From Law and Poverty to *Access to Justice*

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The law as a force for significant social and political change.

The Second Main Report of the Commission of Inquiry into Poverty, *Law and Poverty in Australia*, was presented to the then Prime Minister of Australia, Mr E.G. Whitlam, on 20 October 1975.[1] The passage of 20 years has not entirely dimmed the communal memory (or reconstruction) of those momentous days, culminating in the most remarkable event in Australia's constitutional history. It is fair to say that the timing of the Report was not necessarily calculated to encourage careful and mature consideration of its proposals by the Government which had commissioned it.[2] Even so, the themes in the report remain of considerable significance as the Australian legal system now struggles to adapt to demands for improved 'access to justice' and to advance the objective of genuine equality before the law.

The preparation of the Law and Poverty Report coincided with a period of law reform in Australia unprecedented at the time, and unmatched since. In 1975, for example, the Commonwealth Parliament enacted the *Family Law Act*, the *Administrative Appeals Act* and the *Racial Discrimination Act*, each of which has had a profound impact, not merely on the Australian legal system, but on the everyday life of the Australian community. The previous year had seen the enactment of the *Trade Practices Act*, which marked the intervention of the Commonwealth into the fields of consumer protection and fair dealing among competitors in the market-place. In 1973 the Australian Government had established the Australian Legal Aid Office, the first attempt by the national government to provide legal services on a large scale. In February 1975 the Australian Government also established a system of appeals for dissatisfied applicants for social security which, whatever the system's deficiencies, recognised the dependence of many Australians on income maintenance programs and the need for adequate review procedures to ensure fairness in decision making.

The Law and Poverty Report itself proposed many reforms in areas of substantive law of special importance to poor people. These included the law of landlord and tenant, legislation governing consumer credit and the enforcement of debts and relics from the 19th century such as vagrancy laws. The Report also recommended measures to ameliorate the often harsh impact of the legal system on disadvantaged groups, in particular non-English speaking migrants, Aboriginal people, homeless people and juvenile offenders. In the 20 years since the Report was presented, many of the reforms proposed in it have been adopted, especially in the areas of substantive law identified as being in need of change, such as residential tenancies law and consumer credit law.

Themes

Law and social change

Apart from its recommendations, the Law and Poverty Report identified a number of themes. First and foremost, the Report expressed the view that the legal system itself can be a powerful force for social change.

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> In short, for the legal system to realise fully the goal of equality before the law it must become more responsive to the needs of poor people and a positive force for the elimination of poverty . . . [D]espite the healthy respect for precedent, which is an essential part of the common law tradition, the law is capable of providing an important impetus for social and economic change. Not only is reform of the law often essential to overcome obvious inequalities and injustices in society, but the reforms can markedly influence community attitudes and behaviour. [p.2]

To some extent, this expression of confidence in the legal system reflected the legislative reforms introduced during the Whitlam years, although it was to be some time before the full impact of those reforms became apparent. The Law and Poverty Report's sentiments also reflected the experience in the United States over the preceding two decades. In that country, the decisions of the Supreme Court in such areas as desegregation, reapportionment and criminal procedure had demonstrated, albeit in a different constitutional context, the potential of the legal system as a catalyst for significant social and political change.

Barriers to the legal system

Secondly, the Law and Poverty Report recognised the importance of encouraging access to the legal system by disadvantaged groups and individuals. To this end the report emphasised the need to address the financial and non-financial barriers preventing poorer people from obtaining legal advice and assistance. In this respect, the Report attempted to dispel the notion that the impediments to justice could be overcome simply by providing more money for litigation and other traditional legal services, although it acknowledged the importance of increased resources. The Report also emphasised the need for legal aid schemes, especially community-based services, to be active in promoting law reform in the interests of disadvantaged groups.

Commonwealth's role

Thirdly, the Law and Poverty Report envisaged that the Commonwealth should play a much expanded role in actively overcoming the bias of the legal system against poorer people. The most important manifestation of this expanded role was in the funding and provision of legal aid services. But it was proposed that the Commonwealth should use its powers in relation to non-English speaking migrants, Aboriginal people and social security recipients to tackle discriminatory laws and practices and to ensure that courts and law enforcement agencies became more responsive to the special needs of these groups. In short, alleviating significant deficiencies in the legal system was characterised as a national issue.

Omissions

Women

Before returning to these themes, it must be acknowledged, with the considerable benefit of hindsight, that there were some important omissions from the Law and Poverty Report. The most obvious was the absence of any detailed treatment of the impact of the legal system on women, especially poorer women. Although the Law and Poverty Report did identify and analyse specific legal issues of special significance to women,[3] it did not explore the historical bias of the legal system against women, nor did it recommend reforms to overcome that bias. It is perhaps a measure of the rapidity of change in community attitudes that it is inconceivable, in the last years of the 20th century, to contemplate an inquiry into law and poverty without addressing those issues. The recent reports of the Australian Law Reform Commission 'Equality Before the Law: Justice for Australian Women' (Part I 1994) and 'Equality Before the Law: Women's Equality' (Part II 1995) highlight the significance of this point.

Legal profession

A second omission was the absence of any consideration of the role and organisation of the legal profession as an element in depriving disadvantaged groups and individuals of access to legal advice and assistance. These questions were considered, although in a rather broader context, by the New South Wales Law Reform Commission in a series of reports published in the early 1980s on the legal profession. The Commission's reports were followed by other studies such as the Trade Practices Commission 'Study of the Professions — Legal', Final Report 1994 and in the Report of the Access to Justice Advisory Committee, 'Access to Justice: An Action Plan' 1994. These reports applied recently formulated (or, depending on one's viewpoint, recently acknowledged) competition principles to the regulation of the legal profession.

The adversary system

Thirdly, the Law and Poverty Report did not specifically examine the assumptions underpinning the adversary system, although it did recommend a variety of procedural reforms in civil and criminal litigation. The proposed reforms included improved interpreter services for non-English speaking migrants, more stringent safeguards for Aboriginal people charged with criminal offences and the separation of the welfare and criminal law functions of children's courts. The Report also proposed specialist tribunals to deal with particular categories of disputes, such as those involving residential tenancies. But it did not address in depth whether the legal system should encourage alternatives to traditional adversary litigation, such as mediation or court-sponsored arbitration.

A force for change — the High Court

The fundamental notion underlying the Law and Poverty Report, that the legal system can be a force for significant social and political change, is now firmly implanted in the public consciousness in Australia. The irony is that the institution primarily responsible for this development has been the High Court.

It is, of course, true that during the first 75 years of federalism the Court decided many cases of great political significance. One need think only of the *Engineers'* case, (*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129) the *Bank Nationalisation* case (*Bank of NSW v Commonwealth* (1948) 76 CLR 1) and the *Communist Party* case (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1). But these momentous decisions were couched in the forms of traditional legal analysis and were presented without the persistent glare of public scrutiny that has accompanied the growth of more critical and questioning attitudes of public institutions, including courts and judges. The emergence of these attitudes has coincided with the authoritative abandonment of the 'fairy tale' that judges do not make law, but merely declare it.[4] It has also coincided with a clear recognition that:

> [b]ecause policy oriented interpretation exposes underlying values for debate it would enhance the open character of the judicial decision-making process and promote legal reasoning that is more comprehensible and persuasive to society as a whole.[5]

Many of the policy-oriented decisions that characterised the latter years of the Mason Court were clearly designed to protect and advance the interests of disadvantaged groups and individuals. They did so in ways that, if not unthinkable in the early 1970s, could hardly have been predicted as a course the Court would be likely to follow. Moreover, the decisions reflect a willingness on the part of the Court to apply new principles in a manner that virtually compels a government response, whether in the form of legislation, or the allocation of resources, or both.

Mabo and native title rights

The most striking illustration is, of course, the *Mabo* decision (*Mabo v Queensland (No.2)* (1992) 175 CLR 1). The Law and Poverty Report concluded the chapter on 'Aboriginals and the Law' with a warning that the changes recommended, although important, had tackled only the symptoms of the problems experienced by Aboriginal people and not the causes.

> The causes are connected with the political subjugation and alienation of Aboriginals and the destruction, over many years, of Aboriginal culture, identity and dignity. [p.288]

The fundamental reforms necessary to address the causes included:

> the recognition of rights to traditional lands (including the restoration of tribal authority over those lands) and the payment of appropriate compensation for land which cannot be returned. [p.288]

These observations were not made in the expectation of a swift community response, although the *Aboriginal Land Rights (Northern Territory) Act 1976*, giving limited recognition to Aboriginal land rights in the Northern Territory, was passed the following year. The doctrine that Australia had been a settled colony and that the Crown acquired beneficial title to all unalienated land, appeared at the time to be an immutable part of Australian law.[6] Yet in *Mabo*, the Court overturned these principles and recognised the rights and privileges of the Meriam people, under native title, to the Murray islands. While the title of the Meriam people was theoretically subject to extinction by valid legislation of the Queensland Parliament, it was clear enough from the *Mabo* litigation that such legislation would almost certainly be inconsistent with the *Racial Discrimination Act 1975*.[7]

The High Court's decision in *Mabo* meant that, despite the political difficulties, the Commonwealth faced no practicable alternative other than to acknowledge and make legislative provision for claims based on native title.

Dietrich — legal aid and a fair trial

Dietrich v The Queen (1992) 177 CLR 292 is another important illustration of the significant role that the High Court has played in promoting social and political change and improving access to justice. In *McInnis v The Queen* (1979) 143 CLR 575 a majority of the High Court applied the apparently unexceptional principle that an accused person has no right to be provided with counsel at public expense. Thus the accused in that case failed to overturn the trial judge's decision not to grant an adjournment to allow a challenge to the refusal to grant legal aid.

In *Dietrich*, 13 years later, the Court adhered to the principle applied in *McInnis*. However, the Court effectively undermined that principle by accepting that an accused has a right to a fair trial which, in a serious case, may be jeopardised by a lack of legal representation and that a trial judge has power to stay proceedings to avoid an unfair trial. The decision was reached on the express, but dubious, assumption that a substantial financial burden was 'not likely' to be imposed on governments and that the decision would 'require no more than a reordering of priorities' for legal aid (at 312 per Mason CJ and McHugh J).

While attempts to expand the scope of *Dietrich* have failed,[8] the case has fundamentally altered the balance between the authority of the trial court and government or legal aid bodies responsible for financing legal aid. Most recently, in *Reg v Milat*, (unreported, Supreme Court, NSW Criminal Division, 11 August 1995) Hunt CJ put the position thus:

> It is the right of this applicant, in common with all accused persons, to receive a fair trial *according to law*, not one which is merely fair according to the amount of money appropriated by Parliament to the justice system and available to the Legal Aid Commission. [at 10, emphasis added]

The willingness of the Court to intervene in areas hitherto regarded as matters for government, poses important questions as to the role of courts and of the High Court in particular. The questions are presented most starkly in a constitutional context, where judicial decisions cannot be overturned by Parliament acting alone.[9] But they also arise in areas where Parliament has power to restore the *status quo ante*, since legislation of this kind may face formidable obstacles. The important point, however, is that, even if they might wish to do so, courts will find it increasingly difficult to avoid addressing unjust laws or practices on the ground that any remedy must be within the province of Parliament. The Rubicon has been crossed.

Making access to justice a reality

The disparity between formal equality before the law and effective rights is at the heart of the modern movement to reform the justice system. As Cappelletti said in 1989:

> [W]e are the witnesses of a new vision of justice emerging throughout the world . . .
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> [This is no] longer the vision of a merely theoretical and therefore mystifying justice, closed and sealed to 'those who do not count'. On the contrary, it is marked by a quest for effectiveness — effective right of action and defence, effective access to court, effective equality of the parties — encompassing all the once-neglected problems of legal aid, of delay, of costs and small claims, in a pervasive attempt to bring this new justice within the reach of all.[10]

It is no coincidence that the stated objective of the Australian Government's May 1995 *Justice Statement* is to 'make access to justice a reality for all Australians'.[11] 'Access to Justice' has become a catchcry, implying that traditional legal processes are often poorly adapted to cope with the challenges identified by Cappelletti.

The access to justice movement has created many tensions. Foremost among these is the conflict faced by the courts between their search for the 'holy grail' of individualised justice and the community's strong wish to reduce the delay, complexity and expense associated with litigation.[12] This conflict has undeniably created serious difficulties for the courts and the legal system and has contributed to the increasingly critical scrutiny to which legal institutions have been subjected in Australia. By the same token, acknowledgment of the tension between individualised justice and speedy dispute resolution has led to the emergence of alternatives to adversary litigation.

Alternative dispute resolution

Perhaps the most striking modification to the adversary system has been the increasing resort to alternative dispute resolution (ADR) as a means of avoiding or resolving what might otherwise be protracted litigation. Most attention has been devoted to mediation, a process designed to assist the parties to reach a consensual settlement that will accommodate their needs.[13] However, other processes such as ombudsmen and consumer complaint schemes, and non-consensual procedures such as arbitration, are rapidly developing as alternatives to litigation. The fact that courts have embraced these alternatives with considerable enthusiasm reflects the urgency of the need to relieve the pressure created by a 'rights-conscious' community.

The role of courts

Courts themselves have not merely been passive observers of the changed legal environment. Increased workloads, limited resources and high public expectations of the legal system have induced the courts to modify their approach to the conduct of litigation. Case management techniques have been employed as a response to the delay and expense associated with leaving the conduct of litigation to the parties and their advisers. Greater judicial intervention in the management and conduct of litigation is the product of a variety of forces, not least the recognition by courts that self-governance carries with it greater responsibility for the effective use of scarce judicial resources.[14] These same factors have encouraged a re-evaluation by the courts of the appropriateness to modern conditions of procedures long taken for granted.

The pressures created by the access to justice movement require those responsible for the justice system — including courts and tribunals, legal practitioners, legal aid agencies and governments — actively to participate in the process of change. Passivity is no longer a long-term option.

A national response

The Law and Poverty Report envisaged a greater role for the Commonwealth in overcoming the bias of the legal system against poorer people, primarily by intervention in areas for which the Commonwealth had express constitutional powers. In fact, the Commonwealth's role in shaping the Australian legal system has expanded remarkably over the past 20 years. In part, this reflects a greater willingness by the Commonwealth Parliament to exercise to the full its constitutional powers (including its external affairs power) and to allocate resources to tackle what are seen as national issues. In a more specifically legal context, it reflects the establishment of new national courts and tribunals, notably the Federal Court, the Family Court and the Administrative Appeals Tribunal.

The most significant aspect of the *Access to Justice* report and the *Justice Statement* is the recognition that so many of the access to justice issues require a national response. This is not to suggest, of course, that the States have no part to play, or that solutions to problems must invariably be uniform throughout Australia. However, the range of matters dealt with in both the *Access to Justice Report* and the *Justice Statement* show how few issues can be regarded as purely State or local in character. The extent of Commonwealth funding of legal aid commissions and community legal centres, and the policy issues arising out of the Commonwealth's interest in ordering priorities, are simply obvious examples. Another is the regulation of the legal services market which, in an age of competition policy, is increasingly seen as a national issue.

The recognition that access to justice is a national issue has been accompanied by a willingness to develop a national strategy to address that issue. Of course, there is room for considerable argument as to the adequacy of the response and the priorities that have been selected. It is also undeniable that the willingness of successive governments to follow a similar path will depend on their political philosophies and the exigencies at the time. But it is too late to regard access to justice as a matter to be addressed primarily through local rather than national responses.

Conclusion

Few people in Australia would suggest that the developments of the past 20 years have overcome the patterns of inequality and disadvantage documented by the Poverty Commission. Equally, few would deny that the legal system has gone at least some way towards redressing the balance. Among the most important developments has been the recognition that the legal system can be a force for significant social and political change. The access to justice movement and a willingness to characterise equality before the law as a national issue have created pressures that cannot be ignored. In this sense, 1995 is very different from 1975.

References

1. *Law and Poverty in Australia*, AGPS, Canberra, 1975 (referred to as 'Law and Poverty Report').
2. The previous Coalition Government had established the Commission of Inquiry into Poverty, under the chairmanship of Professor Ronald Henderson, of the Department of Applied Economic and Social Research of the University of Melbourne. On 6 March 1973, the Prime Minister announced the broadening of the Commission by the appointment of four additional Commissioners to consider, respectively, educational questions, selected economic issues, social/medical aspects of poverty and law and poverty. The Commission ultimately produced five Main Reports.
3. For example, the so-called 'cohabitation rule' governing entitlement to income maintenance payments, and the statutory requirement that a woman with children in her care take maintenance action against the father as a condition of income support: *Law and Poverty*, at 183-193.
4. Mason, A.F., 'The Role of the Courts at the Turn of the Century', (1994) 3 *JJA* 156, at 163.
5. Mason, A.F., 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *F L Rev* 1, at 28.
6. They had been recently affirmed in the *Gove Land Rights Case: Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141. Compare the analysis of Brennan J in *Mabo (No.2)*, at 26 ff.
7. As had been decided in *Mabo v Queensland (No.1)* (1988) 166 CLR 186. In *Western Australia v Commonwealth* (1995) 69 ALJR 309, the High Court held that the *Native Title Act 1993* (Cth), with the exception of one section, was valid. The Court also held that key sections of the *Land (Titles and Traditional Usage) Act 1993* (WA) (which purported to extinguish native title and replace it with a statutory regime of traditional usage, was inconsistent with the *Racial Discrimination Act 1975*.
8. *New South Wales v Canellis* (1994) 181 CLR 309.
9. Most discussion has of course been directed to the High Court's decisions on implied constitutional freedoms: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.
10. Cappelletti, M., *The Judicial Process in Comparative Perspective*, Clarendon Press, Oxford, 1989, at 266. The passage is cited in the submission of the Federal Court in response to the Australian Law Reform Commission, *Who Should Pay? A Review of Litigation Cost Rules*, Issues Paper 13, 1994.
11. Attorney-General's Department, *Justice Statement*, May 1995, at iii. The *Justice Statement* is largely based on *Access to Justice*.
12. Gleeson, A.M., 'Individualised Justice — The Holy Grail' (1995) 69 *ALJ* 421.
13. Astor, H. and Chinkin, C.M., *Dispute Resolution in Australia*, Butterworths, Sydney, 1992, at 60, cited in *Access to Justice*, at 277.
14. Sackville, R., 'The Access to Justice Report: Change and Accountability in the Justice System' (1994) 4 *JJA* 65.