LAW AND POVERTY IN AUSTRALIA
40 YEARS AFTER THE SACKVILLE REPORT

THE LAW AND POVERTY REPORT
FORTY YEARS ON*

Friday, 16 October 2015

* **The Hon Ronald Sackville AO QC**
Acting Judge of Appeal
Supreme Court of New South Wales
(formerly Commissioner for Law and Poverty,
Australian Government Commission of Inquiry on Poverty, 1973-1975)

Assumptions and Policy Making

The work of all official policy making bodies is underpinned by assumptions, explicit or implicit. The assumptions are often ideological in character, but they can reflect political or community perceptions as to the nature of problems requiring investigation and report. Either way, they influence, if not dictate the outcome of inquiries undertaken by those bodies.

In the case of permanent statutory bodies, assumptions are built into the governing legislation. The functions of the Productivity Commission, for example, are skewed towards economic goals, such as promoting productivity, efficiency and international competitiveness.[1] The Human Rights Commission, by contrast, is obliged to ensure that its functions are performed with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.[2] While there is a slight degree of overlap in their functions,[3] it is not surprising that the Productivity Commission tends not to adopt a human rights perspective in its work and the Human Rights Commission tends not to regard international competitiveness or economic efficiency as its paramount objectives.

Some inquiries investigate past events as the basis that something has gone amiss and that remedial action is required. Sometimes the assumption is correct. For example, the terms of reference for the Royal Commission into Institutional Responses to Child Sexual Abuse rightly assume that over many years there have been unacceptable levels of child sexual abuse in Australia and that the responses of many institutions to abuse of children in their care has been woefully inadequate.[4]

On occasion, however, the perceptions underlying the inquiry turn out to be quite wrong. The Royal Commission into Aboriginal Deaths in Custody was established in

---

[1] *Productivity Commission Act 1998* (Cth), ss 6, 8.

[2] *Australian Human Rights Commission Act 1986* (Cth), s 10A. The specific functions of the Commission are set out in ss 11, 31. None refers to economic concepts. The Commission is, however, obliged to perform its own functions "efficiently": s 10A(1)(b).

[3] The *Productivity Commission Act 1998* (Cth) requires the Commission, among many other matters, to have regard to the need for Australia to meet its international obligations: s 8(1)(j). For an example of its approach to the legal system, see Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014).

[4] The Royal Commission was established by Letters Patent dated 11 January 2013. The terms of reference can be viewed at http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference.

October 1987 as a response to eleven Aboriginal deaths in custody in the first half of the year and five more in the six weeks between late June and early August 1987.[5] The very title of the Royal Commission reflected the almost universal assumption, later falsified by the Royal Commission itself, that Aboriginal prisoners died in custody at a much higher rate than non-Indigenous prisoners. In fact the proportion of Aboriginal prisoners dying while in custody was no greater than the proportion of non-Aboriginal prisoners dying in custody. The reasons for the apparent disparity turned out to be the gross over representation of Aboriginal people in the prison population.[6]

The Establishment of the Poverty Commission

Like other policy making bodies, the establishment and subsequent expansion of the Australian Government Commission of Inquiry into Poverty (the **Poverty Commission**) were underpinned by assumptions. The unusual feature of the Poverty Commission, however was that its terms of reference, as framed by successive governments, incorporated different views as to the nature of poverty in Australia and the means by which its effects could be ameliorated. The ideological conflict became apparent as soon as the McMahon Government announced in the dying months of the 23 year post-war conservative ascendancy in Australia[7] that it had decided to set up an "Enquiry into Poverty".[8]

The decision to establish the Poverty Commission was largely a response to agitation from church representatives and peak welfare bodies such as the Australian Council of Social Service seeking a review of Australia's welfare system. These organisations expressed particular concern at what they saw as the exclusion of poor and disadvantaged groups from the general economic prosperity by the

[5] H Wootten, "Reflections on the 20th Anniversary of the Royal Commission into Aboriginal Deaths in Custody" (2011) 7 Indigenous Law Bulletin 3, 3.
[6] Royal Commission into Aboriginal Deaths in Custody, *National Report* (AGPS, 1991), [1.3.1]-[1.3.3].
[7] Robert Menzies became Prime Minister after the defeat of the Chifley Labor Government on 10 December 1949. After Menzies retired in 1965, the Coalition Government was led, successively, by Harold Hold, John Gorton and William McMahon (the Country Party leader, John McEwen was Prime Minister for a short time after Holt's death in 1967). The McMahon Government was defeated by the Australian Labor Party under EG Whitlam in the election of 2 December 1972. The Whitlam government was in office until its dismissal by the Governor-General on 11 November 1975. The *Law and Poverty Report* was presented to the Prime Minister on 20 October 1975.
[8] The name of the Inquiry was subsequently changed to the Australian Government Commission of Inquiry into Poverty. I use "Poverty Commission" for consistency.

nation. The time was thought to be propitious for an inquiry not only because of the McMahon Government's fragile hold on office, but because a prolonged period of largely uninterrupted growth "fostered a general air of optimism about the scope for innovation and improvement".[9]

The Prime Minister formally announced the terms of reference for the Poverty Commission on 29 August 1972. He also announced that Professor RF Henderson, the Director of the Institute of Applied Economic and Social Research at the University of Melbourne, would be the sole Commissioner. Professor Henderson, who has been described as "the founding father of Australian poverty studies" and the putative "Australian Beveridge"[10] had undertaken pioneering work identifying the extent of poverty in Australia.[11] His research had received wide publicity and had made a major contribution to increasing public and political awareness of the dimensions of poverty in Australia and of the deficiencies of the social security system (as it was known) in alleviating poverty.

Professor Henderson's approach prior to his appointment was to attempt to measure the incidence of poverty by reference to a standard based on the income of particular categories of households. On this rather straightforward approach, poverty is essentially the product of households having insufficient income to meet their basic needs. The original terms of reference for the Poverty Commission reflected this understanding:[12]

> "To investigate:
>
> (a) the extent of poverty in Australia, including changes in its level;
> (b) the incidence of poverty in Australia upon special categories of persons or localities;
> (c) factors which cause poverty in Australia;
> (d) the ways in which Commonwealth and State Governments, local

[9] A Herscovitch and D Stanton, "History of Social Security in Australia" (2008) 80 *Family Matters* 51, 55, cited in S Regan, *Australia's Welfare System: A Review of Reviews 1941-2013* (Crawford School of Public Policy, ANU College of Asia and the Pacific, June 2014), 19.

[10] P Saunders, *Defining Poverty and Identifying the Poor: Reflections on the Australian Experience* (Social Policy Research Centre, SPRC Discussion paper No 84, June 1998), 4. The reference to "Beveridge" is to the Beveridge Report, *Social Insurance and Allied Services* (Cmd 6404, HMSO, 1942).

[11] See, for example, RF Henderson, A Harcourt and RJA Harper, *People in Poverty: A Melbourne Survey* (Cheshire for the Institute of Applied Economic and Social Research, 1970).

[12] The terms of reference are reproduced in Australian Government Commission of Inquiry into Poverty, *Poverty in Australia* (First Main Report, April 1975) (**Poverty in Australia**), vii.

government bodies and other bodies and persons currently assist the alleviation of poverty in Australia; the extent and effectiveness of existing measures and services; and differences between and within States in the efforts of State Government, local government bodies and other bodies and persons to alleviate aspects of poverty in Australia;

(e) any desirable changes that would contribute to the reduction of poverty in Australia; and

(f) any associated matters relevant to the general objects of the Inquiry."

This language assumed that poverty was a measurable phenomenon and that the incidence of poverty would fluctuate depending on economic conditions and presumably the structure of government financial income support programs. The terms of reference also assumed that "special categories of persons and localities" were susceptible to poverty and that it was possible to identify the categories particularly at risk.

The Poverty Commission's original terms of reference did not necessarily limit Professor Henderson to proposing more generous income maintenance programs for vulnerable income units. Nonetheless the language implied, consistently with Professor Henderson's previous studies, that strategies for the alleviation of poverty should concentrate on improving income support for those in poverty for the groups most likely to be living in poverty. It was the implicit emphasis on income support programs as the means of alleviating that contributed to some community organisations expressing disappointment that the Poverty Commission would concentrate on the "narrow question of poverty", rather than undertake a "full national inquiry into social welfare".[13] While welcoming the appointment of Professor Henderson as a Commissioner, the critics suggested that a broader approach would provide an opportunity to examine priorities, rethink goals and values and rationalise both the allocation of resources to and the delivery of services by welfare programs.

The critics did not underestimate either the difficulty or importance of the task confronting Professor Henderson. Measuring the extent of poverty and formulating workable proposals for income maintenance programs presented a range of complex definitional and methodological issues. To measure the extent of poverty by

[13] *Sydney Morning Herald*, 31 August 1972, p 8.

reference to household income it was necessary to define "income" and to determine the period over which household income should be assessed. It was also necessary to identify "income units" and to adjust the "poverty line" for each discrete income unit by reference to such variables as employment status, housing arrangements, age and the number of persons in the household.[14] In addition, the process required the collection and analysis of vast quantities of data, much of which was not readily available, without the assistance of sophisticated computer technology.

The contribution made by Professor Henderson to an appreciation of the nature and extent of poverty in Australia is demonstrated by the use subsequently made of the Henderson "poverty lines". From the date *Poverty in Australia* was presented to the Whitlam Government, the Institute of Applied Economic and Social Research updated the poverty lines on a quarterly basis, by reference to changes in average incomes. Thus the poverty lines identified in *Poverty in Australia* for the various income units provided a relative measure of poverty and a reference point for policy debates long after Professor Henderson had reported.[15] The debate about the adequacy of the Poverty Commission's original terms of reference was therefore not directed to the desirability of formulating standards by which to assess the extent and incidence of poverty. Nor was it a criticism of the need to improve income support for vulnerable groups and individuals. It was essentially an argument about the nature of poverty and the need to develop a range of strategies to reduce the hardship and powerlessness associated with poverty.

To some extent the debate in 1972 about the scope of the Poverty Commission anticipated contemporary critics who argue that poverty studies which concentrate on "a single dimension of disadvantage"[16] deal only with part of the problem. Some critics unkindly, tend to characterise an approach whereby a poverty line is defined relative to means or median household disposable income as "too narrow and

---

[14] *Poverty in Australia*, esp ch 3; R Wilkins, "The Changing Composition of Poverty in Australia: 1982 to 2004" (2007) 42 *Aust J Soc Issues* 481, 484.

[15] See, for example, D Johnson, "The Calculation and Use of Poverty Lines in Australia" [1987] *Australian Economic Review* 45. The Senate Community Affairs References Committee in its report, *A Hand Up Not a Hand Out: Renewing the Fight Against Poverty* (2004) (**Renewing the Fight**) referred to the Henderson poverty line as one of the ways to measure poverty nearly 30 years after. *Poverty in Australia* was completed: *Renewing the Fight*, [2.18]-[2.29], [3.4], [3.7].

[16] B Headley, *A Framework for Assessing Poverty, Disadvantage and Law Capabilities in Australia* (Melbourne Institute Report No 6, May 2006), 5.

simplistic".[17] They assert that "socio-economic disadvantage [is] multi-dimensional" and that the extent, nature and causes of poverty therefore cannot be understood merely by examining the cash income of households or income units. Accordingly they may prefer an approach which concentrates on "capability and functioning", on the basis that unless a person has reasonable levels of health, education, material resources and social network, his or her range of choice will be impoverished.[18]

Professor Saunders identifies several "alternative paradigms" that have emerged, "[r]eflecting the limitations of both the theory and practicalities of income poverty".[19] The three alternatives – deprivation, capability and social exclusion – emphasise different aspects of poverty and measures the phenomenon in different ways. Social exclusion, for example:[20]

> "reflects a combination of different inter-related factors, and focuses on causes (low skills), outcomes (high crime) and processes (family breakdown), rather than the level of economic resources at a particular time".

Professor Saunders considers social exclusion to be problematic because it identifies what can happen when there is exclusion, not necessarily what actually happens.[21] Nonetheless, the Senate Committee, reporting in 2004, accepted that poverty could be described as:[22]

> "a multidimensional concept that goes beyond just material deprivation; it also includes exclusion from social networks and isolation from community life".

The Scope of the Law and Poverty Inquiry

Terms of Reference

The defeat of the McMahon Government in the election of December 1972 more or less settled the debate about the Poverty Commission's terms of reference since the

---

[17] R Scutella, R Wilkins and W Kostenko, *Estimates of Poverty and Social Exclusion in Australia* (Melbourne Institute of Applied Economic and Social Research, Working Paper 26/09, 2009).
[18] B Headley, note 16 above, 9-10 (drawing an Armatya Sen's concept of "substantive freedom of choice": A Sen, *Development and Freedom* (Anchor Books, 1999)).
[19] P Saunders, *The Poverty Wars* (University of New South Wales Press, 2005) (**The Poverty Wars**), 62-82.
[20] *The Poverty Wars*, 73
[21] *The Poverty Wars*, 73.
[22] *Renewing the Fight*, [1.9].

Whitlam Government came to office with a very much more ambitious social policy agenda than its predecessor. The new Government announced early in its term in office that the scope of the Poverty Commission would be "significantly broadened" by the appointment of "four more experts to enquire into particular facets of poverty in the Australian community".[23] The new terms of reference would "offer the new appointees, and Professor Henderson … great scope for a comprehensive, far reaching, and timely report into poverty in Australia". By this time, a number of other inquiries had been established into aspects of the welfare and financial systems, reflecting the new Government's interest in social reform.[24]

One of the so-called specialist areas related to Law and Poverty. The terms of reference for this aspect of the Poverty Commission's work were as follows:[25]

> "Investigate the effect of the law and the legal system upon the poor and other disadvantaged groups and individuals in the Australian community and in particular examine:
>
> (i) Those areas of substantive law, whether Federal or State, that are of special significance to the poor.
>
> (ii) The delivery of legal services to the poor, including:
>
> (a) the nature and scope of existing legal aid and referral services, whether administered through the legal profession or not, and their effectiveness in meeting the perceived needs of the poor;
>
> (b) barriers to the effective use of legal aid services and methods of overcoming those barriers; and
>
> (c) alternative forms of legal advice and assistance including those offered in connection with non-legal services.
>
> (iii) The administration of the system of criminal and civil justice in so far as it affects the poor and other vulnerable groups such as

[23] The announcement was made by a Press Release by the Prime Minister on 7 March 1973.
[24] The inquiries include the Committee of Inquiry into a National Rehabilitation and Compensation Scheme in Australia (the Woodhouse Committee), the Committee of Inquiry into National Superannuation (the Hancock Committee) and the Taxation Review Committee (Asprey Committee). See National Committee of Inquiry, *Compensation and Rehabilitation in Australia* (Final Report, AGPS, 1974); National Superannuation Committee of Inquiry; *A National Superannuation Scheme for Australia* (Final Report, AGPS, 1976); Commonwealth Taxation Review Committee, *Final Report* (AGPS, 1975).
[25] R Sackville, *Law and Poverty in Australia* (Australian Government Commission of Inquiry into Poverty, Second Main Report, October 1975) (**Law and Poverty Report**), ix. The terms of reference for the other three Commissioners related to educational and cultural disadvantage (Dr RT Fitzgerald); social/medical aspects of poverty (Rev GS Martin) and selected economic issues within the original terms of reference (Professor RC Gates): see *Poverty in Australia*, App A.

migrants and children appearing in Children's Courts.

(iv) The legal rights of recipients of social welfare assistance.

(v) Any associated matters relevant to the above and to the general objectives of the Inquiry."

These terms of reference incorporated their own assumptions. Most importantly, they assumed that "the law and the legal system" could affect "the poor and other disadvantaged groups". Unlike the original terms of reference, this language contemplated that the categories of "the poor" and "disadvantaged groups", although perhaps overlapping, were by no means identical. Thus disadvantage was not necessarily seen as solely a function of low income but could be the product of many other factors such as language difficulties, low levels of education, inadequate information and geographic or social isolation.

The language also contemplated that the law and the legal system could have both a beneficial and an adverse impact on the poor and disadvantaged. A second key assumption, in other words, was that although the law and the legal system could inflict hardship on the poor and disadvantaged, they might depend on the circumstances, also alleviate hardship and even contribute to allowing people to escape poverty.

A third important assumption was that many areas of law of particular importance to disadvantaged people were governed by State rather than Commonwealth law. The terms of reference addressed the obvious difficulty facing a Commonwealth inquiry by adopting a somewhat robust attitude towards constitutional niceties. Consistent with the Whitlam Government's bold if occasionally heedless approach to reform, the terms of reference allowed more or less free rein to the Law and Poverty Inquiry to explore areas of substantive law of "special significance" to the poor, whether the law happened to be State or Commonwealth. Since the reach of Commonwealth law in 1973 was considerably more limited than it has become four decades later, the terms of reference removed a potentially significant constraint on the Inquiry's recommendations. Whether the States, which had not asked for the *Law and Poverty Report* to be prepared, were willing to consider the Inquiry's recommendations was a separate question.

The Law and Poverty Inquiry's Approach

The *Law and Poverty Report* did not analyse in depth the precise language used in the terms of reference or identify the assumptions incorporated in its language. But the contents of the *Report* clearly accepted the assumptions as the starting point for an analysis of the relationship between law and poverty. The first chapter of the *Report* specifically highlighted the dual significance of the legal system for poor and disadvantaged people.

The *Report* found that the legal system was biased against poor and disadvantaged people at several levels. The substantive law not only failed to protect vulnerable people against injustice and exploitation, but often actually exacerbated the hardship associated with poverty. An extreme example was the law of vagrancy, which had its origins in fourteenth century English statutes designed to confine and control a displaced labouring class.[26] This vestige of medieval times effectively penalised extreme poverty and forms of mental illness and was an obvious candidate for reform. In some States, debtors could still be imprisoned for failing to comply with court orders to pay their civil debts, sometimes without being afforded procedural fairness. This, too, was an outdated relic of English law, in this case notorious nineteenth century debt enforcement procedures.[27]

Even where the law appeared to be relatively neutral in its application to poor and disadvantaged groups, it rested on principles capable of working great hardship to people unable to understand legal documents or lacking any bargaining power. The law's traditional laissez-faire approach to contractual relationships continued to influence transactions and legal relationships of particular significance to those least equipped to protect themselves in a market economy. For example, research reported in *Poverty in Australia* demonstrated, not surprisingly, that the poorest groups in society were likely to rent their accommodation.[28] About two fifths of income units classified as "poor" rented accommodation in the private sector. The law of landlord and tenant, including residential tenancies law (to the extent it was regarded as a separate area of law), continued to be heavily influenced by principles

[26] *Law and Poverty Report*, 247.
[27] *Law and Poverty Report*, 134-138.
[28] *Law and Poverty Report*, 57-58.

derived from nineteenth century notions of freedom of contract. In the absence of statutory regulation, disadvantaged people dependent on rental accommodation in the private sector had little protection against unscrupulous or avaricious landlords or against simple neglect.

The *Law and Poverty Report* pointed out that many poor people were shut out of the consumer credit market altogether.[29] Those who were able to obtain or forced to seek credit found themselves in largely unregulated territory.[30] As with residential leases, the failure of the legal system to regulate the provision of consumer credit and to provide adequate relief for improvident transactions, created boundless opportunities for the infliction of hardship and injustice of vulnerable people.

Whatever the deficiencies of the substantive law, the *Law and Poverty Report* was adamant that

> "[b]y far the most significant bias of the legal system against poor people has been its failure to provide legal advice and representation to many who require that assistance."[31]

Legal aid services, particularly in relation to advice and civil litigation, were in an embryonic state. People who lacked the resources to obtain advice and representation were denied the protection accorded as a matter of course to more powerful or affluent interests. This was true whether the disadvantage flowed from lack of income, inability to speak English, unfamiliarity with the system, ignorance or other causes. The *Report* made detailed recommendations for the expansion of civil legal aid services, including measures designed to reduce, if not eliminate, the physical and psychological barriers to poor people gaining access to services they required.[32] While the *Report* did not use the now much over-used phrase "access to

[29] Then as now: see T Wilson, "Consumer Credit Regulation and Rights-Based Social Justice: Addressing Financial Exclusion and Meeting the Credit Needs of Low-Income Australians" (2012) 35 UNSWLJ 501.
[30] *Law and Poverty Report*, ch 4.
[31] *Law and Poverty Report*, 3.
[32] *Law and Poverty Report,* 32-35.

justice",[33] the proposals fitted comfortably within that rubric.

While much of the *Law and Poverty Report* was directed to removing or ameliorating the biases of the legal system against poor and disadvantaged people, it went further. It argued that if the legal system was

> "to secure fully the goal of equality before the law it must become more responsive to the needs of poor people **and** a **positive force for the elimination of poverty** … [T]he law is capable of providing an important impetus for social and economic change. Not only is reform of the law often essential to overcome obvious economic inequalities and injustice in society, but the reform **can markedly influence community attitudes and behaviour**".[34] (Emphasis added.)

The *Report* supported this claim by referring to decisions of the Supreme Court of the United States requiring the desegregation of public schools[35] and the changes in attitudes towards family breakdown and divorce brought about by the introduction of no-fault divorce by the (then) recently enacted *Family Law Act 1975* (Cth).

The *Report's* endorsement of the legal system as a potential mechanism for redressing inequality attributed an important role to courts. It accepted that the potential for bringing about legal and social change through the judicial process was more limited than in the United States, given that the Australian Constitution lacked a Bill of Rights and its few express guarantees had generally received a narrow construction. Even so, the Report envisaged that litigation could achieve significant reforms if poor and disadvantaged people could present their claims in much the same way as more powerful commercial and private interests.[36]

The *Report* argued that:[37]

> "One of the basic choices to be made in establishing or reorganising a system of legal aid is to determine whether the services provided should be confined solely to meeting the needs of individual clients or should extend to the use of the legal process to attempt to change the political, economic and social status of the poor. In

[33] For a critique of the assumptions underlying the expression "access to justice", see R Sackville, "Some Thoughts on Access to Justice" (2004) 2 *New Zealand Journal of Public and International Law* 85.
[34] *Law and Poverty Report*, 2.
[35] Notably in *Brown v Board of Education* 347 US 483 (1954).
[36] *Law and Poverty Report*, 13.
[37] *Law and Poverty Report,* 14.

> Australia the more limited approach has been taken, but if the law is to play a significant role in improving the position of large numbers of disadvantaged people, the broader view should be accepted. This approach involves the use of such techniques as test cases brought to develop principles in areas not previously judicially explored, or … to stimulate changes in legislation or administrative practices. In addition legal aid agencies should be prepared to press for the introduction of reforms in the interests of disadvantaged groups, by the formation and presentation of draft legislation and other proposals for change."

It followed from this analysis that an important function of legal aid services was "to stimulate legal reforms in the interests of poor and disadvantaged groups in the community".[38]

The optimism displayed in the *Law and Poverty Report* about the potential for Australian courts to instigate social changes in the interests of poor and disadvantaged people owed much to the experience in the United States. Despite the disclaimers in the *Report*, it was clearly influenced by the dramatic changes in the legal and social structure of the United States that seemed to have been brought about by decisions of the Supreme Court. The Supreme Court in a few years had progressed from refusing to enforce race-based restrictive covenants over land[39] to abandoning the disingenuous "separate but equal" doctrine and declaring unlawful the era of state sanctioned segregation in public schools.[40] The Court had invalidated race-based gerrymandering of electoral districts by requiring States to adhere to the principle of "One person, one vote".[41] In a decision that highlighted the lack of legal protection for social security beneficiaries in Australia,[42] the Supreme Court held in 1970 that welfare recipients were constitutionally entitled to procedural due process before the State could terminate their public assistance payments.[43]

Of course, as the experience in the United States during the New Deal demonstrated, the Supreme Court had not always deployed its authority as the interpreter of the United States Constitution authority to further liberal ideas. Nor

---

[38] *Law and Poverty Report,* 15.
[39] *Shelley v Kraemer* 334 US 1 (1948) (relying on the Equal Protection clause of the Fourteenth Amendment).
[40] *Brown v Board of Education* 347 US 583 (1954). The decision had been preceded by *Sweatt v Painter* 339 US 629 (1959), where the Supreme Court found that educational opportunities for black and white law students in Texas were unequal. The Court held that the Fourteenth Amendment required a black law student to be admitted to the University of Texas Law School.
[41] *Baker v Carr* 396 US 186 (1962); *Reynolds v Sims* 377 US 533 (1964).
[42] *Law and Poverty Report*, 172 n 30.
[43] *Goldberg v Kelly* 397 US 254 (1970).

would it always do so in the future. But in the prevailing climate of opinion in the 1960s and early 1970s, the prospect of a Supreme Court dominated by conservatives granting constitutional protection to rights of dubious social value such as the right to gun ownership[44] and the right of the rich to make unlimited political contributions[45] seemed remote. The role of courts in providing an impetus for social change appeared to be a promising avenue to explore.

The Limits of Judicial Reform

Some critics of the *Law and Poverty Report* cavilled with the idea that expanded legal aid services and readier access to the courts by poor and disadvantaged groups would achieve significant changes in social attitudes and in public police. A Note in the *Modern Law Review*,[46] for example, drew attention to commentaries that cast doubt on the ability of courts to bring about significant improvements in the relative position of disadvantaged groups.

The sceptics included Marc Galanter in a well-known 1974 article, which explained that:[47]

> "the basic architecture of the legal system creates and limits the possibilities of using the system as a means of redistributive (that is, systematically equalizing) change."

Galanter emphasised the advantages enjoyed by "repeat players", who are experienced in litigation, and "one-shotters" who are not. The large volume litigator can use many strategies to ensure that the judicial process works to its advantage. These include selecting the cases to defend or pursue (and settling others), utilising procedural mechanisms to delay and deter opponents, exploiting familiarity with the legal system to maximise tactical advantages and deploying substantial legal and financial resources where required to ward off potentially damaging claims or defences.

---

[44] *District of Columbia v Heller* 554 US 570 (2008).
[45] *McCutcheon v Federal Election Commission* 134 S Ct 1434 (2014); compare *McCloy v New South Wales* [2015] HCA 134.
[46] Note, "Australian Government Commission of Inquiry into Poverty: Law and Poverty Series: Reports" (1977) 40 Modern L Rev 201, 206 (Professor M Partington).
[47] M Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law & Soc Rev 95, 95.

Writing at much the same time as Galanter, Stuart Scheingold critically assessed what he described as the "myth of rights" in the United States and argued that

> "a rearrangement of legal rights and obligations … does not guarantee behaviour in the real world that is consistent with the rearrangement."[48]

Scheingold pointed out that the Supreme Court's desegregation decisions were not self-executing. The decisions had not of themselves produced "racial justice" and the courts had been unable to:

> "take a leading role in positing goals consistent with rooting out those elements of racism which are buried deep in our social fabric."[49]

Similarly Scheingold argued that although decisions entitling welfare recipients to procedural fairness were important in limiting the exercise of arbitrary administrative discretion, they did not guarantee that welfare benefits would be adequate for a decent standard of living.[50]

Observations of the kind made by Galanter and Scheingold provide a counterweight to the assumption that more equal access to the judicial system, even in a jurisdiction with robust constitutional protection of civil rights, will necessarily produce significant changes in social attitudes or practices or substantial improvements in the material well-being of poor people. As their comments imply, even judicial decisions of great importance are often as much the product of social change as they are instigators of social change. Thus by 1954, when *Brown v Board of Education* was decided,

> "a variety of economic, social, demographic, ideological and international factors had contributed to a fundamental change in race relations."[51]

Accordingly, the decision, important as it was, may have been much less of a driver

---

[48] Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Yale University Press, 1974) 117.

[49] *Id*, 104. According to Professor Klarman, the Supreme Court "withdrew almost entirely from the school desegregation arena for nearly a decade" after *Brown v Board of Education*. When it returned, the Court was following, not leading opinion: Michael K Klarman, *From Jim Crow to Civil Rights*: *The Supreme Court and the Struggle for Racial Equality* (Oxford University Press, 2004), 383.

[50] *Id*, 106.

[51] See R Sackville, "Courts and Social Change" (2005) 33 Fed L Rev 373, 386, referring to Michael J Klarman, note 49 above, 444-446..

of change in attitudes towards race in the United States than is conventionally thought (and much less than the *Law and Poverty Report* attributed to the decision).

In Australia, few decisions have had greater legal and social significance than the High Court's recognition of common law native title in *Mabo v Queensland (No 2)*.[52] On any view, the *Mabo* decision represented a dramatic break from two centuries of refusal to acknowledge any common law claim to land by indigenous people. Yet the High Court's decision came at a time when: [53]

> "the Australian people had become much more aware of the historic injustices inflicted on indigenous people … and much more sympathetic to their aspirations."

Not surprisingly, a decision of such momentous significance generated controversy. But the generally sympathetic reception received and the swift enactment of the *Native Title Act 1993* (Cth) incorporating the basic principles articulated by the High Court,[54] suggests that the decision was at least consistent with mainstream opinion of the time.

More recently, decisions concerning same sex marriage provide examples of courts, while appearing to lead changes in social attitudes, are actually responding to shifts in public attitudes to social issues. The Supreme Court of the United States as recently as 1986 upheld the constitutionality of a State law criminalising homosexual acts.[55] Twenty nine years later a majority of the Supreme Court held that the due process and equal protection clauses of the Fourteenth Amendment require a State to licence a marriage between same sex couples and to recognise a same sex marriage performed in another State.[56] The majority was prepared to accept that it "demeans gays and lesbians for the State to lock them out of a contractual institution of the Nation's society".[57] The inconsistency of limiting marriage to heterosexual

---

[52] (1992) 175 CLR 1.
[53] R Sackville, note 51 above, 388.
[54] See B Edgeworth, "The Mabo 'Vibe' and its Many Resonances in Australian Property Law" in S Brennan, M Davis, B Edgeworth and L Terrill, *Native Title from Mabo to Akiba*: *A Vehicle for Change and Empowerment?* (The Federation Press, 2015), 95-97.
[55] *Bowers v Hardwick* 478 US 186 (1986), overruled in *Lawrence v Texas* 539 US 558 (2003).
[56] *Oberfegell v Hodges* 135 S Ct 2584 (2015).
[57] *Oberfegell v Hodges*, 135 S Ct 2584, at 2602.

couples with the fundamental rights to marry was "**now** manifest".[58]

In 2013, the High Court of Australia held that the Commonwealth Parliament's power to make laws with respect to "Marriage"[59] extended to recognising a same sex union as a marriage and defining the mutual rights and obligations of the partner to the marriage.[60] Of course the High Court was deciding that the Commonwealth Parliament was bound to legislate for same sex marriage; its decision was only concerned with the scope of federal legislative power. Not surprisingly, having regard to the High Court's approach to constitutional adjudication, the Court did not expressly advert to changes in social attitudes towards marriage. But it is difficult to envisage that it would have been prepared to interpret the marriage power in this way at a time when State laws imposed criminal sanctions on homosexual acts.

A Five Year Assessment

Writing five years after presentation of the *Law and Poverty Report*, I suggested that the expansive approach taken in the Report to the role of the law in alleviating poverty reflected the mood of the times.[61] The Whitlam Government had tested the Constitution to its (then) limits by introducing novel and far-reaching legislation that transformed the legal landscape. The legislative reforms covered areas as diverse as racial discrimination, consumer protection, standards of commercial conduct, family law and merits review of administrative decisions.[62] In addition, the Commonwealth Government had accepted that it had a significant part to play in funding legal aid services and, to that end, established the Australian Legal Aid Office by executive action. During its tumultuous three year term in office, which outlasted the Law and Poverty Inquiry by a mere three weeks, ambitious legal and social reforms had been placed squarely on the nation's political agenda.

---

[58] *Ibid*.
[59] Constitution, s 51(xxi).
[60] *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441. The issue arose because the Commonwealth sought a declaration that ACT legislation defining "marriage" to include same sex unions was inconsistent with the definition of marriage in the *Marriage Act 1961* (Cth) and was therefore invalid. The Court upheld the Commonwealth's contention.
[61] R Sackville, "Law and Poverty in Australia – Five Years Later" (The Second Poverty Inquiry: Conference Proceedings, 22-23 September 1980).
[62] *Racial Discrimination Act 1975* (Cth); *Trade Practices Act 1974* (Cth); *Family Law Act 1975* (Cth); *Administrative Appeals Tribunal Act 1975* (Cth).

Yet only five years after presentation of the *Report*, a great deal had changed. The era of full employment and stable economic conditions appeared to be over. Both inflation and unemployment seemed to be endemic. As Professor Henderson had anticipated,[63] a society afflicted by economic stagnation and uncertainty is much less willing to invest resources in redistributive programs of any kind. It is one thing for most people to accept that a portion of the seemingly endless growth in national income should be diverted to redress disadvantage; it is another for most people to accept that a redistribution should occur at the expense of their own living standards.

While retreating a little from the spirit of optimism that pervaded the *Law and Poverty Report*, I detected modest progress on the path to reform. Some jurisdictions had introduced statutory modifications to residential tenancy laws; some had repealed vagrancy laws had been repealed, and at least one jurisdiction had overhauled civil debt recovery procedures. Legal aid was in a state of flux, but more resources were being made available for civil legal aid and community legal centres. Moves were afoot to establish independent appeal tribunals to allow people dependent on social welfare to challenge adverse decisions. Thus it was not unduly optimistic to suggest that:

> "the legal system had shown itself capable of responding, however reluctantly and inadequately, as the deficiencies of the substantive law and of legal aid services became apparent".[64]

Forty Years On

Forty years after the *Law and Poverty Report*, two things are clear. The first is that a substantial proportion of the Australian population continues to live in poverty. There are many different definitions of poverty and at least an equivalent number of methodologies for measuring the extent of poverty. But on any view, the number of Australians living in poverty is very large. In 2004, the Senate Community References Committee estimated[65] that between 5 per cent and 22.6 per cent of the

[63] *Poverty in Australia*, viii.
[64] R Sackville, note 61 above, 31.
[65] *Renewing the Fight*, [3.7].

population lived in poverty, depending on which methodology was employed.[66] The Australian Council of Social Service estimated that in 2012 about 2.55 million people (13.9 per cent of the total) including 603,000 on children (17.7 per cent of all children), lived in households below a poverty line set at 50 per cent median income (adjusted for housing costs).[67]

Secondly, despite social policy commentators seeing poverty as a mere complex phenomenon than simply a lack of adequate income, the literature contains remarkably few references to the role of the law in exacerbating or ameliorating poverty. Studies seem to pay little attention to the legal system, either as a source of hardship or "exclusion" for poor people or as a potential mechanism for removing people from poverty. Professor Saunders, a leading scholar in poverty studies, makes no mention of the law in his work on *The Poverty Wars*.[68] The Senate Committee, in its 2004 report of over 500 pages and 95 recommendations, made only three recommendations that can fairly be described as law reform proposals.[69] It seems that the law is regarded by policy makers and social policy commentators as irrelevant or at best peripheral to the disadvantages and hardship associated with poverty.

Does this mean that the Law and Poverty Inquiry failed? Certainly if the criterion of success is the elimination of poverty, the Inquiry was a failure. Even if the objective was a significant reduction in the level of poverty in Australia (however defined), it is very doubtful whether the recommendations, of themselves, could have achieved that objective (assuming their implementation in full). The continuing high levels of poverty suggest that law reform is of relatively minor significance in reducing poverty when compared with other strategies addressing directly the ability of people to obtain the necessities of life and to participate in the life of the community. These

[66] The lower figure was an estimate by the Centre for Independent Studies of the proportion living in "chronic poverty". The higher figure was based on the Henderson poverty line, as adjusted in 1999.
[67] Australian Council of Social Service, *Poverty in Australia 2014* (Australian Council of Social Service, 2014), 9. ACOSS estimated that the proportion of the population living in poverty had increased from 13 per cent to 13.9 per cent over the previous two years).
[68] See note 19 above.
[69] Recommendation 19 of *Renewing the Fight* proposes that the Commonwealth, in co-operation with the States, should develop national guidelines in relation to the operation of tenancy databases. Recommendation 35 suggests amending the *Consumer Credit Code* to impose additional requirements on fringe credit providers who supply high cost loans. Recommendation 67 says that the Commonwealth should provide additional (unspecified) finding for Aboriginal and Torres Strait Islander Legal Services.

strategies transfers of income and benefits through the taxation and welfare systems; improvements to universal health care; expanded educational opportunities; and policies that lead to lower unemployment rates and higher rates of workforce participation.

Viewed in retrospect, the *Law and Poverty Report* overstated the capacity of legal principles and the legal system (including the courts) to combat poverty. Some of the language in the *Report* was perhaps calculated to create unrealistic expectations as to the potential for law reform both to change social attitudes and to reduce levels of poverty in the community. In particular, the *Report* overstated the ability of the courts, whether through test cases brought on behalf of disadvantaged people or otherwise, to ameliorate the hardship visited on sections of the Australian community by inadequate income, substandard accommodation, poor health, limited educational opportunities, restricted employment opportunities and other manifestations of disadvantage. The correction of injustice is one thing; the elimination or amelioration of poverty is another.

Mabo (No 2) illustrates the point. It is hardly possible to conceive of a more important judicial decision. The High Court's decision did more than correct, albeit belatedly and incompletely, an historic injustice. It also transformed Australia's established system of land tenure and, after much disputation, led to the recognition of some form of native title rights and interests over large swaths of the Australian continent.[70] Yet it is difficult to contend that this remarkable transformation has eliminated or even substantially reduced overall levels of poverty in the general indigenous community. While no doubt some communities have benefited considerably from the recognition of native title, the conventional indicia of poverty (such as income, employment status, life expectancy, health, levels of education and rates of imprisonment) suggest that the extent of poverty among aboriginal

[70] By 2013, about 2.5 million square kilometres of Australia's land mass, or about 33 per cent of the total, was subject either to some form of native title or land rights. (About eight per cent of the continent was held under some form of land rights regime prior to *Mabo (No 2)*. See J Altman and F Markham, "Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities" in *Native Title*, 126-135. For further details see Australian Law Reform Commission, *Connect to Country: Review of the Native Title Act 1993* (Cth) (ALRC Report 126, 2015), [3.15]-[3.18].

communities remains very high.[71]

It is, however, legitimate to view the work of Law and Poverty Inquiry through a different prism. The core concerns of the *Report* were to limit the injustice inflicted by the law on disadvantaged people and to make the legal system more responsive to their needs and interests. To this end the *Report* recommended measures designed to increase the opportunities for disadvantaged people to gain access to legal advice and representation in order to enforce their rights and defend their interests. It was for the same reason that the *Report* proposed reforms to redress the power imbalances between governments and commercial interests on the one hand, and disadvantaged people on the other. The fundamental theme of the *Law and Poverty Report* can therefore be seen to be the alleviation of injustice, rather than simply the alleviation of poverty.[72] The two objectives are related but they do not cover the same ground.

The *Report's* analysis of the inadequacies of the legal system and its recommendations for reform played a part – if only a modest part – in bringing about the changes necessary to address the most serious injustices experienced by disadvantaged people. Over time, residential tenancies law, consumer credit regulation, debt collection and enforcement procedures and the legal treatment of homelessness and public drunkenness have been overhauled. More systematic efforts are made by courts and other agencies to assist non-English speaking people and others who are ill-equipped to navigate the court and tribunal system. The comprehensive reforms of Australian administrative law dating from the 1970s now provide for independent review of administrative decisions adversely affecting the entitlements of social welfare beneficiaries.

The provision of legal aid is beset by disagreement as to the levels of funding that should be provided by governments and the division of responsibility between the Commonwealth and the States. But there is now virtually universal recognition of the principle that governments should fund legal aid, not only in criminal prosecutions

[71] The Steering Committee for the Review of Government Service Provisions publishes an annual report intended to measure the wellbeing of Aboriginal and Torres Strait Islander people: see *Overcoming Indigenous Disadvantage Key Indicators 2014* (Productivity Commission, 2014).
[72] See R Sackville, "Law and Justice: Do They Meet? Some Personal Reflections" (2014) 37 UNSWLJ 1142, 1148-1156.

but for civil advice and representation. There will always be ebbs and flow in the levels of funding, particularly for community legal services. Governments will frequently become impatient with legal aid agencies that challenge their decisions or attempt to frustrate implementation of their policies. But the basic principle is firmly established.

In the past four decades a great has changed, both for the better and for worse. Remedies have been provided for form of injustice, such as discrimination on the grounds of race, ethnic origin or sexual orientation, for which there was previously no legal redress. Some egregious injustices that were for so long ignored or dismissed as trivial, have been exposed and efforts made to provide redress. Governments have been made more accountable as individuals afflicted by decisions have broader opportunities to seek merits review in independent tribunals. The courts have contributed to greater levels of accountability by expanding the scope of judicial review of administrative action and by invoking constitutional principles to entrench their power to set aside decisions affected by “jurisdictional error”.

The courts have transformed their own role from passive adjudicators little concerned with the cost or timeliness of dispute resolution, to active managers of litigation with a view to reducing the cost and delays traditionally associated with court cases. There are limits to what the courts can achieve, consistently with their obligation to afford the parties procedural fairness. Even so, the transformation of the judicial role has reduced the advantages enjoyed by repeat players and has increased the chances that individual litigants will achieve a fair outcome within a reasonably period and at a cost proportionate to what is at stake.

None of this is to suggest that the legal system has now met the challenge of alleviating injustice. Much less is it the case that poor and disadvantaged people enjoy appropriate protection from the legal system. The task of alleviating injustice inflicted or condoned by the legal system did not begin with the Law and Poverty Inquiry and did not end with the *Law and Poverty Report*. It is a work in progress requiring continual attention.

If an assessment is to be made of the Law and Poverty Inquiry forty years on,

perhaps the verdict might be that its objective was worthy and that its flaws, although significant, were not unforgivable.