

348

DARLING DOWNS INSTITUTE OF ADVANCED EDUCATION

McGREGOR COLLEGE, TOOWOOMBA, QUEENSLAND

FRIDAY, 30 JULY, 1982

SIXTH ALEX McGREGOR MEMORIAL ORATION

RECESSION, LAW REFORM AND EDUCATION.

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

July 1982

DARLING DOWNS INSTITUTE OF ADVANCED EDUCATION

McGREGOR COLLEGE, TOOWOOMBA, QUEENSLAND

FRIDAY, 30 JULY, 1982

SIXTH ALEX McGREGOR MEMORIAL ORATION

RECESSION, LAW REFORM AND EDUCATION

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission*
Deputy Chancellor of The University of Newcastle

THE McGREGOR ORATION

I am honoured to be invited to deliver the Sixth Memorial Oration bearing the name of Dr. Alex McGregor. I did not know Dr. McGregor, whose contributions to tertiary education in this region are remembered in the name of this fine College, in the Oration and in so many other ways. My predecessor in the Oration series was Sir Zelman Cowen. He retired this week as Governor-General of Australia and I know I would speak for all of you in paying tribute to his service to the Crown and to Australia in the office he has just relinquished. Before he became Governor-General, he was a part-time Commissioner of the Australian Law Reform Commission. Recently I spoke to him of Dr. McGregor and he told me, in that warm and generous way in which he speaks of people he admires, that Dr. McGregor was above all the epitome of a good citizen; busy and constructive in civic affairs, optimistic and dedicated to the improvement of his society.

All of you would know that Dr. McGregor was the Foundation Chairman of the Darling Downs University Establishment Association formed in 1957 with the object of the establishment of a University College in Toowoomba. The Martin Report on tertiary education in 1964 proposed the creation of a second stream within tertiary education in Australia. This led on to the establishment of the Colleges of Advanced Education of which the Darling Downs Institute in Toowoomba is an outstandingly successful example. Not long before Sir Paul Hasluck, as Governor-General, opened the first stage of this College, Dr. McGregor, this fine civic, professional and individual leader, was

accidentally killed in Paris. Sir Zelman in the last Oration records the shock and sadness of his death. However, his achievements live on in this College, inaugurated in 1972 and in the Institute of Advanced Education. I am sure that his memory is alive for many here tonight.

Abraham Lincoln once said that when he heard a man orate, he liked to see him act as if he were fighting bees. Orations are coming back into fashion in Australia and because of the position I hold, you can imagine that there are plenty of occasions for me to fight those bees. An oration is something more formal than a mere 'lecture' and more significant than a humble 'speech'. It is certainly to be more dignified than a mere 'talk'. Yet it must not be as sleep-inducing as a sermon of equal length. I have been given no guidance on the subject matter and so my mind can wander over any idea that catches my fancy. In fact, I have been given no guidance at all, save for the instruction that my oratory must not carry me away so far that I go beyond 40 to 60 minutes. You will be distressed to know that I intend to opt for the latter rather than the former interval of time. Judges are not noted for their brevity.

I propose to take this occasion to say something about law reform in hard times. I will also make a few observations about my own education, in the hope that these will be relevant to the current debate about the state of public education in our country: for I was educated in public schools - as are most of the young people hardest hit by the economic recession through which we are now passing.

THE AUSTRALIAN LAW REFORM COMMISSION

Let me start my observations on law reform in a recession by telling you something about the Australian Law Reform Commission itself. It is one of ten law reform agencies in this country: permanent bodies, all of them with small resources and limited manpower, established to help the processes of parliamentary government with the reform, modernisation and simplification of the law. There is in Queensland a State Law Reform Commission, under the distinguished leadership of Mr. Justice Andrews, the Senior Puisne Judge of the Supreme Court of Queensland. We enjoy close and cordial relations with our Queensland colleagues. The Australian Federal Commission is established in Sydney. It has had, virtually over the whole time since its establishment in 1975, a series of distinguished Commissioners drawn from Queensland. I have mentioned Sir Zelman Cowen, who was, at his appointment, Vice-Chancellor of the University of Queensland. One of our original Commissioners was Mr. F.G. Brennan, Q.C., then of the Queensland Bar now Sir Gerard Brennan, a Justice of the High Court of Australia. He was appointed a Commissioner on the same day as Mr. John Cain, now the Premier of Victoria. It was a day of prescient appointments.

The Australian Law Reform Commission is a permanent national institution. It works only on projects assigned to it by the Federal Attorney-General. Under successive Attorneys-General - and I have worked to five of them - we have received challenging and highly relevant tasks, in areas which have required us to examine the future of the legal system and its modification to take into account the tremendous forces of change that are the special mark of our time. People ask me: 'When will you finish the task of law reform?'. The answer must be that I will finish when I return to judicial duties. But the forces of science and technology, the changing moral and social values of our community, the changing methods of doing business and the growth of the responsibilities of government, all impose upon law reform bodies a task of reform and modernisation that will never be finished. The law must keep pace with the times. Law Reform Commissions exist to help Parliaments with this adjustment. They cannot succeed without the support of the Governments and the Parliaments they serve. The interest and participation of citizens in the work of law reform is a guarantee against irrelevance and against indifference to the reports, once delivered.

Numerous reports of the Australian Law Reform Commission have been implemented both at a Federal and State level in Australia. One of the first States to adopt a report of the Commission was Queensland, which enacted legislation based on the Commission's report on human tissue transplantation.¹

The Australian Law Reform Commission consults widely and seeks to encourage and promote what the Prime Minister, Mr. Fraser has described as its methodology of 'participatory law reform'.² Whether it is working on the best method of handling complaints against the police, the reform of criminal investigation laws, the design of new laws on human tissue transplantation, the modification of the law to adjust to the protection of privacy in computerised information systems, the testing question of the recognition of Aboriginal customary laws, the reform of child welfare law or the proposal for a uniform defamation law, in all of these tasks and in the others under study the Australian Law Reform Commission seeks out the views of ordinary citizens. This is not simply to get information and opinions, although that is important. It is also to ensure that strongly held dissenting views are taken into account, so that proposals once placed before the Parliament in such controversial matters of reference, are thoroughly ventilated in a way that will help politicians to feel able to pursue the reform suggestions and see them, with or without modifications, into the law of the land. The process of public discussion about law reform issues also helps to break down the mystique and mystery of the law which, after all, is there to serve the people. It also promotes an expectation of law reform action. Mr. Elliott, when he was Attorney-General, never ceased to remind me that we were the Law Reform Commission and not the Law Report Commission. The delivery of splendid, well-reasoned and closely argued reports will not

contribute to the removal of injustices and the improvement of our society and its laws, unless we can carry with us the citizens and the legislators. I am sure that Dr. Alex McGregor - as a practical activist who carried with him the citizens and the legislators, and who translated good ideas into action would approve of this philosophy. The business I am in - the business of practical law reform - is to help that indispensable institution of our democracy - the elected Parliament - with the reform, modernisation and simplification of the law in areas that will otherwise all too readily be ignored and neglected. It is fashionable in Australia to denigrate politicians and the parliamentary institution. I will have none of it. Instead of such a carping and 'knocking' attitude, all true democrats will be seeking to bend their efforts to the improvement of the political process so that Parliament works better. That is the central philosophy of the Australian Law Reform Commission. There are painful, complicated, sensitive, technical and just plain boring questions which can easily be overlooked in the heady, political atmosphere of Parliament today. If our parliamentary institutions are to survive and flourish, they will need inter-disciplinary, expert assistance from bodies which are not afraid to consult the experts and the citizenry.

HARD TIMES

If, as I have said, the task of a law reform commission is to help Parliament change old laws and develop new rules to cope with society as it is, a central feature of our present Australian society which cannot be ignored by law reform, is the economic downturn. The Commonwealth Government has recently acknowledged that this is a recession. It seems to be generally agreed that it is, in fact, the most widespread, persistent and penetrating recession since the Great Depression of the 1930's. The exact extent of unemployment is a matter of debate. A recent issue of the Australian Bulletin of Labour (June 1982) says that the unemployment level reached 7% in February. Most of you will have heard the President of the A.C.T.U., Mr. Dolan predicting last week that by the end of the year we in Australia would be up to the current British figure of 13%.³ The Federal Opposition spokesman on industrial relations, Mr. Hawke has suggested that the figure of 7% understates the true position. He contends that more than a million Australians could now be unwillingly out of work or under-employed. This 'hidden unemployed', as he described them, is made up of people who would normally be actively looking for work but who have withdrawn from the labour market because of the acknowledged pointlessness of seeking a job:

Such people do not figure in the recorded unemployment statistics, but have become what has been termed the hidden unemployed. Recent estimates suggest that this form of unemployment, which was virtually non-existent before 1974-75 could now involve as many as 350,000 people. In other words

close to 800,000 Australians could be properly classified as willing to work but unable to get jobs. We should also account for those Australians who...are working shorter hours than they would prefer.⁴

The Federal Government's Social Welfare Policy Secretariat has conducted a special enquiry into the incidence of poverty in Australia. In our apparently affluent and lucky country, how many people are poor? The Federal report discovered that at least 1,250,000 people are below an updated version of Professor Henderson's poverty line. Whether this includes 'subsistence poverty' or people who cannot reasonably feed and dress themselves, is not entirely clear.⁵ In Britain, it is said that about 10 million of the population of 50 million are experiencing a poverty stricken life.⁶

Of course, we must keep this talk of recession and poverty in perspective. Professor Geoffrey Blainey, the Professor of History at the University of Melbourne, has recently reminded us that by the standards of the 1920's and 1930's, things are nowhere near as bad as they were then.

Unemployment was not only more severe in the world Depression but people had more difficulty in coping with it. Families had less spare money to look after those members who were unemployed and the dole was much lower. It could buy much less.⁷

It seems generally realised that there will be no fundamental solution to our economic ills until the United States economy is back in equilibrium, with a drop in American interest rates, which inevitably have their ripple effect throughout the Western community including in Australia. Various proposals are made, in Australia, to soften the burden of the recession upon the deprived, the young, the old and the otherwise disadvantaged. The Federal Government, preparing what has been described as the most important Budget since the War, hears the chorus of angry, anxious voices calling for reform:

- * Some urge fundamental reform of the taxation system, new efforts to stamp out tax avoidance and thereby to permit the cutting of taxes for ordinary workers and the improvement of real take home pay after inflation and tax.⁸
- * Others, such as the Victorian Council of Social Service in a recent report titled 'Passing the Buck' urge a halt to 'new Federalism', a recognition that the States are either not willing or not able to take over Federal responsibilities for the disadvantaged and a retreat from 'privatisation' of welfare services which, it is claimed, 'produce some of the most undesirable characteristics of the private sector, including diminishing accountability to users, diminished service and diminished choice'.⁹

- * Others urge a termination of the payment of pensions to people over 70 irrespective of income, so that the limited welfare cake can be divided more amply amongst the most needy.¹⁰
- * Some voices call for tightening up in particular welfare services, such as the Community Youth Support Scheme, benefits for single women¹¹, a crack down on invalid pensions¹² and a cut in the family support services program.¹³
- * The Deputy Prime Minister has urged the consideration of job sharing¹⁴. Others urge an increase, beyond what is already occurring, of part time work.
- * Mr. Dolan has mentioned the possible need for unions to consider the aggregate workforce and to moderate wage demands.¹⁵ The National Wage decision of the Arbitration Commission on 14 May 1982, the first since the Commission abandoned wage indexation 10 months ago, awarded no national pay increase, producing the Prime Minister's comment that it was 'the best wage decision for 7 years'.¹⁶
- * In Victoria, the new Minister for Community Welfare Services has established a task force to investigate poverty in Victoria a problem she described to be one 'about a lack of jobs, inadequate health, housing, educational and child care funding...About single supporting parents, the aged, disabled, Aborigines and migrants who have no access to a dignified lifestyle'.¹⁷
- * The same report from the National Institute of Labour Studies at Flinders University confirms that adolescents are still the worse hit in unemployment and under-employment. Mid year, the unemployment rate nationally remains highest for adolescents - 14.1% in the case of males and 21.3% in the case of females.¹⁸ The unemployment rate for adolescents looking for full time work was said to be drifting upwards. In some parts of Australia, the situation is worse than others. For example, in the Australian Capital Territory, an area of the Commonwealth's responsibility, whereas the national average for adolescents looking for full time work was 17.2%, the average in the Capital Territory was as high as 28.2%. The recent Flinders study shows that the impact on teenage women is large and it is growing, although the decline in overall employment growth has been most heavily borne by male employees.

Cold statistics and dispassionate talk about this problem do nothing to convey the personal despair of that minority of our country which is caught up in the daily humiliation of poverty and unemployment. It is sometimes thought to be bad form to talk in emotional terms about this problem. But if we are to avoid Disraeli's warning of two nations:

between whom there is no intercourse and no sympathy; who are as ignorant of each others habits, thoughts and feelings as if they were...inhabitants of different planets...who are fed different food, or ordered by different manners and are not governed by the same laws.¹⁹

If we are to avoid institutionalising, for a generation at least, of 'two nations', we who are the fortunate ones do well to reflect upon the personal tragedy and predicament of those who are carrying the personal burden of the economic malady of our time. One worker, with four children who had worked as a retail manager in England and Sydney before going to Canberra described the predicament well. He had lost his job soon after moving to the capital. He applied for numerous jobs but missed out either because he was not experienced enough or was too highly qualified for unskilled positions. He told the journalist:

The real problems are the psychological aspects of being unemployed and trying to survive on unemployment benefits. People don't realise what it is like to have to beg. You go to the Department of Social Security and they cannot help you so you go the welfare agencies and have to beg. You get called a 'dole bludger' by people - you lose your self respect - and you lose interest, and when you get in this situation, it is easy to do just that - lose interest.²⁰

HARD TIMES AND THE LAW

Now, I am a lawyer and though I picked an Economics degree during my protracted University education, I cannot and must not offer, pundit-like, my solutions to the economic problems of our country. The issues are in any case at the heart of the party political debate in our country and it would be quite wrong for me to proffer to the Executive Government unsolicited and possibly unwelcome views about what should be done. Furthermore, I believe that we must be careful lest we fall into the trap of the depression mentality. Countries are like people. They have moods. A profound bout of depression can have terrible consequences. Just as in individuals, it can sometimes be self-induced. It is not always possible to find a rapid cure. Nor is the doctor always willing or available to propose national shock therapy or a kind of national valium sedative.

My concerns are those of the lawyer. Hard times have implications for the law. These implications are not always fully realised. Poor people, unemployed people are not rich people without money and jobs. Their legal needs may be quite different.

In the civil law, our legal system, inherited from Britain, developed very largely to solve the problems of those with sufficient property to be able to afford to take their case to court. Our legal system was largely developed by judges in the course of solving practical disputes between the people who could afford to go to court. The civil law was largely created around the concerns, interests and conflicts of propertied people. The very methodology of the adversary trial — resolving disputes by the competing contentions of highly paid advocates arguing the case on behalf of their clients — tended to keep out of the courts people who could not afford a lawyer's fee. In this way, the common law of England, when it was transplanted in Australia, was profoundly affected by the biases and concerns of property. Thus, when I was at the Law School, not so many years ago not a whisper was breathed of laws on social security, welfare workers, Aborigines, mentally retarded people, patients' rights and so on. These were areas of 'undeveloped territory' so far as the law was concerned. Instead, I spent the midnight hours studying the laws of land conveyancing, contracts, mercantile law, company law, the laws of probate and succession, the rules of equity and tax law — laws for the well lawyered who could pay the fees

The two areas of law which tended to affect ordinary folk and which were taught in my day were the criminal law and divorce law. Even divorce law was a relatively recent development. Until the mid 19th century you needed a special Act of Parliament to get a divorce. Pressures of social change and the intense feelings that surround intimate personal relationships led to the development of a general divorce law, later overtaken by the Family Law Act.

So far as the criminal law was concerned, it must be remembered that our country's modern history was itself a by-product of the criminal justice system of Britain. The burgeoning prisons could not contain the overflow of the people of the poorer classes in prison for stealing, sometimes literally to survive in the dislocated world of the first Industrial Revolution. The loss of the American colonies sent the First Fleet south to Australia, brim-full with disaffected victims of the only real connexion most ordinary Englishmen had with courts of law. They were the lucky ones. They escaped the hangman's noose and the other grim punishments that survived up to that time. But they brought with them, in their vessels, the legal system which reflected the property concerns of the Mother Country and whose methodology of dispute resolution in the courts often prevented ordinary people from getting to the umpire or asserting or defending their legal rights.

UNEMPLOYMENT AND THE LAW

The growth in the number of unemployed must obviously have implications for the law — both in substance and practice. There is a famous story of an encounter between Sir John Latham, then an Australian Minister and later to be Chief Justice of

Australia, and the Italian Dictator Mussolini. The encounter took place in the early 1930s. Latham sought to explain to Mussolini the role of the High Court of Australia as a neutral umpire, resolving the ultimate battles over power between the Federal and State authorities or between government and the citizen. Mussolini, so it is recorded, listened in astonishment to the way in which the decisions of our Federal supreme court were simply accepted and faithfully obeyed by all concerned. He then asked Latham a pertinent question: 'Where are the armies which the High Court uses to enforce its decrees?' Latham was able to point out that in our system of law the ultimate enforcement of the law and acceptance of the authority of the courts rests not upon military force, nor even upon police intervention. It depends not upon an army of sheriffs' officers rushing about, fully armed, to uphold the dignity of the judges and enforce their rulings. It depends rather upon the acceptance by the community of the Rule of Law and of the principle that our constitutional machinery is legitimate and deserves the respect (if not always the agreement) of everyone.

One danger of endemic unemployment, short employment, under-employment, unsuitable employment or undesired part-time employment, may be an erosion of this respect for the law and its institutions. If the problem is transient and if relatively few are caught up in the depression of unemployment, we need have little concern and should devote our efforts as a society to ameliorating the predicament of those who are displaced. But if the problem is endemic, if it is worldwide, if it were to last for a matter of years, indeed if it were to set in as a permanent feature of our form of society (as the microchip and other technology displaced workers, particularly from routine employment), we have a much greater social problem on our hands. In these circumstances, we will need to rethink the Calvinist ethic about work. We will have to rethink the standard hours of work. We will have to prepare people for constructive use of leisure time. For many, including myself, a life of much leisure would be death. Yet if a steady and possibly growing number of our people are to be confined to increasing hours of leisure, we must adjust our social moralities and rid our common vocabulary of expressions such as 'dole bludger' and 'welfare cheat'. or unless we can either solve the problems of endemic unemployment or revise society's attitudes to non-productive idleness, we are likely to reap a whirlwind of discontent and alienation, particularly amongst the young. They will feel betrayed by society: condemned for idleness beyond their control and surrounded by wealth and property which they cannot hope to attain. The Brixton riots in London and confrontation between the unemployed and police in Belgium and the United States stand as a warning — even to us in the lucky country

In part the answer to this social predicament lies in education. We have a very poor record in Australia in educational retention when compared to the United States, Canada and Japan. They keep twice as many young people in education after 16 as we do. The answer will also lie in more vocational training and retraining for new skills. This Institute will play a part in this. But it does seem that there may remain a kernel of unemployed, large by the standards of the post-war era. If we are not to alienate this section of our community and create disaffection and resentment, including towards the law and our institutions, we must be sensitive to their predicament. We must design social policies and laws that take their problems into account. I often feel that it is not entirely coincidental that the problem of new drugs in the Australian society has coincided with the economic malaise and the rise in unemployment amongst the young.

UNEMPLOYMENT AND LAW REFORM

The Australian Law Reform Commission works only on tasks that are specifically assigned to it by the Federal Attorney-General. No task has been assigned precisely to deal with the legal issues raised by unemployment and new poverty in Australia. In 1977 we reported to the Commonwealth Government on a new system for handling the problems of people who get into debt. It was not a particularly novel proposal. In fact it was based upon statutory schemes operating for many years in the greatest credit economy of them all — the United States. Put briefly, the report proposed a system by which people who got into financial difficulties could secure a moratorium on all their debts, without the painful necessity of going bankrupt or the expensive business of going to court for individual debts. Procedures were then proposed so that such people could secure rudimentary debt counselling, an organisation of their debts and the establishment of schemes for the regular repayment of their debts. Members of the middle class organise their debts by the use of credit cards or Bankcard. The poor, the unemployed and those who were just not able to cope with the problem of debt may sometimes need a little more help than presently they receive. A report earlier this year in Britain proposed a similar system for that country.²¹ The proposal of the Australian Law Reform Commission seems to be lost somewhere in the Commonwealth bureaucracy. In law reform one must learn to be patient.

The Australian Law Reform Commission is also working on the reform of debt recovery laws generally. As well, it is examining the law of standing in the courts. That law has, until now, frequently confined the power to raise important questions in the courts to those who have a personal and generally a property interest in the issue they want to have determined. The Commission is now seeking to find a formulation that will ensure that community groups who have a genuine concern in a particular issue (though no immediate financial interest) can ensure that the law is upheld in the courts. In the

United States, legal service advocates have been vigorous in using the law to protect the poor and disadvantaged as a group — working the machinery of the justice system for a wider clientele.

The Commission's most recent report on child welfare law reform sought to tackle in a sensitive way the desperately sad cases of young people who become caught up in criminality or who are in need of care because they are neglected or abused or in unsuitable child-minding centres or oppressive employment. There are many other tasks before the Commission in which we are trying to help the Government and the Parliament to modernise and simplify the law and to make it more sensitive to Australian conditions today.

PUBLIC EDUCATION IN HARD TIMES

When Disraeli talked of 'two nations' he did not mention the separate education of the two nations. This was doubtless because his play Sybil, in which he wrote of the two nations, was penned before the advent of universal education — free, secular and compulsory for the whole community. I want to devote my closing remarks to an issue that concerns us all in Australia, namely the quality of secondary education. I could have spoken of some of the issues facing tertiary education. This time last week I was addressing one such issue in my capacity as Deputy Chancellor of the University of Newcastle. As you may know, that University, like the James Cook University in Queensland, has been required to amalgamate with the adjoining College of Advanced Education. I have refrained from dealing with tertiary questions because it is not a month since Professor Peter Karmel reviewed 'The re-organisation of tertiary education in Australia' at a conference in this city.²² So let me therefore make a few closing remarks about primary and secondary education. I hope you will not regard them as divisive. They are not meant to be. Sometimes facts are divisive but they must not for that reason be ignored.

All of us, whatever our background, social status or religion have a legitimate interest in the success of public primary and secondary education in Australia. On that success depends, in very large measure, the preparation for the future of the great majority of Australians. Let me first disclose an interest. I was educated entirely in the government school system in New South Wales. From a local primary school, I was sent to what is called in New South Wales an 'opportunity school' (for children who did well in I.Q. tests). Thence I went on to Fort Street High School and matriculated to Sydney University. I received a fine education. I had wonderful teachers. My debt to them encourages me to speak up in this educational institution and at this time for the cause of public education in our country.

No sensible commentator nowadays would urge the abolition of private or systemic (parochial) education. Our country has matured to the point that it no longer seeks to enforce a monotonous uniformity in social activities and attitudes, including in education. There is room for variety, experimentation and difference. But those who have benefited from education in government schools, as I have, owe a duty of support to the children of most ordinary Australians - some of them poor, unemployed, disadvantaged, migrants, Aborigines and so on who do not choose a church school - and who cannot afford private education. If those who have taken advantage of the general system of government education in the local school and local high school do not speak out, who will? If it is left to teachers, they may be seen as self interested or industrially motivated. I have neither of these motivations. I speak up for government schools because, like many others in public life today, I owe much to them.

All of you would be aware of the controversy over what has been described as the 'rise and rise of private education' in Australia.²³ Government funding to such schools has increased considerably in recent years. The increase has been especially notable in Commonwealth Government direct funding to non-government schools. For example, funding of private secondary schools has increased by 77.5% in real terms between 1976 and 1983 - a time of general budgetary restraint. In the same period, in real terms, the grants to government schools will have fallen 10.1%.²⁴ Of all Australian secondary students 23% attend private schools. The remaining 77% attend government schools. On a per capita basis, an unequal position appears to be emerging. A little over half of the Commonwealth Government's direct recurrent education expenditure goes on non-government schools. In New South Wales about 5% of the State Government education budget goes to non-government schools. Overall the State figure is about 5% Australia-wide. In New South Wales, the State Government contributes 82% of recurrent government funds for education, and the Commonwealth's direct expenditure is 18%. Overall, in New South Wales 13% of total government funds (Commonwealth and State) is expended on the often already advantaged 23% of students in non-government schools and the expenditure figure is rising. But even new and well resourced private schools have over 40% of their running costs paid for by government. And in addition to direct assistance of this kind, significant assistance is offered in the form of subsidies for interest on loans for building projects, boarding allowances, tax concessions and so on.

The numbers of young Australians attending government schools has begun, proportionately, to decline. The Schools Commission has forecast a government school decline of between 4% and 6% by 1984, whilst private schools will increase enrolments from 5% to 13%. The Schools Commission says that by the mid-1980's the private

schools will have returned to their previous post-War highpoint of 24% of all enrolments and that this will keep on expanding past that point.²⁶

A table illustrates the comparatively advantageous position of parochial and other private schools, when compared to government schools:

TABLE

<u>Type of School</u>	<u>Source of money</u>	<u>Percentage change 1974/79 in real terms</u>
Catholic primary	Commonwealth Grant	up 91%
	State grants	up 55.9%
	PRIVATE INPUT	up 2.1%
Catholic Secondary	Commonwealth Grant	up 104.6%
	State grants	up 92%
	PRIVATE INPUT	down 10.3%
Other Private Primary	Commonwealth Grant	up 115.5%
	State grants	up 74%
	PRIVATE INPUT	down 1.5%
Other Private Secondary	Commonwealth Grant	up 88.8%
	State grants	up 109.9%
	PRIVATE INPUT	down 14.2%
Government Primary	Both State and Commonwealth grants	up 42.5%
Government Secondary	Both State and Commonwealth grants	up 32.6%

Of course, some of these changes may be justified. The 23% of the children who attend private schools are Australians too. Some of the schools - especially of the Catholic schools were badly deprived and would have disappeared but for the support of succeeding governments over the past two decades. The nation cannot afford to lose the maximisation of its intellectual talent, wherever educated, whether in government, Catholic or private schools. As I have already said, we have a major problem in Australia in school retention, in all three systems. By comparison to other OECD countries our three systems are failing, in aggregate, to keep young people in education. The issue of funding is one that causes considerable emotion and even legal challenges. In 1981 an attempt to challenge the constitutionality of government funds for religious schools failed in the High Court of Australia.²⁷ That Court refused to apply in Australia the decisions of the United States courts which absolutely forbid the devotion of government money to church schools, however needy.

In July 1982 I revisited my old school in Sydney - a sort of Brideshead Revisited, 1982 style. Although there were a few new facilities, and in particular a new library and a language laboratory, the position in this government school - the oldest in

a country - an ornament of the New South Wales public education system - was depressing when compared to the bright prospectuses issued by the private schools, now heavily and increasingly funded from the public purse. There was no heated swimming pool here. The playing fields include no manicured oval, just the same rough mixture of asphalt and grass upon which I stumbled so often in the 50's. There is certainly no chapel, no ivy quadrangle, no boat shed and the theatre is an ungainly relic of the 20's and 30's, now little used: where once the budding thespians played. The music room is a limited facility, as it was in my day. But what was most noticeable was the fall in morale: the feeling that the famous and powerful who had taken advantage of this government school - the Evatts, the Barwicks, the Kerrs, the Spenders, the Ellicotts, the Wrans, the Dowds and so on, were content to stand quietly by as observers to the steady comparative decline of funding of government schools.

I am no expert in education, let alone educational funding. I do not pretend to know the basis upon which the Schools Commission decides its classifications of need and its funding program. But I do detect a growing sensitivity in the general community to what has been happening. Without divisiveness but in payment of an educational debt, those in public life today who enjoyed education in government schools must consider the figures I have quoted and they must reflect upon their significance for the education of the mass of Australian boys and girls.

Let it not be thought that the government schools are blameless: spotless, innocent victims of a 'privatisation plot'. The drift of enrolments to private schools is itself a reflection of community concerns about some developments in the state education system, particularly the secondary system. A perceived decline in discipline, decline in some teaching standards and decline in the pursuit of excellence are often mentioned as the reasons. In the name of democracy and egalitarianism, educationalists and teacher unions have all too often neglected the needs and entitlements of the gifted child in Australia. Our society should place the highest premium upon the early identification of that child and the provision of specialist, selective education for him and her. Contrary to the dogma of some officials, this is not 'elitism'. It is the very opposite. It is the guarantee that our institutions of power: law, government, administration and the media, will not become the closed preserve of those who were privately educated. If we embrace the democratic ideal, we should be doing everything we can to ensure that the small child at the local school at Toowoomba, Goondawindi, Fremantle and Strathfield North in Sydney has an opportunity to excel and to flourish and is not disadvantaged because his parents happen to be poor, unemployed, Aboriginal, migrants or otherwise disadvantaged.

CONCLUSIONS

These comments bring me back to my central theme. We are living in a time of rapid change. It is difficult for our leaders to comprehend the variety and pace of change. Our social problems are compounded by the current phase of the economic cycle. The downturn, though not as bad as the 1920's and 30's is serious. It is nobody's special fault. But it affects individuals and it affects society. It has implications for the rule of law. It raises needs for particular laws: sensitive to the special problems of the poor and disadvantaged.

Just as the law must respond to the needs of the disadvantaged and less well off, so too must education at every level. In primary and second schools, we must not be content to see the relative erosion of that priceless national asset: our government school systems. Through that system has come many of the leaders of the Australian community. At the top levels of government, the judiciary, the military and administration, as well as in all walks of life, those who were educated in the local government school have mixed equally and with ease with those educated in private schools. We do not have sufficient talent in this country to permit the decline of the government school system. It educates three-quarters of our people. It deserves the support of all citizens. Those who reaped its advantages should speak up for it. We must modernise our educational system to make it more attractive to all of our people so that more of them feel that it is relevant to persist with education. But we must also ensure that gifted students are encouraged to excel. And not only if their parents are wealthy enough to see to it.

Above the Old Bailey in Central London under the golden cross and beneath the statue of blindfolded Justice, there is carved an inscription. It is read by the parade of judges, prisoners, lawyers, witnesses and citizens entering that place. It is, if you like, the battle cry of a just legal system. It reads: 'Defend the widows and the children of the poor'. In hard times, in times of recession, this motto has a special relevancy, and the message goes out beyond the law.

FOOTNOTES

- * The views expressed in this Oration are the author's personal views only.
1. Australian Law Reform Commission Human Tissue Transplants (ALRC 7), 1977. See Transplantation and Anatomy Act 1979.
 2. J.M. Fraser, speech at the opening of the 19th Australian Legal Convention (1977) 51 Australian Law Journal 343.
 3. C.O. Dolan, speech at the opening of the Annual Conference, Australian Metal Workers' and Shipwrights' Union, 22 July 1982.
 4. R.J. Hawke, address Launceston, reported Sunday Telegraph, 25 April 1982.
 5. See A. Nicholls 'Poverty and the Community', Age, 14 July 1982.
 6. See Dr. M. Brown, reported Melbourne Herald, 16 July 1982.
 7. G. Blainey cited by G. Barker, 'The Recession, the Good News and the Bad News', Age, 17 April 1982, 11.
 8. G. Barker, *ibid.*
 9. Victorian Council of Social Service, 'Passing the Buck', 1982 reported G.Barker 'Canberra Passes the Welfare Buck', The Age, 1 May 1982, 11.
 10. See e.g. A. Robinson, 'Pension "Bludgers"', Melbourne Herald, 23 June 1982, 22.
 11. S. Sanders 'A Benefit Clamp on Single Women', reported Sun Herald, 20 June 1982.
 12. G. Williams 'Government Continues Crackdown Against Invalid Pensioners', Sydney Morning Herald, 27 April 1982.
 13. R. Yallop 'Welfare Cuts Threaten Consumer Casualties', in The Age, 2 February 1982.
 14. S. Arnold 'Poverty...The Other Face of Sydney' in Sydney Sun, 23 July 1982, 14.
 15. Dolan, n. 3 above.
 16. J. M. Fraser quote in the Australian Teacher, 1 June 1982, 4.
 17. Mrs. P. T. Toner, quoted Melbourne Herald, 28 April 1982, 1.
 18. Canberra Times, 9 April 1982, 1. For the Flinders University report see National Institute of Labour Studies, Australian Bulletin of Labour, vol 8, no 3, June 1982
 19. B. Disraeli Sybil II, v cited P. Hollingsworth 'Australia, A Land of Two Nations?', the Age, 29 June 1982, 13.
 20. M. Nightingale, quoted Canberra Times, 22 April 1982, 3.
 21. Report of the Review Committee, Insolvency Law and Practice, 1982 (Chairman Sir Kenneth Cork). Cf. Australian Law Reform Commission, 'Insolvency: The Regular Payment of Debts' (ALRC 6) 1977.
 22. P. Karmel, 'The Context of the Re-organisation of Tertiary Education in Australia: A National Perspective', mimeo, paper delivered to conference 'The Re-organisation of Tertiary Education in Australia', Toowoomba, 10 July 1982.

23. P. McRae, 'The Rise and Rise of Private Schools' in the Australian Teacher, June 1982, 11.
24. Commonwealth Schools Commission, Recommendations for 1983, 1982, 30-31. See S. Marginson, 'Privacy Schooling: A Deliberate Strategy' in Education, 14 July 1982, 15.
25. Based on the 1981 Commonwealth Government Guidelines for Education Commissions. See Marginson, n.24.
26. Commonwealth Schools Commission, Report for the 1982-84 Triennium, 1981, 261-3.
27. Attorney-General (Victoria); ex rel Black v the Commonwealth (D.O.G.S. case) (1981) 55 Australian Law Journal Reports 155. See also Attorney-General (N.S.W.) v. Grant (1976) 135 Commonwealth Law Reports 587. Mr. Justice Murphy dissented in both decisions. Compare United States cases there cited.