

REFLECTIONS *on social justice*

AUSTRALIAN
DEMOCRACY, LAW
AND JUSTICE. WHAT
HAS HAPPENED TO
THE CHECKS AND
BALANCES?

FEATURING
ALASTAIR NICHOLSON



ANGLICARE SOCIAL ACTION AND RESEARCH CENTRE 2005

ANGLICARE
TASMANIA

Social Action and Research Centre

The importance Anglicare places on addressing the causes of injustice and poverty has been reflected in its establishment in 1995 of the Social Action and Research Centre.

The SARC team work with low income Tasmanians to identify the structural barriers that impact most severely on their lives. The Centre pursues policy change on these issues at a State and Federal level.

Anglicare therefore works for a socially just Tasmania through research, advocacy and public debate as well as by providing a range of community support services.

These dual roles of providing support to individuals in need and actively campaigning for a more just and caring society allow Anglicare to be a powerful force in assisting disadvantaged Tasmanians.

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Welcome to Reflections on Social Justice

WELCOME to the fifth edition of *Reflections on Social Justice*. In previous years, this publication has focused on the situation of indigenous people and asylum seekers, the quest to embrace diversity in our community and the particular challenges faced by people who have mental illness and those who love them.

This year, we welcome the Hon Alastair Nicholson, former Chief Justice of the Family Court of Australia, as the 9th Anglicare Social Justice Lecturer. In a powerful and passionate essay, he explores the nature of justice under the current Government, looking at examples such as the mandatory and unlimited detention of asylum seekers, the provisions of Australia's new security legislation and the limited access to justice of people who are facing the disadvantages of poverty, illness, or the prejudices of age, gender, sexuality or race.

Community services such as Anglicare, which provide food or vouchers for essential goods or services, or which work to assist people to find housing or keep tenancies see daily the widespread and complex problems of disadvantage in Australia. People facing multiple levels of financial, social, educational and/or health problems are the ones most likely to slip through a legal system which is overworked and underfunded. They are the ones most likely to be the victims of unjust or improper laws and they are the ones most vulnerable to what Justice Nicholson describes as the 'body blow' of injustice.

Thank you for purchasing *Reflections on Social Justice* and your willingness to engage in important issues of social justice in Tasmania.

Acknowledgement

I am greatly indebted to the assistance given to me in the preparation of this paper by my former senior legal advisers at the Family Court of Australia, Mr Danny Sandor and Ms Margaret Harrison.

Alastair Nicholson

July 2005

Australian democracy, law and justice. What has happened to the checks and balances?

Anglicare Tasmania
Social Justice Lecture 2005
Hobart Conference Centre
27th July, 2005

THE HON. ALASTAIR NICHOLSON AO RFD QC

IT is a great privilege give this address. It is now 45 years since I graduated in law and 44 since I was admitted to practice. I commenced working as an independent barrister in 1963 and continued to do so for 19 years until my appointment to the Supreme Court of Victoria in November 1982. Both before then and subsequently as a judge I have had the opportunity to observe how the legal system intersects with justice and with social justice in particular.

In my junior years I spent a considerable time in Magistrates' Courts. It was a most useful experience because it is in those courts that one sees the interaction of the law with the ordinary citizen. All too often the citizen was at a considerable disadvantage, for a variety of reasons, which included ethnicity, gender, lack of education and sheer bewilderment at the intricacies of the system. Other problems included excessive court workloads and the lack of proper representation. On too many occasions the two concepts of law and justice passed each other like ships in the night. Despite this I saw many good people both on and off the Bench who were doing their best to make the sys-

tem work in a just and timely fashion and it was these people that provided an inspiration to me.

Throughout that time I developed an increased commitment to justice in general and to social justice in particular and this no doubt accounts for many of the controversies that have been associated with my subsequent career. I have always believed that justice and the law should be compatible and where possible I have endeavoured to bring this about, as have many others.

This is not the place for a dissertation on the relationship between law and justice. It is a concept that has bedevilled philosophers and scholars since the times of Socrates and Aristotle. What I think can be said is that one of the objects of law must be the achievement of justice. It may have other objects but if justice is not one of them then it is likely to be bad law. A useful discussion of the problem for present purposes is contained in Paton on Jurisprudence as follows:

*“ ... we must distinguish clearly between justice and law, for each is a different conception. Law is that which is actually in force, whether it be evil or good. Justice is an ideal founded in the moral nature of man. The conception of justice may develop as man’s understanding develops, but justice is not limited by what happens in the actual world of fact. It is wrong, however, to regard law and justice as entirely unrelated. Justice acts within the law as well as providing an external test by which the law may be judged, e.g. justice emphasises good faith, and this conception has greatly influenced the development of legal systems.”*¹

Justice is a concept that we instinctively understand but sometimes find difficult to identify in words. It is not capable of a fixed definition because what is regarded as justice will vary from time to time and from community to community. It has been defined as the quality of being just or fair² and thus as being synonymous with fairness. I had originally regarded this as a useful definition for the purposes of this address. However, I had some initial unease about simply equating fairness with justice, which I felt belonged on a higher plane. I then

read a work written by last year's speaker, Professor Raimond Gaita that caused me to think further about such a definition, and his view is I think encapsulated in the following passage:

*“Acknowledgment of someone as fully human is an act of justice of a different kind from those acts of justice which are rightly described as forms of fairness. Fairness is at issue only when the fully human status of those who are protesting their unfair treatment is not disputed. When they centre on the distribution of goods or access to opportunities and such things, concerns about equity presuppose a more fundamental level of equality of respect. If you are taken as fully ‘one of us’, then your protestation that equity demands that you receive higher wages or be granted better promotion prospects, for example, is probably an appeal to justice as fairness. If, however, you are regarded as sub-human, then it would be ludicrous for you to even consider pressing such claims, unless as a device to dramatise the radically different kind of equality that is really at issue.”*³

Gaita was there speaking about Indigenous people in the context of the High Court of Australia's decision in *Mabo v Queensland*⁴. When one thinks about it, the sort of treatment accorded to Indigenous people or to asylum seekers is not merely unfair, but something far worse and to describe it as an injustice is much more appropriate than to simply say that their treatment is unfair. It is a denial of their common humanity. As Gaita points out, justice is an ideal that transcends mere fairness.

The achievement of justice and fairness once occupied a primary position in our society. I liked to believe that they were part of the Australian ethos and that they applied universally. I still cling to that hope but, unfortunately, more recent events have brought that belief into serious question. This is not to say that our society in the past was always just and fair; far from it in the case of Indigenous people in particular, but I believe that there was a public aspiration to these ideals which eventually enabled us to recognise the need to act to rectify our past treatment of them.

Among the many manifestations of justice and fairness that one hopes is now generally accepted is the avoidance of discrimination on the grounds of gender, race, disability, age and economic circumstances. Again, this has been called into question in recent years. However, justice also comprises something more, to the point where there is an innate feeling as to whether a decision or result is unjust or otherwise.

For example, we know and we now know that even John Howard and his colleagues have come to accept that it is unfair and unjust to incarcerate people indefinitely in a detention centre. It is true that he and others have in the past sought to justify this upon the basis of deterrence, but in this context this is no more than an argument that the end justifies the means, which we also know to be unjust and wrong. It is similarly so with torture, which when some Victorian academics recently sought to justify it,⁵ produced an almost universal response that torture is wrong, not on utilitarian grounds, but on the grounds that a descent to torture is contrary to human rights and inherently wrong and is thus unfair and unjust.

A recent article in the *Australian Financial Review* by Professor Desmond Manderson summarised the case against torture as follows:

So too human rights protect not just good people but all people, and not just some of the time but all of the time: they are not to be weighed up, or sacrificed. It is in the nature of a human right that it is incalculable. We might feel that certain people have acted in such a way that they no longer deserve to be treated humanely, and if society as a whole were to gain by torturing them a little, then we should be allowed to do so. But human rights are not something we deserve. They are something that protects each of us from abuse by protecting us all of us unconditionally. These rights recognise as inviolable, regardless of the reason, the core of our autonomy as human beings. And if there is anything at all that we have a right to protect against the government and against all of society, it is our bodily integrity, indeed our sanity, our very self. That is the absolute right that torture threatens to deprive us of. Rather more than a fingernail is at stake.⁶

Contrary to popular belief I do not think that justice is or should be blind, except in the limited sense of not favouring a person or body because of who or what they are. I believe that any court and any judge worth their salt will always strive for justice and that includes looking beyond the cold letter of the law and trying to arrive at a just result. On rare occasions, the law will not seem to permit this; however, if at first sight it appears to do so, it is not uncommon to find, on closer examination, that this is not the case and that the law *does* permit a just result to be achieved. In achieving such a result I also think it vital for the judge to attempt to understand and allow for the particular problems of the many and varied people who come before the court.

It is clear that justice and law are not synonymous. Law can be extremely unfair and unjust, either intrinsically because it is bad law, or because it has unexpected ill effects in certain circumstances and/or in its application by the Executive and/or by the courts. The famous American jurist Oliver Wendell Holmes Jr. once said "*The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*"⁷ If this be correct it can be seen that it is possible for there to be a wide gulf between law and justice. It certainly has some substance, because by and large it is the courts that declare what the law is, as distinct from what we might think it ought to be.

It follows that if the courts get it wrong then things are likely to go seriously awry. We had a very good example of that recently in relation to the former Queensland Chief Magistrate, Di Fingleton. In her case the Executive, in the form of the Director of Public Prosecutions, brought a prosecution that should never have been brought. A judge on two occasions wrongly let the case go to the jury and on the second occasion the jury wrongly convicted her. She was sentenced to a term of imprisonment and the Queensland Court of Criminal Appeal wrongly rejected her appeal. She had served her sentence by the time that the case reached the High Court of Australia, which unanimously allowed her appeal.⁸

A good example of bad law in Australia are many aspects of the

Migration Act 1958 and the regulations made under it. I particularly have in mind those sections which effectively prevent decisions of the Executive to be challenged in the courts and of course those sections which enable the indefinite detention of people and the detention of children. Gleeson CJ in *Al-Khateb v Godwin* described the legislation as follows:

“One of the features of a system of mandatory, as distinct from discretionary, detention is that circumstances personal to a detainee may be irrelevant to the operation of the system. A person in the position of the appellant might be young or old, dangerous or harmless, likely or unlikely to abscond, recently in detention or someone who has been there for years, healthy or unhealthy, badly affected by incarceration or relatively unaffected. The considerations that might bear upon the reasonableness of a discretionary decision to detain such a person do not operate. The Act is expressed in terms which appear to assume the possibility of compliance with the unqualified statutory obligation imposed by s 198. That assumption is made the basis of the specification of the period of detention required and authorised by s 196. The period is expressed to be finite. In cases where the assumption is valid, the period of mandatory detention may be relatively brief, save to the extent that it is prolonged by a detainee’s own action in seeking a visa, with the delays that may involve. And, where the assumption is valid, the detention can always be brought to an end by the detainee’s own request for removal. As the facts of the present case illustrate, however, compliance with the unqualified statutory obligation may require the co-operation of others, whose co-operation cannot be compelled. Compliance with an obligation defines the period of detention. The obligation, however, in its nature is subject to the possibility that it cannot be fulfilled for reasons unrelated to any fault on the part of the detainer, or the detainee.”⁹

This is the essence of an unjust law. Regrettably, acceptance of new powers enabling coercive detention by the state, in mandatory and indefinite forms and by way of sentence or bureaucratic decision, has become a routine feature of public discourse, both here and in the

United States. This seems to me to be a revealing and disturbing measure of how our community is losing sight of the hard-won right to liberty as a cornerstone of our civil culture and values and is losing its sense of justice and fairness.

Absent the death penalty and the official approval of torture, loss of individual liberty is the most extreme sanction that can be inflicted by the state on our autonomy and integrity. Historically, our legal systems and institutions reflected this fact and the concept of the “liberty of the subject” is one of the cherished doctrines of the common law. Indeed, the capricious use of detention often lay at the heart of popular portrayals of totalitarian regimes in contradistinction to ours. Now, in a society where democratic virtues are hailed as the foundation of our personal freedoms, we seem to have come to accept the legitimacy of the extended use of incarceration, one which could have perilous, ever-increasing application.

Our media constantly calls for heavier and heavier sentences in criminal cases and criticises judges who do not fall into line and praises judges who do so. This in turn leads to calls for bigger and better prisons and harsher treatment of inmates. All this takes place against a background where available research suggests that such measures do nothing to reduce crime.

This is a far cry from the broad movement galvanised against the mandatory sentencing laws introduced by Western Australia and the Northern Territory in the 1990s. And, for an even deeper thermometer of the shift in the public psyche as concerns individual freedoms, we need only think back 20 years to the successful protest and outrage that was prompted by the then Hawke Labor Government’s proposal to introduce the Australia Card, which was a form of universal identity card.

It is therefore ironic that consideration of a modern version of the Australia Card has now re-surfaced from one of its former strongest opponents, the Prime Minister in the wake of the London bombings. It is at least pleasing to see some reservations being expressed from

within his own party. So there should be reservations. What is its possible justification? It would have done nothing to stop the London bombings. I would have no problem with a voluntary identity card that people could obtain and carry as they wish which could have some of the smart card characteristics that are sometimes discussed, but I would strongly object to having to produce it to a policeman or other government official on demand with the possibility of prosecution for non production. This would amount to an extraordinary and unnecessary interference with individual freedom and give far too much power to officials. It is redolent of totalitarianism

It is hard to resist thinking that the difference in the public attitude to state intrusiveness lies in how the Australia Card would have impacted upon the general population whereas the current indifference to loss of liberty has little widespread resonance. The difference is that it applied to “us” as distinct from “them”. A perception that fundamental rights and safeguards might be lost for “others” only, but not to me is reminiscent of that aphorism “I’m alright Jack — stuff you” — a huge and disturbing shift from the cohesive ethos of the land of the “fair go”.

There are of course valiant individuals and organisations that have campaigned against this shift. But the ease with which public debate is mainly confined to the situational or personal circumstances where it is “acceptable” leaves me fearing that we have become desensitised and inoculated against recognising the gravity of the core change in mindset. For example, I doubt whether the disgraceful treatment of the mentally ill Cornelia Rau in detention and particularly in Queensland prisons and the Baxter Detention facility would have attracted public interest or concern if she had been an “illegal queue jumper” and a Moslem to boot. It seems to me that it is only because she turned out to be one of “us” that people were outraged.

It is a threat to the ethical health of our society which is measured by how our institutions and systems, including the law, impact upon minorities and the most marginalised and disempowered — not how it caters to the majority. In this address I am dwelling principally upon

attitudes to migration, security legislation and access to justice as exemplars of a deeper malaise. However these are examples only. Many other minorities in our community are marginalised including the disabled, those with mental health problems, the frail aged, single mothers and their children, Indigenous people and particularly Indigenous children, migrant workers and those whose religion has been wrongly associated with terrorism.

While the Legislature bears primary responsibility for these evils, the Executive and indeed the Labor Opposition is not without blame.

Some 10 years ago I drew public attention to the evil of detaining people and children in particular in virtual concentration camps. I was then subjected to considerable public criticism, particularly from spokespersons of the then Labor Government for having the temerity as a judge to take up the issue on the part of children who were in detention. However the behaviour of that Government was almost benign compared with that of the Howard Government that succeeded it in 1996. It went on to build bigger and better detention centres both within and outside Australia and cynically manipulated the Australian electorate in order to win power in 2001.

Who can forget the disgraceful affair of the *Tampa*?¹⁰ The *Tampa* was a Norwegian ship which rescued from a sinking boat a number of persons claiming to be refugees who were *en route* to Australia shortly prior to 11 September 2001. It attempted to land them on Christmas Island, which was Australian territory. The ship was intercepted by Australian military forces and the refugees taken off and landed and interned in several Pacific client states pursuant to arrangements between those states and the Australian Government. The Government derived great domestic political capital from this xenophobic behaviour, particularly in the shadow of 9/11 and in late 2001, won an election that it had been expected to lose as a result.

Meanwhile the Opposition, because of its doubtful record in this area adopted a craven position of support and compliance, also for political advantage.

To that sorry episode can be added the Children Overboard affair, where for political purposes, the Government lied to the Australian people about allegations that refugees on another boat had deliberately thrown children overboard and the appalling losses suffered with the sinking of the *SIEV X*. The circumstances of how that boat came to sink with such a huge loss of life will hopefully receive further detailed examination in the future. Whatever they were, I doubt that they will reflect credit upon Australia.

The 2001 election win was indeed a dark victory for the government. Speaking in May of that year, Marion Le delivering the Alfred Deakin lecture had this to say:

“There is something mean, tricky and squalid about a policy which locks up little children behind barbed wire, razor wire, for five years.

There is something mean, tricky and sordid about an immigration policy which denies a family reunion because a child has a disability and yet upholds the family as the core of our Australian society.

There is something mean, tricky and out of touch about a government which denies entry to Australia to the grandparents of Australian citizen children on the basis of cost to the community and yet upholds the family as the core of our Australian society.

There is something mean, tricky and sordid about a government which locates the euphemistically named Immigration Reception and Processing Centres in the deserts and remote outback towns, and pretends that all is well.

There is something mean, tricky and squalid about locking up asylum seekers for indeterminate periods of time without setting the limits so that they go crazy in limbo and inflict harm on themselves and others out of sheer frustration.

There is something mean, tricky and out of touch about a government who accepted children as residents from the trauma and loss of war and once they are in trouble, locks the doors to our gaols and throws away the keys. I speak here of the plight of the young Vietnamese who

have served their time in our gaols yet are now held, seemingly forever, in our gaols awaiting deportation which is not an option.

For the future, it is apparent that much needs to be done internationally and at home.

In the overall global context of mass movement of people across borders and international politics we have allowed the arrival of a few desperate survivors of war and torture to bring about a return to what George Dibbs identified in 1888, as “a sudden spasm of fear and panic”.

Our reception of the refugee on our borders is the measure of our maturity as a nation.

How sad that we now appear to have entered upon an era of the mean-spirited and punitive response to those who arrive here largely the victims of international politics and the realignment of power within their homelands.

Sadly, as a country, we have become reactive, rather than proactive, in a world which desperately needs sound, compassionate, moral leadership on the issues of human rights and free speech in order to cope with the overwhelming abuses perpetuated on so many people in the world today.

We need to creatively embrace the international dilemma of dispossession and respond practically and humanely.

A Government which does not listen to the voices of the human rights advocates has got it wrong.”¹¹

Finally, despite the efforts of the Federal Court of Australia in cases like *Minister for Immigration and Multicultural Affairs v Al Masri*¹² and the Family Court of Australia in *B and B v Minister for Immigration and Multicultural Affairs*¹³ to find ways to overcome the problems created by the legislation, I believe that our highest court, the High Court of Australia lamentably failed to do justice to the unfortunate people, including children, languishing in immigration detention, whose

appeals came before it¹⁴. Justice is indeed in a sorry state in this country when that court, albeit by a narrow majority, held in *Al-Kateb's* case¹⁵ that it was constitutionally open to the legislature to authorise the Executive to hold people in detention indefinitely. The approach adopted by the majority in that case was that of legal technicians, rather than independent judges.

The judgment of the Chief Justice, Murray Gleeson bears reading in that case. Hardly a social radical, it proved too much for him to stomach that an Act of Federal Parliament should be read so as to authorise the indefinite detention of anyone unless it was expressed in the clearest terms. He said:

“Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases It is not new. In 1908, in this Court, O’Connor J referred to a passage from the fourth edition of Maxwell on Statutes which stated that “[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.”¹⁶

Unfortunately, four of his colleagues took a different view.

It can thus be seen that in relation to the *Migration Act*, the gap between law and justice became enormous. Indeed it was only the incompetent and vindictive administration of the Act by the

Department of Immigration and Indigenous Affairs that finally caused the wheels to fall off the government's policies over the *Migration Act*. This was revealed almost by chance when it emerged that that the Department had wrongfully arrested and kept in detention Cornelia Rau, and unlawfully deported another Australian citizen at a time when she was suffering from serious injuries. While it appears that the Department was very much at fault, under the present Government the doctrine of ministerial responsibility seems to have also been thrown out the window. This is a very important doctrine in the context of a Parliamentary democracy because it prevents Ministers and Governments from evading responsibility for maladministration by blaming it upon their Departments. They are the Government and the responsibility is theirs.

In the case of the Immigration Department, all of the blame has been thrust upon the Department by the responsible Ministers. If the doctrine of ministerial responsibility means anything at all, the shortcomings of the Department were surely the responsibility of the present Minister, Senator Vanstone and the long serving previous Minister and present Attorney-General, Mr Ruddock. The fact is that the problems arose because the Department was carrying out the policies of the relevant Minister and the Government, which should bear full responsibility for this appalling behaviour.¹⁷

It is worth noting that the Opposition did change its stance on detention, at least in relation to children and that legislation not dissimilar to recent amending legislation was proposed by the then Shadow Minister for Immigration Nicola Roxon and voted down by the Government in 2003. It is a sad note that it was only the belated move for change from four courageous members of the governing Liberal party that finally forced some change of Government policy in 2005.

It is arguable that the gap between law and justice has been widened by the policy of the Howard Government in relation to judicial appointments and appointments to the High Court of Australia in particular. It is important in a democracy that the people should have confidence in the impartiality of courts and judges in determining

cases before them. This does not mean that judges should never be appointed who have had some association with politics — far from it, but what should not happen is that particular appointments are made, particularly to the High Court of Australia, in the expectation that the judge will in the course of his or her judgments pursue a particular political ideology.

The present Government has set itself upon a course of making appointments of judges with a very conservative background — conservatives with a “Capital C” as the former Deputy Prime Minister Tim Fischer put it. This followed a dispute between the Government and the former Chief Justice of the High Court, Sir Gerard Brennan, as to the role of the High Court of Australia. There have of course been political appointments before from both sides of politics, but these have usually been made for purposes of convenience, rather than in pursuance of a particular ideology. In fact, by contrast to the present Government, the appointments made by the previous Keating Government were largely politically neutral. The present appointments were clearly made, not only to counter the influence of the so called ‘activist’ judges of the Mason High Court but to leave a legacy of conservative rule long after the Howard Government is but a memory.

This reflects a concern that I have for the future of the independence of the judiciary in this country. It has become a popular conservative view, largely reflected by the press, that there is something intrinsically wrong with so called “activist” judges who seek to interpret the law in such a way as to make it compatible with justice, or who draw public attention to the existence of injustices. Such people prefer legal technicians who adopt a strict “black letter” approach to the law and refrain from public comment about it. Professor Greg Craven, an unabashed critic of ‘activist’ judges put the conservative argument succinctly in a recent lecture when he said:

“The old constitutionalism, unsurprisingly, represents the “traditional” approach to Australia’s constitutional order. It displays a basic belief

in democratically elected Parliaments as the ultimate arbiters of day-to-day policy. It has a corresponding belief in the people themselves, at referendum, as arbiters of constitutional policy. It is sceptical of the notion of entrenched rights, believing that it is up to Parliament to mutually accommodate rights on an ongoing basis. It evinces a broad adherence to a functional version of the separation of powers, holding that Parliaments make laws, Executives implement them, and courts merely interpret legislation. As a matter of style, the old constitutionalism is deeply suspicious of abstract constitutional values and concepts: its métier is rules and language. Obviously, constitutional activism runs foul of every tenet of the old constitutionalism.

The new constitutionalism thoroughly dislikes Parliament as a nest of political hacks and fixers. It loathes the Executive as a body almost programmed for the violation of human rights. Indeed, it regards the Constitution generally with deep suspicion, regarding it as dated, partial and inadequate. Its principal obsession is with human rights: they are (or should be) the Constitution and a Constitution is to be judged principally according to its status as a shrine for such rights. The people themselves are viewed ambivalently, with favour as the potential recipients of rights, suspiciously as willing despoilers of the rights of minorities. Crucially, the judiciary is much loved, as a vehicle by which the savage instincts of populace and Parliament alike may be restrained through the wielding of a Constitution whose meaning is almost infinitely malleable. Consistently with this conception, new constitutionalists are deeply attracted to abstract constitutional values and concepts, which give content and significance to the Constitution's uninspiring words."¹⁸

The inherent arrogance in this approach is startling. It treats the Constitution as something approaching holy writ and suggests that anyone who thinks it dated or partial or inadequate is not to be trusted. But let us think a moment. Dated it most certainly is. It is a product of a 19th Century world and an uneasy compromise between groups of all male colonial politicians who were anxious to preserve their local powers. Partial it also most certainly is. Women played no part in

its creation. The motivation for much of its content was undoubtedly discriminatory and racist.

In a speech delivered at the Centenary of the High Court of Australia in Canberra Professor Hilary Charlesworth said:

*"The absence of a formal catalogue of rights in the Australian Constitution was, to a certain extent, the product of anxiety about the impact of guarantees of rights on colonial laws imposing special burdens on Asian and African workers. In their debates, the constitutional drafters regularly commented on the deep racial inequality in American society that justified equal protection and due process guarantees. They could see no parallels in Australia however. It was accepted that Aborigines were inferior because they were so different to Europeans and in any event they were assumed to be a dying race. Discrimination against other racial groups was regarded as reasonable and necessary to ensure the economic and cultural dominance of Europeans."*¹⁹

Inadequate it certainly is. It contains very little reference to rights at all and because of the era in which it was drafted, takes no account of the many changes in society and scientific and other advances that have taken place since 1901.

Next, I ask what is wrong with a national Constitution being seen as a shrine for human rights? Where else are human rights likely to be protected? Why are conservatives so antipathetic towards human rights? In a society where religion plays a less significant role and where there are wide differences between the world's religions as to human rights in any event, do not the rights agreed upon by the world's nation states represent a real hope for the future? These human rights instruments were a direct reaction to the barbarism of the wars of the 19th and particularly the 20th century and it seems to me that they represent a real hope for the world. In the absence of such rights where stands the world other than at the dawn of a new barbaric age? Are they not a real protection and perhaps the only protection against injustice?

Leaving aside Craven's hyperbole, are there not inadequacies about our present Parliamentary system? Should we not have a healthy suspicion of a legislature and executive that countenances the permanent detention of individuals including children who have committed no offence, or introduces mandatory sentencing of juveniles in a thinly disguised attack on Indigenous youth. Should we not be suspicious of placing too much power into the hands of the Executive in any event?

Finally, are we not entitled to look to the Courts to protect the citizen from the excesses of Parliament and the Executive? If not, where else can we look? The next election is usually a long way away and in any event a single issue, however important, is likely to become lost in the hyperbole and spin of an election campaign. Further, the result of an election by its very nature is unlikely to provide a protection for minorities in the community.

There can be no doubt that conservatives like Craven are anxious to weaken the Courts in order to ensure that they become more and more the creatures of the Executive. As I have said, we are starting to see more and more judicial appointments from the Howard Government that reflect such an approach. A similar tendency in the United States can be discerned in the appointments of the Bush administration. There is currently a significant political controversy as to the type of person who will replace Justice Sandra Day O'Connor and a looming controversy as to who will replace Chief Justice Rehnquist. However in that country, there are checks and balances on this process, which are not present in Australia. Interestingly enough, unlike the United States situation, the pending retirement of Justice Michael McHugh from the High Court has not attracted the same attention in this country. His replacement will represent the fourth appointment of the Howard Government and can be expected to be another conservative. One would have thought that more alarm bells would have been ringing in this country about this prospect.

I think that there are grave dangers in these developments, which, had they represented the norm, would have been reflected by different decisions in cases such as the *Communist Party* case²⁰ and *Mabo v*

Queensland ²¹. I mention these landmarks because they were cases in which the High Court of Australia made decisions preserving political freedom in the first case and recognising the long denied rights of Indigenous people in the second. A court of legal technicians would never have made those decisions and I doubt that our High Court, as presently constituted, would have done so either. Of course there are exceptions on the court and one who stands out is Justice Michael Kirby. His stance has not come without cost in the prevailing Australian political climate. He has constantly and courageously dissented on many issues, particularly where human rights have been involved. Recently his record of dissent has attracted some media criticism from conservative commentators. However a prescient remark was made by one that he would have been regarded as occupying the centre in the Mason court. This speaks volumes for the stance of the majority of the present High Court.

It is worth reflecting for a few moments upon what an activist judge is and this in turn requires us to consider what we expect of a judge. Quite obviously, judges are not free to decide cases on the basis of what they think should be the correct result, regardless of the law. At the same time I believe that the reason why we have an independent judge, rather than some bureaucratic functionary to decide these important issues, is because a judge is expected to inject wisdom, fairness and humanity into the decision making process. That seems to me to more likely to achieve justice. This is something which I always strived to do and if this be judicial activism then I am proud of it.

We should I think ask the question as to why conservatives are so opposed to activist judges. I think that the answer lies in their desire to remove checks and balances that lie in the way of absolute power which can otherwise be achieved by manipulation of the democratic system, particularly through the mass media. An argument often advanced is that judges are not elected and therefore have no right to stand in the way of the elected representatives of the people.

Alexander Hamilton gave the answer to this proposition as long ago as 1787-88 when he said:

“Nor does this conclusion (the superiority of the Constitution over legislation) by any means suppose a superiority of the judicial to legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by fundamental laws rather than by those which are not fundamental.”²²

Of course this is in a sense all very well, but it rather begs the question as to how the Constitution should be interpreted. Our Constitution in particular, is not heavily based upon human rights and individual liberty in a written sense. However, these concepts were not unknown at the time that it was written. The new Commonwealth was intended to be a democracy and the ideals expressed in instruments such as the French Declaration of the Rights of Man and the US Declaration of Independence, Constitution and Bill of Rights were well known to the founding fathers.

I therefore find it difficult to understand why it is not open to a modern High Court to attempt to interpret the Constitution, inadequate though it may be, to give some meaning to the concepts and ideals that are supposed to influence and form the basis of a democratic society. This is what the much criticised Mason High Court attempted to do in cases like *Nationwide News v. Wills* and *Australian Capital Television Pty Ltd v. Commonwealth (No 2)*²³, which found that there could be implied into the Constitution a right of freedom of communication on matters relevant to political discussion. These decisions prevented the curtailment of political advertising prior to an election and produced a storm of criticism from conservative sources.²⁴

To date I have concentrated on examples of bad laws and bad decisions in the immigration area as indicative of the widening gap between justice and law, which have been coupled with an attempt to neutralise the Courts and particularly the High Court of Australia.

It is worth also noting that the effect of these policies have been felt

by people least able to protect themselves, namely helpless asylum seekers and their children who have been successfully demonised by the Government for political advantage. However there have been many other effects of the policies of modern governments and particularly the Howard Government that have been largely directed at people who are least able to care for themselves.

The scene was set as early as 1996 when the Prime Minister adopted what can only be regarded as an ambivalent attitude to the racist policies espoused by Pauline Hanson. This brought racism into the open in Australian politics for the first time since the abandonment of the White Australia policy in the 1960s, interestingly enough by a Liberal Government. There then developed a climate of opposition to multiculturalism and a fear of ethnic minorities. This in turn provided fertile ground for the further demonisation of refugees and particularly those refugees who arrived in Australia in small boats from South East Asia. In the final analysis, the Government's policy strongly resembled that initially advocated by Pauline Hanson.

These problems were greatly exacerbated after 11 September 2001 when the Government reacted in near hysterical fashion as part of the so called 'War on Terror'. Amongst other things, this led to the passage of draconian legislation placing excessive power in the hands of security agencies and severely restricting the liberties of Australians in significant ways. On this occasion the Opposition did play a part in limiting some of the more extreme proposals with the support of minority parties in the Senate. Lest I be thought to be exaggerating the effect of this legislation it is of interest to note the comments of Professor George Williams in a recent article appearing in the Melbourne 'Age' when he said:

"The threat of a terrorist attack has changed Australian law in ways that were unimaginable four years ago. Before September 11, 2001, we had no federal law on terrorism. Today, that law criminalises terrorists and their associates, bans organisations and even provides for people who might know something about terrorism to be detained at the behest of ASIO for up to a week.

*While the law needed to be changed, the draconian nature of some of the new laws cannot be justified. According to the Government's own website (www.nationalsecurity.gov.au): "There is presently no known specific threat to Australia." That site contains a four-level alert system (low, medium, high and extreme) that assesses Australia as being at a medium level of alert, which has been the case since September 2001."*²⁵

The last point is well made. The only terrorist attacks impinging upon Australia and Australians since 11 September 2001, namely the Bali bombing and the attack on the Australian Embassy in Jakarta, took place outside Australia. This is not to say that they could not happen here, but it does weaken the imminent threat argument as a justification for these laws.

Williams, after making the point that the Parliamentary process had modified the laws as originally drafted, continued:

"Even after a long and difficult parliamentary process that produced important changes and compromises, many aspects of the new laws go far beyond what can be justified.

These include the imposition of a five-year jail term for speaking about or reporting the detention of a person by ASIO, including in which that person has been mistreated. Another example is that non-suspect Australians can be detained for one week, whereas suspects can only be held for 24 hours before being charged. Indeed, it even seems possible that the present three-year sunset clause will be removed and these exceptional powers made a permanent part of the law.

*A reason for these outcomes is that, even though our political system has many strengths, it also has a key weakness: human rights lack legitimacy in political debate. When they are needed most, they can be simply absent. This can be because human rights are not generally part of our law. Unlike every other democratic nation, Australia must search for answers to fundamental questions about civil liberties and national security without the benefit of a bill of rights."*²⁶

I will return to the issue of a Bill of Rights subsequently but I would suggest that there is already evidence of a potential misuse of these laws and the powers granted under them.

On 23 June 2005, SBS television screened the program *Truth, Lies and Intelligence* produced by Carmel Travers. The subject matter of the program largely related to the truth of statements made by President Bush and Prime Ministers Blair and Howard in 2003 justifying the attack upon Iraq upon the basis that Iraq possessed weapons of mass destruction. The program featured interviews with Andrew Wilkie, a former senior intelligence officer with the Office of National Assessments in Canberra.

A chilling fact that emerged was not so much the contents of the program itself, but rather the fact that in the course of making it the producer received a visit from persons purporting to be from the Attorney-General's Department. These persons demanded access to her computer and apparently destroyed its hard drive and when she attempted to film them doing so, threatened to charge her with an offence carrying a penalty of 7 years imprisonment. Apparently they were seeking information about her communications with Mr Wilkie. The only other media mention of this affair appeared in the Age Green Guide of all places. (The Green Guide is a lift out largely devoted to TV and radio programming.) That article suggested that similar actions had taken place in respect of others with whom Mr Wilkie had been in contact, including the well known commentator, Professor Robert Manne.

One would have thought that such behaviour would have been the subject of media headlines in normal circumstances. This once again suggests that we have become inured to governmental attacks upon our liberties. The situation is not very different in the US. In a recent article in the New York Times, Frank Rich commented in relation to the media treatment of the disclosure of the identity of "Deep Throat" in connection with the Watergate affair:

"The fundamental right of Americans, through our free press, to pene-

trate and criticise the workings of our government is under attack as never before” was how the former Nixon speech writer William Safire put it on this page almost nine months ago. The current administration, a second-term imperial presidency that outstrips Nixon’s in hubris by the day, leads the attack, trying to intimidate and snuff out any Woodwards or Bernsteins that might challenge it, any media proprietor like Katharine Graham or editor like Ben Bradlee who might support them and any anonymous source like Deep Throat who might enable them to find what Carl Bernstein calls “the best obtainable version of the truth.”

The attacks continue to be so successful that even now, long after many news organisations, including The Times, have been found guilty of failing to puncture the administration’s prewar W.M.D. hype, new details on that same story are still being ignored or left uninvestigated. The July 2002 “Downing Street memo”, the minutes of a meeting in which Tony Blair and his advisers learned of a White House effort to fix “the intelligence and facts” to justify the war in Iraq, was published by The London Sunday Times on May 1. Yet, in the 19 daily Scott McClellan briefings that followed, the memo was the subject of only two out of the approximately 940 questions asked by the White House press corps, according to Eric Boehlert of Salon.

This is the kind of lapdog news media the Nixon White House cherished.”²⁷

Much the same can be said of most of the Australian media and particularly the Murdoch press. This is a very troublesome development, particularly when it is coupled with a deliberate policy of intimidating and reducing expenditure on the Australian Broadcasting Corporation.

Last month the Attorney-General Mr Ruddock announced that ASIO had carried out a number of information gathering exercises using search warrants issued by him to enter various premises in Sydney and Melbourne. Speaking on ABC Radio on 29 June 2005, he rejected a characterisation of these exercises as ‘raids’. He did not deny that offi-

cers of his Department had informed the media of them. However characterised, it is quite clear that they involved incursions into people's homes and places of worship. We do not know what people were affected, for we are never told, but it seems likely that many were Islamic.

The incursions were described by one Islamic leader, Sheik Mohammed Omran, as a political stunt in order to boost support for an extension of the Government's anti-terrorist legislation.²⁸ It is difficult to form a judgment about this as the whole affair is shrouded in secrecy. That is the precise problem about the use of these sorts of powers and therein lies the danger about their use. The actions of those carrying them out cannot be questioned in the courts and although there is some limited right to complain, one could have little confidence that these powers have been exercised properly. We have already seen in the case of the Department of Immigration, Multicultural and Indigenous Affairs that Departments and Ministers are more than capable of making serious mistakes and this is simply not good enough where our liberties are involved. Again the people against whom these actions are directed are people that have already been demonised, largely as a result of the Government's actions, thus making it less likely that the rest of the community will be concerned.

In an editorial on 30 June 2005, the Melbourne Age had this to say:

"The pursuit of terrorists is not akin to other criminal investigations in Australia. Under laws introduced by the Howard Government, suspects forfeit basic protections such as the right to silence. There are wider powers allowing for arbitrary detention for up to one week without charge. Even legal counsel are barred from revealing whether or not they are acting for any suspects, under threat of imprisonment. In the absence of a bill of rights, there are few protections. Perhaps it is not surprising that former Prime Minister Malcolm Fraser finds cause to criticise the Government's anti-terrorism policies as creating a culture of fear. Australia, according to the Government's own assessment, is not under imminent terrorist threat. Even in the much-altered world

since September 11, no other country has found it necessary to use such draconian powers. The Government introduced these measures on the basis of combating terrorism. Using them to rattle cages cannot be justified.”²⁹

I think that we have reached a watershed in Australian politics where the Parliament, the Executive and regrettably the Courts can no longer be trusted to protect our liberties without further safeguards. I therefore strongly agree with Professor Williams’ call for an Australian Bill of Rights. I have in another context, written extensively about why a Bill of Rights is necessary to protect children in Australia, including children in immigration detention.³⁰ In that article I said:

“Australia is now one of the few countries that do not have a Bill of Rights. Of countries with a similar tradition to Australia, the United States enacted a Bill of Rights in 1791, Canada has had a Charter of Freedoms since 1982, New Zealand since 1990, South Africa since 1997 and the UK since 1998. Australia is the only western nation without a Bill of Rights and indeed only a few countries such as Brunei and Burma lack such a Bill.”³¹

In the course of the article I pointed out that children are one of a number of minorities in our community and have no vote. I suggested that they are particularly vulnerable to discriminatory and ill-considered executive or legislative action and have been the victims of it. As well as the example of immigration detention I pointed to mandatory sentencing laws directed at juveniles in Western Australia and formerly in the Northern Territory and the unsatisfactory nature of child protection laws and laws dealing with juveniles in Australia. There are many other areas of human rights that remain unprotected and uncared for in Australia, including the rights of children under the UN Convention on the Rights of the Child and many social and economic rights.

I do not propose to develop those arguments further today, beyond saying that in my view it is now imperative that this country enacts a Bill of Rights. I note that this has been done by the legislature in the

ACT and that the Victorian Government is also considering such a proposal. These initiatives, while commendable, are characterised by extreme caution about making the enforcement of any rights so conferred justiciable. If this is not done there is a real danger that such Bills will amount to nothing more than window dressing. In any event, they will do nothing to correct the sort of evils under discussion in this address, which can only be dealt with at a national level.

Since this speech went to the printers we have had the London bombings.

It is my proposition that far from derogating from the need for the protection of a Bill of Rights, those terrible events make the need to protect our citizens by this means, even more important.

On these occasions in the aftermath of such a tragedy, it is a seductive argument to say that we must be prepared to forgo our civil liberties for the greater good, i.e. that we can only successfully combat this type of terrorism by enabling law enforcement authorities to exercise powers inconsistent with civil liberties in order to detect and capture the perpetrators of these atrocities. This sort of argument can already be heard from radio and television commentators and in the print media. It can also be heard from politicians.

My position on this is that we must be very careful indeed before we sacrifice such hard won liberties that we have for such a purpose. We would need I suggest, to be fully satisfied that what is proposed is justified. The trouble about achieving this is that the response to a request for such information is usually that the information is classified and that its disclosure might assist our enemies. This may well be the case, but in the absence of some firm guarantee of our rights we are left with no protection at all.

In this country, in the absence of a Bill of Rights, we may in fact have no choice about the removal of our liberties. The Government controls both Houses at Federal level and within the bounds set by the Constitution, can pass any legislation it likes. The more the present situation is characterised as a war the wider those powers become, as

the High Court has held that the Defence power contained in the Constitution widens in time of war. The Government and others are fond of describing the present situation as a “War on Terror”, ably assisted by the mass media. In my the High Court is a very doubtful source of protection from excesses by Government.

Let me make my own position clear. I do not for a moment suggest that we do not need ASIO nor other intelligence gathering organisations, nor do I suggest that they should not be properly empowered to carry out their functions. Those functions are primarily the gathering of intelligence. The important question is as to what is a proper empowerment. It is simply not good enough for the Government to assert the need for a power without justifying it as the Attorney-General seeks to do. Similarly it is important that police have sufficient powers to act to prevent terrorism and to detect the perpetrators when it has occurred. As to the latter, the British Police seem to have done an admirable job without these extended powers and it is difficult to see how the exercise of the sort of powers conferred upon ASIO in Australia would have prevented the tragedy. I note that the British Police are now asking for additional powers including a right to detain suspects for two months. While understandable I hope that there is a period of reflection before conferring these powers upon any organisation, in the UK or Australia.

The present powers conferred upon ASIO are extensive and represent a considerable invasion of civil liberties. The fact that they have apparently been exercised sparingly to date, while commendable, is no answer. The fact is that police powers of this type are always open to the possibility of abuse.

A Bill of Rights, while essential, is of course not the only answer to the problems that presently face our community. As I have said, any such rights conferred must be justiciable at the instance of the individual affected, but another essential ingredient is that there must also be ready access to the judicial system in order to enable these rights to be exercised.

In my view, we have in our community also suffered a serious inter-

ference with our right of access to justice. The fault for this lies principally with successive Governments, both Federal and State, but also with the court system itself and with the practising legal profession.

At base, the meaning of access to justice requires some positions of principle. There are three fundamental and inter-related starting points to my thinking about this aspect of tonight's topic.

There is a growing risk of losing sight that Law and its associated institutions are, or are meant to be, means to the end of achieving a just society. They are not ends in themselves.

Secondly, access to justice is a human rights imperative and human rights should not depend upon social position. Social norms, social institutions and social mechanisms connected to justice are differently experienced within our nation. They are dependent on factors such as access to information, the attitudes of personnel within the justice system and one's relative privilege or disadvantage in what is disturbingly, still a far too unequal Australia. New South Wales Magistrate Ms Pat O'Shane puts it succinctly in the title to her chapter on the subject of access to justice: it "depends on who you are".³²

Thirdly, the meaning of justice and access to it is not merely a philosophical or legal concept — it is a felt experience. It resonates most powerfully when one feels that justice has been denied because the denial of justice can be a body blow to dignity and humanity.

Taking these three standpoints together suggests to me that we will realise the goal of access to justice not when lawyers and politicians and the like think that the challenge has been met. Rather, it will be when those who have most felt the unfairness, exclusion and indignity of injustice can and do say that they actually get the Australian ideal of a "fair go" — and that they get a "fair go" as a matter of right.

It also leads me to where I think we must look to answer questions about what represents justice, and where we must look in divining the future of access to justice. It tells us to scrutinise the forces and institutions that shape the enjoyment or denial of human rights.

In the remaining time available to me tonight, I would like to consider forces and institutions such as our parliaments, our courts, our governments and our law reform bodies.

First and foremost, in my view, is our attitude as a community. That is because I consider the realisation of a culture that values human rights and access to justice fundamentally depends upon and is determined by our community attitude to the idea. Australia is a prosperous nation with, I believe at heart, and notwithstanding the reservations I mentioned earlier, a base ethos that values the ideal of a fair go and egalitarianism. That ethos is not uniformly widespread, not uniformly generous, not without bigotry. Yet we have the promise and potential of becoming a true international example of the best that democracy can deliver to the felt experience of human rights.

So long as a significant economic downturn remains at bay, that mood is a favourable portent for access to justice in this century because there has been no more unsatisfactory excuse peddled for the denial of human rights in recent years than the claim, in effect, that it costs too much.

As I have said on many previous occasions, a principal victim group of such a governmental attitude has been women, children and young people. They are an object of concern and tender rhetoric by our governments, but actions speak louder than words. For example:

- Is there any jurisdiction that has escaped criticism over its inadequate level of service to child and adolescent survivors of abuse?
- Why has there been virtually no action arising from the scores of recommendations to government that resulted from the Inquiry into Children and the Legal Process conducted by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission?
- How can we justify the horrendous and disproportionate rates of mortality and crippling early childhood diseases suffered by our Indigenous young?

- When will Australia have a Federal Commission for Children and Young People that is independent and responsible for monitoring our compliance with the Convention on the Rights of the Child, a Convention that Australia is rightly proud to say it took a leading role in drafting?
- Why are women constantly refused legal aid in matrimonial property disputes?
- Why is child care unaffordable and unavailable for those with young families and in the greatest areas of need?
- Why is there no proper system for the representation of children in disputes affecting them in family and children's courts?
- Why do we continue to tolerate a defence of reasonable chastisement as a defence to an assault on a child?

Similarly, I was highly critical of the former Government for its attempt to legislate the decision of the High Court in *Teoh's* case³³ out of existence and I remain critical of this one for having continued that policy. This is nothing more than a direct attack on the UN Convention on the Rights of the Child and was and is a shameful position for any Government to take on such an issue.

A feature of Australian legislative history has been an almost absolute inability to act co-operatively to address common issues thereby creating significant access to justice barriers. One of the most obvious areas is the area of child protection and family law in so far as it relates to children where we have eight State and Territory systems and one Federal system overlapping and sometimes contradicting each other's decisions. In Western Australia we have the ludicrous arrangement whereby appeals from the State Family Court go to either the Family Court of Australia or the Full Court of the Supreme Court of Western Australia depending on whether the parents of the relevant child or children were married.

The area of property is equally as bad. There we have one federal system dealing with the property of married couples and eight systems

dealing with the property of de facto relationships. Matrimonial torts are also dealt with within the state systems.

The High Court's decision in *Wakim's* case³⁴ destroyed one of the only real attempts that had been made to address these problems, namely cross vesting — a legal scheme that allowed Commonwealth, State and Territory superior courts to exercise each others jurisdiction that was found to not be constitutionally permissible. I am not disagreeing with the legal analysis of the High Court in that case but simply pointing to the effect that the decision has had. The remedy lies not with the Courts but with Government and while it remains unresolved there will not only be barriers of expense. As I have pointed out elsewhere, in children's matters there is a continuing risk that they fall between the cracks of the fractured jurisdictional arrangements.

In recent years our Governments of all political persuasions have become obsessed with the reduction of Government expenditure and hence services over many areas. A particular target has been the area of legal aid and this has had the effect of further disadvantaging some of the most disadvantaged people in our community. On this topic, in a joint 1999 statement, the then Chief Justice of Australia Sir Gerard Brennan and then Chief Justice of New Zealand, Sir Thomas Eichelbaum said:

“Consider the present situation. The courts are over-burdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant. Governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an over-statement to say that the system of administering justice is in crisis. ... Ordinary people cannot afford to protect their rights or litigate to protect their immunities.”³⁵

Unfortunately, little has changed since that statement was made. Again I stress that my criticism of Governmental attitudes to legal aid are not just directed at the present Government. In an address that I gave to a forum on Legal Aid held at Old Parliament House in 1999, I said: “The decline in the availability of legal aid to family law began

*prior to the election of the Coalition government in 1996 although there can be no doubt that the Coalition greatly accelerated the process. Before then however, the family law share of the legal aid 'pie' had steadily declined and I made a number of protests to the former government about that fact, without success."*³⁶

The present Chief Justice of the High Court, Gleeson CJ, in a 1999 speech to the Australian Legal Convention said:

"For a system based upon that assumption, the unrepresented litigant is a serious problem. People cannot be compelled to be legally represented. Some are unrepresented of their own choice, but most unrepresented litigants are unrepresented because they have been unable, usually for financial reasons, to obtain the services of a lawyer. The resulting problem has two aspects. The first relates to justice; the second relates to cost and efficiency.

Our system proceeds upon the assumption that a just outcome is most likely to result from a contest in which strong arguments are put on both sides of the question, and the court adopts the role of a neutral and impartial adjudicator. If parties are not legally represented, then the assumption is often invalidated, partly or completely. A senior English judge said that "the adversary system calls for legal representation if it is to operate with such justice as is vouchsafed to humankind.

*What is not so well understood outside the court system and the legal profession is the cost to the system, and the community, in terms of disruption and delay, of the unrepresented litigant. If the work which the courts routinely leave to be done by lawyers is left in the hands of the litigants themselves, in most cases the work will either not be done at all, or it will be done slowly, wastefully, and ineffectively. If the judge or magistrate intervenes then his or her impartiality is likely to be compromised, and the time of the court will be occupied in activities which would ordinarily be unnecessary. The result is often confusion and delay in the instant case, with consequences for other litigants waiting their turn in overburdened court lists."*³⁷

While I generally agree with the remarks of Chief Justice Gleeson, I have come to despair of the government taking any action to correct the situation, which I know to be particularly bad in the area of family law. That area is bedevilled by a chronic shortage of judges and now magistrates and none of the Government's family law reforms have begun to address this issue. They have proceeded on the blithe and I believe false assumption that the provision of family dispute resolution centres will solve the problem. The Family Court has long experience with alternative dispute resolution, which it pioneered. It is extremely valuable, but it is not a universal panacea and I have little doubt that the existing pressure on the courts will continue and increase.

A particular gap in the Government's recent 'reforms' is that they have completely ignored the area of matrimonial property. It is not intended that the Family Relationship Centres will deal with property issues at all. Anyone with the slightest knowledge of family law would realise that issues in relation to children are often intermingled with property issues to the point that the determination of with whom the children will spend the majority of their time will often determine the extent of the property adjustment to be made. Until this issue is addressed, I fear that the Family Relationship Centres will be doomed to failure. In any event however, I have no doubt that sufficient numbers of people will seek a litigated solution to maintain and increase the present pressure upon the courts.

It was with this factor in mind that I turned some years ago to possible solutions to the enormous cost burden that litigation imposes and to ways in which litigation could be conducted more efficiently. In particular, I was seeking to find ways in which justice could continue to be done in circumstances where parties were unrepresented and unable to properly present their cases.³⁸

The Family Court had over many years explored ways in which the litigious path could be made easier. Procedures were simplified, counselling and then mediation were introduced, case management measures were introduced designed to assist the process of settlement

of family disputes at the earliest possible stage and a new and modern set of Rules of Court were introduced shortly prior to my retirement in April 2004. Specific initiatives such as the Magellan project were introduced to deal with cases involving serious child abuse and an extensive programme including the innovative use of the Court's website was developed to assist litigants generally and unrepresented litigants in particular.

Many of these programmes were highly successful, but we were still left with the difficulties that I believe are associated with the adversary system. I doubt whether a pure adversary system is ever appropriate for the determination of family law disputes, if only because children are not and should not be adversaries or the victims of adversary contests. However even in cases not involving children, the stylised format of the adversary system is usually inappropriate to determine issues between former partners. There is often a strong financial imbalance between them which enables one, usually the male, to oppress the other. The adversary system becomes even more unsuitable when the parties are not represented by competent counsel and/or when English is not their first language or where they are inarticulate or come from a different cultural background.

These are problems that in part face our legal system as a whole, albeit being exacerbated in a family law context. However historically our courts and the legal profession have been remarkably slow to address these issues. Politicians, when they do so, usually do so in a blundering fashion in response to well organised publicity campaigns such as those mounted by so called 'men's groups' in recent years.

In a sense our Federal system contributes to the problem. In my experience the legal profession, which is organised on State and Territory lines, rarely looks beyond the boundaries of their particular State or Territory and the same can be said for the State and Territory court systems. There are exceptions of course and there are many members of the legal profession and a number of State and Territory judges who do not fall into this category. One notable member of the last category has been Justice Geoffrey Davies of the Queensland Court of Appeal

who has written and spoken tirelessly on the need for reform of the adversary system.³⁹

It was against this background that I and other people within the Family Court thought that we must look for a better way. Little help was to be gained from the other common law jurisdictions such as the United States, United Kingdom, Canada and New Zealand, all of whom operate systems similar to our own.

My thoughts then turned to Europe, whose countries largely operate a legal system based upon the *Code Napoleon*. It is often referred to in a pejorative sense in this country as the *inquisitorial system*. I reasoned however that countries that otherwise represented the cradle of European civilisation could not have consistently got everything wrong since Napoleon's demise and thought that some insights might be gained from that system. I was fortified in this endeavour by the pioneering work of Justice Geoffrey Davies, to which I have already referred, whose thesis is that there is much wrong with the adversary system and that the two systems are gradually, albeit unwittingly, coming together, with much resistance on both sides.

In cases relating to children, the continental system has, we discovered, been much further refined in Germany. In my view those refinements could equally carry forward into property disputes and represent a real way forward for the determination of family law disputes.

Following on my own observations of the European system and those of others within the Court it was decided to introduce a pilot programme for children's cases in the Parramatta and Sydney Registries of the court, largely based upon the German system. In doing so we were greatly assisted by consultations with a German judge, Eberhard Carl, who had been a pioneer of the German system.

Before commencing the pilot, there were a number of legal obstacles to be overcome, largely contained in the Commonwealth *Evidence Act* and the *Family Law Act*.

Extensive consultations were held with representatives of the legal profession, Attorney General's Department, legal aid agencies and community legal centres which led to the commencement of the pilot programme in March 2004. I may say that although I have been critical of the legal profession for being slow to move on reform issues, I received nothing but full co-operation from the New South Wales Bar and Law Society in relation to this project. Similarly, both the Federal Attorney-General's Department and the NSW Legal Aid Commission were particularly helpful.

The pilot programme was initially confined to children's cases because of advice that, as these were not strictly adversarial, cases decided in this way were less open to legal challenge. The essential feature of the pilot programme is that the proceedings, including the timetable, are controlled by the judge rather than by the parties or their lawyers. It is for the judge to determine what evidence will be required and the manner in which it will be presented and whether any and what cross-examination will be permitted. The judge may at any time adopt the role of mediator and/or have the assistance of a court mediator in resolving the dispute. The rules of evidence are waived, unless the judge determines that they should apply, thus saving much time and eliminating formal objections and the calling of unnecessary evidence.

To date the pilot has been very successful and is about to be extended to Melbourne. I am pleased to say that it has been enthusiastically adopted by my successor Chief Justice Diana Bryant. Even more significantly, the Federal Government has decided to support the initiative and the exposure draft of the 2005 Family Law Reform Bill contains provisions very much along the lines that I have discussed. The Bill has been referred to the Legal and Constitutional Affairs Committee and I am hopeful that it will be passed this year.

The proposal is not without its opponents, both within and outside the court. It will no doubt face challenges in the High Court. I believe that it represents the wave of the future for the law and I am proud to have played a part in its introduction. There will be problems and difficulties, but if we keep in mind what should be the main aim of any

court system, the delivery of justice that is open and accessible to all, then it has much to commend it.

I should make it very clear that I do not see this as a purely family law initiative, but one that is relevant to many other areas of the law. It is for this reason that I have discussed it in this address. I consider that it has the potential to revolutionise the delivery of justice in this country in all areas of the law, including the criminal law. I believe that our present system is so outmoded and expensive that in many instances it is not providing justice to our citizens. This is not to say that the present system should be scrapped, but rather to say that we must be much more open to innovation and change if access to the justice system is to remain a real option to the ordinary citizens of this country. In that regard I consider it to be highly relevant to social justice issues, because if there is no speedy and efficient way to access the judicial system then there is no justice for all.

REFERENCES

- 1 Paton G.W. *A Textbook of Jurisprudence*, Oxford University Press (2nd ed. 1951) at 70
- 2 <http://dict.die.net/justice>
- 3 Gaita R. *A Common Humanity, Thinking about Love and Truth and Justice* Text Publishing, Melbourne (1999)
- 4 *Mabo v Queensland No 2* [1992] HCA 23; (1992) 175 CLR 1
- 5 Mirko Bagaric, "A case for torture" *The Age*, 17 May 2005 <<http://www.theage.com.au/news/Opinion/A-case-for-torture/2005/05/16/1116095904947.html>
- 6 Australian Financial Review (Review Section) 3 June 2005
- 7 Holmes O.W.'The Path of Law' Lecture at Boston University Law School 1897; Collected Legal Papers (London, 1920) *Law A Treasury of Art and Literature* p52 Hugh Lauter Levin Associates, Inc, New York (1990)
- 8 *Fingleton v The Queen* [2005] HCA 34 (23 June 2005)
- 9 *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004) per Gleeson CJ at Para 12
- 10 For a fuller account of this episode see *Dark Victory* by David Marr and Marian Wilkinson (Allen & Unwin) Sydney 2003.
- 11 <http://www.abc.net.au/rn/deakin>
- 12 (2003) 126 FCR 54
- 13 (2003) 173 FLR 260
- 14 See *Minister for Immigration and Multicultural Affairs v B* [2004]HCA 20; *Al-Kateb v Godwin* [2004] HCA 37; *Re Wooley ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49
- 15 Ibid
- 16 Ibid at Para 19 per Gleeson CJ
- 17 Grattan M. *The Age* Melbourne 6 July 2005 <http://www.theage.com.au/news/national/now-lets-have-some-action/2005/07/05/1120329447108.html>
- 18 Craven G. (2004) Judicial Activism; The Beginning of the End of the Beginning; *Proceedings of the 16th Conference of the Samuel Griffith Society*, Vol.16 Ch.7 Perth accessed at

- <http://www.samuelgriffith.org.au/papers/html/volume16/v16chap7.html>;
- ¹⁹ H. Charlesworth The High Court and Human Rights: The Centenary Conference of the High Court of Australia Canberra 2003 (to be published)
- ²⁰ *Australian Communist Party v The Commonwealth* [1951] HCA 5; (1951) 83 CLR 1
- ²¹ *Mabo v Queensland No 2* [1992] HCA 23;(1992) 175 CLR 1
- ²² The Federalist, no 78; *Law A Treasury of Art and Literature p174* Hugh Lauter Levin Associates, Inc, New York (1990)
- ²³ (1992) 177 CLR 1
- ²⁴ Craven G. (2004) Judicial Activism; The Beginning of the End of the Beginning; *Proceedings of the 16th Conference of the Samuel Griffith Society*, Vol.16 Ch.7 Perth accessed at <http://www.samuelgriffith.org.au/papers/html/volume16/v16chap7.html>; G. Craven (1997) *The High Court of Australia: A Study in the Abuse of Power*; The 31st Alfred Deakin Lecture, The Alfred Deakin Lecture Trust; D. Moore (2002) *Judicial Intervention : The Old Province for Law and Order* 13th Conference Samuel Griffith Society; accessed at <http://www.hrnicholls.com.au/Special/MooreSG2002.html>
- ²⁵ Williams G. *The Age* Melbourne 27 June 2005 <http://theage.com.au/articles/2005/06/26/1119724522645.html>
- ²⁶ Ibid
- ²⁷ <http://www.nytimes.com/2005/06/12/opinion/12rich.html?ex=1121918400&en=cdb2327fc1606144&ei=5087&nl=ep&emc=ep&rd=hcmcp?p=048y23048y4v4Baa0012000mhGvRhGzs>,
- ²⁸ <http://www.abc.net.au/am/content/2005/s1402864.htm>
- ²⁹ <http://www.theage.com.au/news/editorial/asios-raids-and-the-war-on-terror/2005/06/29/1119724697531.html>
- ³⁰ Nicholson A. The United Nations Convention on the Rights of the Child and the need for its incorporation into a Bill of Rights? To be published in *Family Court Review*; (Blackwell Publishing, Massachusetts and Hofstra University School of Law, New York, January 2006)
- ³¹ Williams G; *The Case for an Australian Bill of Rights; Freedom in the War on Terror*, UNSW Press 2004 pp16-17
- ³² O'Shane in *A Just Society*, Victoria Law Foundation.

- ³³ *Ah Hin Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273
- ³⁴ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
- ³⁵ Brennan, F.G. and Eichelbaum, T 'Key Issues in Judicial Administration', an Address to the 15th Annual Conference of the Australian Institute of Judicial Administration, Wellington, 20 September 1996, at 3-4.
- ³⁶ Nicholson, A. (1999) 'Legal Aid and A Fair Family Law Justice System', an Address to the Legal Aid Towards 2010 forum, Canberra, 21 April 1999, at 7.
- ³⁷ http://www.hcourt.gov.au/speeches/cj/cj_sta10oct.htm
- ³⁸ Nicholson A. Children and Young People: The Law and Human Rights, 16th Sir Richard Blackburn Oration,(Australian National University 2002) http://www.apo.org.au/linkboard/results.chtml?filename_num=01555,
- ³⁹ Davies G. The foundations of a fair justice system in 2010 — what the judiciary and the legal profession can do (Legal Aid Forum, Canberra 1999) <http://www.legalaid.canberra.net.au/html/forumpapersgeoffrey-davies.html>, *The Law Report* ABC Radio 15 July 1997, <http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr970715.htm>

Alastair Nicholson AO RFD QC

The Hon. Alastair Nicholson was the second Chief Justice of the Family Court of Australia, serving in that role from 1988 until 2004. Described by Justice Michael Kirby as “an outstanding servant of the Australian Commonwealth”, and by the head of the Australian Bar Association as someone who would wear his battles with successive Attorneys-General as a “badge of honour”, Chief Justice Nicholson has earned recognition and respect in the Australian community for his energy, intellectual calibre and moral courage and his willingness to engage with ordinary citizens beyond the legal fraternity in debates around issues of broad concern such as the rights of children. Justice Nicholson has also been President of the Australian Association of Family Lawyers and Conciliators, President of the Association of Family and Conciliation Courts, Judge Advocate General of the Australian Defence Force, and chair of the Second World Congress on Family Law and the Rights of Children. On his retirement an essay which appeared in the *Melbourne Age* observed "Nicholson has been a spectacular judge; perhaps appearing more extraordinary as the society around him has grown increasingly conservative". The valedictory speech delivered on his retirement by Justice Michael Kirby concluded

“Even in his own remarks at his farewell, he took the occasion to criticise a proposal to establish a new Family Tribunal, limiting the representation of participants by lawyers, as ‘a serious attack on civil liberties of Australians, smacking more of totalitarian regimes than of a democracy’. It was not his style to leave office otherwise than with all guns blazing. He had doubtless read that in Germany, in the 1930s, the judges, witnessing so many wrongs, only lifted their voices once and then solely in defence of their pension rights. Alastair Nicholson was never one to embrace that model of judicial restraint or anything like it.”

Alastair Nicholson has served as Queens Counsel and Judge of the Supreme Court of Victoria. He has been awarded the Order of Australia.