WHITLAM AS LAW REFORMER

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In this article Mr Justice Kirby outlines a number of important legal themes in the career of the former Prime Minister. Several issues were identified by him soon after Mr Whitlam entered Parliament and persisted with in Opposition and Government. Some of them led to important legislative reforms. The abolition of appeals to the Privy Council was achieved in part. The establishment of a new Federal Court, long predicted, has now been achieved. Major reform of family law and the establishment of a special Family Court was pioneered with the support of Mr Whitlam. The expansion of Commonwealth interests in commercial and business law coincided with facultative decisions of the High Court. The achievement of a single corporation law and of national compensation eluded the Whitlam Government but may yet be secured. The identification of the need for a new administrative law is instanced as the most original of Mr Whitlam's law reform preoccupations. The new body of Commonwealth administrative law was initiated during his Administration. This paper is a history not an evaluation. But it identifies a number of themes important for continuing law reform in Australia and illustrates Mr Whitlam's persistence, and in some cases successful action, towards achieving reform of the law.

THE WAY OF THE REFORMER IS HARD

Orderly reform of our society, including reform and improvement of the law, is a common theme of each of the two major political movements in Australia. The emphasis differs; but the commitment to reform is shared. "Reform" does not mean change for its own sake. It implies change for the better. Because what is better is often a matter of controversy, there is room for sincere people of good will to have differing views about the needs for change, the means of achieving it and the urgencies involved.

I make this point at the outset, so that my contribution to this lecture series honouring the former Prime Minister will not be seen as in any way partisan. In the nature of things, it cannot and should not be so. The present Prime Minister, Mr Fraser, speaking in Melbourne soon after taking up office put it this way:

> There are many aspects of Australia's institutions where reform is needed. Reform is needed wherever our democratic institutions work less well than they might. Reform is needed wherever operation of the law shows itself to be unjust or undesirable in its consequences. Reform is needed wherever our institutions fail to

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> enhance the freedom and self respect of the individual. . . . Australia has always been a country where constructive reform has been welcomed and encouraged. Achieving a better life for all Australians through progressive reform will be a continuing concern of the Government. Debate in Australian politics has never been over whether reform is desirable. Australians, whatever their politics, are too much realists to believe that no further improvement is possible and too much idealists to refuse to take action where it is needed. The debate has rather been about the kinds of reforms and methods of reform that are desirable.[1]

It would not be appropriate or proper for me to comment upon the controversial political, constitutional and social reforms that were advocated by Mr Whitlam during his career in public life. Any evaluation of such matters must be left to other lecturers and, perhaps, other times. I speak of Whitlam as a law reformer. I want to illustrate a number of interests he displayed from his earliest days in the Parliament and to show how, in government, practical reforms were brought about or initiated, many of them durable and some of them farsighted. About a number there will be little dispute today. The creation, with the support of all political parties, of the Law Reform Commission itself occurred during the Whitlam administration. It will become, I hope, a permanent and routine way by which Governments and the Parliament can be assisted to secure the necessary modernisation, simplification and reform of the legal system. Other matters upon which Mr Whitlam spoke, when in Opposition, in Parliament, at legal conventions and elsewhere, illustrate his abiding concern, as a lawyer, for improvements in the law and its accessibility to ordinary people. To the 1973 Legal Convention, shortly after taking office, he said this:

> I am more than ever convinced that lawyers (and some of my most useful colleagues are lawyers) . . . are able to discern issues, to express issues and to devise solutions more than people of any other discipline in the country; but there is a very real risk that lawyers will appear to be beyond the reach of the citizen. The courts must always be accessible . . . but also the profession must be accessible. It must be relevant and it must be seen to be relevant.[2]

Gough Whitlam was never under any illusion about the difficulties in the way of the reformer, particularly the legal reformer in Australia. A recurring theme of his collected speeches is his assertion that "the way of the reformer is hard in Australia". He first said this at the close of his 1957 Chifley Memorial Lecture.[3] He repeated it at the

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[1] Fraser, Address to the Melbourne Rotary Club, 21 April 1976, *mimeo*, 1.

[2] (1973) 47 A.L.J. 413.

[3] Whitlam, "The Constitution *versus* Labor" Chifley Memorial Lecture 1957, in Whitlam *On Australia's Constitution* (1977) (hereafter "Whitlam") 15, 44.

beginning of his 1975 Chifley Memorial Lecture.[4] He repeats it in the introduction to his recent collection of speeches and essays.[5] He repeated it in April 1978 in his T. J. Ryan Memorial Lecture which was, significantly, titled "Reform During Recession".[6] Reformism, he declared in 1975 "is basically optimistic".[7] A long period in Opposition, a short period on the Treasury Benches, and a period after for reflection confirmed him in an appreciation of the institutional, attitudinal, economic and other resistances to his notion of reform. Complacency indifference and apathy: these rather than frank and reasoned opposition are the chief opponents of reform.

For all that, a scrutiny of what he said during the long haul in Opposition and what was done during his administration indicates, I believe, a remarkable persistence with a number of topics that can properly be called "law reform". I say nothing of constitutional reform, for here the consensus in our community probably evaporates. On a number of recurring themes, however, Gough Whitlam in Opposition and in office identified areas where the current law is anomolous or does injustice. In some cases he initiated practical reforms to right wrongs.

It is not the purpose of this lecture to catalogue all of Whitlam's interests and achievements as a law reformer. That would deserve a much lengthier analysis than this can be. My modest purpose is to identify several themes which, like *Leitmotivs* recur in his speeches in public office and come together in an obvious concern that the law and lawyers should be more relevant to Australian society today and more sensitive to the needs of that society.

WHITLAM THE LAWYER

Let it not be forgotten that Whitlam is a lawyer, a Queen's Counsel, and son of a distinguished public lawyer. His father H. F. E. Whitlam was Crown Solicitor for the Commonwealth. Young Gough grew up in a legal and (federally legal) atmosphere and married into an equally distinguished legal family. As is well-known, Mrs Whitlam was the daughter of the late Mr Justice Dovey.

Admitted to the N.S.W. Bar in 1947, Whitlam the barrister soon made his mark. A Supreme Court judge in N.S.W., a contemporary of his, has told me that had he remained at the Bar, Whitlam would undoubtedly have risen to its top ranks and doubtless been rewarded with judicial honours. In 1951-1952 he was one of the Counsel assisting the Royal Commission into the liquor trade in N.S.W. Between 1949 and 1953 he was a member of the N.S.W. Bar Council, elected to that position by his discerning colleagues. In 1952, he entered Parliament

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[4] Whitlam, "Chifley Memorial Lecture 1975" in Whitlam 193.
[5] Whitlam 1.
[6] Whitlam, "Reform During Recession" *Inaugural T.J. Ryan Lecture* 1978, 4.
[7] Whitlam, *Chifley Memorial Lecture 1975* in Whitlam 196.

as the member for Werriwa, a position he has only lately surrendered. His Parliamentary career began, taking him to the highest elective position which the country offers. Through all this, he never forgot his professional origins. Not only does his career testify to the intellectual and physical disciplines of which the law has no equal. His early training alerted him to injustices in the law and the need to rectify them.

Pending the definitive work, I offer this examination of some of the legal themes upon which he spoke from time to time and on several of which he acted when the opportunity came. This is a chronicle not an assessment.

THE PRIVY COUNCIL

The Australian Labor Party had long had as an objective "investing the High Court [of Australia] with final jurisdiction in all questions and matters".[8] In fact, at the time of federation, the Founding Fathers, of differing political persuasion had sought to remove or severely limit the opportunities for appeal to London.[9] Despite this, appeals to the Privy Council persist to this day. They were a nagging source of irritation to Whitlam. They affronted his concept of a "new national spirit and national self-respect".[10] In his Chifley Memorial Lecture in 1957, he pointed with annoyance to the fact that the Privy Council had decided that section 92 cases did not concern the limits *inter se* of the powers of the Commonwealth and the States or of the States themselves and accordingly would hear appeals from the High Court without certificate.

> Since Section 92 has been the resort of hordes of citizens who feel irked by a Commonwealth or State law, more and more appeals, and vital ones, are being determined by the Privy Council instead of the High Court.[11]

Speaking on the Estimates in August 1958, he returned to this theme:

> . . . [W]e should abolish appeals to the Privy Council in constitutional matters, thus making the High Court supreme in such matters . . . [This] would involve the passage by this Parliament of a law limiting the matters in which the Privy Council may give leave to appeal from a decision of the High Court, at least to matters which concern the powers of the Commonwealth Parliament and State parliaments, if not to matters which concern the interpretation of laws or the rights of citizens between themselves. At the time of federation it was thought that the determination of

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[8] Cited in "The Constitution *versus* Labor" in Whitlam 43-44.

[9] *Cf.* the writer's 1978 Deakin Lecture *The Dilemma of the Law in an Age of Violence*, Melbourne, 1978.

[10] Whitlam, Labor Party Policy Speech 1974 in Whitlam 355.

[11] "The Constitution *versus* Labor" in Whitlam 44. The reference to "hordes" was an hyperbole. The number of cases was small. See (1977) 51 A.L.J. 495.

> constitutional matters was effectively reserved to the High Court by requiring a certificate from that court before an appeal could go to the Privy Council . . . [The section 92] . . . loophole was not envisaged by the founding fathers and . . . can be closed by action of this Parliament. I believe the intention of the founding fathers would be re-asserted if the Parliament were to say that at least in constitutional matters the High Court should remain the final arbiter.[12]

To the 13th Australian Legal Convention 1963, he asserted:

> Judges who are called on to interpret and apply statutes should be appointed by governments responsible to the parliaments which passed those statutes. On this basic principle alone . . . federal laws should primarily be applied and interpreted by judges appointed by the federal government. It is on the same principle that so many Australians condemn and that most countries of the British Commonwealth have ended appeals to the Privy Council, which is appointed by a government which is not responsible to their parliaments.[13]

To the same effect he addressed the 17th Legal Convention in Perth in July 1973, as Prime Minister. But already the first step had been taken by the Gorton Government in the Privy Council (Limitation of Appeals) Act 1968 (Cth). This had effectively excluded appeals from Federal Courts and Supreme Courts of the Territories. When he gained office, Whitlam sought to take the abolition of Privy Council appeals further. At first he sought to do it in a bold way which had occurred to him as early as 1963. In that year, he said:

> . . . [O]ne can find satisfaction in the appointment of all the puisne justices of the High Court to the Judicial Committee [of the Privy Council] and the consequent prospect that appeals from Australian courts will now invariably be heard in Australia by Australian judges appointed by the Australian government.[14]

The 1972 policy speech spelt it out less elliptically:

> We will arrange with the British Government for the *Judicial Committee of the Privy Council to be constituted by its Australian members sitting in Australia* to hear appeals to the Privy Council from State Courts.[15]

In 1973, as Prime Minister, Whitlam addressed the 17th Australian Legal Convention and took the occasion to criticise the vested interested of lawyers in the court "across the waters":

> Also (and of course I say this in a completely non-partisan attitude) there has been interest in the Privy Council. Of course, to lawyers

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[12] H.R. Deb. 1958, Vol. 20, 835.

[13] Byers and Toose, "The Necessity for a New Federal Court (A Survey of the Federal Court System in Australia)" (1963) 36 A.L.J. 308, 327.

[14] *Ibid.*

[15] Whitlam, Labor Party Policy Speech 1972, in Whitlam 299.

> this is well understood. The laity—the lesser breeds—still find it extraordinary that disputes between Australian citizens or between Australian citizens and State Governments can be determined in another country by judges appointed by the government of that other country, giving judgment in the form of advice to the Queen of the United Kingdom, not the Queen of Australia, as she is now titled. I do not underrate the attraction that top lawyers have always found in the possibility of appearing—usually during the Australian legal holidays—before the Privy Council. . . .[16]

We are not told of the negotiations with the British Government to fulfil the purpose so confidently announced in 1972. The fact is that an alternative course was adopted. We are entitled to infer that the British Government would not agree in the solution proposed to repatriate the Privy Council to Australia. In 1974, Whitlam promised to proceed with legislation to abolish appeals to the Privy Council[17] and in February 1975 two Bills were introduced to effect this promise. The first, the Privy Council (Appeals from the High Court) Bill 1975 subsequently passed into law. The effect is to preclude appeals from the High Court in those matters, not being constitutional and federal matters, which had remained after the 1968 Act. The second Bill was assertively titled the Privy Council Appeals Abolition Bill 1975. It purported to abolish appeals from Australian courts, including the courts of a State and to exclude approaches being made for advisory opinions of the Privy Council. This Bill did not pass the Senate and its validity has not, therefore, been tested. However, the validity of the 1975 Act has been upheld, the argument being rejected that the power to "limit" appeals did not extend to one of "abolishing them".[18] His declared concern in introducing the 1975 Bill was that the Parliament "should do everything in its power to complete the process of making the High Court of Australia Australia's final court of appeal from all Australian courts".[19] Although this aim has not yet been fully achieved, the writing is clearly on the wall for the Privy Council. Its days as a part of the Australian Judicature are now clearly numbered. The mischief that is done by preserving two co-ordinate, competing courts of final appeal in the one country has been clearly identified.[20] The Court of Appeal in N.S.W. indicated recently that leave to appeal to the Privy Council will probably not now be granted by that Court.[21] The Govern-

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[16] (1973) 47 A.L.J. 416.

[17] Labor Party Policy Speech 1974, in Whitlam 347.

[18] *Viro* v. *R.* (1978) 18 A.L.R. 257; *Attorney-General of the Commonwealth* v. *T. & G. Mutual Life Society Ltd* (1978) 19 A.L.R. 385; *Kitano* v. *The Commonwealth* (1973) 47 A.L.J.R. 757.

[19] H.R. Deb. 1975, Vol. 93, 57; Whitlam, "Privy Council Appeals Abolition" in Whitlam 191.

[20] *Viro* v. *The Queen* (1978) 18 A.L.R. 257; Barwick, "The State of the Australian Judicature" (1977) 51 A.L.J. 480, 486-487.

[21] *National Employers Mutual General Association Ltd* v. *Waind*, unreported, 19 July 1978 (Court of Appeal, N.S.W.).

ment of N.S.W. in the last session of the State Parliament undertook "to make the High Court of Australia the final Court of Appeal".[22] The move towards the wholly Australian judicial system transcends party politics and has acquired an increasing urgency because of the potential for mischief inherent in the present situation of two co-equal final courts of appeal.

A NEW FEDERAL COURT

Whitlam's ideas about the reconstitution of the judicial machinery of Australia did not stop at abolition of Privy Council appeals. From his earliest days in Parliament, he was a constant advocate of the creation of a new, intermediate, Federal court, with special responsibilities to interpret and apply the expanding Federal law of Australia. In 1958 he put it thus:

> The next suggestion that I make is for the establishment of a federal supreme court, somewhat on the lines of the United States Circuit Courts of Appeal . . . in which litigants could bring many matters which at present must go to the High Court. My first objective in suggesting such a court is to free the High Court from hearing lesser matters . . . Such a federal supreme court would also give a lead to nation-wide law reform.[23]

In 1959, addressing the 11th Australian Legal Convention he warmed to this theme:

> It is salutary for lawyers and others to be reminded that there is nothing inconsistent with the federal system for Federal Supreme Courts to be created with a similar function and status to the State Supreme Courts. Firstly, a Federal Supreme Court could hear many matters in which the Constitution and the Judiciary Act have conferred original jurisdiction on the High Court and also those appeals which at present can come only to the High Court from a single Supreme Court judge in the Australian Capital Territory, the Northern Territory . . . There should be an appeal similarly to a Federal Full Supreme Court from the Federal Bankruptcy Court and from the Federal Divorce Court which may well be created. I think it would be in the interests of existing territorial Supreme Court judges that their functions should be intermingled. They should not always be isolated in one solitary jurisdiction . . . In domestic, commercial and Federal administrative matters I believe there is scope for the creation of a Federal Supreme Court. In the administration of the law Australia has still very much to learn from the practice of the greatest Federation of all—the United States of America.[24]

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[22] Opening of Session, N.S.W. Parliamentary Debates (Legislative Council), 15 August 1978.

[23] H.R. Deb. 1958, Vol. 20, 835-836.

[24] Harlan, "Some Aspects of the Judicial Process in the Supreme Court of the United States" (1959) 33 A.L.J. 108.

During the 1960s Whitlam frequently returned to this issue. In May 1960 he diverted a speech on the Conciliation and Arbitration Bill 1960 to a discussion of the need for a "Federal Supreme Court". By this time, the Attorney-General (Sir Garfield Barwick) had announced that he had under consideration the question of what further jurisdiction of a general, as distinct from an industrial character, could conveniently and appropriately be added to the jurisdiction vested in the Commonwealth Industrial Court.[25] Whitlam wished the Attorney-General well in this intention:

> Such a Federal Supreme Court could give a lead in nationwide law reform . . . This Parliament could implement a uniform code throughout Australia in which the Commonwealth was one litigant and a private citizen or a State the other; or in matters in which two States were litigants; in which residents of different States were litigants; or in matters in which a State and the resident of another State were litigants. It could implement a code relating to matters which arise under any laws made by this Parliament or matters in which claims were made under the laws of different States . . . There is a very great opportunity for this Parliament to modernise Australian administrative law, domestic law, industrial property law and commercial law and to do it through a federal supreme court. Whatever may be said of the Commonwealth Industrial Court hitherto—and what is said about it is mainly due to the functions which this Parliament imposes upon it—it does seem that that court provides the nucleus for such a federal supreme court.[26]

The 13th Legal Convention in 1963 discussed a paper on the need for a new Federal Court.[27] Whitlam, by now a Silk, rose to comment. Painstakingly he pointed to his expression of view to the Perth Convention in 1959 and in the House of Representatives. With premature optimism he announced that:

> In an improved capacity at the next convention I expect to discuss the working of statutes which carry out the principles of this paper.

Condemning arguments against the proposal "on the basis of State rights" he again urged that Federal laws should primarily be "applied and interpreted by judges appointed by the Federal Government".[28]

During the 1960s the proposal for a Commonwealth Superior Court advanced at a somewhat languid pace. In December 1962, Cabinet had authorised Sir Garfield Barwick to design such a Court and he described

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[25] H.R. Deb. 1960, Vol. 27, 1317.

[26] *Id.* 1317, 1321.

[27] Byers and Toose, "The Necessity for a New Federal Court" (1963) 36 A.L.J. 308. Whitlam's comments are at 327.

[28] *Ibid.* see also *id.* 357-358.

it in a celebrated article in the Federal Law Review in June 1964.[29] In May 1967 Attorney-General Bowen made a ministerial statement on the proposed court and in November 1968 he introduced the Commonwealth Superior Court Bill. The matter was revived by the tabling in Parliament of the report of the Commonwealth Administrative Review Committee, headed by Mr Justice Kerr. Whitlam complained that though the principle of a Superior Court had been approved by Cabinet in December 1962, the Bill had been allowed to languish:

> I believe it is not unreasonable to ask the Prime Minister at this stage what decision has been made on this 9-year old proposal on which the House was given a Bill 3 years ago.[30]

After assuming Office, Whitlam as Prime Minister, told the Perth Legal Convention of his resolve to proceed with a Bill for a Superior Court of Australia.[31] A Bill was introduced in 1974 but rejected.[32] Addressing the Canberra Legal Convention in 1975 he recounted again the gestation of the proposed Federal Court:

> My Government introduced a similar Bill in redemption of promises I made at the elections in 1972 and 1974. It's been twice rejected by the Senate. May I congratulate the State Supreme Court judges in their unparalleled skill as lobbyists?[33]

Eventually, after his return to the Opposition Benches, a Federal Court was established by the present Government. The Court commenced operation in 1977 and, although some of the jurisdiction which Whitlam urged for it in 1958 has not been conferred, its central role in the hierarchy of Australian courts and in the administration of Federal law is now unquestioned. Critics exist. Professor Sawer lamented:

> I wish . . . that Mr Whitlam's plans for new federalisms did not include what I regard as the hare-brained scheme for a federal Superior Court—hare-brained because of the notorious narrowness, technicalities and angularities of federal jurisdiction and the impossibility of creating all-purpose trial tribunals in that way.[34]

Other critics in the State Supreme Courts and elsewhere remain.[35] At this stage, the argument about the existence of the court is "academic". The debate will continue about the scope of the jurisdiction which should be conferred upon the Court and the acceptability of Whitlam's simple thesis that Federal laws should be administered uniformly throughout the country by Federal judges appointed by the Federal Government.

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[29] Barwick, "The Australian Judicial System: The Proposed New Federal Superior Court" (1964) 1 Fed.L.R. 1.

[30] H.R. Deb. 1971, Vol. 74, 2357.

[31] (1973) 47 A.L.J. 417.

[32] Labor Party Policy Speech 1974, in Whitlam 347.

[33] (1975) 49 A.L.J. 310.

[34] Sawer, "The Whitlam Revolution in Australian Federalism—Promise, Possibilities and Performance" (1976) 10 Melbourne University Law Review 315, 323.

[35] *E.g.*, "Warning on Dual Courts" (1978) 13 Australian Law News 3.

FAMILY LAW REFORM

Perhaps the most pervading reform of the private law effected during the Whitlam administration was the Family Law Act 1975 (Cth). That Act, passed on a free vote, was not specifically the proposal of the Government. Nevertheless, the Bill was introduced into the House of Representatives by Whitlam himself. He left no one in doubt as to his staunch support for it and for the "new life to the marriage and matrimonial power"[36] which it undoubtedly gained.

As early as 1958, Whitlam was envisaging passage of a Federal matrimonial law and the utilisation of a Federal superior court as an avenue of appeal from the judges exercising jurisdiction under it.[37] Mention has already been made of his prediction of a "Federal Divorce Court" in 1959,[38] long before the creation of a specific Federal court in family matters was generally accepted. At that time, the exercise of federal jurisdiction by State Courts was generally considered appropriate. The notion of a specific Family Court had not won acceptance. Introducing the Family Law Bill in November 1974, Whitlam as Prime Minister pointed out that the Bill was the response of the Attorney-General "to an overwhelming demand for reform in this area, and not, as has been suggested by some, to impose an unwanted measure on an unwilling community".[39] His attitude to community consensus upon such a measure of reform as this is indicated in his Second Reading Speech:

> I am aware, of course, as we all are from the letters and petitions we have all received in such volume, that there is opposition to this change. However, it was the experience and expertise in the areas of social welfare and family law possessed by the persons and bodies that have expressed support for the proposed ground of divorce, as well as the strength of their numbers, that convinced the Attorney-General of the desirability of this reform. These persons and bodies included marriage counselling organisations, judges, the legal profession, some—I know not all—church representatives, and a wide variety of interested persons.[40]

The notion of a specific Family Court as a "helping court" with judges "specially and carefully selected for their suitability for the work of the court"[41] was somewhat novel as was the creation of a Family Law Council and an Institute of Family Studies to make recommendations on the operation of the law and to conduct ongoing research into factors affecting marital and family stability in Australia.

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[36] Whitlam 5.
[37] (1959) 33 A.L.J. 124.
[38] H.R. Deb. 1974, Vol. 92, 4320.
[39] *Ibid.*
[40] *Id.* 4321.
[41] *Id.* 4322.

Whitlam's philosophy on reform emerged in the resumed debate, six months later. A critical division arose between those who supported a period of 12 months as sufficient proof that a marriage had "broken down" and those who believed two years should be required.

> The whole purpose of the Bill is to enable the law and society to face reality—the reality of a broken marriage and the futility of perpetuating a broken marriage. There is no point in pretending that a marriage which has failed for a year is likely to survive in any meaningful sense or that it is more likely to survive if it has failed for 2 years . . . That seems to me to be not only heartless but also absurd. Let us keep in mind that marriage is essentially a human relationship between 2 people. It takes 2 people to make a marriage but it takes only one to break it. Idealists might wish that it were otherwise, but it is not. It is time society acknowledged that simple fact. We have no right to condemn 2 people to live together in misery and suffering for a moment longer than necessary. Ultimately the only test of a marriage is whether both parties agree to maintain it . . . I do not believe that society has to the right to make . . . divorces more difficult or protracted. People do not resort to divorce lightly or irresponsibly, they turn to it as a last resort. In such an extremity it is no business of anyone but the parties to determine what course their lives should take or to place unnecessary obstacles in the way of their decisions.[42]

In the end, this view carried the day. The Act was passed, relevantly, in the form presented. The Family Court of Australia was established. Recently the Joint Parliamentary Committee has been set up to review the operation of the Act. But the Act is undoubtedly a major measure of reform. It and the Court are now well established in the legal life of the country.

ECONOMIC LAW REFORM[43]

The constitutional limitations which prevent or control the socialisation or regulation of industry and investment in Australia were well known to Whitlam, the lawyer.[44] In his 1957 lecture "The Constitution Versus Labor"[45] he explored ways in which, within the Constitution the Commonwealth could take an active part in what he termed "economic law reform". Years before the introduction of restrictive trade practices legislation, he called for what he termed "anti-trust laws":

> Since the Constitution precludes nationalisation and limits Commonwealth participation in trade, a Labor government should make more use of our anti-trust laws. Before World War I all parties were anti-trust as both parties still are in the United States. In 1911 the Commonwealth failed in the only prosecution it has

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[42] H.R. Deb. 1975, Vol. 95, 2417.
[43] Labor Party Policy Speech 1972, in Whitlam 299.
[44] "The Constitution *versus* Labor" in Whitlam 25.
[45] *Id.* 15.

> launched against a monopoly under the Australian Industries Preservation Act 1906. . . . Price fixing agreements and other restrictive practices have become more effective in the meantime and our basic industries are now in the hands of fewer and stronger companies. There seems a fruitful field in curbing such practices along the lines of recent British legislation and stimulating competition along American lines by the exercise of Commonwealth power . . .[46]

Repeatedly, whilst in Opposition, Whitlam, the lawyer, explored the potential of Commonwealth constitutional power to "superintend" the private sector:

> The Commonwealth Parliament has fewer and smaller legislative powers than any other national parliament. Interpretations of the Constitution have created gaps in the combined powers of Australia's several parliaments such as are to be found in no other country. The Commonwealth Parliament has no general power to deal with economic matters.[47]

But some specifics did exist and their scope was significantly increased by decisions of the High Court during the 1960s and 1970s. Allied with his repeated calls for an intermediate federal court, Whitlam pointed to the undoubted heads of Commonwealth constitutional power relevant to business and the economy. He suggested that these should all be chanelled, at first instance (or on appeal) into the proposed court. In 1959 he suggested that the court could deal with matters of industrial property *viz.* patents, trade-marks, copyrights and designs. He suggested that the Commonwealth "should have power to legislate on company law".[48] In 1960 he called for Commonwealth legislation on copyright, as promised in 1954.[49] He criticised what he described as the "abdication of Commonwealth powers in several matters" amongst which he numbered credit.[50] He offered the support of the Opposition, in a referendum, to expand the Commonwealth's legislative competence to deal with the economy. In 1960 he urged the utility of a Federal Supreme Court dealing, in a uniform way, with the commercial law of the Commonwealth:

> [A] federal supreme court could be a commercial court for the whole of Australia. Already, this Parliament can pass laws concerning bills of exchange, copyright, patents and trade-marks. By simple constitutional reforms which, I should imagine, would meet no political objections, the Commonwealth could secure jurisdiction in respect of companies . . . [t]hus there would be a

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[46] *Id.* 40.

[47] Whitlam, "Labor Policies and Commonwealth Powers" speech to the A.L.P. 25th Commonwealth Conference 1963, in Whitlam 73, 77.

[48] (1959) 33 A.L.J. 124.

[49] H.R. Deb. 1960, Vol. 26, 158.

[50] *Ibid.*

> federal supreme court which could deal with matters of industrial property, compan[y] . . . bankruptcy.[51]

Later in 1960 the notion of "anti-monopoly legislation" was again pressed forward:

> Anti-monopoly legislation has existed in the United States and Canada since last century. Great Britain, under the Attlee government, introduced anti-monopoly legislation in 1948, and New Zealand, under the Nash government, did so in 1958. Why will we not do something similar? If every party in this Parliament supports an amendment to the Constitution we will get it. Does any honourable member doubt that the people would endorse such a recommendation being carried out to assist them. The only people who would suffer under such legislation would be those who are skimming off the cream at the moment.[52]

In 1965 the Trade Practices Act (Cth) was passed dealing with certain unfair trade practices. In 1971 the Restrictive Trade Practices Act (Cth) took advantage of the decision of the High Court of Australia in the *Concrete Pipes Case*.[53] During the Whitlam administration, a more radical package, the Trade Practices Act 1974 was passed. Although significantly amended in 1977 and still under review it remains, substantially the Australian law of fair trade practices. It expands the scope of Commonwealth regulation, including regulation relating to consumer protection, in ways which would have appeared constitutionally impossible, during the days before the momentous decisions of the High Court on the scope of the Commonwealth's corporations power.

Emboldened by those decisions, and consistent with his views about the need for federal economic regulation of business and industry, Whitlam promised to introduce a National Companies Act and securities and exchange legislation.[54] To the 1975 Legal Convention, in July of that year, he said this:

> [A]t the 1963 Convention a paper was delivered by Mr John Young Q.C., as he then was, and Mr Rodd on the Uniform Companies Legislation. At the time the late Mr Justice Hardie argued that any such legislation would have to be Federal legislation if it were to be effective. Work is well advanced on the preparation of a Uniform Companies Bill. When this is enacted it will end the frustration suffered by companies which wish to operate on a national basis but find themselves confronted with eight sets of company law. There is still no uniform law in Australia. A Corporations and Securities Industry Bill has already been introduced, following the report of the Senate Committee

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[51] H.R. Deb. 1960, Vol. 27, 1318.
[52] *Id.* 1 June 1960, 2150.
[53] *Strickland* v. *Rocla Concrete Pipes Ltd* (1970-1971) 124 C.L.R. 468.
[54] (1973) 44 A.L.J. 417.

> on Securities and Exchange, for a Corporations and Exchange Commission to provide, where regulation is necessary, a proper regulation of the securities industry on a national basis.[55]

The National Companies Act upon which a great deal of work was done was to have been introduced on 12 November 1975. It was subsequently presented as an Opposition measure in 1976. It remains one of the bases for the proposed uniform companies law, although this will now proceed in a somewhat different way and not in exclusive reliance upon Commonwealth power. The momentum for a truly uniform and national company law and Commonwealth laws on business regulation generally undoubtedly gained momentum during the period of the Whitlam Government.

HUMAN RIGHTS LEGISLATION

Following his dismissal from office, Whitlam identified, as a task of his party the re-fashioning of the Constitution and "entrench[ing] in it the basic rights and freedoms which citizens in any democracy have a right to expect".[56]

> It goes without saying that this is a formidable task. How should we approach it? The main need is to be realistic and practical about what we can achieve. There are many reformers who see the best safeguard for democracy in a bill of rights on the American model. I am not convinced that this is the best solution. Even if it were possible to incorporate a bill of rights in the Constitution, it would have to be so watered down to accommodate conservative objections and thus command the necessary support in a referendum it would probably be useless. A better way of dealing with questions of human rights and discrimination may be to use the existing external affairs power under the Constitution in helping to draft and then ratif[y] international conventions.[57]

The utilisation of the external affairs power was never far from Whitlam's mind as his interventions in Parliament during the years of Opposition frequently indicate. Whether in connection with international aviation regulation,[58] international labour standards,[59] enforcement of foreign judgments and awards,[60] the role of the International Court of Justice[61] or the implementation of the International Covenant on Civil and Political Rights, Whitlam advanced a decidedly internationalistic position.

Though the International Covenant had been negotiated by the previous Administration under Attorney-General Bowen, it was the

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[55] (1975) 49 A.L.J. 305, 310-311.
[56] Whitlam 5.
[57] *Id.* 5-6.
[58] H.R. Deb. 1960, Vol. 27, 2061.
[59] (1963) 36 A.L.J. 358; H.R. Deb. 1978, Vol. 109, 2578.
[60] (1963) 36 A.L.J. 356-357; H.R. Deb. 1978, Vol. 109, 2359.
[61] H.R. Deb. 1978, Vol. 109, 1666.

Whitlam Government which, within days of assuming office, signed the Covenant. The ill-fated Human Rights Bill 1973 was introduced specifically to ratify that Covenant, a schedule to the Bill. Often a critic of the failure of governments to ratify international conventions, Whitlam took a keen interest in them and in their utilisation for the implementation of Commonwealth laws relevant to human rights and other matters. The Racial Discrimination Act 1975 (Cth) and the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth) were each based on an international convention and relied upon the external affairs power for constitutional support. Neither has yet been challenged. Both remain Commonwealth laws.[62]

During 1973 the Government's interest in international law was translated into proceedings in the International Court of Justice concerned with French nuclear tests in the Pacific. As Prime Minister, Whitlam told the Perth Legal Convention in July 1973:

> My Government places great emphasis on the extension and strengthening of international law—not only in questions of sheer peaceful matters but also questions of the environment such as are involved in this present proceeding before the World Court. In all matters of commercial intercourse between nations, trade, treaties and conventions are going to be of increasing significance. There must be some orderly method of determining the inevitable differences of opinion which will occur . . .[63]

The International Covenant on Civil and Political Rights remains unratified by Australia to this day, although it has now passed into international law, with the deposit of sufficient ratifications. It is the bipartisan policy of successive Commonwealth Governments to adhere to the Covenant. The present Government's intention is to first seek agreement from the States in the creation of a human rights commission or other machinery to ensure the implementation of the obligations of the Covenant throughout Australia. The Human Rights Bill 1973 sought, basically, to apply the Covenant, in terms, as part of Commonwealth law. The differences of approach are perhaps less significant than the unanimity of successive Governments on the principle of adherence and the provision of some machinery for local implementation.

Outside the area of local implementation of international agreements concerned with human rights, specific steps were taken which are obviously relevant. The Family Law Act itself might be instanced. Likewise the passage of the Death Penalty Abolition Act 1973[64] not only implemented the promise of the 1972 policy speech but also fulfilled calls made for this measure dating back at least to November

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[62] Whitlam 5.

[63] (1973) 47 A.L.J. 416.

[64] H.R. Deb. 1973, Vol. 85, 522; Labor Party Policy Speech 1972, in Whitlam 299.

1960.[65] At that time, Whitlam had sought to amend the Crimes Bill to this effect but was defeated in a vote on party lines. The same process occurred in a debate on the Crimes (Aircraft) Bill in 1963. A third occasion occurred in the debate on a Senate Bill in June 1968. The Bill was, in fact, the first measure introduced by the Whitlam Government into the Senate by Attorney-General Murphy.

In 1960 Whitlam had expressed his concern about the telephone tapping. He criticised the Telephonic Communications (Interception) Bill of that year on the ground of its offence against "civil liberties". He mentioned the need for a bipartisan enquiry into the necessity to continue to tap telephones and his perception of serious unfairness to migrants refused citizenship on security grounds.

The Interception Act made in 1960 remained unaltered and was used during his administration. However, in 1974 he promised to appoint a judicial inquiry into the structure of the Australian security services and into methods of reviewing decisions adversely affecting citizens or migrants.[66] This promise was fulfilled in the Royal Commission conducted by Mr Justice Hope. Legislation to implement some of the decisions of that Royal Commission has already been implemented by the present Government and more is expected. Similarly, the Royal Commission on Human Relationships was established and, following the stormy reception of its report at the height of an election campaign, the Government has now ordered a close study of its recommendations. Some at least of the proposals recommended, notably those dealing with rape law and procedure, may be expected shortly, to pass into law. Others may follow later.

NATIONAL COMPENSATION

At the Bar, Whitlam had done his share of personal injury litigation. He never disguised his dissatisfaction with the inadequate response of the common law to the invention of the internal combustion engine and the development of factories. In 1959, debating the Civil Aviation (Carriers' Liability) Bill he moved that the Bill should be withdrawn and re-drafted to incorporate the general principle of unlimited liability at law for negligence on the part of domestic airline operators.[67]

> Let us draw a comparison between this legislation and workers' compensation . . . If an employee is injured at work, or in some other circumstances, he can secure certain fixed compensation . . . If he is killed his dependants can secure certain fixed amounts . . . These amounts are recoverable irrespective of the negligence of the employer or, every where except in Commonwealth competence, irrespective of the negligence of a fellow employee. . . . We want

[65] *Id.* 523.
[66] Labor Party Policy Speech 1974 in Whitlam 347.
[67] H.R. Deb. 1959, Vol. 22, 918.

> to provide that if anybody is injured in interstate air carriage through the negligence of the operator, he should be able to secure unlimited damages . . .[68]

The endeavour failed.

In May 1959 he drew attention to other inequities, concerning the Commonwealth in "third party litigation".

> The Commonwealth owns far more motor vehicles than any other corporation or instrumentality or government in Australia. It owns more than any other ten combined. Yet, it is the only owner of motor vehicles in Australia which can plead that it is not responsible for the negligent acts of its drivers if they are not acting or driving in the course of their duty.[69]

His persistence on this point was finally rewarded when Attorney-General Barwick introduced the Commonwealth Motor Vehicles (Liability) Bill 1959. In his speech on the Bill, Whitlam traced his criticism of the Commonwealth's immunity back to October 1957. He applauded the measure. Specifically he applauded the preservation of the right to trial by jury.[70] But he then raised a new theme which was to recur over the succeeding 15 years:

> I shall conclude by a reference to the continuing weakness of third party insurance in cases of road accidents. The great fault of all litigation in this field is that it stems from a development of the old actions for negligence. As in all actions for tort, damages have to be given in a lump sum or not at all. It is a completely anomalous fact that if a person is injured in a road accident, or is bereaved as a result of a road accident, damages are given in a lump sum. It is quite inappropriate. . . . [A] more appropriate form of compensation would be by way of periodical payments. . . . [L]itigation in these matters is unnecessarily, dilatory, expensive and hazardous. The Social Services Department has the appropriate machinery for determining the amount of compensation that a person is entitled to receive to put him in the same position as he would have been if the accident had not happened, and the petrol tax provides a ready and fair means for all road users to contribute in respect of accidents that occur on the roads.[71]

In May 1960 he suggested that no fault liability should be introduced for motor vehicle injuries to be determined "by way of a social service or periodic payment instead of lump sums".[72]

In 1973, in office, the opportunity presented to translate these proposals into action. Speaking to the Legal Convention that year he reminded his listeners how, at the 1959 convention he had proposed a

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[68] *Id.* 917.
[69] H.R. Deb. 1959, Vol. 23, 2195.
[70] H.R. Deb. 1959, Vol. 25, 3054.
[71] *Id.* 3055.
[72] H.R. Deb. 1960, Vol. 27, 1320. *Cf.* (1959) 33 A.L.J. 124.

national compensation scheme to take the place of running down cases and workers' compensation:

> It was not a notion that got very much enthusiasm in its response, but I am happy to say that we have been able to draw on the services of a very distinguished New Zealand judge . . . Mr Justice Woodhouse—as well as Mr Justice Meares of the New South Wales Supreme Court . . . in studying this . . . matter.[73]

The 1974 policy speech contained this commitment:

> We are determined to place the security, the welfare of those who suffer incapacity through accident or sickness on a sure and certain basis—on the basis of confidence and freedom from financial anxiety for themselves and their families. Australians should not have to live in doubt or anxiety lest injury or sickness reduce them to poverty. We want to reduce hardships imposed by one of the great factors for inequality in society—inequality of luck.[74]

The National Rehabilitation and Compensation Committee duly reported with draft legislation. The 1975 Legal Convention was told:

> National compensation legislation to supplant the litigation based on compulsory workers' compensation insurance and compulsory third party insurance has been the subject of debate which awaits a report from a Senate committee. I hasten to add that lawyers will be amply compensated for the *National Compensation Act* by new fields of jurisprudence arising from legislation on consumer affairs and the environment on family law and on international conventions dealing with matters of commerce and liability and human rights.[75]

The important proposals for national compensation and rehabilitation were held up by a unique combination of opposition from the Senate, the insurance industry, the trade unions and the legal fraternity.[76] Its constitutionality was, in some respects, doubted. Its cost was attacked. The methods of funding the scheme (including, significantly, by a tax on petrol) was criticised.[77] A measure based upon the draft Bill attached to the Committee's report was introduced by Whitlam, in Opposition, it failed to proceed. The Committee's report remains under study within the Commonwealth bureaucracy. We may have to wait for better economic times and a different vehicle before it is introduced. Few doubt that radical reforms of accident compensation will come. The equivalent measure in New Zealand is said to be working well.[78] A

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[73] (1973) 47 A.L.J. 417.

[74] Labor Party Policy Speech 1974, in Whitlam 328.

[75] (1975) 49 A.L.J. 311.

[76] Whitlam 5.

[77] Keeler, "Report of the National Committee of Enquiry into Compensation and Rehabilitation in Australia" (1975) 5 Adelaide Law Review 1214.

[78] Sir Owen Woodhouse, "Compensation for Personal Injury 1978" Paper for the 1978 N.Z. Law Conference, *mimeo.*

scheme of limited "no fault" compensation has been introduced in Victoria.[79] A compromise proposal for Britain was advanced by a Royal Commission in March 1978.[80]

A NEW ADMINISTRATIVE LAW

It is in the area of administrative law reform that Whitlam was most prescient. The growth of the Public Service and of the role and power of the bureaucracy has at last produced a legislative response designed to provide, in the Commonwealth's sphere a comprehensive "package" of independent control of the administration available to the citizen. Some of the initiatives towards the new administrative law were predicted by Whitlam long before they became matters of discussion or consideration in Australia. Presented in the 1957 Chifley lecture was a proposal for judicial review, on appeal or reference, of a wide range of Commonwealth administrative decisions. Specifically, appeal from decisions of the Department of Social Services was described as "overdue".[81] In August 1958, speaking to the Estimates he referred to the "complicated and variegated" appeals on Commonwealth administrative matters which had grown up. In answer to one of Whitlam's questions, the Prime Minister had listed 94 Boards, Tribunals, Committees and Courts determining appeals under 45 Commonwealth Acts. 50 different Boards, Tribunals, Committees and Courts were hearing appeals from administrative decisions under Commonwealth legislation:

> [T]he Commonwealth should give the lead to governments in Australia by providing some form of judicial procedure whereby, if appeals are to be heard from administrative decisions, they can be heard in an appropriate fashion.[82]

The role of a predicted Federal Supreme Court to "co-ordinate administrative procedures, administrative appeals" was urged to give a lead to administrative practice, state and municipal, throughout Australia:

> We would be simplifying the Commonwealth's own administrative practice, and we would be making it possible for citizens, in a clearer and simpler and cheaper fashion, to vindicate their rights under Commonwealth Acts of Parliament.[83]

To the 1959 Legal Convention he attempted to make the idea palatable to lawyers, threatened with the loss of other work.

> Appeals to a Federal Supreme Court from departmental decisions... would in turn provide the profession with some compensation for

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[79] Report of the Board of Enquiry into Motor Vehicle Accident Compensation in Victoria (Sir John Minogue Q.C.) 1978.

[80] Report of the Pearson Royal Commission, Cmnd. 7054 (1978) (3 vols.).

[81] "The Constitution *versus* Labor" in Whitlam 42.

[82] H.R. Deb. 1958, Vol. 20, 837.

[83] H.R. Deb. 1959, Vol. 23, 2196.

> the decline in running down cases, which now occupy 50% of the time of the Supreme Courts of the States and Territories.[84]

Over and over again he returned to this theme. In a debate in 1960 he instanced civil service appeals, appeals concerning instrumentalities, taxation, war pension, health insurance and valuation and resumption cases as being appropriate for appeal supervision.[85] The absence of appeal provisions in social service decisions was specifically attacked for "many persons' income depend on them. It is not satisfactory", he declared, "to have those matters determined on appeal, if at all, through representations made through a member of this Parliament".[86] Addressing himself to criticism which now seems antique he said this:

> One of the objections I have found to administrative decisions of this character is that persons who receive an unfavourable decision or who are aggrieved by [an] administrative decision are able to criticise the public servants concerned. . . . Most of those complaints are ill-founded, but if these matters could be determined in a court as we determine comparable matters, no such complaints would be believed, or they would be less likely to be believed.[87]

Again, at the 1963 Legal Convention he reverted to this theme:

> It would be appropriate for the [Federal Supreme Court] . . . to provide a method of reviewing executive and administrative Acts which affect individuals and corporations. I am not suggesting that the executive should abdicate its functions. . . . It is not proper that the executive should select the judges to hear one matter. If there was a judicial tribunal which normally and regularly held such enquiries, then the tribunal would itself determine which of its members could conduct a particular enquiry. There is, however, no standing or regular body which reviews administrative and executive decisions in Australia. Such decisions are becoming more numerous and more important. Far too much time, money and legal talent are devoted to litigating highway and industrial actions which, under compulsory insurance and with institutional backing, are inevitably profitable to the profession but unworthy of it. At the same time lawyers have allowed the increasing field of administrative law to develop without the benefit of their skills and principles.[88]

In 1971 the Prime Minister, Mr McMahon, tabled the report of the Commonwealth Administrative Review Committee, whose chairman had been Mr Justice Kerr. Speaking in the debate on the report, Whitlam referred to Mr Justice Kerr's other current enquiry on parliamentary salaries. He chided his colleagues for their lack of interest in the new administrative law, with somewhat heavy handed irony:

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[84] (1959) 33 A.L.J. 124.
[85] H.R. Deb. 1960, Vol. 27, 1318.
[86] *Id.* 1320.
[87] *Ibid.*
[88] (1963) 36 A.L.J. 327-328, 357.

> [I] suppose we should reassure honourable members, in view of the number and the intensity of their attendance and interests, that this is not the other report which Mr Justice Kerr is preparing, nor can we expect that it can be acted upon as rapidly. But having said that, I would like to say that it is impossible to exaggerate the significance of the matters dealt with in this report. The life, property and pursuit of happiness of the average citizen now are affected in many more cases and to a much greater degree by administrative decisions which cannot come before courts or be in any other way reviewed than they are by most other issues which can become before the courts.[89]

In the 1972 policy speech, Whitlam promised a "practical program" to ensure basic civil rights in the field of law reform. He promised that an Ombudsman would be appointed "to act as the guardian of the people. He will investigate complaints of unjust treatment by Government Departments and agencies, and report directly to Parliament".[90]

To the 1975 Legal Convention he asserted:

> In the past the development of a proper system of administrative law in Australia has been sadly lacking. The independence of the judiciary has been largely an irrelevant safeguard in the face of increasing areas of government regulation that have not been subject to ordinary review by the courts. The reports of the Kerr Committee and the Bland Committee have highlighted the need to enable administrative decisions affecting individuals to be reviewed on their merits. They have also shown the need for an independent body to ensure that an individual has been dealt with fairly by the Public Service and by statutory bodies.[91]

To implement the reform needed in this area, the government introduced the Administrative Appeals Tribunal Bill 1975 and the Ombudsman Bill 1975. The former passed before Parliament was dissolved in November 1975. The Tribunal was established and is now functioning vigorously. During its passage through the Senate the Administrative Appeals Tribunal Bill was amended on the insistence of the Opposition to provide for an Administrative Review Council. Subsequently, the Act was further amended in 1977. However, the provision of a general administrative tribunal with wide powers to review on appeal the correctness of administrative decisions is now an established fact in Australia. The Ombudsman Bill 1975 failed to pass before the Parliament was dissolved. However, subsequently the new administration reintroduced a measure substantially identical to that proposed in 1975. The Commonwealth Ombudsman is now a reality and in his first year of operations has dealt with nearly 3000 public complaints.

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[89] H.R. Deb. 1971, Vol. 74, 2356.
[90] Labor Party Policy Speech 1972 in Whitlam 298.
[91] (1975) 49 A.L.J. 311.

It would be neither appropriate nor just to ascribe the new administrative law alone to the Whitlam administration, its predecessors or successor. From a practical point of view the review of administrative law was commenced with the establishment of the Kerr Committee in October 1968. The series of laws is not yet complete. Attorney-General Ellicott secured the passage of the Administrative Decisions (Judicial Review) Act 1977 (Cth).[92] Attorney-General Durack has introduced a Freedom of Information Bill 1978. Further legislation has been promised on privacy protection and standardised procedures for Commonwealth tribunals.

What can be fairly said for Whitlam is that from his earliest days in the Parliament he harped constantly on a theme which has now twenty years on become a well-developed harmony. By world standards the innovations in judicial, tribunal and ombudsman superintendence of administrative actions in the Commonwealth's sphere in Australia are quite novel. Though "not accompanied by much publicity or popular debate" and "perhaps . . . ill-understood" they will "inevitably produce changes in the citizen's relationship with government and in the workings of the machinery of government".[93] Whitlam's specific contribution was his constant harrassment of successive Attorneys-General and his implementation of the first legislation to translate proposals for independent control of the bureaucracy into the law of the land.

LAW REFORM AND THE LAW REFORM COMMISSION

Two further themes stand out from this examination of Hansard and other speeches. The first is Whitlam's constant concern with law reform. The second is his desire to promote uniformity of laws by stretching to their limit the Commonwealth's constitutional powers.

The role of a Federal Supreme Court to "give a lead in nation-wide law reform" was a constant argument advanced by him. In 1958, he asserted:

> This Parliament has the power to give the lead in law reform . . . This Parliament could implement a uniform code throughout Australia in matters [of federal jurisdiction]. . . . [It] could in this way eliminate a great number of the irritating differences between the laws of the States which at present make litigation between governments and citizens unnecessarily protracted and expensive. We have the means at hand—we should adopt them.[94]

The creation of a new federal court would, he declared, ensure that the High Court was left to deal with matters of paramount constitutional

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[92] Not yet proclaimed. The most novel provision is the requirement of s. 13 to provide reasons for discretionary decisions of an administrative character made by Commonwealth officers under Commonwealth law.

[93] Brennan, Foreword, Administrative Review Council, *First Annual Report 1977*.

[94] H.R. Deb. 1958, Vol. 20, 836.

and legal importance. It would also ensure "that there was some co-ordination of law reform in Australia".[95]

In office, early steps were taken to establish the Law Reform Commission. The Act was passed with the support of all Parties in 1973. Its charter was spelt out and includes a number of familiar themes:

> 6(1) The functions of the Commission are, in pursuance of references to the Commission made by the Attorney-General, whether at the suggestion of the Commission or otherwise:
>
> (a) to review laws to which this Act applies with a view to the systematic development and reform of the law including, in particular:
>
> (i) the modernisation of the law by bringing it into accord with current conditions;
>
> (ii) the elimination of defects in the law;
>
> (iii) the simplification of the law; and
>
> (iv) the adoption of new or more effective methods for the administration of the law and the dispensation of justice;
>
> (b) to consider proposals for the making of laws to which this Act applies;
>
> (c) to consider proposals relating to—
>
> (i) the consolidation of laws to which this Act applies; or
>
> (ii) the repeal of laws to which this Act applies that are obsolete or unnecessary; and
>
> (d) to consider proposals for uniformity between laws of the Territories and laws of the States. . . .

Speaking to the 17th Legal Convention in 1973, as Prime Minister, Whitlam asserted a growing interest in the law and its reform:

> [I] believe that in Australian politics people are taking more interest in the implications of the law. . . . [W]e do see how old, noble professions can paint themselves into a corner if they get out of step with public opinion, including the opinion of their younger, more idealistic recruits. I would not want to have that happen to the legal profession.[96]

The establishment of a federal Law Reform Commission, with a special responsibility for uniform laws was clearly a source of satisfaction. The 1975 Legal Convention in Canberra was told of the establishment of the Commission and the appointment of its first members:

> Many of the matters proposed in earlier Conventions have been debated in the Parliament in this city since the last Convention. Many of the matters I myself mentioned in the last Convention have been discussed here. Some have come to fruition, others have not yet done so, at least not yet. At the 10th Legal Convention, in 1957, Sir Owen Dixon suggested a Federal Law Reform

[95] *Id.* 838. *Cf.* H.R. Deb. 1960, Vol. 27, 1317.
[96] (1973) 47 A.L.J. 417.

> Committee to prepare and promulgate draft reforms for adoption by the Parliaments of Australia and the States. He pointed out that in all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia . . . If I may quote Tacitus, *corruptissima respublica plurimae leges*; the Commonwealth is most marred when it has most laws. At long last Sir Owen Dixon's suggestion has borne fruit. An Act of the Australian Parliament has established a Law Reform Commission. It has been charged with the task of preparing proposals for reform of laws, not only on matters within the direct competence of the Australian Parliament but on matters on which it is desirable there should be uniformity of law in the States and Territories. . . .[97]

Without waiting for the Commission to be fully established an important reference was given to it connected with the reform of criminal investigation and procedure. That reference produced two reports. The first dealing with an independent method of handling complaints against federal police is under current study in Canberra and has recently been adopted, in substance in the law of N.S.W.[98] The second report is the basis of the Criminal Investigation Bill 1977, introduced by the present Commonwealth Government. It is, as Attorney-General Ellicott described it "a major measure of reform". The Prime Minister Mr Fraser, justly said of it:

> The basic purpose of this Bill . . . is to codify and clarify the rights and duties of citizens and Commonwealth Police when involved in the process of criminal investigation. This is an area in which there has been much dissatisfaction, considerable writing, many proposals for reform, but not much legislative action.[99]

If the Australian Law Reform Commission can assist Parliaments, Commonwealth and State, to deal with matters such as this, difficult, vexatious, controversial matters, it may become a permanent instrument for orderly reform to help Parliaments in the process of adapting and modernising the laws and meet new times. Certainly the issues referred to the Commission by the Whitlam and Fraser administrations have all been uniformly relevant and timely to the problems facing the law in this country. All have involved matters of high controversy. All have been thoroughly debated in the public forum. The catalogue of matters recently concluded and still before the Law Reform Commission tells the tale. They include the recently delivered reports on human tissue

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[97] (1975) 49 A.L.J. 310.

[98] The Law Reform Commission, *Complaints Against Police*, 1975 (A.L.R.C. 1); Complaints Against Police: Supplementary Report, 1978 (A.L.R.C. 9). *Cf.* Police Regulation (Allegations of Misconduct) Act 1978 (N.S.W.).

[99] Fraser, speech to the opening of the 19th Australian Legal Convention (1977) 51 A.L.J. 343, 344.

transplantation[1] and insolvency[2] and the current projects on a uniform defamation law, privacy protection, insurance contracts law, reformed lands acquisition law procedures, standing and class actions in Federal jurisdiction, the recognition of Aboriginal customary laws, debt recovery and, most recently of all, sentencing in Federal jurisdiction. Some of these assignments will undoubtedly involve the extension of the use of available Commonwealth constitutional power. Some will involve the reshaping of Federal jurisdiction and the administrative law. Through all of them run two common themes. The first is the endeavour to modernise the law to bring it more in tune with social and national attitudes of today's Australia. The second is the need to update the law to answer the formidable challenges which science and technology daily present to it. Reform, in Australia is more likely to be brought about by "evolutionary rather than revolutionary means", Whitlam declared in April 1977.[3] The genius of the English-speaking people has been in their ability to reduce disputation and turmoil to routine machinery and orderly, rational debate. The Law Reform Commission will, I believe, become part of the routine procedures by which Parliament improves and modernises the legal system. If this prediction is fulfilled, the Commission may be one of the more lasting creations of the Whitlam administration. It is a happy portent, that in a time of political turbulence and economic difficulties, the Commission continues to have the support of all Parties in the Parliament. Parliamentarians everywhere increasingly realise the need to have assistance in the reform of the law and its institutions. The Law Reform Commission is one instrument to provide that assistance.

CONCLUSION

This is a history, not an evaluation. The times recounted are too close. And it would not be appropriate for me to be the assessor. The full evaluation of the Whitlam administration will take the citizen and the scholar well beyond the field of the law and its reform. That field represents nothing more than the scene or two in a drama with many Acts. Nor has all the scenery been painted. Nothing has been said of legal aid, improved access to the courts, the use of judges in Royal Commissions and inquiries, the creation of new tribunals, the establishment of bodies such as the Australian Institute of Criminology or the Legislative Drafting Institute. The *dramatis personae* have not been described, let alone judged. These are a tasks for another essay and a different essayist.

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[1] The Law Reform Commission, *Human Tissue Transplants*, 1977 (A.L.R.C. 7).

[2] The Law Reform Commission, *Insolvency: The Regular Payment of Debts*, 1977 (A.L.R.C. 6).

[3] Whitlam 12.

What does emerge from these pages is the single-minded insistence with which the former Prime Minister identified a number of important issues, during his earliest days in the Parliament, and then pursued them, in some cases achieving notable reforms. Many of the issues were seen clearly years before they became topics of common concern. The Privy Council remains, but the Commonwealth Parliament has now probably exhausted its powers of its own motion to limit appeals to London. The demise of the remaining appeals from State courts must be only a matter of time. Whitlam undoubtedly hastened the end of this distinguished anachronism.

His efforts to establish the oft predicted Federal Court foundered in the Senate. However, his successors have now established that Court and it may well come to play the critical unifying role which Whitlam predicted from his earliest days in Parliament.

The reform of family law and the establishment of a special Family Court, although not specifically a Whitlam achievement, undoubtedly gained strength from his wholehearted support. Likewise, his personal inclination to expand Commonwealth legislation in the field of commercial and business law coincided happily with decisions of the High Court extending Commonwealth power and the plain desire of the business community to be regulated, if at all, on a national and uniform, rather than a local and disparate basis. If he failed to achieve Commonwealth legislation for a national Companies Act, the passage of such a law or its near constitutional equivalent, cannot be far off. Developments are on the horizon, including the advance of so-called "industrial democracy" which will expedite the perceptions of the necessity of a single corporation law operating throughout Australia. The alternative will become increasingly unthinkable.

Legislation in the field of human rights made a few gains (notably the Racial Discrimination Act) but was generally disappointing. Nevertheless, there is happily a bi-partisan view that Australia should adhere to the International Covenant on Civil and Political Rights. Whitlam's constant urging towards internationalism may be seen by future generations as far sighted.

The National Compensation Bill, which he long foretold and plainly saw as a vital step towards releasing legal talent for more relevant tasks foundered in the face of the unexpected and, to say the least unusual, alliance of trade unions, the insurance industry and the legal profession. Nevertheless, it would be a rash man who predicted that the current "golden Autumn" of personal accident litigation will survive this century. The Woodhouse scheme or some variant of it will undoubtedly come about as the injustices and wastefulness of the current litigious remedies by negligence actions are perceived and the economy's capacity to pay for the alternative improves.

It was his perception of the importance of administrative law that marks out Whitlam's originality as a law reformer. Although the Franks Report was delivered in England in 1956, it caused hardly a ripple in Australia until the 1965 Commonwealth and Empire Law Conference in Sydney awakened professional interest. Throughout the late 50s and indeed until he took office, Whitlam persisted with his call for the new administrative law for Australia to discipline the growing public service by the rule of law. Provision of review and appeal procedures, the reduction in the proliferation of tribunals, the modernisation of judicial review, and the adaptation of the Ombudsman, in all these Whitlam foretold, with considerable accuracy, the developments that have now taken place. It is for others to comment upon the irony of the fact that the three principal architects of the most important law reform which Australia has pioneered in the last generation the reform of administrative law are Gough Whitlam, John Kerr and Bob Ellicott.

Through it all Whitlam propounded a plain concern to reform, modernise and simplify the law. His predecessors had created a Law Reform Commission for the Capital Territory. His administration created the Federal Law Commission for which Sir Owen Dixon had called in 1957. That Commission is now in its fourth year. It has been entrusted by successive Governments with major tasks of great relevance to the modernisation of the law and the improvement of Australian society government by the law. The way of the reformer in Australia is still hard. But the provision of permanent machinery may ensure that reform is achieved in a routine way and that the notion of orderly renewal of our legal system, in all its parts, is accepted: change not for its own sake; change for the better.