

LAW AND JUSTICE: DO THEY MEET? SOME PERSONAL REFLECTIONS

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I INTRODUCTION

The intersection of law and justice is not a topic to be broached lightly. After all, the greatest philosophers have pondered the meaning of the concept of justice over a period of at least several thousand years. In the Western tradition, the search for objective standards by which to determine whether a society is just, or particular conduct is virtuous, can be traced back to the Old Testament, Aristotle's *Nicomachean Ethics* and beyond. Other cultures have been no less assiduous in the search for justice and have done so over similar time spans, as illustrated by the Sanskrit literature on ethics and jurisprudence.¹ Yet a consensus on these matters is yet to emerge and perhaps never will.

Whatever the philosophical difficulties, lawyers are necessarily much concerned with the concept of justice. Unlike most other professions or occupations, the notion of justice is central to what lawyers do, or at least to what they claim to do. This is demonstrated by the language of the law. We speak of the 'justice system' and the 'administration of justice'. In Australia's system of government, those who wield judicial power are given the title 'Justice'. Enhancing 'access to justice' is universally embraced as an essential objective of the legal system and of the work that lawyers perform within that system. To label a court decision or a principle of law as 'unjust' is to condemn it as contravening fundamental societal values and to go some way to depriving the decision of legitimacy.

I do not purport to be a legal philosopher, nor to be able to add meaningfully to the debates on fundamental philosophical questions. All I propose to do is to

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1 See Amartya Sen, *The Idea of Justice* (Belknap Press, 2010) 20–2.

offer a personal view of justice or, more specifically, on what I see as its practical counterpart, the elimination or amelioration of injustice. I do so, for what it is worth, on the basis of my own experiences. If that perspective is too narrow or idiosyncratic to provide insight to others, at least it may serve as an apology – in the sense of an explanation or justification – for some of my actions as a lawyer.

A A Definition of Law

Because I wish to concentrate on a particular conception of justice, I shall sidestep centuries of disputation about the nature and sources of law and adopt a conventional definition. I recognise that the definition is incomplete, ambiguous and conceals as much as it reveals, but it will suffice for present purposes. By ‘law’ I mean the body of official principles, rules and practices that bind members of the community (governments, individuals, corporations and other entities), or that govern, regulate or facilitate their relationships and dealings with each other. These principles, rules and practices are derived from a variety of sources, but in Australia primarily from the *Constitution*, statute and the common law. They can and do change in conformity with a further set of principles that determine how laws can legitimately be altered.

B Lawyers and Justice

Perhaps the best known attempt to develop a theory of justice in relatively recent times is that of John Rawls.² He derives two principles of justice from what he describes as the ‘original position’, a starting point succinctly summarised by Amartya Sen as follows:

The original position is an imagined situation of primordial equality, when the parties involved have no knowledge of their personal identities, or their respective vested interests, within the group as a whole. Their representatives have to choose under this ‘veil of ignorance’, that is, in an imagined state of selective ignorance ... and it is in that state of devised ignorance that the principles of justice are chosen unanimously.³

The two principles Rawls derives from the original position, from which much else flows in his theory of justice, are these:

- a. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
- b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.⁴

2 John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 17–22.

3 Sen, above n 1, 54.

4 John Rawls, *Political Liberalism* (Columbia University Press, 1993) 291. This formulation is a refinement of the proposition in Rawls’ *A Theory of Justice*: Rawls, above n 2, 60.

Rawls' theory has generated a vast literature. I refer to his two principles of justice only to illustrate the vibrancy and indeterminateness of the continuing philosophical quest to define authoritatively the content of a word that pervades the daily discourse not only of lawyers but of members of the wider community.

The great majority of people, including decent citizens who obey the law, pay their taxes and act honestly towards others, are not philosophers. They do not consciously develop and refine a theory of justice to explain or justify how they should behave in their everyday lives. This is not to suggest that thoughtful people do not consider the consequences of their conduct or that they lack standards by which to gauge the rightness of their actions. Many people are guided by values that they have internalised and that they accept as providing sensible and proper criteria by which actions can and should be judged. But the processes by which people accept a set of social or ethical values do not ordinarily include a philosophical inquiry into the nature of justice or a systematic study of the many and varied theories on the subject.

Because justice is central to the roles performed by lawyers, university law courses almost always include some exposure to jurisprudential concepts and to theories of justice, although not necessarily as part of the compulsory curriculum. No matter how many times the curriculum is reformed, lawyers can be expected to have given some thought in the course of their professional training to how they and the legal system can better serve justice. Nonetheless, the reality is that lawyers tend not to be very different from non-lawyers when it comes to philosophical matters. Few lawyers would describe themselves as legal philosophers or, I suspect, claim that their professional lives have been shaped by a particular theory of justice. It is true that lawyers are required to familiarise themselves with and to observe a complex and sometimes counter-intuitive set of ethical rules expressly designed to promote justice, protect clients and advance the rule of law. But, like the ethical standards binding members of other professional associations, these are external standards. They are imposed on practitioners as the price for plying their trade and belonging to a profession that is recognised as having special skills and expertise and enjoys a monopoly on certain kinds of work.

It is also true that many lawyers, although not necessarily a high proportion of those who are legally trained, devote themselves, often at great personal cost, to protecting the rights and interests of poor and other vulnerable people. Others see their role as primarily to resist the incursions of state power into the freedoms and liberties of individuals, notwithstanding that their clients may be distinctly unpopular, unsavoury or both. Lawyers who take on these burdensome and challenging responsibilities are undoubtedly motivated primarily by a belief that they can use the law and legal processes to advance justice or at least minimise injustice. But again I suspect that most would not say that their professional choices, admirable as they are, reflect a philosophical inquiry into the nature of justice, as distinct from deeply felt personal views as to what is right and proper and how their professional activities can contribute to a more just society. Those two categories are by no means mutually exclusive. But the distinction is there nonetheless.

C Some Personal Experiences

A person's own concept of justice will be influenced by many factors. These include the example (good or bad) set by parents or parental figures, formal education, religious training or ethical instruction (or the lack of either), the entrenched values of the society of which the individual is a member, the particular attitudes of the communities or groups with whom he or she identifies, personal experience of actual or perceived injustice, the tidal waves of change that periodically sweep across the social landscape (think here, for example, of feminism, multiculturalism, globalisation and the communication opportunities presented by the digital world) and the influence of political and community leaders.

My own case is no different. I do not propose to attempt to disentangle all the influences on my thinking, such as it is. But I do wish to recount something of my own background and experiences, for two reasons. First, personal experience tends to have a lasting influence on social attitudes, including one's own conception of justice. Secondly, the account brings home just how profoundly this country has changed over the nearly five decades of my professional life.

I grew up in a moderately observant Jewish household in Melbourne. Of all countries in the postwar world, outside Israel following its creation in 1948 and the United States ('US'), Australia was the most welcoming to Jews (at least to those already in the country). Jews had been part of the Australian community since the First Fleet, although not initially as a matter of free choice. The small Australian Jewish community had played a prominent part in the nation's affairs almost from the beginning of European settlement. The community had certainly provided more than its fair share of acknowledged leaders. Two examples suffice.

Sir John Monash was recognised as a national hero for his exploits on the Western Front towards the end of World War I. Monash, who was a member of the St Kilda Hebrew Congregation of which my father later became President, was such a revered figure that 300 000 people attended his funeral procession in 1931. Some 60 000 were at the gravesite.⁵ Sir Isaac Isaacs, whose biographer was another Jewish Governor-General, had briefly been Chief Justice of the High Court before his appointment, shortly before Monash's death, as the first Australian born Governor-General, albeit over the vehement opposition of King George V.⁶

And yet Australia, like England, has a long history of mostly genteel anti-Semitism. In 1898, Alfred Deakin described Isaacs, who was not particularly religiously observant, in generally complimentary terms, but could not help

5 Roland Perry, *Monash: The Outsider Who Won a War* (Random House, 2004) 514–16. The service was conducted by Rabbi Jacob Danglow whom I knew into my teens.

6 Sir Zelman Cowen, *Isaac Isaacs* (University of Queensland Press, 1993). As it happens, Isaacs' father-in-law was one of my own father's predecessors as President of the St Kilda Hebrew Congregation.

commenting that Isaacs was ‘dogmatic by disposition, full of legal subtlety and the precise literalness and littleness of the rabbinical mind’.⁷

Edmund Barton, a colleague of Isaacs on the High Court, wrote in a 1913 letter concerning what he regarded as judicial manipulation by Isaacs: ‘I don’t think ... there is the least sincerity in the jewling’s attitude’.⁸ Isaacs himself had experienced openly anti-Semitic attacks at various times during his long life to which, as his biographer recounts, he was prone to respond with anger.⁹

Growing up Jewish in Melbourne in the 1950s and 1960s it was impossible to avoid contradictions. On the one hand, eminent Jews like Monash and Isaacs had played, and been recognised as having played, an important part in the nation’s history. Jews had flourished in an atmosphere of freedom and, for the most part, tolerance. On the other hand, the manifestations of anti-Semitism, much as one tried, could not be ignored. Generally these manifestations were thoughtless rather than vicious, but anti-Semitic attitudes were entrenched in the language and in social attitudes. This was despite the horrors of the Holocaust which, although fresh in the collective memory, curiously enough did not figure prominently in public discourse in the decades immediately following World War II.

I never experienced the brutal forms of anti-Semitism that historically were characteristic of much of Europe (and still persist in some places). My experiences were vastly different from those of my grandparents who left Russia at the turn of the 20th century to escape the pogroms that were a regular feature of life under the Czars. Nonetheless I experienced sufficient anti-Semitism to understand how corrosive and dangerous prejudice can be, however genteel its expression. In my own case, it led to a feeling that in some respects I was an outsider who was not necessarily part of the Australian mainstream, even if I played sport and followed Australian Rules football.

One experience, relatively trivial as it may seem, is seared in my memory. In 1967, I returned to my alma mater, the University of Melbourne, as a Senior Lecturer. I did so after a year studying at Yale University and a second year teaching at the University of California at Berkeley, just before the eruption of the great student protests of 1968. I knew that one of the senior academics at the Law School was a member of the Melbourne Club. That club, like many others at the time, did not admit Jews.¹⁰ Being young and brash and perhaps emboldened by having observed from close quarters the promise of President Lyndon Johnson’s Great Society, I raised the issue with the senior academic over lunch. How was it consistent, I asked him, with what I understood to be his commitment

7 Ibid 47.

8 Ibid 116.

9 Ibid 226.

10 Hence the establishment in the 1950s and 1960s of Jewish golf clubs in Melbourne and Sydney. The Sydney club was named Monash.

to justice and equality, for him to belong to a club that excluded people on the basis of religion or race?

His response was that he saw no inconsistency as the club was a voluntary association and its members were entitled to determine for themselves who was eligible to join. I considered his response then, as I do now, to be profoundly demeaning and unjust. The thought also occurred to me at the time that it was not entirely coincidental that, unlike the more robust state of New South Wales, no Jewish lawyer had ever been appointed to the Supreme Court of Victoria. And this notwithstanding that a significant number of Jewish barristers had been leaders of the Victorian bar, including the eminent Queen's Counsel who had moved my own admission as a barrister and solicitor.

A second anecdote concerns a different but related topic. In 1956, the Olympic Games were held in Melbourne. It was a more modest affair than the extravaganzas to which we have become accustomed, although the Games were enlivened by the efforts of the Hungarian and Russian water polo teams to drown each other, this being just a few months after the brutal Russian invasion of Hungary.

Shortly before the Games I was travelling on a Melbourne tram, a mode of transport that has survived technological revolutions. At a stop, a black man boarded the tram. I suddenly realised, with something of a shock, that I had never to my knowledge been in the presence of a black person. Not an indigenous person; not an African-American (that was not the descriptive phrase then used); not a black person from any other country. I may have seen such a person, but I was not conscious of having done so. I had certainly seen films or newsreels with non-Europeans (television had only been introduced a few months earlier), but this was different.

My surprise was perhaps not quite as strange as it may seem from the vantage point of the second decade of the 21st century. In 1956, the White Australia Policy, one of the pillars of the Australian settlement since Federation, was still in full force. The depth of Australia's commitment to the White Australia Policy (and corresponding attitude to the Aboriginal people) is shown in the comments made by Sir Owen Dixon in a speech given in Tennessee in 1943, when he was wartime Minister to the US on leave from his post as a Justice of the High Court:

We regard our country as a southern stronghold of the white race – a thing for which it is well fitted; and our population is European. The aboriginal native has retreated before the advance of civilisation, contact with which he apparently cannot survive. The analogy in this country is the Red Indian, but the Australian Aboriginal is of a much lower state of development. He belongs to the Stone Age and no success has attended efforts to incorporate him in civilised society. His

numbers do not exceed 60 000 and he is now to be met with only in the remoter parts of Australia.¹¹

It was not until 1957 that the Commonwealth introduced a concession allowing a non-European resident of at least 15 years standing to apply for Australian citizenship, and it was not until 1966 that the Policy was finally jettisoned.

Not long before my tram journey, the year nine class at my school had engaged in a lively debate about the merits of the White Australia Policy. Melbourne High School was an excellent selective public school with some remarkable teachers and also some remarkable students (I do not include myself). The incipient conservatives among the 13 to 15 year old boys argued that Australia's immigration policy should seek to create a little Britain, embodying the best characteristics of the mother country (whose flag still adorns our own). The incipient progressives argued that Australia should aspire to create a little Europe, incorporating the best characteristics of European culture and history. The proponents of the more progressive view primarily had in mind potential migrants from Western Europe, not the rather more troublesome prospect of refugees arriving from behind the Iron Curtain that shrouded Eastern Europe at the time.

Not one member of the class, myself included, argued for a migration policy that would admit migrants from around the world regardless of race, national origin or religious affiliation. The class included future writers, historians, lawyers, medical practitioners and others who achieved considerable eminence. Yet none of us at that stage of our education was able to break free of the shackles that the White Australia Policy had placed on our imaginations.

The lesson I drew from this episode as I looked back on it years later was that ingrained attitudes can be very difficult to displace, even (or perhaps especially) if they are founded on irrational beliefs. Particularly is this the case when the attitudes are inculcated, however subtly, from an early age. We are invariably quick to recognise injustice when it is inflicted on us or on those with whom we associate or strongly sympathise. We tend to be slower to recognise injustice that affects others, even to the point where we ourselves sometimes unwittingly become, if not the perpetrators, complicit in the infliction of injustice.

Judith Shklar describes this phenomenon as 'passive injustice'.¹² She points out that injustice flourishes not only because the rules of justice (whatever they may be) are violated by actively unjust people, but because of the indifference of others: 'The passive citizens who turn away from actual and potential victims contribute their share to the sum of iniquity ... The passively unjust ... [person's]

11 Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003) 161. In 1950, while acting as a United Nations mediator in the Kashmir dispute, Dixon said that his experience showed 'how utterly impossible it is for us to relax the White Australia Policy': at 211.

12 Judith N Shklar, *The Faces of Injustice* (Yale University Press, 1990) 40–50. I am grateful to Professor Martin Krygier for drawing my attention to Judith Shklar's book.

failure is specifically as a citizen'.¹³ Those who could not see the injustice in the white Australia or, worse, saw it but did nothing to rectify the injustice, were themselves passively unjust.

D A Sense of Injustice

At the University of Melbourne in the early 1960s, jurisprudence was a compulsory subject as indeed were virtually all subjects in the undergraduate curriculum. Jurisprudence did not, however, have a great deal to do with theories of justice. The focus was on analytical jurisprudence and the nature and definition of law.¹⁴ Much time was spent on legal concepts such as possession, and on legal reasoning within the framework of the doctrine of precedent. Close attention was paid to H L A Hart's then recently published *The Concept of Law*,¹⁵ which elaborated and refined the notion of 'rules' that dominated the Austinian positivism familiar to generations of lawyers. Hart also explored the link between rules, the language of the law and moral responsibility. In this way, the concept of justice was touched upon: the retrospective nature of the laws applied at the Nuremberg trials, for example, provided much food for thought. But mostly jurisprudence dealt with somewhat more prosaic matters.

There were certainly detours in the direction of the American realists, although acceptance of their radical ideas was impeded by what seemed to be a lingering resentment about American impertinence in declaring independence from Britain in 1776. Of the realists, Jerome Frank's *Law and the Modern Mind*,¹⁶ published in 1930, served, at least for me, as a powerful antidote to the apparently ordered and predictable English common law world of precise legal rules, which were to be applied to established facts in conformity with binding precedent. Frank drew on a Freudian perspective to expose and undermine the yearning of lawyers for the comforting, but specious patina of certainty apparently provided by common law rules. But if the ordered world of positivism was to crumble, it was not clear what would replace it, other than the rather unsatisfactory variables of whether the judge had a good breakfast or had not quarrelled with anyone on the morning of the hearing.

I must acknowledge that even if the course had included a systematic study of theories of justice, I doubt that my immature mind would have been able to grasp the abstract concepts. Indeed, nearly fifty years later, when I read Amartya Sen's doubts as to the practical utility of theories that seek to identify the

13 Ibid 40–2.

14 The brief summary in Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 2, captures the flavour.

15 H L A Hart, *The Concept of Law* (Oxford University Press, 1961).

16 Jerome Frank, *Law and the Modern Mind* (Brentano's, 1930). The volume was reprinted in 2009 by Transaction Publishers.

characteristics of a perfectly just society,¹⁷ I felt a sense of relief. A world of theoretical perfection can illuminate reasoning and analysis, but it is not necessarily of much help in making hard choices between apparently reasonable alternatives.

However, during my studies I did come across a book that catered to my limited capacity for abstract analysis and also seemed to make a lot of sense. Edmond Cahn was a trusts and tax lawyer who joined New York University Law School in 1946 and taught there until his death in 1964. Oddly enough, he became a legal philosopher, not the usual career progression for a tax expert (socially aware and committed to fairness though they all are). Like Jerome Frank, Cahn was a legal realist and indeed the two were close friends. In 1949, Cahn published *The Sense of Injustice: An Anthropocentric View of Law*.¹⁸ This was the book I read.

Cahn commenced with a quotation from W H Auden's poem *Law Like Love*.¹⁹ I read the stanza as a wry condemnation of an approach to law that divorces legal rules from morality or justice:

Yet law-abiding scholars write
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times.²⁰

While Cahn did not quote from the rest of Auden's poem, he might well have:

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is the Law.²¹

Cahn rejected natural law as a counterbalance to an amoral positivism. That rejection was perhaps associated with his admitted inability to explain affirmatively what the word 'justice' meant. He thought it more productive to speak of 'the sense of injustice', which he described as 'a general phenomenon operative in the law. Among its facets are the demands for equality, desert, human dignity, conscientious adjudication, confinement of government to its proper functions, and fulfillment of common expectations'.²²

Cahn demonstrated his idea through a number of 'instances' or examples. This approach appealed to a mind like mine, which was accustomed to thinking in concrete rather than abstract terms. For example, Cahn's 'Instance A'

17 Sen, above n 1.

18 Edmond Cahn, *The Sense of Injustice: An Anthropocentric View of Law* (Indiana University Press, 1949).

19 W H Auden, *Another Time* (Random House, 1940).

20 Ibid.

21 Ibid.

22 Cahn, above n 18, 22.

concerned a hypothetical group of people, all of whom had committed precisely the same offence at the same time, but who had been treated unequally by the legal system. Some had been acquitted, one had been found guilty and fined a small sum, and another had been found guilty but subjected to an unaccountably severe penalty. These diverse outcomes, said Cahn, arouse a sense of injustice in us because they offend our deeply rooted belief that arbitrary inequality is the antithesis of justice.²³

Cahn did not assert that all aspects of the sense of injustice were universal. He nonetheless thought that concepts can be ‘real’, in that they can have meaningful pragmatic consequences, without necessarily being universally valid. In his view, nature has equipped all people to regard injustice to another as personal aggression: ‘the human animal is predisposed to fight injustice’.²⁴ He saw the sense of injustice as a blend of ‘reason and empathy’.²⁵ It was therefore to some extent an emotional rather than rational response, but it involved a call to action to remedy perceived injustice. The sense of injustice was ‘an active, spontaneous source of law, contributing its current to the juridic stream’.²⁶

Rereading *The Sense of Injustice*, it is not difficult to see the flaws and gaps in the analysis. Cahn’s intuition about decisions or actions that will evoke outrage or shock among the populace is convincing enough in the case of his most extreme examples, but is highly contestable elsewhere. He appears to assume a societal consensus that does not and did not exist, even in the US whose citizens he primarily had in mind. The discussion at Melbourne High School to which I have referred and Australia’s confused and sometimes inhumane responses (by both major political parties) to the much overblown threat posed by so-called ‘boat people’ demonstrate the problem. Cahn’s express acknowledgement that the sense of justice is neither universal nor categorically right²⁷ creates the strong suspicion that his interpretation of the likely emotional responses by the community to ‘injustice’ reflected the particular preoccupations of liberal sentiment in the US in the immediate postwar years.²⁸

Despite these flaws, others have followed a similar path. Writing 40 years after Cahn, Judith Shklar remarked on the unwillingness of most philosophers to think about injustice as deeply or subtly as they think about justice.²⁹ She thought that ‘common sense and history’ tells us that feelings of injustice are common experiences among all people and thus have an immediate claim on our attention. She pointed out that most injustices occur within the framework of an established

23 Ibid 14–15.

24 Ibid 25.

25 Ibid 26.

26 Ibid 31.

27 Ibid 23.

28 See generally Bruce S Ledewitz, ‘Edmond Cahn’s Sense of Injustice: A Contemporary Reintroduction’ (1985) 3 *Journal of Law and Religion* 277.

29 Shklar, above n 12, 16, 85.

polity that has an operative system of law. Indeed, in some respects laws can actually be designed to entrench the injustices flowing from inequalities in society.³⁰

Shklar recognised that people differ enormously as to what they perceive to be unjust.³¹ Every social change is thought by someone to be unjust, if only because expectations of future benefits are frustrated. Moreover, the responses to injustice vary widely. Victims of undeniable injustice may accept their loss apparently without complaint, for example, women in abusive relationships or exploited workers who fear the loss of their jobs. Others may seek revenge for the perceived injustice, an emotion which, in the absence of an effective legal system, can lead to an endless cycle of violence.³²

Even so, Shklar, like Cahn, thought that the sense of injustice is the best defence against oppression.³³ The political structure must be such that the victim's voice can be heard. Thus there must be opportunities for 'choice, voice, protest, and denial'.³⁴ Shklar's reliance on the sense of injustice perhaps produces more sweeping consequences than Cahn's analysis, but both accord the concept an important role in improving the lives of the least powerful and most deprived in the community.

E A Practical Guide?

Despite the flaws in Cahn's analysis, as a young lawyer I found his prescription to provide a useful practical guide. If legal rules, institutions and practices could be instruments that perpetuated injustice, surely it was worthwhile to identify injustices and to consider how legal reforms could eliminate or at least ameliorate them. My experience studying and teaching in the US rather fortified this view. The robust constitutional jurisprudence of the Supreme Court under Chief Justice Earl Warren had contributed materially to a fundamental shift in America's race relations. It had also brought about greater transparency and enhanced democratic legitimacy of elected institutions in that country.³⁵ The role of law in seemingly transforming the US of the 1960s suggested that if law could be an instrument of oppression, it could also be a positive force to overcome the injustice associated with poverty and inequality in society.

30 Ibid 120–2.

31 Ibid 95–6.

32 Ibid 95–7.

33 Ibid 55.

34 Ibid 116.

35 The most significant decisions of that era included *Brown v Board of Education* 347 US 483 (1954) (school desegregation); *Baker v Carr* 369 US 186 (1962); *Reynolds v Sims* 377 US 533 (1964) (electoral malapportionment).

There was perhaps an element of overenthusiasm or even naiveté in these views.³⁶ But Cahn's insight that it is much easier to recognise injustice than to define 'justice' seemed to me to provide a practical reference point. Why was it not feasible to identify instances of institutional or systemic injustice – after all, there were many possibilities from which to choose – and to consider how reforms could ameliorate the injustice?

Although I was unaware at the time of Adam Smith's notion of the 'fair and impartial spectator', this was more or less the approach I had in mind. Smith argued in his *Theory of Moral Sentiments* that we can assess our own conduct only if we imagine how an independent fair and impartial observer would view the conduct.³⁷ Smith's insistence on this form of objectivity can be applied more widely to the alleviation of injustice. As Amartya Sen explains, 'objectivity demands serious scrutiny and taking note of different viewpoints from elsewhere, reflecting the influence of other empirical experiences'.³⁸ In other words, we do not necessarily search for an ideal solution that would, at least in a theoretical world, eliminate the injustice. Rather the quest is for the best available alternative, imperfect as it might be.

I accepted that it was not enough simply to rely on emotional community responses to particular injustices. Careful reasoning would be required to explain why the laws or practices under scrutiny were unjust and to identify the societal values that they contravened. Similarly, formulation of reform proposals would necessitate a systematic examination of the available options, a process usually involving detailed technical analysis of legal principles and comparisons with the experience of other jurisdictions. Choices would have to be made between alternatives, none of which could be characterised as unreasonable or inconsistent with fundamental societal values. Bearing all this in mind, the sense of injustice seemed like a good place to start.

F Applying the Sense of Injustice

As a young solicitor in 1965 I had occasion to instruct a very capable slightly older barrister who was representing a mother in affiliation proceedings.³⁹ These were proceedings brought by the mother of a child born outside marriage against the putative father, seeking an order for maintenance of the child. At that time, the mother of such a child was frequently required to institute affiliation proceedings as a condition of receiving meagre financial assistance from the state (so meagre that many unmarried mothers were effectively forced to give up their children for adoption). I was struck by the forensic ordeal that a mother had to endure when confronted with the putative father's denial of paternity. The case

36 See Ronald Sackville, 'Courts and Social Change' (2005) 33 *Federal Law Review* 373.

37 Adam Smith, *The Theory of Moral Sentiments* (A Millar, 6th ed, 1790) III.I.2.

38 Sen, above n 1, 130.

39 The barrister happened to be Michael Black, later Chief Justice of the Federal Court.

also brought home the plainly unjust impact on individuals of well-established common law rules, particularly those discriminating against a so-called illegitimate child simply because of the circumstances of his or her birth.

A few years later, when a colleague and I examined the issues from an academic perspective, the injustice was not difficult to identify.⁴⁰ We stated at the outset that ‘there seems to be no rational basis in modern times for a moral or ethical judgment that the illegitimate child, by reason solely of his [or her] illegitimacy, is somehow blameworthy and therefore properly the subject of legal and social discrimination’.⁴¹

We went on to suggest reforms that would eliminate or substantially reduce the legal disabilities imposed on children born outside marriage. Subsequent studies explored the procedural deficiencies of affiliation proceedings,⁴² and sought to expose the discrimination that persisted in the provision of welfare benefits to ‘fatherless families’.⁴³

Times have changed. Four decades on, the notion that children should be penalised for their status at birth seems absurd. The legal regime that imposed disabilities has been dismantled. Welfare entitlements for families do not depend on marital status or the ‘legitimacy’ of the children. It is fair to say that at least one set of historic injustices has been removed.

A few years later, the concept of injustice played an important part in shaping the report on *Law and Poverty in Australia*.⁴⁴ The principal theme of the report was that the law had ‘failed to accord equal treatment to all people and [had] therefore contributed to the perpetuation of poverty in Australia’.⁴⁵

The report identified ways in which the legal system disadvantaged poor people and sought to remedy the ‘most obvious injustices’ that served to exacerbate inequalities in Australian society.⁴⁶ This approach may well have been jurisprudentially inadequate, but it provided a more or less workable framework

40 Ronald Sackville and Annemaree Lanteri, ‘The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis’ (1970) 44 *Australian Law Journal* 5, 5.

41 Ibid.

42 Ronald Sackville, ‘Affiliation Proceedings in Victoria’ (1972) 8 *Melbourne University Law Review* 351.

43 Ronald Sackville, ‘Social Welfare for Fatherless Families in Australia: Some Legal Issues’ (1972) 46 *Australian Law Journal* 607; Ronald Sackville, ‘Social Welfare for Fatherless Families in Australia: Some Legal Issues – Part II’ (1973) 47 *Australian Law Journal* 5.

44 Commission of Inquiry into Poverty, *Law and Poverty in Australia: Second Main Report*, (Australian Government Publishing Service, 1975) (*Report on Law and Poverty*). The Poverty Inquiry was set up by the Liberal–Country Party Government in 1972, with Professor Ronald Henderson, a distinguished economist, as the sole member. The newly elected Labor Government appointed four additional Commissioners in 1973 to address broader issues relating to poverty, including educational disadvantage, access to medical and social services, and the impact of the law on poor and vulnerable people. The *Report on Law and Poverty*, which I prepared, was presented to Prime Minister Whitlam shortly before the dismissal of the Labor Government on 11 November 1975.

45 Ibid 1.

46 Ibid 2.

within which to identify areas of law and legal practices that were in need of reform.

As with the legal disabilities imposed for no good reason on illegitimate children, it was not especially difficult to nominate a number of areas where the law inflicted injustice on the poorest and most vulnerable people in the community, or had otherwise failed to ameliorate serious injustice. The most significant bias against poor people was the failure to provide adequate and accessible sources of legal advice to enable people to enforce their rights or to protect themselves against exploitation by more powerful interests. But the substantive law also inflicted injustice. For example, the law of vagrancy criminalised extreme poverty and mental illness, while many persons charged with but not convicted of offences were denied their freedom pending trial because of their inability to afford to post bail or procure sureties. Debt recovery procedures in some Australian jurisdictions still provided for the imprisonment of debtors in certain circumstances, a hangover from Dickensian times or even earlier. Tenancy law and the law of consumer credit were firmly grounded in 19th century laissez-faire principles that worked to the advantage of well-informed and well-resourced landlords and credit providers, and to the distinct disadvantage of residential tenants and non-commercial borrowers.

Non-English speaking migrants lacked the language skills or resources to understand their rights and obligations, or to gain such protection as the law might offer. The plight of indigenous people was manifest, but all too often (then as now) the response to family or communal dysfunction was to apply criminal sanctions rather than to address the underlying social and economic problems. People wholly or largely dependent on social welfare benefits for their very subsistence lacked any effective recourse if denied their entitlements by the administrative decision-making process.

Implementation of the detailed recommendations in the *Report on Law and Poverty* was bound to be slow and piecemeal, if only because constitutional responsibility for many of the unjust laws and practices rested with the states rather than the Commonwealth. And it was slow and piecemeal. But over time Australian Parliaments and governments of all political persuasions addressed the issues identified in the *Report on Law and Poverty*, although not always comprehensively or successfully. Many factors contributed to changes in political and community attitudes to these issues, but it can fairly be said that the identification of systemic injustice in the legal system made a modest contribution to the reform process.

When the sense of injustice of the community or of influential sections of the community is aroused, the effect can be to create a climate of opinion conducive to reform and to the amelioration of the particular injustice. An illustration is the response to the New South Wales Law Reform Commission's 1983 report on

De Facto Relationships ('NSWLRC Report').⁴⁷ The report argued for legislation designed to remove the legal disadvantages experienced by partners to a heterosexual de facto relationship, when compared to married couples in a similar position. At the time the *NSWLRC Report* was presented, the recommendations were capable of being viewed as radical, especially by religious groups which could have seen legislation of this kind as undermining the traditional concept of marriage. (It would have been even more radical and outside the terms of reference to argue that the new regime should apply to same sex couples; that would come later.)

The *NSWLRC Report* gave three reasons for the recommendations.⁴⁸ The first was that there was a substantial and increasing number of unmarried couples living in de facto relationships. Secondly, the existing law produced serious injustices and anomalies of which the report gave many examples. The most telling was the parlous situation on breakdown of the relationship of a partner (almost always the woman) who had made substantial non-financial contributions to the relationship, but who had no claim to any property because all substantial assets were held in the name of her partner and had been paid for by the partner. The third reason was that there was broad acceptance of the need for reform within the legal community and the wider community.

The third reason contained an element of wish fulfilment because of the obvious risk that religious opposition would prove to be an insuperable obstacle to legislative action. Yet, in the end the mainstream religious groups proved to be surprisingly amenable to the proposals. Concrete examples of the unfairness of the existing law persuaded them that the virtues of reform outweighed the possible moral consequences flowing from a comprehensive legislative recognition of de facto relationships. Their response was a reflection of the proposition, demonstrated on a daily basis in the mass media, that people relate much more closely to specific instances of injustice than to injustice identified at a more general level.⁴⁹ That the legislation, the first of its kind in Australia, passed within a year of presentation of the *NSWLRC Report* is a testament to the potential power of the community's sense of injustice.

G Diverging Paths of Law and Justice

So far the focus has been on ways in which the law can intersect with justice, in the sense that it can provide the means by which injustice can be eliminated or ameliorated. However, even identifying unjust laws or practices and explaining in detail the nature of the injustices provides no guarantee of reform. It is hardly unknown for influential interest groups to seek to preserve their privileged status at the expense of weaker or more diffuse groups in the community. It is not

47 New South Wales Law Reform Commission, *De Facto Relationships*, Report No 36 (1983).

48 *Ibid* [5.3]–[5.29].

49 Shklar, above n 12, 110.

necessary to read Machiavelli to appreciate that it is very much easier for determined and well-organised groups to oppose reforms than it is for the proponents of change to succeed in altering the status quo.

It is also self-evident that democracy does not produce a kind of determinist legislative progression, whereby laws develop inexorably from a state of primitive unfairness ever closer to an advanced state of perfect justice. There are always pressures, whether in the name of national security, border protection, law and order, or other catchphrases of the moment, tending towards the introduction of new laws capable of inflicting serious injustice. New laws are as capable of creating injustice as the old. The elimination of legally inflicted injustice is always a work in progress.

Where do the courts fit in this picture? Is it not their job to eliminate or prevent injustice? To some extent, the answer is yes. For example, in civil litigation, at least on one view, the object of the adversary system is to ascertain which of the competing factual claims is accurate. The factual findings then provide the foundation for the application of legal principles and for the ultimate decision. The closer a court can get to the truth, the less likely that the decision will cause true injustice to one of the parties (which is not to say that the losing party will accept that justice has been done).

But there is another widely held view that the fact-finding process in the adversary system is not primarily concerned with ascertaining the truth. Sir Owen Dixon is said to have given this answer to a woman who was unwise enough to suggest to him that it must be wonderful to dispense justice:

I do not have anything to do with justice, Madam. I sit on a court of appeal, where none of the facts are known. One third of the facts are excluded by normal frailty and memory; one third by the negligence of the profession; and the remaining third by the archaic laws of evidence.⁵⁰

Dixon's acerbic response may have been in part due to his saturnine nature, but it reflects the reality that the forensic fact-finding process is clearly not exclusively concerned with the truth. At the very least, it also aims to protect other values such as the right to a fair trial and the interests protected by the exclusionary rules of evidence, such as the rules rendering inadmissible evidence that infringes client legal privilege or the privilege against self-incrimination.⁵¹ The more often the adversary system requires a decision-maker to proceed on the basis of something other than the truth, the greater the likelihood that the decision will inflict injustice on one or more of the parties.

The extent to which courts have the ability to develop the law to make it more just (or less unjust), or better adapted to contemporary social and economic circumstances, is a very large question indeed. Certainly the courts, particularly

50 Philip Ayres, 'High Court Centenary: Sir Owen Dixon' (2003) 77 *Australian Law Journal* 692, 693.

51 See J J Spigelman, 'Truth and the Law (The Sir Maurice Byers Lecture, 2011)' in Nye Perram and Rachel Pepper (eds), *The Byers Lectures 2000–2012* (Federation Press, 2012) 232, 239–40.

the High Court as the ultimate constitutional and appellate court in the country, have some leeway to develop the law in this way. Common law principles have been invented, adapted and reformulated over centuries.⁵² The elaborate and occasionally inconsistent principles of statutory construction are designed in part to avoid the legislation becoming an instrument of unfairness and to protect civil liberties and individual freedoms. Sometimes, as with the High Court's Chapter III jurisprudence, new or refined constitutional principles will seek to achieve policy objectives at the expense of the powers of democratically elected Parliaments and governments.⁵³

It is, however, fundamental to our system of governance that the role of the courts is not simply to dispense justice. The judicial oath (or affirmation) requires the judge to 'do right to all manner of people *according to law* without fear or favour, affection or ill-will'.⁵⁴ The qualification 'according to law' is of profound importance. Law and justice are not the same thing.

The courts are bound to apply the substantive law, even if the law is capable of causing injustice. Many such laws were identified in the *Report on Law and Poverty*.⁵⁵ The vagrancy laws, for example, inflicted punishment on people who, by reason of extreme poverty or mental illness, were not truly responsible for conduct deemed to be criminal. The legal regimes governing residential tenancies or debt recovery often operated unfairly on poorer tenants or defaulting debtors unable to bargain effectively or to protect their own interests. Courts acting with due attention to procedural fairness nonetheless could not always avoid being instruments of injustice. Contemporary illustrations of the same phenomenon include laws creating barriers to asylum seekers attempting to reach Australia in order to claim protection in this country,⁵⁶ and minimum mandatory sentencing laws which inevitably bear most harshly on vulnerable groups such as young

52 Ronald Sackville, 'Why Do Judges Make Law? Some Aspects of Judicial Law Making' (2001) 5 *University of Western Sydney Law Review* 59.

53 Ronald Sackville, 'An Age of Judicial Hegemony' (2013) 87 *Australian Law Journal* 105.

54 *High Court of Australia Act 1979* (Cth) Schedule (emphasis added).

55 *Report on Law and Poverty*, above n 44.

56 See, eg, the legislation and subordinate legislation considered in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ('*Malaysian Solution Case*'). See also the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) enacted in response to the decision in the *Malaysian Solution Case*.

indigenous offenders or poor foreigners recruited to engage in ‘people smuggling’.⁵⁷

Two additional illustrations reflect my judicial experience. The first concerns judicial review of administrative decisions. In recent years the High Court has greatly expanded the powers of courts to review the legality of administrative action. The High Court has interpreted section 75(v) of the *Constitution*⁵⁸ to mean that the Commonwealth Parliament cannot render decisions of ‘officers of the Commonwealth’ immune from judicial review on the ground of so-called ‘jurisdictional error’.⁵⁹ More recently, the High Court has held that Chapter III of the *Constitution* entrenches the jurisdiction of the Supreme Courts of the states to set aside decisions made by administrative bodies or inferior courts when the decision-maker commits a jurisdictional error.⁶⁰ It follows that neither the Commonwealth nor a state Parliament has constitutional authority to remove the power of the courts to grant appropriate relief where the challenged decision is affected by a jurisdictional error.

Despite the expansion of judicial power at the expense of legislative and executive power, there are severe restrictions on the ability of the courts to correct errors made by administrative decision-makers. One of the ‘pillars’ of Australian administrative law is that courts are not concerned with the merits of administrative decisions, but only with their legality.⁶¹ Thus a court cannot intervene merely because the decision ‘on the merits’ appears to be mistaken. Even if the decision lacks logic or has resulted in egregious injustice to the person concerned, the court cannot grant relief unless the process has been legally flawed.⁶² For this reason it is not uncommon for an asylum seeker’s challenge to an adverse decision by the Refugee Review Tribunal to fail even though the court may have serious reservations, expressed or unexpressed, about the factual findings that led the Tribunal to reject the application.

57 A recent example of mandatory sentencing laws is s 25B of the *Crimes Act 1900* (NSW) (introduced by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW)), which imposes a mandatory minimum sentence of eight years imprisonment for a person found guilty of assault causing death while that person was intoxicated. The offenders affected by the ‘three strikes’ mandatory sentencing regime in Western Australia were overwhelmingly indigenous: see Neil Morgan, Harry Blagg and Victoria Williams, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (Aboriginal Justice Council, 2001). The High Court has upheld the constitutionality of the minimum sentencing regime for ‘people smuggling’ offences in a case where the offender was a ‘simple Indonesian fisherman’ and, but for the regime, would have received a more lenient sentence: *Magaming v The Queen* (2013) 302 ALR 461, 463.

58 Section 75(v) provides that the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth.

59 *Plaintiff S157 / 2002 v Commonwealth* (2003) 211 CLR 476.

60 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

61 Ronald Sackville, ‘The Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States’ (2000) 28 *Federal Law Review* 315, 321–2.

62 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411, 420–2 [20]–[26] (per curiam).

The limited role of the court in judicial review of administrative action is not confined to migration cases. In one case, I dismissed a challenge to a grant of consent by the relevant federal Minister to a tourist development near Hinchinbrook Island on the Great Barrier Reef.⁶³ The challenge was based in part upon the contention that the Minister's decision was unreasonable because dredging of a channel would have an impact on seagrasses and lead to loss of wildlife including dugongs and turtles. I made it clear that dismissal of the claim had nothing to do with the merits of the proposed development or of the Minister's decision:

the role of the Court in proceedings of this kind is not to determine the desirability or otherwise of the Port Hinchinbrook development. Nor is it to consider afresh the merits of the Minister's decision to grant the consents under the World Heritage Act. The essential issue in the proceedings is whether the Minister exceeded the powers conferred on him by the Act. The fact that not all decision-makers in the position of the Minister would necessarily have taken the same view ... does not demonstrate that he committed any legal error. Whether or not he did so turns on the construction of the relevant legislation and the application to the facts of well-established principles of administrative law.⁶⁴

It would not have mattered had I thought that the development would bring serious environmental damage to a pristine area. My job was to determine the legality of the decision, not its environmental wisdom.

A second example is a case that attracted much attention and understandably aroused strong emotions. In *Cubillo v Commonwealth*,⁶⁵ two Aboriginal people, Ms Cubillo and Mr Gunner, brought proceedings against the Commonwealth, alleging that as children they had been forcibly and illegally removed from their families. Ms Cubillo, then just under nine years old, was removed in 1947 from the Phillip Creek Settlement, some 40 kilometres from Tennant Creek in the Northern Territory, and taken to a children's home in Darwin. Mr Cubillo, then seven years old, was taken in 1956 from Utopia cattle station, also in the Northern Territory, and placed in a home in Alice Springs. It was not in dispute that both had been profoundly distressed and damaged by being removed from their families and that both had suffered greatly over the years as a consequence.

Ms Cubillo and Mr Gunner sought damages from the Commonwealth, relying on causes of action in false imprisonment, breach of statutory duty, negligence and breach of fiduciary duties said to be owed to them by both the Director of Native Affairs and the Commonwealth. The obvious difficulty confronting them was they did not commence their proceedings until 1996, some 49 years after Ms Cubillo's removal and 40 years after Mr Gunner's. By then some of the principals involved in the removals had died and others were too infirm to give evidence. Contemporaneous documents had been lost.

63 *Friends of Hinchinbrook Society Inc v Minister for Environment [No 2]* (1997) 69 FCR 28. An appeal was dismissed: *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 77 FCR 153.

64 *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28, 36.

65 *Cubillo v Commonwealth* (2001) 112 FCR 455.

After a trial lasting 106 hearing days, the trial judge dismissed the claims.⁶⁶ He held that the major claims were statute barred because of the lapse of time and that, although the Court had power to extend the limitation period, it would be unfair to the Commonwealth to exercise that power. To do so would cause the Commonwealth irreparable prejudice in attempting to defend the claims.

An appeal to the Full Court of the Federal Court, of which I was a member, was dismissed.⁶⁷ The Court upheld the trial judge's refusal to extend the limitation period on the basis that he was entitled to conclude that the Commonwealth would be prejudiced if the case were permitted to proceed. In any event, the Court held that none of the claims against the Commonwealth could be made out, either because the claimants had not proved all elements of their respective cases or because the Commonwealth could not be held liable for the actions of the officials or other persons responsible for the removals. Although the appellate judgment was lengthy (the report runs for 125 pages), the Court was unanimous and the judgment betrays no doubt as to the outcome.

The members of the Court were, however, acutely conscious of the controversy that had raged as to the accuracy of the official reports into the forcible removal of Aboriginal children in the Northern Territory and elsewhere.⁶⁸ The detailed accounts in those reports did not convince everyone and there were shrill denials in some quarters that a 'Stolen Generation' had ever existed. The Court was also acutely conscious that some commentators would be anxious to use the decision as 'proof' that the Stolen Generation was a figment of the imagination of well-intentioned but misguided people.

For that reason the Court was careful to place a caveat at the forefront of the judgment: 'It is ... important to stress that neither the primary judge nor this Court was asked to make findings on [the issues surrounding the existence or otherwise of the Stolen Generation] and it would be inappropriate for us to do so'.⁶⁹ The judgment went on to explain that the issues in the appeal concerned the particular circumstances of the removal of the two claimants and the legal consequences of those events. The Court expressly stated that it was making no comment about the policies of successive Commonwealth governments to the removal of Aboriginal children from their own communities.

The Court's disclaimer did not prevent some commentators interpreting the judgment as dismissing the very existence of the Stolen Generation. More significantly for present purposes, the decision is a striking illustration of the fact

66 *Cubillo v Commonwealth* [No 2] (2000) 103 FCR 1.

67 *Cubillo v Commonwealth* (2001) 112 FCR 455.

68 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Island Children from Their Families* (1997); Senate Legal and Constitutional Affairs References Committee, *Healing: A Legacy of Generations – The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home* (2000).

69 *Cubillo v Commonwealth* (2001) 112 FCR 455, 464 [10] (per curiam).

that legal proceedings frequently cannot remedy injustices. The leeway that is undoubtedly available to mould the law to changing circumstances does not extend to distorting legal principle in order to provide a remedy for people who have experienced historical injustice and have suffered profoundly as a result. Other mechanisms must be found to remedy the injustice. As Auden said, sometimes the 'Law is the Law'.⁷⁰

II CONCLUSION

The answer to the question of whether law and justice intersect is that they do and they do not. Law can be a powerful instrument of injustice, particularly in its impact on poor and vulnerable groups in the community. Yet law can also be a powerful force for the elimination or amelioration of injustice, especially through carefully designed legislative reforms supported by adequate mechanisms for their implementation. Courts generally strive to avoid inflicting injustice, either on the parties to the dispute or, through the legal principles they formulate and apply, on the wider community. The overriding qualification, however, is that judges must apply the law, including the rules of evidence and the procedural requirements for a fair trial under the adversary system. The result inevitably is that law and justice sometimes diverge. While this may seem surprising, it is the price that must be paid to maintain the rule of law, a fundamental guarantee of both order and freedom.

Notwithstanding its philosophical limitations, Cahn's sense of injustice (or something like it) provides an important counterweight to the tendency of the legal system (reflecting broader legislative and social imperatives) to tolerate or even facilitate injustice. If the community's sense of injustice can be sufficiently aroused, the gateway to reforms through the political and perhaps the judicial process can be opened. Arousal of the community's sense of injustice may require the interest and support of influential groups, especially the media. But community attitudes are not immutable.

This does not mean that on any given issue there is a dormant community consensus ready to be awakened. In a pluralistic and often ideologically divided society there is not likely to be unanimity or anything approaching unanimity as to whether a particular state of affairs is so unjust as to require remedial action. Even if injustice is widely acknowledged, as with the extraordinarily high rates of imprisonment of young Aboriginal men, very different views may be held as to what, if anything, governments should do to rectify the situation.

Two contemporary issues illustrate the point. An increasing proportion of the community regards the current definition of marriage as the union of a man and woman for life to the exclusion of all others as inherently unjust since it denies

70 Auden, above n 19.

same-sex couples the right to marry. Opponents of same-sex marriage argue with equal fervour that to redefine marriage to accommodate same-sex couples is profoundly unjust to those who conscientiously believe, whether for religious or other reasons, that the institution of marriage must be confined to heterosexual relationships.⁷¹ Proponents of increased powers for law enforcement and national security agencies argue that unless the agencies receive those powers innocent people may suffer the ultimate injustice – loss of life or physical wellbeing. Civil libertarians opposing the grant of greater powers see the potential for injustice in the form of abuse of authority, intrusions into basic personal freedoms, and the targeting of marginalised or unpopular groups or individuals.

There is no easy answer. A good starting point, however, is to ensure that this country has sufficient independent institutions and agencies, both public and private, whose job includes exposing injustice and proposing action to remedy the injustice. The first can influence the community to understand the nature of the injustices and to encourage changes in social values and therefore in short-term political attitudes; the second can chart the course for effective action.

Well-resourced universities that encourage independent, innovative and challenging research and teaching, as well as vigorous engagement with the wider community, have a vital role to play. But so do other institutions and organisations capable of the long-term policy analysis that is so essential to the achievement of a more just society. These include permanent statutory authorities, Royal Commissions and other ad hoc inquiries, law reform commissions, non-government agencies, and sometimes even trade unions and industry bodies. As the attention span of the community diminishes in inverse proportion to its technological sophistication and as the political process focuses ever more on the here and now, institutions that can stimulate the community's sense of injustice are critical to the wellbeing of this society.

71 The High Court struck down the attempt of the legislature of the ACT to provide for a form of same sex marriage on the ground of inconsistency with the *Marriage Act 1961* (Cth): *Commonwealth v Australian Capital Territory* (2013) 304 ALR 204 (holding that the *Marriage Equality (Same Sex) Act 2013* (ACT) was of no effect). However, the decision confirmed that the Commonwealth has power to legislate for the introduction of same-sex marriage pursuant to s 51(xxi) of the *Constitution*, which gives the Parliament the power to make laws with respect to 'marriage'.