government, Lord Gardiner, had been an advocate of "institutionalized" law reform for many years and had written widely on the subject.[24] Each Law Commission was chaired by a High Court Judge, and comprised a number of full-time commissioners drawn from the practising professions and the universities, supported by a Secretary, usually a full-time public servant seconded from the Lord Chancellor's Department, and a number of research staff. The Law Commission also included a legislative drafter on its staff.

Attorney General Murphy was committed to the establishment of an Australian Law Reform Commission ("ALRC"), and the Act enabling such a body was passed in 1973. Its first chairman, Justice Michael Kirby, was appointed in 1974, as were 2 full-time and a number of part-time commissioners. The commission has existed in a similar form since then and has undertaken over 80 references over a wide range of areas of legal activity. Its first reports dealt with Commonwealth criminal procedure and criminal investigation but it has also dealt with such areas as privacy, evidence, insurance law, human tissue transplants, multiculturalism, Customs and Excise laws, biotechnology, and choice of law rules.

[23] Still the best historical account of the establishment of permanent law reform institutions is W Hurlbert, *Law Reform Commissions in the United Kingdom, Australia and Canada,* Edmonton, Juriliber, 1986. The ALRC website, at <http://www.alrc.gov.au/links/index.html> contains links to other law reform agencies throughout the world. The Home Page contains links to most of the ALRC's published reports.

[24] *Law Reform Now*, London, 1963.

The ALRC was not the first permanent law reform body set up in Australia: New South Wales established a full-time Law Reform Commission in 1964.[25] While the New South Wales Commission has continued, though with much reduced resources. Victoria established, and then abolished a law reform commission, only to re-establish it in the late 1990s. South Australia established a full-time law reform commission, but it fell by the wayside when the then government refused to appoint new commissioners as the terms of office of the old commissioners expired. Tasmania has a part-time law commission and Queensland and Western Australia have permanent full-time commissions. Of the commissions, only the New South Wales commission was in existence in 1974.

It is fair to say that the full-time law reform agencies have dealt with anomalies in the common and statue law in a systematic way, so that many of the technical problems in the common law that concerned lawyers in the early 1970s have now been rectified, at least in part. Most law reform agencies, however, can only work in areas referred to them by the Attorney General, and their reports require a political decision and an allocation of legislative priority before they can become law.[26] The reports of the various commissions often lie on the shelf until an urgent need becomes apparent.[27] Some anomalies remain because the solutions are politically unpalatable.

The reports of the commissions are generally well thought through and are made after consultation with a wide range of stakeholders. However, there are obstacles in the way of implementation of many of the proposals. Political interests may agitate against law reform proposals. For example, the tobacco industry lobbied actively (and ultimately successfully) against the implementation of the ALRC's proposals to reform law of liability for defective products.[28] Elements within the government itself -- and especially, it should be said, within Attorney General's Department's, whose officers consider that

[25] This Commission has an excellent website at <http://intranet/nswlrc.nsf/pages/index> which has links to the Commission's publications and other relevant information. Like the ALRC website, (at n. 23 above), it also contains links to other law reform agencies in Australia.
[26] Australia, The Senate, Standing Committee on Legal and Constitutional Affairs, *Reforming the law*, Report on processing law reform proposals, Canbertra, AGPS, 1979..
[27] For example, one of the first reports of the ALRC was a report on the acquisition of land by the Commonwealth. (ALRC 14 - *Lands acquisition and compensation*, 1980) This report was delivered in 1980. It was not until about 1990, when there were active proposals to establish a second airport in Sydney, requiring the resumption of large areas of land, that the proposals were dusted off and enacted as law.

they are the appropriate people to carry out reviews of legislation and policy -- also have hindered the implementation of other law reform proposals. For example, the ALRC made extensive proposals to reform the law of standing to sue, that is, the rules which determine who is entitled to commence legal proceedings.[29] These proposals received widespread community support. However, most actions in which standing to sue is an issue are actions against government officials and departments, and it is hardly surprising that the government itself would oppose measures which facilitate access to remedies that would most often be used against government..

The general consensus is that law reform agencies are worthwhile, although there are indications that the resources available to them decrease when they tread in politically sensitive areas.

"Law and Order" criminal law reform

One area over which, traditionally, judges had unlimited discretion, was the sentencing of convicted criminals. It was common for statutes to prescribe a maximum penalty -- usually a term of imprisonment or a fine. However, the judge or magistrate had a discretion to impose a sentence far less onerous than the prescribed maximum, or even to discharge the offender without recording a conviction.

When media publicity focuses on particularly horrible offences, there is a tendency for politicians (and talk-back radio hosts) to stir up popular opinion at the allegedly light sentences imposed on offenders. Some politicians see political mileage in jumping on a populist wave of support for increased penalties. This is not a novelty,[30] but it has been particularly true in New South Wales over the past 10 years. During that time the NSW Law Reform Commission has had a wide-ranging reference to review and suggest changes in the laws regarding the sentencing of offenders. It has produced a number of reports dealing with particular groups of offenders, for example, Aboriginal people, corporate offenders and people with intellectual disabilities. In the course of this reference the Commission consulted widely with stakeholder groups, including judicial

[28] For my contemporary comments, see "Reforming Australian product liability laws: processes and problems of law reform" (1989) 1 *Bond Law Review* 193-217.
[29] ALRC 27 - *Standing in public interest litigation,* 1985.

officers, police, the Department of Corrective Services, organisations purporting to represent victims of crime, and the legal profession.

During this period the State Premier has frequently canvassed the idea of "grid sentencing" and mandatory minimum sentences, though he has not made detailed references to the Commission.

"Mandatory sentencing" refers to a system where the sentencing court has no discretion in the sentence it must impose. Although this has become controversial in Australia only in the last few years, such penalties have been required in respect to driving offences in New South Wales for at least 20 years. In the case of certain types of traffic offence, a sentencing court is required to disqualify an offender from holding a driver's licence for a specified period as soon as a conviction is recorded. In some, but not all cases, the court has a discretion to reduce, but not to waive, the period of mandatory disqualification. This penalty is imposed in addition to any custodial or other sentence that may be imposed by the court for that offence.

While there has been little popular outcry at this form of mandatory punishment, probably because driving offences are seen to be a threat to public safety, the imposition of mandatory disqualification appears to have been accepted. It does not necessarily follow that the community accepts other forms of mandatory sentencing.

In Western Australia and the Northern Territory, laws have been enacted requiring courts to impose fixed and prescribed sentences on persons convicted of certain property offences. In Western Australia these laws had bipartisan political support, but in the Northern Territory the mandatory sentencing laws became an electoral issue and were repealed when the government changed.

The Commonwealth government refused to disallow the Northern Territory mandatory sentencing laws, although it had the power to do so, and only a few months previously had disallowed the Northern Territory laws permitting euthanasia in limited cases.

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[30] G D Woods, *A History of Criminal Law in NSW,* Sydney, The Federation Press, 2002, 333, 346, Chapter 24.

In New South Wales, from the beginning of 2004, persons convicted of specified offences must be sentenced to a "standard non-parole period", unless the court finds there are special extenuating circumstances, and records its reasons for so doing.[31] This means that if a court fails to impose a standard non-parole period, an appeal court, on application by the prosecution, may review the situation and impose the standard term. The NSW Parliament has also recently amended the Bail Act, so as to reduce significantly the discretion of judicial officers to release accused persons on bail, thus reducing the practical value of the presumption of innocence.

All these measures have been designed by politicians to eliminate or reduce the powers of the courts. They show a clear desire on the part of politicians to remove lawyers and judges from the process of punishing crime, even though the courts, over the years, have performed a very satisfactory role in this respect.

I have spent time describing these laws as it seems to be that they are probably the epitome of political distrust of the courts.

"Tort Reform"

The common law provided that a person who deliberately injured another was liable to compensate the injured person in such a way that the injured person would, so far as possible, be restored to the position he or she would have been in but for the injury.

The landmark case of *Donoghue v Stevenson*[32] established a proposition that everyone has a duty to take reasonable care not to injure his or her "neighbour", that is, anyone who the person should reasonably foresee as being affected by his or her acts.

During the 20th-century a number of well-merited changes in the law made it easier for injured people to recover damages for personal injury where that injury could be shown to be the result of the negligent act or omission of the defendant. Contributory negligence (that is, failure of a plaintiff to take reasonable care for his or her own safety) ceased to be a complete defence, and was replaced by legislation requiring the court to

[31] *Crimes (Sentencing Procedure) Act 1999,* s 54C.
[32] [1932] AC 562.

apportion the responsibility between the parties according to the degree to which the negligence of each had contributed to the damage. The doctrine of "common employment", which meant that a person could not recover damages either from a fellow employee or from the employer if the fellow employee broke a duty of care, was abolished.[33]

However, not only did legal changes make it easier for people to recover damages for personal injuries. The increasing use of motor vehicles meant that more people were injured on the roads, either as pedestrians or as drivers or passengers in motor vehicles. This led to the enactment of statutory schemes requiring all vehicles to be insured under policies of third-party insurance as a condition of being registered. This, to some extent, socialised the obligation to compensate for injuries across society, as it meant that an insurer (rather than the negligent owner or driver) would bear the burden of paying the compensation to the injured individual.[34] Recovery of compensation under the motor accidents legislation required the claimant to prove that the owner or driver of the vehicle was at fault -- that is, negligent -- before compensation could be paid.

In Australia from about 1920, all employers were required to carry insurance against workplace injuries to their employees, and employees injured at work became entitled to recover both regular payments to replace income and lump sums to compensate them for permanent impairment. Proof of fault was not necessary. All that a worker needed to show was that the injury arose in the course of employment.

In United States, during the 1970s and 1980s, business and insurance interests became concerned at the large amounts of compensation that were being awarded by courts, and especially by juries, to successful plaintiffs. These interests, and the lawyers who depend upon them, began a movement known as "tort reform". In effect, this was a well-organised political campaign to reduce the amount of compensation that could be paid to

[33] This is an exception to the general rule that an employer is liable for the wrongful acts of employees committed in the course of employment.
[34] See G Calabrese, *The Costs of Accidents*, New Haven and London, Yale University Press, 1970, P S Atiyah, *Accidents, Compensation and the Law*, 2nd ed., London, Weidenfeld & Nicolson, London, 1975.

personal injury plaintiffs and to restrict the possible bases of liability. The tort reform movement was able to gather some support from economists.[35]

Because the right to recover full damages for road and workplace accidents was severely limited in the US after the introduction of statutory workers and motor vehicle injury compensation schemes requiring insurance and providing some compensation, injured plaintiffs who sought the unrestricted damages available at common law began to sue the manufacturers of products if the manufacturers could be shown to be "negligent". This type of claim became known as "product liability " and, because of some rather unusual cases, it became possible for the tort reform lobby to suggest that the system of personal injuries damages had become farcical.

When the Australian Law Reform Commission conducted a study of the law of product liability from 1987 to 1990, business and insurance interests adopted a number of the arguments that had been put forward by the "tort reform" movement in United States. Although the ALRC's recommendations were not enacted, the Commonwealth Parliament did enact laws based on a Directive of the European Communities, which imposed significant liability on the manufacturers of goods which could be shown to be defective.[36]

In 2001-2002, one of the mutual insurers established by Australian medical practitioners to provide their professional indemnity insurance, became (or indicated publicly that it had become) insolvent and unable to meet claims. Medical practitioners, who were already complaining about the high cost of professional indemnity insurance, threatened to cease practising.

The New South Wales government enacted legislation limiting the amount of damages that could be recovered in negligence actions against health professionals, and the Commonwealth government shortly afterwards established a committee under the chairmanship of Justice David Ipp, then of the Supreme Court of Western Australia, to

[35] The history of these matters, with reference to some relevant commentaries, is contained in T. Young, *Product Liability: Laws and Policies* ALRC Product Liability Research Paper No 1, September 1988. See also text at n 28 above.
[36] *Trade Practices Act* 1974, Part VA.

examine the rules of negligence.[37] I have considered this report elsewhere.[38] To be fair to the committee, its terms of reference were extremely narrow and were set down by the Commonwealth Treasury, rather than by any person or body familiar with the operation or detailed rules of negligence law. The outcome of this review was clearly not *whether* the law of personal injury should change, but rather, how, within a very closely defined area, it would change. The basic issues of underlying policy were not considered, and the range of policy options presented to government very strictly limited by the terms of reference. Government justified this because it asserted (without solid evidence) that there was a "liability crisis".
Even before the committee reported, the New South Wales government introduced 4 major pieces of legislation severely restricting the role of the courts and the rights of injured persons to recover damages for personal injury. These are discussed below. There was also legislation affecting liability of health professionals.

From the early 1980s defects in the system of damages for personal injuries were obvious. A review of law in the 1970s in New Zealand, by a committee chaired by Sir Owen Woodhouse, a Justice of the New Zealand High Court and later president of the New Zealand Law Commission, recommended that there should be a single system of accident insurance covering all cases of sickness injury and disability, regardless of fault; anyone who was unable to work would be entitled to compensation payments, rehabilitation and medical expenses from a fund created by imposing levies on motorists and employers. This system has been operating successfully in New Zealand for some 30 years.

In 1974 the Australian Commonwealth Government asked Sir Owen Woodhouse to head a Royal Commission in Australia which would also examine the law of compensation for personal injuries. This commission reported in 1976, but the new government was unsympathetic to its recommendations.

In the mid-1980s, the New South Wales government abolished common law damages for personal injuries arising out of motor accidents and established the "Transcover"

[37] Commonwealth of Australia, *Review of the law of negligence, Final Report,* Canberra, September 2002.
[38] "The Civil Liability Act 2002 (NSW)" (2003) 6 *The Judicial Review* 272-310.

scheme.[39] This proved to be highly unpopular and was repealed in 1987 after a change of government. However, while it remained possible to obtain damages for personal injuries suffered in motor accidents if fault could be established, the total amount of damages was restricted and damages could be recovered for non-economic loss only if that plaintiff crossed a threshold expressed as a percentage of a hypothetical plaintiff who was a "most extreme case". Most Australian States enacted legislation similar to the New South Wales model, restricting the amount of damages that could be recovered.[40]

In 1998, New South Wales went further. The Premier promised to reduce the cost of motor vehicle insurance by $100 per year as part of his election campaign, and the resulting legislation was the consequence of this. It established an administrative machinery for the assessment of personal injury damages. In order to commence proceedings in court for recovery of damages the claimant had to cross a threshold expressed in terms of a percentage of whole person impairment, determined by an medical assessor employed by the Motor Accidents Authority, on the basis of criteria laid down initially by the American Medical Association. This legislation has reduced significantly the number of personal injury claims commenced in courts. To some extent, this has been due to the slow pace at which the relevant authorities issue certificates of assessment declaring that claims either cross the threshold or are exempt. In the long run, larger claims will continue to court hearings, but most of the smaller claims will disappear. The experience seems to be that even though people are quite severely injured they cannot cross the statutory threshold.

Subsequently, the New South Wales government replaced the workers' compensation legislation which had been operating in much the same form for 75 years. The Compensation Court (formerly the Workers Compensation Commission) was replaced by an administrative commission which was empowered to determine claims. Though it is still possible to seek limited damages in the courts in some cases, few, if any, cases have reached the courts.

Finally in 2002 and 2003 the New South Wales government passed its *Civil Liability Act* 2002. This was done in 2 stages. Part of this Act is based on the recommendations of

[39] A similar scheme was enacted in Victoria and some other States.
[40] Some of this is mentioned in K Hayne, "Restricting Litigiousness" (2004) 78 ALJ 381.

the Ipp committee, which have also been adopted in other Australian States. Some parts, though, go much further than any recommendations of that committee. These legal changes have not resulted from detailed consideration of law and policy, such as would be given to them by law reform commissions, but rather proceed a political and ideological drive to reduce insurance costs. In a recent autobiography the Premier has expressed satisfaction at excluding lawyers from this area of personal injury compensation.[41]

It is quite clear, as the Woodhouse Reports, both in Australia[42] and New Zealand demonstrate, the common law relating to damages for personal injuries was far from perfect. However, the almost total exclusion of lawyers from the area of personal injuries compensation represents, it is suggested, a distrust of law and lawyers purportedly based on some dubious economic theories.

Legal Aid

Before 1974 there were various legal aid schemes in Australia. The private profession provided legal services extensively on a gratuitous or reduced fee basis for people in need, but there was no systematic organisation of the provision of those services. Some states operated publicly funded schemes under which legal aid and assistance was provided to poor people. New South Wales for many years had a number of Public Defenders, who were barristers appointed on a salaried full-time basis to defend poor people accused of serious crimes. There was also a Public Solicitor's Office, which provided advice and assistance to people who met a means test in both contentious and non-contentious matters, particularly family law.

In about 1970 there were some important developments outside government in the provision of legal aid. Academics at the newly established University of New South Wales Law School formed a service to provide legal aid to (and ultimately to be controlled by) Aboriginal people and also a community-run service in a suburb near the University. In Melbourne, young lawyers established the community-based Fitzroy Legal

[41] See M Dodkin, *Bob Carr: The Reluctant Leader,* Sydney, UNSW Press, 2003, 213.
[42] Australia, National Committee of Inquiry into Compensation and Rehabilitation in Australia, *Compensation and Rehabilitation in Australia,* AGPS, Canberra, 1974.

Service to provide legal aid for poorer members of the community. Other community-based legal centres followed in Melbourne, Sydney and Brisbane.

Both Prime Minister Whitlam and Attorney General Murphy understood that "equality before the law" meant nothing in practice unless everyone had access to competent legal representation. Not only did the Whitlam government support community legal services, but very quickly established the Australian Legal Aid Office, even before the report of the Commission of Enquiry into Poverty which it had appointed, and which ultimately recommended extensive Commonwealth involvement in the provision of legal aid.[43] This body provided legal services in "Commonwealth" matters -- that is, matters arising under Commonwealth law including family law and administrative law matters -- and to people for whom the Commonwealth had a particular responsibility, such as war veterans, pensioners and students receiving Commonwealth benefits.

After the Whitlam government was dismissed, the Australian Legal Aid Office was abolished, and its functions transferred to state legal aid agencies. The Commonwealth provided grants to the States on condition that they established legal aid commissions with particular structures and policies, and which provided a specified range of legal services. Commonwealth funds continued to be made available to community-based legal services, and the Aboriginal Legal Service was established on a national basis. Both Labor and Conservative Governments accepted the need for legal aid and continued to provide funds. This was so despite initial opposition from the organised legal profession. At first the law societies did not realise that for every plaintiff there is a defendant, and that if more people were granted access to legal services other parties will also require legal services. The Bar was always much more sympathetic to legal aid.

Legal aid has always been available subject to two tests: first, a means test based on the income and other resources of the applicant; and secondly, an assessment by the legal aid provider of other matters, including whether or not the applicant is custody or not, and, in civil and family law matters, also a merits test, that is, whether the proposed litigation had a reasonable chance of success.

[43] Commission of Inquiry into Poverty, Second Main Report, *Law and Poverty in Australia,* Canberra, 1976. This is commonly known as the Sackville Report, after the Commissioner in Charge.

The legal aid organisations, for a while, relied primarily on their salaried legal practitioners, but, in general, Conservative governments did not favour the employment of salaried professionals and preferred to contract out the provision of legal services to private practitioners. Nevertheless, particularly in criminal and family law, salaried lawyers continued (and still continue) to play an important role in the provision of legal aid services.

The need for Aboriginal people to have access to legal aid services which were particularly attuned to their needs, and which were governed by members of the Aboriginal and Islander Communities, was recognized early. These services were funded separately, and operated quite separately from community-based and other government legal services. They were available to all Aboriginal people without a means test. In 2004, the Government appears to have decided that these services are not efficient, and has called for expressions of interest from private practitioners to provide legal services to Aboriginal people. Such services are unlikely to have neither the support of Aboriginal people, nor the skills and experience necessary to provide adequate legal services for them. Community-bases Aboriginal and Islander legal services will continue to operate, but their capacity will be severely limited by lack of Commonwealth funding.

Changes in government priorities have meant that the total resources available for legal aid have diminished significantly. Nevertheless, legal aid is accepted as a necessity, particularly in the smooth operation of the criminal courts.

LEGAL EDUCATION

Since 1974, legal education has been transformed. Instead of 9 law schools, there are now nearly 40 in Australia. The narrow, strictly professional, approach criticized by Dr Coombs and others had already been challenged, not only by the pioneering work of Julius Stone and Geoffrey Sawer, but especially by the new, "contextual" approach adopted at the University of NSW by its foundation dean, Hal Wootten, in a law school which attempted to replace the traditional lecture by more student-centred forms of learning. In some law schools, a "formal" or strictly doctrinal approach to the study of law, which had been the norm until then, was replaced or supplemented by more

"critical" or "contextual" approaches. Legal research also developed, from a highly exegetical exercise to a study which, if not carried on jointly using the techniques of economics and the social sciences, particularly sociology, certainly drew on the insights provided by those disciplines. The focus of legal scholarship moved significantly from the "How?" to the "Why?" Those new approaches had a very definite impact on Australian legal education and scholarship, which is described in more detail elsewhere.[44]

Students now pay fees for tertiary education, as they did before 1974. Fees for law courses are in the highest range. This has only reduced the demand for places marginally, if at all. There are now more law students than ever before. The fees will affect the make-up of the student body, but this is one area where government moves to reduce the place of lawyers are absent, or at least less obvious.

CONCLUSION

The examples I have given are intended to demonstrate that, over the past 30 years, the role of the law and lawyers has changed. In 1974 we were full of hope that ideas of Justice would pervade the law and assist it to develop in ways of benefit to society.

Some of those hopes have borne fruit, but in the face of politics disguised as economic theory and of interests that see law as an obstacle, in many areas, law, and even the Rule of Law, have been marginalised. The criminal law remains important as an instrument of state control, but, in this, as in many other areas, governments are seeking to reduce the extent of judicial discretion, and possibly the access of the people to law and legal remedies. Industrial law (as distinct from general contract law) is something of the past. Administrative law has become far less important because the range of activities to which it applies have been significantly reduced as part of the fetish for "small government", "privatization" and efficiency. Lawyers have a role in facilitating business and they will continue to have a role there. In virtually every other area, including the traditional field of conveyancing, there are further moves to exclude them.

[44] D. Pearce, et al, *Australian Law Schools,* 1987, Canberra, AGPS; Chesterman, M, and D Weisbrot, "Legal Scholarship in Australia" (1987) 50 MLR 709; Goldring, J, C Sampford and R Simmonds, *New Foundations in Legal Education,* 1998, Cavendish, Sydney and London; McInnis C and S Marginson, *Australian Law Schools after the 1987 Pearce Report,* DEET, Canberra, 1994.

This sounds pessimistic. It is not meant to be too pessimistic. Lawyers will continue to play a role in society, but it will not be as easy for them to shape or influence social change as it may have been in the past. The 2004 Australian Lawyers and Social Change Seminar will address some of the questions I have raised. However, it would be foolish for it not to examine the question my hypothesis that governments are trying to reduce the role of law and lawyers in society, and if so, why this is.