1410

BILLABLE HOURS IN A NOBLE CALLING

PUBLISHED BY

ALTERNATIVE LAW JOURNAL

DECEMBER 1996

Billable hours in a noble calling?

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Ethics and the Australian legal profession.

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Let me invite a re-examination of what it means to be a member of a profession and a legal practitioner in our society today. Let me challenge the Australian legal profession to re-evaluate its conduct with a view to enhancing the level of service provided to a community which has ever-increasing expectations of the profession but a diminishing estimation of the likelihood that such expectations will be fulfilled.

Clearly, there is a tension between the traditional features of the practice of the law in a learned profession, enjoying important privileges (on the one hand) and the dictates of modern business practices which impose on lawyers of today obligations to address cost factors and so-called 'bottom line' considerations (on the other). Within the Australian legal profession a fear has been expressed that the undue emphasis on economic factors has led, in recent times, to a lessening of sensitivity to, and adherence to, the old ethic and culture of professional service. How real is this fear?

The basic questions which I pose are these: Is this expressed anxiety nothing more than a nostalgic hankering for a return to 'good old days' of legal practice, which were not always so good for the consumer after all? Was the professionalism of the past merely a self-deceiving disguise to preserve a hold on power in society? Or is the expressed anxiety a last desperate effort to keep alive the flame of professionalism in the face of so much evidence that the law is moving in the direction of becoming just another business? In short, is the idealism and selflessness of professionalism finally dying out in the law such that we will attend the funeral before the century is out?

Problems

Three recent comments on these questions are relevant.

The first is a book by Professor Anthony Kronman, Dean of the Yale Law School, titled *The Lost Lawyer: Failing Ideals of the Legal Profession.*[1] This book has been called the most influential work on the legal profession written in recent decades in the United States. If you have read it, you will understand why. It takes attorneys, advocates, law teachers and judges to task. It contrasts the suggested idealism, self-discipline, public spirit, economy and wisdom of the lawyers of Kronman's early years with the scene he observes today as head of one of his nation's finest law schools. Kronman begins his book with these arresting words:

> This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul. The crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer's life to offer fulfilment to the person who takes it up. Disguised by the material well-being of lawyers, is a spiritual crisis that strikes at the heart of their professional pride. [p.1]

Kronman considers that, in the hands of today's lawyers, the stewardship of the institutions of law in the United States has been extremely poor. They will not pass on a profession of quality and integrity

ch as they received from earlier generations. This is how sums it up:

> Attorneys practise law in a different way than did their forebears. The best graduates gravitate to huge and impersonal law firms where they are put in a corner and time charging is the rule. Original ideals of wise and dispassionate advice to clients are increasingly enfeebled by a mercantile attitude which effectively lets the client dictate the course of disputes, without the effective cautionary words which lawyers previously gave. The role of the lawyer in times gone by involved compassion for the client's entire predicament, tempered by detachment and also a measure of concern for the public good. Kronman predicts that the growing ascendancy of the economic view of law and a decline of its self-image as a helping profession, will continue the decline of idealism and professionalism unless this is arrested.

Advocates too, according to Kronman, are changing their ways. The old days of complete honesty with the courts and candour and honour in dealing with each other has given way to a more ruthless effort to win cases because larger profits hang on them, essential to the lawyer's 'business'. The client becomes a mere 'punter'. The lawyer becomes caught up in the client's speculation. Whereas, in the past, the advocate would conceive of his or her role as being, akin to the judge, the maintenance of a measure of dispassion, the shift to a business definition of the law embroils the lawyer entirely in the client's cause. It erodes the detachment essential to professionalism.

Kronman is equally critical of law schools for fostering the teaching of law (and negating the teaching of legal ethics) in ways that pander to the demands which the market view of legal practice place upon the law schools.

But Kronman's most scathing comments are reserved for the judges, especially appellate judges. He says that in the United States, under the pressure of their case-loads, judges have become mere editors of opinion drafts presented to them by their clerks. According to Kronman, very few judges in the United States still draft their own opinions. The consequence is discursive opinion writing, needless dissents and footnote battles as the clerks struggle for their place in the law books, with fuzzy reasoning which reflects a lack of traditional judicial wisdom and 'horse-sense'.[2]

A reading of Kronman's book would leave any lawyer spirited. In fact, it is a profoundly discouraging book, not ast because its author does not offer very much by way of lution or many causes for optimism. The question which Australian lawyer asks on putting it down is whether there evidence in Australia (with its somewhat different legal ditions) which makes Kronman's analysis inapplicable to r own circumstances or whether it is, at least, a warning of hat may be in store.

To answer this last question it is necessary to consider a ich publicised essay by my colleague, Sir Daryl Dawson, he Legal Services Market'.[3] Justice Dawson acknowledges at the very changes which give rise to many of Kronman's ncerns can already be detected in the Australian legal ene. Written soon after the publication of the Sackville port[4] and the Justice Statement of the Federal Attorney-neral's Department,[5] Justice Dawson's essay rejects a stalgic hankering for the past that will not return. To talk a 'national market for legal services' is to conceive of the al profession in economic terms in a way that would have offended the purists of past generations. But Justice Dawson accepts that the change of language results from a fundamental change in the way in which the profession is now being practised in Australia. It is now increasingly conceived of as a 'commercial activity', albeit one of a special kind. Such changes of approach will doubtless improve the accessibility, efficiency and costs of some legal services and even the rewards to some legal practitioners.

Anomalously, surveys of members of the Australian legal profession have revealed the existence of very high levels of dissatisfaction with professional life.[6] Justice Dawson lists a number of reasons why this should be so. Many of the reasons are connected with the growing concentration of legal practice in large firms. There is the increasingly narrowing effect of specialisation. There is diminished loyalty of partners to each other and to employed solicitors. There is a loss of objectivity consequent upon the employment of marketing managers to attract profitable clientele — something unheard of in years past. The priorities have changed in some places to the making of money rather than the provision of disinterested, yet sympathetic, legal advice. Unprofitable work is rebuffed by some as a waste of time. Longer and longer hours must be worked at the cost of the quality of the lawyer's life. The social environment of the legal workplace has deteriorated. The satisfaction which attended much legal practice in the past has been replaced by a 'strictly commercial and entrepreneurial approach to the practice of the law'.[7]

Justice Dawson, like Kronman, does not offer much by way of solution to these trends. He was not even convinced that the one idea which Kronman advanced, viz working in a right-sized country town, would work in Australia. He observes that 'the attractions of a country life, apart from the practice of the law, are not for every lawyer'.

The third commentary relevant to these remarks is in an address by the Chief Justice of the United States, William Rehnquist, at the Commencement Ceremony of the Catholic University of America Law School on 25 May 1996. Chief Justice Rehnquist reminisced about his own first graduation 54 years earlier and about his early faltering efforts to establish a legal practice in Phoenix, Arizona. He acknowledged that lawyering today was probably of a higher quality than in those days. Law firms are 'certainly more efficient' today. To some extent this is simply the result of new technology and new approaches to office management. He also acknowledged that young lawyers today generally make more money than they did in his day, even allowing for inflation. But then he asked the Kronman question:

> If all this is true, why are there so many dissatisfied young lawyers?

Like Justice Dawson, Chief Justice Rehnquist resists the yearning for the 'good old days'. He discounts the inevitable criticisms from 'old timers' like himself. This is how he expresses his conclusion:

> ...The practice of law is today a business where once it was a profession ...Market capitalism has come to dominate the legal profession in a way that it did not a generation ago. Law firms, whether in 1956 or 1996 have always had to turn a profit if they were to stay in business. But today the profit motive seems to be writ large in a way that it was not in the past. Perhaps nowhere in the profession is this tendency more developed than in the emphasis on billable hours. It appears that now clients are insisting on some changes in this form of billing, and perhaps it will not be as dominant in the future as it has been in the past. Hourly billing rewards inefficiency, the work of lawyer A, who spends 100 hours preparing a motion for summary

judgment, costs the client 100 times the billing rate; the work of lawyer B whom it takes 200 hours to do the same work costs the client twice as much for the same service.

The system of billable hours can reward the slow-witted lawyer. It can penalise the experienced, wise and efficient. Chief Justice Rehnquist is not one generally adverse to the market economy and individual autonomy. Yet he describes the eroding consequences of converting the legal profession into a business:

> in economic terms, large firms simply cannot justify taking on small matters; so they end up with only large clients...[and] large cases...[with] an enormous amount of time devoted to relatively uninteresting work ... [in cases] very few of [which] actually go to completed trial.

There is also a loss of loyalty not only *within* firms but as *between* clients and legal firms. Chief Justice Rehnquist concludes:

> [I]f the law firm simply counts the number of hours spent and sends a bill for that amount, perhaps there isn't a great difference between the law firm, on the one hand, and the office supply vendor who simply counts the number of pencils furnished and sends a bill for that amount, on the other.

I have now said enough about the problem. I have said it through the voices of other distinguished observers of the legal profession: two of them in the United States and one of them in Australia. What are the lessons that we should draw as we consider the direction of the Australian legal profession, struggling for its role in the new century just four years away?

Lessons

First, as Justice Dawson warns, we should avoid tiresome nostalgia for the past. It will always be the privilege of old timers, particularly in a hierarchical, traditionalist and historically conscious occupation such as the law, to look to the past with more affection than, say, the typical aeronautical engineer or a computer games salesman. But lawyers too, and their institutions, must move with fast changing times. Technology stimulates rapid change. Other change factors are also at work: a better educated community; a much expanded legal profession; a less monochrome society with changing values. Every institution, from the Crown down, is under the microscope of critical social scrutiny. In the case of the law, such scrutiny not only reveals the many wrongs in the substantive law which, in 'the good old days', too many lawyers accepted without complaint;[8] it also reveals the inadequacy of the system as currently organised to deliver justice to the ordinary citizen and the unsatisfactory features of the ethnic and class make-up of the legal profession itself.[9]

Second, we should avoid exaggeration of the extent to which the ideals of the legal profession, at least in Australia, have changed. Large firms, relative to the size of the profession, existed 30 years ago. What has changed has not been a mere matter of size but the national and even international operations of some legal firms. These changes are themselves responses to globalisation and the development of a national economy which requires a national response from the legal profession. I agree with Justice Dawson that *Street v Queensland Bar Association* (1989) 168 CLR 461[10] probably hastened the belated advent of a national legal profession in Australia. Yet this was both inevitable and desirable at the present stage of Australia's development. If the practice of law were cocooned in small old-time personalised firms, lawyers would be criticised for failing to respond to national needs and international opportunities. We should not stereotype the responses of legal firms or individual practitioners in terms of size and change of practice. If the supervising courts and professional tribunals hold fast to the high standards of individual service demanded in the past, some of the worst abuses which have occurred in the United States may be avoided here.

Yet even in the United States the big firm is not entirely a novelty. In the May 1895 edition of *American Lawyer* a writer was complaining:

> [T]he typical law office...is located in a maelstrom of business life...In its appointments and methods of work it resembles a great business concern...The most successful and eminent at the Bar are the trained advisors of businessmen...[The Bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honour...[F]or the past thirty years it has been increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking. [pp.84-5]

I remind you that this was written 100 years ago. It tends to confirm that in the law we constantly revisit the controversies of the past. In 1904, in an address to the New York State Bar Association, a lawyer observed:

> The law business is not what it used to be. The expression 'law business' itself marks a certain change. This business side of the profession has assumed paramount importance and the profits of the business are our most practical concern.[11]

If all this sounds familiar, it should make us pause before we accept, at face value, all the criticisms directed at current conditions, at least in Australia.

Third, we should accept that no institution, however gorgeous, is impervious to change. This is least of all so in a profession which repeatedly boasts of its adaptability and which rests upon the foundation of the common law, which is truly one of history's success stories in its capacity to adapt (sometimes quite rapidly) with changing times. Many sole practitioners continue to make a living in the law in Australia, especially in suburban and country districts — although apparently at levels generally lower than in the past. Organised legal aid, the growth of the institution of Public Defenders, combined with the decision of the High Court in *Dietrich v The Queen* (1992) 177 CLR 292,[12] have all stimulated, to some extent, a flow of public funds to individual solicitors, small firms and junior members of the Bar. True, this flow is apparently endangered in the present time of budget cuts. The concentration on legal aid in criminal cases is sometimes criticised when important civil litigation, eg in family law cases, is neglected. However, legal aid is a partial antidote in the Australian legal profession, to combat the worst excesses of work concentration noted in the United States. This should make us careful before we assume that we are on exactly the same track.

Fourth, lawyers should not be adverse to acknowledging that many changes, which alter the character and activities of the legal profession, often forced upon it reluctantly, have been for the better. Clinging to old ways, just because they are old, is not rational. Sometimes we have to unlearn bad old habits which have outlived whatever usefulness they may have had — such as the two counsel or the two-thirds fee rule amongst barristers; or the total ban on advertising; or the prohibition on the use of paralegals or of joint practices with other professionals. Sometimes lawyers have had to respond to the call for external scrutiny of the way in which they

handle complaints from the public and from clients. One does not have to wholly embrace Richard Ackland's view that lawyers are members of a *Broederbond*,[13] or criticism that the Bar is simply a cartel, to accept that external perceptions are often quite useful and even legitimate. Lord Justice Scarman in England recently remarked that some of the profession's ethical rules appeared to have been simply protectionist and not at all concerned with the public interest or the proper administration of justice.[14] We can now see that at least some of the ethical truisms of the past were less concerned with ensuring right behaviour to clients than with gathering and retaining clients from the ambitions of competitors or stamping a high degree of conformity on professional behaviour and services.[15] Mr David Bennett, QC, President of the Australian and New South Wales Bar Associations, has accepted that 'some beneficial reforms to the provision of legal services have taken place in recent years'.[16] While this seems to be an uncharacteristically muted, grudging, even reluctant concession for a leading advocate, it is fair to observe that it is one that would probably not have been offered by some of Mr Bennett's predecessors.

If changes, resisted at the time, are now seen to have been 'beneficial reforms', members of the legal profession must keep their minds open to the possibility that other changes, urged today, will in due course come to be seen as useful to the ultimate objective of practising lawyers, which is to ensure that as many people as possible secure accurate legal advice and competent legal representation.[17]

Fifth, it should be acknowledged, both within the legal profession and by its critics, that there remain many, possibly a majority, who are as committed to the ideals of service and dispassionate advice as existed in times gone by. One United States response to Kronman's book was written by Mary Ann Glendon called *A Nation Under Lawyers — How the Crisis in the Legal Profession is Transforming American Society*.[18] Glendon admits that, with more than 800,000 lawyers, the United States has become the most intensely lawyered society the world has ever known. She concedes that a variety of beliefs and ideals are vying for dominance within the law. But she points to the heroes of the United States judicial and legal scenes in recent decades, notably Archibald Cox and Judge John Sirica and the unanimous opinion of the Supreme Court which ultimately demonstrated that even the President of the United States, with the power of life and death over millions, was subject to the law in a society ruled by law.[19]

We have our heroes and role models in Australia: fine leaders of the legal profession who daily accept the call to *pro bono* work, just as their predecessors did in earlier times; women lawyers who blaze a trail for equal opportunity in the law; Aboriginal lawyers, now exemplified by Judge Robert Blanch in New South Wales, who will help to change two centuries of attitudes to indigenous people; gay lawyers who courageously break down ancient stereotypes and refuse to accept prejudice from society, least of all from their colleagues; Councils for Civil Liberties and numerous professional associations connected with the law and law reform such as the International Commission of Jurists, the International Bar Association, Amnesty and a myriad of other groups. Who says lawyers have wholly lost their idealism? Some may have. But many have not.

Sixth, this said, some of the issues of professionalism which have been identified in the United States and Australia are certainly ripe for attention. Many of them derive from the growth of very large firms with their assignment of unrewarding work to the best and brightest graduates. Such firms are themselves obliged to address the growing evidence of lawyer dissatisfaction with their life and work. Unless a culture of loyalty and self-respect can be restored, the mercantile values of ruthless self-interest will permeate legal practice in Australia just as they have done in the United States. In the past, such loyalty had to be earned by reciprocal fidelity, honesty and dispassion. At the launch of her book *Legal Profiles*, containing client assessments of big firms in Australia, Andrea Warnecke reportedly said that the qualities of good lawyers today include how much fast food they eat, the lack of a good tan and the non-existence of erotic dreams.[20] Such deprivations are not good for lawyers or anyone else. Australian lawyers have received a warning.

Seventh, the revival of the public debate about what legal professional ethics should be makes it timely to urge an intensified interest in the teaching of legal ethics in law schools. I do not mean just a rudimentary training in the requirements of the local professional statute, rules of etiquette and, where applicable, book-keeping and trust account requirements, offered in a few lectures thrown in at the end of the law course. It is a matter of infusing all law teaching with a consideration of the ethical quandaries which can be presented to lawyers in the course of their professional lives. Only in this way will law schools provide students with guidance on professional responsibility and on the ethical issues they will face as they enter the profession.[21] One commentator has remarked, rightly in my view:

> [Law teachers] cannot avoid teaching ethics. By the very act of teaching, law teachers embody lawyering and the conduct of legal professionals. We create images of law and lawyering when we teach doctrine through cases and hypotheticals.[22]

Professor Ross Cranston in his new book *Legal Ethics and Professional Responsibility* accepts that the technical rules can be left to the practice course. However, he asserts:

> ...all law teachers have a responsibility to give attention to the ethical under-pinnings of legal practice. We have a responsibility to sensitise students to the ethical problems they will face as practitioners to provide them with some assistance in the task of resolving these problems, and to expose them to wider issues such as the unmet need for legal services. [p.30]

Eighth, the courts and bodies supervising professional conduct, also have a duty to uphold high standards of honest, faithful, diligent, competent and dispassionate legal advice and representation. In Australia, the courts become involved in cases of professional discipline in only the most serious cases. The establishment of the Legal Services Commissioner's office in New South Wales has seen an apparently significant increase in the number of complaints against lawyers in that State, according to a report published by the Commissioners's office in 1994-95. While the Commissioner's first report was criticised for its statistics and approach, that there has been an increase in complaints seems indisputable. It appears to bear out the conclusion that many clients and citizens feel more comfortable with the notion of complaining to a body which does not have representational and lobbying functions for the legal profession. It may be hoped that professional bodies and courts will have the imagination to devise remedies suitable to the wrongs when proved. Dealing with defalcation, criminal offences and trust fund abuses may be simple. But over-charging may require new responses that involve a purgative obligation of honorary legal service to the poor or disadvantaged.[23] Rudeness

and non-communication may warrant a session of mediation with the complainant as the New South Wales Attorney-General has proposed. But how is incompetence, ignorance of the law and simple failure to attend to a case to be redressed for the protection of the clients who come after?

Ninth, we should be encouraging the gathering and analysis of data on ethical defaults so that we can derive from them lessons about the teaching of law and ethics, the provision of new professional regulations and the provision of example and instruction from the leaders of the legal profession. This is one good result flowing from the establishment of the office of the Legal Services Commissioner in New South Wales. Statistics are now being gathered, according to the formulae in the Commissioner's Act. They are published beyond the legal profession to the community at large. The first step in law reform, indeed of any rational discussion on policy, is to establish the facts.

The deeper malaise

In my view, there is a deeper malaise in legal practice today which may underlie the problem discussed by Professor Kronman, Justice Dawson and Chief Justice Rehnquist. It is difficult to speak of it. In a secular society we feel rather uncomfortable in doing so, lest such words should be misinterpreted as inappropriate, hypocritical or self-righteous.

I refer to the void which is left in many lives by the absence of any spiritual construct and by the increasingly general rejection of any spiritual dimension to life. I mean a life in the law which involves no reflection on the amazing fact of existence and its brevity and about justice and its demands — a life in the law which is content with an annual trip to the Law Service at the beginning of Law Term or which even misses that, as the declining congregations witness a rising generation with 'better things to do' on the first day of Term. Such a life may be devoid of clear signposts. This is the malaise which was mentioned by Justice Zelling on the occasion of his retirement from the Supreme Court of South Australia:

> Even someone of the ability of Lord Radcliffe would have difficulty in reminding us today, as he did thirty-five years ago, of the words of St. Augustine of Hippo that life measured only in human terms is an inescapable disaster. The lack of that shared belief makes the articulation of the community conscience by the judiciary so much harder today.[24]

Until now, a spiritual dimension in societies such as Australia's afforded a framework of common beliefs important to sustaining and reinforcing ethical principles.[25] The Judeo-Christian-Islamic belief in the sacredness of each individual human life, bearing a divine spark, provided an ultimate foundation for self-control and for respect for others. That foundation is certainly one of the *stimuli* to the global movement for universal human rights which continues after the spiritual sources have been rejected or abandoned in many societies.[26]

At a time when so many fundamentals are questioned, doubted, even rejected, it is hardly surprising that the ethics of the legal profession should also be doubted by some of its members and attacked by its critics. It is easier to adopt a purely economic or mercantile view of the law if you have no concept of the nobility of the search for individual justice, of the essential dignity of each human being and the vital necessity of providing the law's protection, particularly to minorities, those who are hated, even demonised, and reviled. Without some kind of spiritual or ethical foundation for our society we can do little other than to reach back into the collective memory of our religious past or to rely on consensus declarations as to contemporary human values.

Conclusions

The challenge before the Australian legal profession as it approaches a new century is to resolve the basic paradoxes which it faces. To adapt to changing social values and revolutionary technology. To reorganise itself in such a way as to provide more effective, real and affordable access to legal advice and representation for ordinary citizens. To preserve and, where necessary, to defend the best of the old rules requiring honesty, fidelity, loyalty, diligence, competence and dispassion in the service of clients — above mere self-interest and, specifically, above commercial self-advantage. Yet to move with the changing direction of legal services in a global and national market. To adapt to the growth and changing composition of our society and of its legal profession: beyond the monochrome club of Anglo Celtic males. And to mould itself to the fast changing content and complexity of substantive and procedural law. It is quite a tall order. Is the Australian legal profession up to it?

The hope must be that some of the old-fashioned notions of service will survive even these changing times. In the void left by the undoubted decline of belief in fundamentals, we must hope that a new foothold for idealism and selflessness will be found. Despite the beliefs of some of its critics, the Australian legal profession's guiding principles will not, I believe, be found in economics alone. Still less will it be found in a dogma of free market competition or the arid language of the *Trade Practices Act*.[27] Economics alone cannot explain the will to do justice, to be dutiful to courts and honest and faithful to clients. Modern economic theory, now put into widespread practice, has not done such a good job in terms of social engineering. The large pool of long-term unemployed, the rise in crime, in drug use and increased stress within personal relationships all suggest the failure of unbridled economic rationalism as an alternative foundation principle for society. Indeed, in place of the old mateship of Australian society we see the steady growth of an underclass with grave dangers for social stability and traditional egalitarianism.

The great debate for lawyers in the coming century will not be whether a separate profession of advocates will survive. It will not be whether competition and consumer pressure will improve the delivery of some legal services. Still less will it be whether some lawyers will wear wigs. These are not the vital questions. What is vital is whether the ascendancy of economics, competition and technology, unrestrained, will snuff out what is left of the nobility of the legal calling and the idealism of those who are attracted to its service. We must certainly all hope that the basic ideal of the legal profession, as one of service beyond pure economic self-interest, will survive. But whether it survives or not is up to the lawyers of today. They should do what they can, while moving with the times, to revive and reinforce the best of the old professional ideals, to teach them rigorously and insistently to new recruits and to enforce those ideals strictly where there is default. But will they heed this call or dismiss it with a yawn and return to billable hours?

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LEGAL STUDIES

uggestions for discussion are n the following article 'In the 96' by Kim Rubenstein.

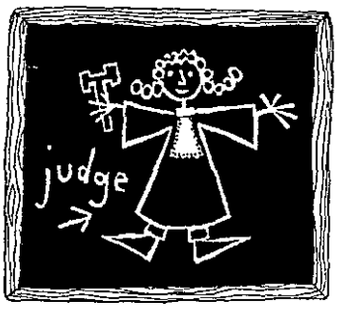
Rubenstein states 'The Consti- n of 1901 failed women'. Do gree? Give your reasons.

individual rights are actually with in the Constitution?

ss Rubenstein's statement: use of information technology to increased public participan the running of government eater accountability by Parliato the public'.

s the meaning of 'separation vers'. Rubenstein says 'Sepaof powers was never absolute 1901 Constitution'. What do nk she means by this?

5. Does the Australian Constitution reflect 'the values and principles of the community'? Discuss.



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