PROPERTY, RIGHTS AND SOCIAL SECURITY

BY RONALD SACKVILLE*

Commentators have put forward a variety of arguments designed to justify greater legal protection for social security applicants and beneficiaries. One such argument is that a claim to social security is properly regarded as a property right, which therefore should attract the same legal safeguards as other property rights. Professor Ronald Sackville argues that the notion of a "property right" is inappropriate to social security claims. However, a philosophy of "entitlement" to social security is emerging without the need to distort the concept of property. This entitlement to social security will be developed further by the framing of more precise legislative criteria governing claims to social security, the introduction of appropriate procedures for the independent review of determinations, more sensitive and efficient administration by the responsible Departments and a recognition in other areas of the law that claimants are entitled to the payments for which they have qualified.

I PROPERTY AND SOCIAL WELFARE

Calls for lawyers to take a greater interest in social welfare have produced vigorous responses in common law countries over recent years. The response has been most evident in the United States, where many great battles have been fought in the courts on behalf of welfare applicants and beneficiaries.[1] This trend is also apparent in the United Kingdom[2] and Australia.[3] Cynics claim that the new-found zeal for social welfare reflects base motives, a quest by practitioners for remunerative work to replace traditional areas of legal practice and a search by academics for new fields in which to undertake research and thereby gain advancement.[4] More charitable observers see the emergence of a distinctive law of social welfare as the long-overdue recognition by lawyers of their responsibilities to people, very often poor, whose sole or principal means of support may be threatened by an unsympathetic or even hostile bureaucracy. On this view the lawyer must not only perform his traditional

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[1] Which is not to say that court victories have necessarily been translated into administrative practices. Cf. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974), Ch. 8.

[2] See generally Adler and Bradley (eds), *Justice, Discretion and Poverty* (1975).

[3] Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia* (Second Main Report, 1975) (Professor Sackville), Ch. 6; Mossman and Sackville in *Essays on Law and Poverty: Bail and Social Security* (1977) (A.G.P.S.).

[4] Bankowski and Mungham, *Images of Law* (1976).

function of acting as a bulwark between the state and the individual, but also actively press the claims of applicants for social welfare benefits.

The expanded role of lawyers has coincided with commentaries urging that greater protection be accorded to people applying for or receiving social welfare benefits and specifically urging that legal processes be employed to overcome the traditionally precarious position of welfare beneficiaries. One of the most influential analyses has been that of Charles Reich in his article "The New Property".[5] In this article Reich points to

> the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of [largesse] is on a vast, imperial scale.[6]

Reich's argument, in brief, is that the new forms of wealth demand the same legal protection that has for so long been accorded to private property. The article correctly recognises that the beneficiaries of this government largesse are not solely or even mainly poor—virtually everyone in the community, including large-scale producers, benefit from or rely on "the new property".[7] But the need for protection is especially acute in the case of poorer social welfare beneficiaries. The state is obliged to provide for the well-being of citizens who, because of circumstances beyond their control, cannot themselves maintain a minimum standard of living. Legal doctrines that characterise government largesse as a privilege to be bestowed or withheld at the whim of public agencies are inconsistent with the recognition that deprivation is often caused by forces beyond the individual's control and that benefits are provided "to preserve the self-sufficiency of the individual. . . . Only by making such benefits into rights can the welfare state achieve its goal of providing secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny".[8]

Reich's argument does not depend on the redefinition of welfare benefits or other forms of government largesse, *as property*. His argument, which is not very different to similar contentions put forward earlier by others,[9] proceeds by analogy from the protection traditionally accorded to property

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5 Reich, "The New Property" (1964) 73 *Yale L. J.* 733.

6 *Id.*, 733.

7 For a similar recognition see Titmuss, *Essays on 'The Welfare State'* (3rd ed. 1976), Ch. 2.

8 Reich, note 5 *supra*, 785-786.

9 Another influential article, cited by Reich, was that by Jones, "The Rule of Law and the Welfare State" (1958) 58 *Colum. L. Rev.* 143, 154: "Even more important than the regulatory aspect of the welfare state is its office as the source of new rights—for example, the expectations created by a comprehensive system of social insurance. I see no reason why the word 'rights', with its unique emotive power, should be deemed inappropriate for these new expectations and pre-empted for use only in connection with such traditional interests as those in tangible property".

rights and compellingly demonstrates the need to elevate government largesse into a similar position. Reich certainly draws a comparison between the functions of private property in an age of more narrowly confined government activities, and the social functions performed in modern times by grants of government largesse. However, the article does not explore the concept of property in depth and it would appear that the use of the phrase "the new property" is not intended to suggest that a claim for a state provided income maintenance payment is to be regarded analytically as identical to a claim, for example, to ownership of goods or to an interest in land. Rather, the phrase serves the purpose of emphasising the crucial significance of government benefits to a wide range of people, not to mention its value as a political catchcry.[10] The point is brought home by a later article in which Reich specifically examines the legal issues created by social welfare programmes.[11] His arguments (for example, the need for greater procedural safeguards to be applied to welfare applicants) are wholly consistent with the philosophy expressed in "The New Property", but nowhere is the term "property" used in the second article, despite the translation of philosophical criteria into principles appropriate to constitutional adjudication before United States courts.

Others seem to have gone further. C. B. Macpherson argues that in a modern democratic society changes in the *concept and institution of property* are required.[12] In pre-capitalist society property was seen, he suggests, as a right to revenue, rather than as a right to material things, and comprised not only private property but common property—that is, a "right *not to be excluded from* the use or benefit of something which society or the state has proclaimed to be for common use . . . for example, common lands, public parks, city streets".[13] Only with the rise of capitalism did property become equated with private property, which Macpherson describes as "the right of a natural or artificial person to exclude others from some use or benefit of something"[14] and the right to dispose of that interest.[15] Private property was at the very heart of the capitalist market economy, the emergence of which, according to Macpherson, coincided with a blurring of the distinction between the "right" and the "thing", as property rights became freely alienable. Hence property moved away from the notion of non-transferable rights to revenue from land and other sources, such as state monopolies, to the idea of exclusive, alienable rights in

[10] Cf. the approach of the Supreme Court of the United States in *Goldberg* v. *Kelly* (1970) 397 U.S. 254, 262, in which the Court referred with approval to Reich's article in concluding that welfare benefits should not be terminated without the opportunity for an evidentiary hearing.

[11] Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74 *Yale L. J.* 1245.

[12] Macpherson, "Capitalism and the Changing Concept of Property" in Kamenka and Neale (eds), *Feudalism, Capitalism and Beyond* (1975).

[13] *Id.*, 106-107.

[14] *Id.*, 105.

[15] *Id.*, 109.

objects. The advent of the capitalist economy also encouraged the theory, propounded by Locke, Mill and others, that the main function of property is to provide an incentive to the labour needed by society for the production of wealth.

Macpherson contends that the concept of property has again changed in the twentieth century and is once more seen as a right to revenue, rather than a right to material things. Property as an exclusive, alienable right is no longer needed solely in that form, since even in modern capitalist economies the market place has less responsibility for allocating resources. The revised concept of property is capable of extending to such vital forms of wealth as pensions and subsidised services, but the main property right is the right to earn an income by the use of one's labour. If property is the reward for the exercise of one's labour, everyone must have the right to use his labour to gain access to the "accumulated productive resources of the whole society".[16] In short, Macpherson suggests that the concept of property must be broadened to embrace the right not to be excluded from the use or benefit of the community's accumulated productive resources—a resurrection of the notion of common property. On his analysis, democratic ideals make acceptance of the broader notion inevitable. Any justification that can be advanced to support private property—the need to preserve individual freedom, the right to the fruits of one's labour, the "right to life at more than an animal level"[17]—also supports the expanded definition of property. One cannot, for example, enjoy a better than animal existence without guaranteed access to society's productive output. Ultimately

> the concept of property will have to be broadened again to include the right to share in political power, and, even beyond that, a right to a kind of society or set of power relations which will enable the individual to live a fully human life. . . . Property can and should become again a right to life and liberty. . . .[18]

This analysis is vulnerable on several counts including its historical accuracy. Professor Tay has carefully examined the concept of seisin in English law, and points out that the identification of property rights and the object of those rights is by no means a phenomenon purely of the capitalist era.[19] The connection between rights and personal enjoyment in the early law is close indeed. Macpherson's notion that the early freeholder merely had a right to revenue from land sits uneasily with the legal doctrines emerging from that period. The sophisticated idea that there is a distinction between the proprietary interest and the object of that

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[16] *Id.*, 116.
[17] *Id.*, 118-119.
[18] *Id.*, 120-123.
[19] Tay, "Property and Law in the Society of Mass Production, Mass Consumption and Mass Allocation" (Seminar Paper, 1975), 7 ff.

interest developed only slowly.[20] The law has been influenced by, first, the lawyers' need to envisage property in tangible terms;[21] secondly, a recognition of what Holmes called the instinct which causes man to resist dispossession from land or other objects;[22] and, thirdly, a policy of discouraging lawlessness.[23] As far as English law is concerned, Macpherson's argument therefore rests on dubious historical ground.

Historical considerations aside, there are major difficulties with Macpherson's argument. It is, of course, important to remember that any analysis of property must take into account the danger of applying a definition mechanically in different contexts. Certainly the perspective of the political philosopher is very different from that of the lawyer concerned with fine points of textual interpretation and the shaping of reasonably precise common law rules. Even lawyers must be prepared to be flexible in employing the concept of property. The term, for example, might well receive one interpretation in a case involving the Commonwealth's constitutional power to acquire property on just terms and quite another in a case involving the interpretation of a taxation statute. Moreover, different aspects of property may be relevant for legal purposes, depending upon the nature of the question under consideration. Thus, many authorities have discussed whether certain rights in relation to land are proprietary (as opposed to contractual or personal) in the sense of being enforceable against persons other than the grantor of the right.[24] Other authorities have debated whether the use of land can be characterised as proprietary for the purposes of rules protecting property rights against invasion by third parties or for the purposes of particular statutory provisions.[25]

Bearing all this in mind, there remains value in distinguishing property rights from other forms of entitlement, such as those deriving from contract, statute, or delictual responsibility. While definitions of property, no less than others vary, legal commentators are generally prepared to agree that the term describes a right enforceable by appropriate legal remedies to exclude other persons from an object. The object may be tangible, as in the case of land or goods, or intangible, as in the case of the collocation of words forming the subject-matter of copyright. The holder of property has the right to use the object although the nature of the "use" will vary according to the character of the object. Unlike con-

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[20] And requires constant reaffirmation: *Pacific Film Laboratories Pty Ltd* v. *Federal Commissioner of Taxation* (1970) 121 C.L.R. 154.

[21] The doctrine of estates enable the common lawyers to visualise the estate as a "thing", separate from the land, thereby allowing interests in land to be divided on the basis of time.

[22] Holmes, *The Common Law* (1881), 206-213.

[23] Cf. *Armory* v. *Delamirie* (1792) 1 Strange 506; 93 E.R. 664.

[24] E.g. *King* v. *David Allan & Sons, Billposting Ltd* [1916] 2 A.C. 54; *Errington* v. *Errington* [1952] 1 K.B. 290; *National Provincial Bank Ltd* v. *Ainsworth* [1965] A.C. 1175.

[25] *Isaac* v. *Hotel de Paris Ltd* [1960] 1 All E.R. 348; *Claude Neon Ltd* v. *Melbourne and Metropalitan Board of Works* (1969) 43 A.L.J.R. 69; *Milirrpum* v. *Nabalco Pty Ltd* (The Aboriginal Land Rights Case) (1971) 17 F.L.R. 141.

tractual rights, the right of exclusion associated with property is enforceable not only against the creator of the right but third parties. Usually, but not invariably, the holder of property is able to assign his interest.[26] Remembering the "penumbra of ambiguity" that attaches to all definitions,[27] this description of property is helpful not only for legal analysis[28] but for the purposes of broader discussion as well. By expanding the concept of property to the point where it is all-encompassing, Macpherson removes its value as an analytical tool.[29] This criticism is not to deny that the function of property, at least non-domestic property, has changed dramatically following the separation of ownership and control and the vast social, economic and political power associated with the control of property. Nor does it deny that the philosophical justifications for the institution of property have changed and that distinctions need to be drawn between various species of property in determining the appropriate forms of public regulation. It does mean, however, that there are important distinctions between different forms of entitlement and that confusion will result if those distinctions are obscured.

Macpherson's argument in the last resort, tends to confuse the justification for the institution of property with the institution itself. The fact that private property historically has been justified by a labour theory does not necessarily lead, for example, to the conclusion that a man has "property" in his right to work. It may well be that in a just society which recognises the catastrophic dislocations caused by the forces of the marketplace, the community will accept responsibility not merely for income maintenance payments but employment opportunities for all who wish to work. However, such a work entitlement is not aptly described as property, even though it may attract some legal protection and may serve some of the same social goals as the institution of property. It may

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26 Compare Felix Cohen's definition:

> To the world:
> Keep off X unless you have my permission, which
> I may grant or withhold.
> Signed: Private citizen
> Endorsed: The state

Cohen, "Dialogue on Private Property" (1954) 9 *Rutgers L. Rev.* 359, 374. See generally on these matters Sackville and Neave, *Property Law—Cases and Materials* (2nd ed. 1975), Ch. 1.

27 Cohen, note 26 *supra,* 13.

28 The fault in the reasoning of Blackburn J. in the Aboriginal Land Rights Case, when considering whether the plaintiff clans had a proprietary relationship to the land they claimed, was not in the formulation of criteria indicating a proprietary relationship but in the inflexible application of those criteria to the evidence in the case: *Milirrpum* v. *Nabalco Pty. Ltd.* (1971) 17 F.L.R. 141. Sackville and Neave, note 26 *supra,* 34-41.

29 Analytically, there is a substantial difference between a right of way over privately owned land, even if shared with others, and a right to use a public highway, which Macpherson characterises as common property. Each may be equally valuable to an individual but, leaving aside the question of alienability, the former involves rights of exclusion of third parties that the latter does not. The distinction may be crucial when it comes, for example, to a question of the application of compensation provisions of a compulsory acquisition statute.

be that Macpherson intends simply to use the concept of property to formulate an attractive political catchcry as a means of improving the position of social security beneficiaries and others who are denied the right to participate fully "in a system of power relations".[30] Perhaps there is less objection to using the concept in this way than in other settings where precision is more important. Even so Professor Tay is surely right to contend that it is odd to elevate property into a ubiquitous concept, particularly at a time when certain aspects of its social role and importance have been seriously challenged.[31]

Professor Tay argues that the best approach to transform social welfare claims into "rights", and thereby promote the dignity and material well-being of claimants, is not through an inappropriate application of private law concepts but by changes in the administrative-regulatory machinery. In fact, a movement of this kind has been under way in Australia for some time, although rather more is involved than simply the expansion of concepts of administrative law. The process is one by which social security claims are being transformed from the status of privilege, both in a legal and more general sense, to that of entitlement. The notion of entitlement embraces but goes beyond the legal right to enforce a claim to social security. It involves the eligible social security claimant being seen as entitled to the benefit claimed, not only by the legal system, but also by those responsible for administering benefits and indeed the community as a whole. The move from privilege towards entitlement is far from complete and there are many obstacles to the transformation, including the disfavour into which social security appears to fall in times of economic hardship. However, changes in the law and the way in which social security is administered will hasten the process. The remainder of this paper briefly reviews some of the more important developments contributing to the emergence of an entitlement to social security. It should be observed that none of these owes anything to the notion of social security as property, suggesting that Macpherson's goals are attainable without the need to do violence to the concept of property.

II THE EMERGENCE OF AN ENTITLEMENT TO SOCIAL SECURITY

1. *Legislative Criteria and Legal Rights*

The major trend in social security programmes in Australia, in the sense of income maintenance schemes designed to assist individuals and families, has been the gradual acceptance by the Commonwealth of responsibility for most pensions and benefits. The trend has occurred in spite of rather than because of the terms of the Constitution, although since 1946 the federal pensions and benefits have been placed on a much firmer footing by section 51 (xxiiiA), introduced partly to validate the extensive wartime

[30] Macpherson, note 12 *supra*, 123.
[31] Tay, note 19 *supra*, 26.

social security programme about which doubts had been expressed.[32] It is perhaps too much to expect government welfare policies to be completely self-consistent; in that light the federal programmes in Australia have been much less fragmented and contradictory in approach than those of other countries. The Australian approach has been to provide means-tested benefits to specific categories of persons considered incapable of supporting themselves and "universal" benefits such as child endowment (now called family allowances) and means-test free age pensions to certain favoured groups. While the pendulum has recently swung slightly in favour of universal benefits, the basic thrust of the programme has been to establish "disability categories"[33] and to assist claimants who can show they come within the categories. Australia, unlike other Western countries, has never accepted a contribution or insurance philosophy as a guiding principle. Consequently, claimants qualify for pensions or benefits without having contributed to an insurance fund.[34] The reach of the disability category approach is expanding constantly and, as Table 1 shows, now embraces nearly 15 per cent of the Australian population.

TABLE 1 — Persons receiving selected social security benefits[35]

Category	Social Services Act 1947	30 June 1975 Numbers	30 June 1975 Proportion of Population	30 June 1976 Numbers	30 June 1976 Proportion of Population	30 June 1977 Numbers	30 June 1977 Proportion of Population
Age and Invalid pensioners	Part III	1,266,009	9.3	1,342,444	9.8	1,408,310	10.0
Widows' pensioners	Part IV	120,791	0.9	129,491	0.9	139,485	1.0
(Children of Widows)		139,004	1.0	145,400*	1.1	(156,500)	1.1
Supporting Mothers' beneficiaries	Part IVAAA	36,015	0.3	45,542	0.3	50,954	0.4
(Children of Supporting Mothers)		58,673	0.4	75,200*	0.6	(86,100)*	0.6
Unemployment, Sickness and Special beneficiaries	Part VII	191,778	1.4	226,115	1.7	292,749	2.1
TOTAL		1,812,270	13.3	1,964,192	14.4	2,134,098	15.2

* approximate

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[32] On this see generally Sackville, "Social Welfare in Australia: The Constitutional Framework" (1973) 5 *Fed. L. Rev.* 248. Section 51(xxiiiA) gives power to make laws with respect to "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services . . ., benefits to students and family allowances".

[33] Australian Government Commission of Inquiry into Poverty, *Poverty in Australia* (First Main Report, 1975) (Professor Henderson, Chairman), 30-31.

[34] For a general examination of the philosophy of social security in Australia see Lewis, *Values in Income Security Policies* (1975).

[35] Adapted and brought up to date from *Law and Poverty in Australia,* note 3 *supra,* Table 6.1. The age pension is means test free for pensioners aged 70 or over.

One advantage of a disability category approach is that the governing legislation can state eligibility requirements with some precision, thus enabling claimants and their advisers to ascertain their entitlement on the basis of authoritative published criteria. If the legislation is sufficiently precise and positive it may have the legal effect of creating a right to social security, in the sense of a claim enforceable by appropriate court action on a showing that the specified eligibility criteria have been met. The creation of such a right may be of considerable legal significance but important also in determining the quality of the relationship between claimants and the Department responsible for administering benefits. If eligible claimants are seen as having a legal right to benefits, it is likely that the administration of social security will be more responsive to their needs and avoid arbitrary or high handed actions.

The Social Services Act 1947 (Cth) does not create machinery by which eligible claimants can enforce their right to social security. Nevertheless, the federal Act is a vast improvement over State income maintenance legislation which has been superseded in most areas, but remains important for certain categories of beneficiaries who must serve a waiting period before becoming eligible for federal payments.[36] The State legislation almost uniformly is deliberately framed in the broadest terms to ensure that the Director or Minister has a virtually untrammelled discretion to decide who should receive payments and at what level.[37] The legal effect of legislation framed in this way is to prevent an individual obtaining an enforceable right to a particular benefit. The Social Services Act, on the other hand while far from a model of clarity, generally states eligibility criteria with reasonable precision, although inevitably considerable scope remains for elaborate departmental instructions interpreting the statutory guidelines. Insofar as a trend in the federal legislation has been discernible, the move has been away from imprecise criteria which leave claimants potentially at the mercy of a broad administrative discretion. For example, the long-standing but rarely applied direction that pensions were not payable to claimants not "of good character" or "not deserving of a pension" was eliminated from the Act in 1974,[38] thus eliminating the possibility of denying benefits to an applicant purely on moral grounds or as a punishment for bad behaviour.

Despite the move away from an approach favouring unfettered administrative discretion, the Social Services Act requires amendment before it can be said to accept that a claimant who meets objective standards should have a legal right to social security. The Act combines fairly

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[36] For example, a woman separated but not divorced from her husband is ineligible for the widows' pension or supporting mothers' benefit until six months after the separation: Social Services Act 1947 (Cth) ss. 59(1), 83 AAA(1).

[37] The legislation is discussed in Sackville, "Social Welfare for Fatherless Families in Australia: Some Legal Issues" Part II (1973) 47 *A.L.J.* 5, 10-13.

[38] By the Social Services Act (No. 3) 1974 (Cth).

precise eligibility criteria with broad discretionary powers vested in administrators, together with other provisions designed to forestall attacks on Departmental decisions. An example of this approach is provided by the provisions governing unemployment benefits, for which there were about a million applications in 1975-1976.[39] The Act, in section 107, provides that a person who meets certain age and residence requirements and who

> (c) satisfies the Director-General that he—
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> (i) is unemployed and that his unemployment is not due to his being a direct participant in a strike;
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> (ii) is capable of undertaking, and is willing to undertake work which, in the opinion of the Director-General, is suitable to be undertaken by that person; and
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> (iii) has taken reasonable steps to obtain such work
>
> shall be qualified to receive an unemployment benefit.

A formula that predicates entitlement on the Director-General being satisfied or forming an opinion as to certain facts is not particularly unusual as a drafting device.[40] Nor is it possible to avoid the fact that any statutory formulation of the work test must leave considerable room for administrative discretion, a point amply demonstrated by recent Ministerial pronouncements on the guidelines to be applied in interpreting section 107(c). However, a formula of this kind limits the opportunity for effective challenge of departmental decisions and detracts from the notion that applicants who can demonstrate compliance with objective criteria should receive income support as a matter of right. Other sections relating to unemployment benefits are apparently intended to have the same effect. While the basic rate of unemployment benefit payable to eligible claimants is stated in positive terms[41] (unlike other pensions and benefits[42]), the adjustment of that rate to take account of the dependence of a wife or *de facto* spouse rests, formally at least, with the favourable exercise of the Director-General's discretion.[43] Similarly, the legislative provisions relating to postponement or cancellation of the benefit are so broad as to be inconsistent with a legislative philosophy that benefits should be payable as

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[39] During the year 891,904 *grants* of unemployment benefit were made. On 30 June 1976 there were 188,423 beneficiaries. *Social Security Annual Report* 1975-76, at 17.

[40] See the Ministerial Statement on "Unemployment Benefit and the Work Test", H.R. Deb., 23 March 1976, 869-87 (Mr. Street, Minister for Employment and Industrial Relations). See also Griffiths, "Welfare Rights and Work Rights: the Unemployed and the Work Test" in Victorian Council of Social Service, *"We've Got No Choice"* (1977).

[41] S.112(1).

[42] For example, the rate payable to a widows' pensioner "shall in each case be a rate determined by the Director-General as being reasonable and sufficient, having regard to all the circumstances of the case, but shall not exceed [specified maximum rates]". S. 63(1).

[43] S. 112(2) and s. 112(4A).

of right to eligible claimants. Section 120 states specific grounds for the postponement of or cancellation of a person's benefit, but most of these are framed in terms of the Director-General's opinion or judgment and embody criteria not always related to the measurable needs of the claimant. These grounds are:

> (a) if that person's unemployment is due, either directly or indirectly, to his voluntary act which, in the opinion of the Director-General, was without good and sufficient reason;
> (b) if that person's unemployment is due to his misconduct as a worker;
> (c) if that person has refused or failed, without good and sufficient reason, to accept an offer of employment which the Director-General considers to be suitable; or
> (d) if, in the opinion of the Director-General—
> (i) that person is a seasonal or intermittent worker; and
> (ii) [his income is sufficient notwithstanding a temporary period of unemployment].

It is somewhat startling, in view of section 120, to find a further section, section 131, authorising the cancellation, suspension or reduction of a benefit if the Director considers this should be done

> (a) having regard to the income of a beneficiary;
> (b) by reason of the failure of a beneficiary to comply with [the requirement to furnish certain information];
> (c) *for any other reason.*[44]

A court, employing bold techniques of statutory construction, could well cut down the scope of section 131(c), but the very existence of the subsection symbolises the ambivalence towards unemployment beneficiaries evident throughout the legislation.

The approach in the Social Services Act has caused the courts difficulty on the rare occasions when the social security legislation has been before them. In *National Insurance Co. of New Zealand Ltd.* v. *Espagne,*[45] a case concerned with the relevance of an invalid pension to a claim for damages for personal injuries, the consensus of opinion in the High Court was that the Social Services Act did "not create an enforceable right to a pension" but only a right to have the claim for a pension determinded by the Director-General.[46] The Director-General was referred to as having an administrative discretion "though doubtless a discretion exercisable on grounds which are not at large".[47] In *Green* v. *Daniels*[48]

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[44] Emphasis added.
[45] (1961) 105 C.L.R. 569.
[46] *Id.*, 585 *per* Windeyer J.
[47] *Id.*, 574 *per* Dixon C.J.
[48] (1977) 13 A.L.R. 1.

the Commonwealth argued that the wording of section 131 and the comments in *Espagne's* case supported the view that "unemployment benefit is no more than a gratuity, to payment of which the plaintiff can have no rights enforceable at law".[49] Stephen J. rejected this contention, but only to the extent of being prepared to issue a declaration that the Director-General was wrong in refusing to consider a school leaver's claim for unemployment benefit until the commencement of the succeeding school year. Such a blanket policy was inconsistent with the Director-General's obligation to consider claims in the light of the criteria specified in section 107. A person who had left school intending not to return and who was looking for work was "unemployed" within section 107(c)(i). Nevertheless, Stephen J. was not prepared to provide a remedy other than a declaration that the Director-General was bound to reconsider the application on the basis of evidence presented with the claim. In particular, he refused to rule on the merits of the application himself or to order the Department to pay the benefit. Doubts, therefore, remain as to the position of a school-leaver claimant whose claim is reconsidered by the Director-General but rejected, perhaps on tenuous grounds. Precisely this situation occurred following *Green* v. *Daniels*. The Director-General of Social Security purported to reconsider the plaintiff's application, which had been lodged during the long vacation, but rejected it on the ground that the applicant had not established, as at the date of the application, that she had taken reasonable steps to obtain suitable employment.[50] Consequently, it seems that if the Social Services Act stood alone (ignoring for the moment other legislation extending the scope of review of departmental decisions[51]) it would not authorise a court to compel the Director-General to rule favourably on a particular claim.

The ambivalence in the Social Services Act, perhaps symbolic of the Commonwealth's fluctuating approach to social security, indicates that the legislation itself falls short of accepting that a claim to social security should be regarded as a legally enforceable right. Nevertheless, the legislation is not as unhelpful to claimants as it could be and has justified judicial intervention at least to the extent of requiring the Director-General to consider a claim made by a person not obviously disqualified. If the legislation were amended further to remove unnecessary administrative discretion and to state unequivocally that a claimant meeting objective standards should receive the benefit claimed as a matter of right,[52] substantial progress would be made towards a philosophy of entitlement to

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[49] *Id.*, 13.

[50] Director-General of Social Security Press Release, 27 May 1977.

[51] Note 54 *infra*.

[52] This is not to suggest that the eligibility criteria for social security can always be stated with precision and so as to minimise the need for the exercise of administrative discretion. Thus if the Commonwealth were to introduce a system of emergency payments for those in need for immediate assistance, as has often been recommended, the legislation would have to be framed in broad terms. Compare the provisions now governing the payment of the "special benefit": Social Services Act 1947 s. 124.

social security. The improvement in the legal position of claimants would help to change the perception of social security entitlement by claimants, administrators and the community generally.

2. *Review*

The form of the legislation regulating entitlement to social security is closely connected with the opportunities available to claimants to secure review of unfavourable determinations and the role that lawyers play in representing claimants. Legislation conferring broad powers on administrators may be more generously applied in practice if the administrative discretion is subject to review by an independent tribunal and if claimants can obtain legal advice and representation readily. Conversely, precise legislative criteria may not guarantee that claimants are treated fairly if there is no effective opportunity for them to secure a review of adverse decisions. In Australia for many years no formal machinery for the review of social security determinations was established, except for an appeal which under the Act lay to the Director-General of Social Security.[53] Thus, until 1975 the only remedies available to a dissatisfied claimant were to appeal to the Director-General, who did not hold hearings but did entertain written objections to the decisions under review, or to request a member of Parliament to seek an informal reconsideration of the case by the Department. While lawyers occasionally assisted claimants in preparing written submissions to the Director-General, they played no substantial role in representing claimants aggrieved by the Department's decisions.

The position concerning review has changed considerably in recent times and is likely to change even further as the effects of the recent restructuring of federal administrative law become apparent.[54] The first major innovation was the establishment by Ministerial direction, as from 10 February 1975, of social security appeals tribunals in each State, to hear appeals by dissatisfied claimants.[55] The new appeals system was clearly an improvement on the totally inadequate review procedures previously in force and the tribunals have had some impact in correcting improper decisions by the Department. In 1975-1976, the first full year of the departmental appeals system, 18,311 appeals were lodged, no formality being required to do so, and 17,426 were finalised, of which nearly 15,000 concerned unemployment benefits.[56] The most remarkable figure is that 10,222 appeals were upheld (58.7 per cent of the total finalised) by the Department *without reference to the tribunals.* In these cases the Department

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[53] Social Services Act 1947 s. 15.

[54] See the Administrative Appeals Tribunal Act 1975 (Cth), as amended, particularly by the Administrative Appeals Tribunal Amendment Act 1977 (Cth); Administrative Decisions (Judicial Review) Act 1977 (Cth).

[55] For a brief examination of the work of the tribunals during their first few months of life see Mossman, "Review Procedures" in *Essays on Law and Poverty: Bail and Social Security* (1977) (A.G.P.S.) 70, 75-79.

[56] *Social Security Annual Report 1975-76*, at 118-119.

changed its mind after reconsidering the matter once the appeal was lodged, without allowing the matter to proceed further. A further 848 appeals were upheld as the result of the tribunals' recommendations. The high rate of "spontaneous success" of appeals is attributable in part to the Department's policy of automatically reconsidering a determination once an appeal is lodged. The success rate on appeal is sufficiently high to cause misgivings about the accuracy of initial determinations and the adequacy of guidelines provided to determining officers.[57] Further misgivings also must be created by the extraordinary differences in the spontaneous success rate between the different States, ranging for example, from 68.2 per cent in New South Wales for unemployment benefit appeals in the September quarter 1976 to 31.8 per cent in South Australia for the same category of cases.[58]

While the appeals tribunals have improved the position of claimants they also suffer from serious defects,[59] which have limited their role in elevating social security claims to legally enforceable rights. First, the tribunals are not genuinely independent of the Department. Each tribunal consists of one full-time departmental officer seconded for the purpose and two part-time members with legal or welfare experience. The departmental officer may be and sometimes is Chairman of the tribunal. The tribunals' decisions are merely recommendations to the Director-General which may or may not be accepted.[60] In any event delays are often experienced while the Department considers the recommendations. Secondly, there must be doubt as to whether the tribunals' procedures adequately protect the interests of appellants. Legal representation of appellants is not permitted, despite the fact that rejection of a claim to a pension or benefit may be of incalculable importance to the individual or family affected by the decision. Departmental instructions, extremely important in practice, are not available to the public, thus limiting the opportunity for full advice to be provided to claimants. Moreover, appellants are not always given full details of the case against them, particularly where allegations are made by persons who wish to remain anonymous. Criticism has been made of the delays involved in disposing of appeals, much of which is attributable to the time taken by the Department to report on each case.[61] Finally, a number of constraints on the tribunals are missing, with the result that uniformity may not be achieved. For example, reasons for decisions are not always given nor are decisions systematically reported. Consequently, it is likely that the tribunals vary in their approach to

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57 These points were made by the "Access Research Program" of the Royal Commission on Australian Government Administration, *Appendixes to Report* (1976) vol. 2, App. 2C "Access to Government Services", para. 176.

58 Sen. Deb., 10 Dec. 1976, 3106.

59 *Law and Poverty in Australia*, note 3 *supra*, 179-183.

60 For example, in the September quarter 1976, of 291 unemployment benefit appeals upheld by the tribunals, 32 were disallowed by the Department despite the tribunals' recommendations. Sen. Deb., 1 Dec. 1976, 2374.

61 "Access to Government Service", note 57 *supra*, para. 177.

appeals. This is particularly so in relation to the extent to which they are prepared to question settled departmental policy, although an assessment of the significance of the variations would require detailed empirical research.

These deficiencies in the appeals tribunals have added force to the argument that a genuinely independent system of review should be available to social security claimants in which lawyers will play an active part.[62] It has been announced that social security appeals are to be brought within the jurisdiction of the newly created Administrative Appeals Tribunal, although recourse to the Tribunal presumably will be available only where the Department has refused to accept the recommendation of a social security appeals tribunal.[63] While this is perhaps less satisfactory than the creation of a completely independent appeal system, the move is important as the Administrative Appeals Tribunal has extensive powers not only to review the challenged decision and to substitute its own, but to challenge the policy applied by the decision-maker.[64] If the Tribunal exercises its power to overturn policy decisions by the Department that do not accord with the Tribunal's interpretation of the legislation, effective scrutiny over the actions of the Department may be established. The jurisdiction of the Tribunal is to be supplemented by the enlarged grounds for judicial review invested in the Federal Court of Australia by the Administrative Decisions (Judicial Review) Act 1977 (Cth), although the precise relationship between judicial review and the Tribunal's powers is by no means clear.

The significance of applying these administrative law reforms to social security determinations is threefold. First, the alternative remedies of administrative appeal and judicial review may well alleviate if not overcome entirely the difficulties hitherto encountered by those attempting to challenge departmental policies, illustrated by *Green* v. *Daniels* and recent English decisions.[65] This will, at the very least, minimise the opportunity for the Department to adhere obdurately to an interpretation regarded by the Administrative Appeals Tribunal or the Court as untenable. An effective system of review also means that administrative discretion is less likely to be exercised in an arbitrary or inconsistent manner as claimants find that they are not totally dependent on determinations made within the Department. Secondly, the expanded opportunities for external review will increase the role that lawyers can play on behalf of claimants, thus removing the immunity administrators have had from effective legal

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[62] *Law and Poverty in Australia*, note 3 *supra*, 182-183.

[63] Director-General of Social Security, Press Release, 27 May 1977.

[64] Administrative Appeals Tribunal Act 1975 ss 28, 43. See also Taylor, "Administrative Appeals Tribunal Act 1975 (Cth)" (1976) 3 *Monash L. Rev.* 69.

[65] *R.* v. *Preston Supplementary Benefits Appeal Tribunal*; *ex parte Moore* [1975] 1 W.L.R. 624 (C.A.); *R.* v. *Barnsley Supplementary Benefits Appeal Tribunal*; *ex Parte Atkinson* [1976] 1 W.L.R. 1047 (D.C.) Cf. *R.* v. *West London Supplementary Benefits Appeal Tribunal*; *ex parte Clarke* [1975] I W.L.R. 1396 (D.C.).

scrutiny and creating in claimants the same expectation of legal assistance as others whose interests are prejudiced by decisions of government. It should be acknowledged that a substantial body of respectable opinion argues that the involvement of lawyers in social security claims may do more harm than good.[66] On balance, however, lawyers have a constructive role to play on behalf of social security claimants to ensure that their claims are pressed vigorously and persuasively.[67] The justification for extending legal representation of this kind is not that social security claimants have property rights as such, but that many of the safeguards traditionally extended to property are appropriate to claims of such great significance.[68] Thirdly, more extensive review procedures will not only have an effect on the legal remedies available to claimants, but will encourage acceptance of the notion that social security is an entitlement, and that claimants should not be deprived of that entitlement by administrative whim.

3. *Quality of Administration*

For obvious reasons lawyers tend to look to legal techniques as the means of controlling the administrative decision-making process. Thus, the rights of social welfare claimants and beneficiaries are to be protected by the enactment of precise eligibility criteria, the opportunity to obtain legal representation in pressing claims, an adequate and independent appeal structure, judicial review of decisions in appropriate cases and the existence of other agencies, such as the ombudsman, to investigate specific abuses. All of these are important in securing the fair and correct adjudication of claims and in establishing a legal right to social security in eligible claimants. There is an increasing recognition that changes in rules and procedures, whether formulated by courts or legislatures, often do not penetrate into every day practice and therefore do not necessarily operate fully to the advantage of the people intended to benefit.[69] The same argument has been applied to the techniques of administrative law, particularly in relation to claimants who lack the material and personal resources necessary to challenge departmental action effectively. J. L. Mashaw, for example, contends that procedural safeguards and appellate review are of limited value in "assuring accurate and timely adjudication of social welfare claims".[70] He attributes this in part to the difficulty of developing satisfactory procedures for social welfare adjudication, the

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66 The most commonly cited proponent of this view is Titmuss, "Welfare Rights, Law and Discretion" (1971) 42 *Political Quarterly* 113.

67 *Law and Poverty in Australia*, note 3 *supra*, 166-170.

68 For an interesting collection of material on the English experience see Adler and Bradley (eds), *Justice, Discretion and Poverty* (1975).

69 Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Soc. Rev.* 95, 137-139.

70 Mashaw, "The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims" (1974) 59 *Cornell L. Rev.* 772, 775.

traditional adversary model being inappropriate because of the nature of the claim and the sheer cost of ensuring that all aggrieved claimants receive adequate representation. However, the main reason is that the informal inquisitorial procedures used in the United States to deal with social welfare claims do not necessarily provide an adequate check on the quality of initial determinations. Mashaw points out that the rate of appeals in the United States appears to be relatively low and that there are significant variations between regions.[71] Moreover, even successful appeals do not necessarily produce revised front-line administrative practices. For example, decisions may not be systematically reported, poor internal communications may prevent principles or even information on the outcome of appeals filtering down to counter-staff[72] and appeals ultimately may be decided on evidence or criteria not available to the staff ruling on the initial application.

Mashaw's conclusion is that social welfare programmes require systems for monitoring the performance of decision-makers — "quality assurance in adjudication".[73] Whether or not this is the most promising approach, it is clear that everyday practices and policies affect hundreds of thousands of people and determine their perception of social welfare programmes more directly than the availability of appeals, ombudsmen or other intermittently invoked legal devices. The Royal Commission on Australian Government Administration probed this question through an "Access Research Programme" applying the theory of access.[74] The theory was described by the Commission as being

> concerned with relations between the administrative allocation of goods and services and the people who use them or for whom they are intended. It reviews the way in which programs are translated into action through institutional rules and procedures, and the effects on the actual or potential clients of rules about significant matters such as eligibility and priority of handling requests. It is concerned also with the staff who actually meet the public, and with the situations in which those meetings take place—offices, counters and so on.[75]

The research programme, therefore, investigated federal schemes from the point of view of the consumer rather than the administrator, concentrating on the barriers encountered by individuals in demonstrating their eligibility for entitlement. In evaluating the role of the Department of Social Security in providing supporting mothers' and unemployment benefits, the research report identified many administrative weaknesses that inflicted frustration and often hardship on claimants. Unemployment beneficiaries, for example, suffered indignities in being forced to wait for

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[71] *Id.*, 784-785.

[72] This was precisely the finding of the Royal Commission on Australian Government Administration, *Report* (1976) (Coombs Report) paras 6.2.10, 6.2.14.

[73] Mashaw, note 70 *supra*, 791-804.

[74] "Access to Government Services", note 57 *supra*, para. 163.

[75] Coombs Report, note 72 *supra*, para. 6.2.1.

lengthy periods in overcrowded and understaffed offices. The indignities and inconvenience were compounded by the repeated loss of files within the office and the inability to deal expeditiously with the most common complaint, the failure of a cheque to arrive. Supporting mothers were often subjected to unsympathetic or judgmental attitudes by counter staff. After remarking that 96 per cent of officers interviewed (extending beyond the Department of Social Security) said that they saw their Department as existing to provide people with services they have a right to receive, the report comments that on their findings

> inquiry staff do not *behave* as if clients have a *right* to receive anything. . . . The organisational structure of the Department of Social Security in the case of late or lost cheques, provides the basis for and reinforces an approach that results in a discretionary decision as to whether a client has the right to receive the correct amount of money at the right time. So the result is that government departments and agencies scale down client service to a level dictated by existing organisational systems rather than to a level dictated by clients' needs or rights.[76]

Serious problems were caused by the delays in making the first payment due to claimants — a median delay of three weeks, for example, occurred before the unemployment benefit was paid. Equally important, the report indicates that there was a clear scale of priorities in handling complaints by aggrieved claimants. The most effective means of securing a swift and thorough review, although few claimants were aware of it, was to enlist the aid of a Member of Parliament; another effective means was to become a "trouble-maker".[77]

The report makes a number of important recommendations generally endorsed by the Royal Commission.[78] These include payment of the first benefit in cash rather than by cheque; the first payment to be made pending a determination of eligibility; the point of contact with the client to be made the point of decision except in unusual circumstances;[79] privacy to be assured to claimants being interviewed; improvements to be made in the methods of providing information to the public, particularly to migrants; a system of emergency cash payments to be instituted;[80] and better training courses to be established for public contact staff to ensure that they give readily available information on other welfare services. Many of these recommendations may appear relatively trivial to lawyers accustomed to canvassing more sweeping reforms, yet they are crucial to the emergence of social security as an entitlement. They indicate clearly that legal rights are only one element in the progression from privilege

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76 "Access to Government Services", note 57 *supra*, para. 163.

77 *Id.*, paras 87-90.

78 Coombs Report, note 72 *supra*, para. 6.2.11; "Access to Government Services", note 57 *supra*, para. 28.

79 Coombs Report, *id.*, para. 6.2.7.

80 Previously recommended by Professor Henderson in *Poverty in Australia*, note 33 *supra*, 54-56.

to entitlement and that sensitive and efficient administration may be of far greater importance to claimants.

4. *Social Security and Maintenance*

Entitlement to social security is a matter that depends primarily on the rules and procedures governing the relationship between claimants and the Department responsible for processing their claims. However, the way in which social security is seen by claimants, administrators and the general community may be influenced by other legal rules and the approach of other institutions to income maintenance programmes. Perhaps, the closest connection between social security and other areas of law occurs in relation to the principles governing financial provision on family breakdown. A significant proportion of widows' pensioners and supporting mothers' beneficiaries are either divorced or married but separated.[81] It follows that the question of how far social security entitlement should be taken into account in assessing maintenance awards in matrimonial proceedings is of major importance to those women and to their husbands. While the principles applied in matrimonial proceedings are not solely concerned with the nature of the women's pension or benefit entitlement, the approach of the Family Courts has some bearing on the question.

The authorities under the now repealed Matrimonial Causes Act 1959 (Cth) differed in their approach. Some judges were dismayed at the prospect of a man throwing even a portion of his obligation to maintain his wife on the taxpayer and accordingly calculated maintenance without regard to the wife's possible pension entitlement. In *Burger* v. *Burger*[82] Carmichael J. considered that section 62(1) of the Social Services Act 1947, which renders a woman ineligible to receive the widow's pension "if she directly or indirectly deprives herself of property or income in order to qualify for a pension", applied to a wife who accepted less than the proper award of maintenance. Consequently, her pension entitlement was to be assessed only *after* maintenance was calculated, without regard to social security as a potential source of income.[83] Carmichael J. observed that the policy that "wives should not be thrown upon or even be allowed to throw themselves upon the public for support" was deeply entrenched in the law.[84] In the same vein Gibson J. of the Supreme Court of Tasmania characterised as "immoral" an agreement to pay maintenance at a rate calculated to maximise social security payments to the wife.[85] However, other courts adopted a more lenient attitude and were prepared to take into account the wife's pension entitlement before awarding maintenance,

[81] On 30 June 1976, 58,385 of the 129,491 widows' pensioners were "divorcees" or "deserted wives" (45.1%); 13,793 of the 45,542 supporting mothers were "deserting wives" (30.3%): *Social Security Annual Report 1975-76*, at 98, 101.

[82] (1974) 45 A.L.R. 569.

[83] See also *Giles* v. *Giles* (1964) 7 F.L.R. 142, 147, *per* Mansfield C.J.

[84] (1974) 5 A.L.R. 569, 574.

[85] *Castle* v. *Castle* (1964) 6 F.L.R. 363.

notwithstanding that this indirectly assisted the husband.[86] This approach was prompted by the familiar problem that the husband was usually supporting a second family and the resources available were simply insufficient to enable him to support both families adequately. The principle as accepted was that applied in English cases, namely, that it is desirable not to have regard to social security benefits, but

> if the total available resources of both parties are so modest that adjustment of that totality would result in the husband being left with a sum quite inadequate to enable him to meet his own financial commitments, then the court may have regard to . . . social security benefits. . . .[87]

This formulation was sufficiently generous to ensure that in practice social security benefits were taken into account in most maintenance proceedings.

The Family Law Act 1975 (Cth) now specifically provides that in maintenance proceedings the Court is to take into account "the eligibility of either party for a pension, allowance or benefit . . . or the rate of any such pension, allowance or benefit being paid to either party".[88] The new provision is not entirely consistent with the philosophy of the Social Services Act as expressed in the requirement that women receiving assistance should take such maintenance action as the Director-General considers reasonable,[89] and the potential conflict has by no means gone unnoticed. While suggestions have been made that the Family Law Act should be amended to place primary responsibility for maintaining families experiencing matrimonial breakdown on husbands rather than taxpayers, these have so far been successfully resisted.[90] No definitive pronouncement on the effect of section 75(2)(f) has yet been made, although there are indications that the section will be regarded as an express recognition that social security should be seen as the primary source of income maintenance, and not merely a secondary form of assistance to be paid only after an order calculated without reference to social security has proved to be unenforceable.[91] If this trend is confirmed it will be significant in the emergence of a philosophy of entitlement to social security. Lawyers dealing with family disputes will be required to become familiar with social security legislation and administrative policies. Their knowledge,

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86 *Daly* v. *Daly* (1964) 7 F.L.R. 70; *Hampson* v. *Hampson* (1974) 5 A.L.R. 359.

87 *Barnes* v. *Barnes* [1972] 3 All E.R. 872, 874, *per* Edmund Davies L.J. applied by Barber J. in *Hampson* v. *Hampson* (1974) 5 A.L.R. 359.

88 Family Law Act 1975 (Cth) s. 75(2)(f).

89 Social Services Act 1947 s. 62(3).

90 *Australian Financial Review*, 6 May 1976. The Minister for Social Security was reported to be supporting the amendment against the opposition of the Attorney-General.

91 *In the Marriage of Todd (No. 2)* (1976) 9 A.L.R. 401. In *Wong* v. *Wong* (1976) 11 A.L.R. 669, Carmichael J., who had previously taken a strict view of the husband's responsibilities under the Matrimonial Cause Act 1959 (Cth), observed that s. 75(2)(f) does not require the court to adjust the property and incomes of the parties so as to create a pension entitlement for one of them. However, this remark was made in the context of a case involving a husband with substantial assets and a high income.

in turn, will increase the likelihood that their clients will be aware of and receive the pensions as benefits to which they are entitled. Furthermore, the notion that social security is an entitlement will become more acceptable as the moralistic attitudes expressed in the earlier cases are discarded. These attitudes reflected the view that to receive support from public sources is reprehensible and to be discouraged as far as possible. The new approach implicitly accepts that social security is not to be regarded as a measure of last resort, but the first source of assistance in cases of family breakdown.

III CONCLUSION

In Australia a coherent philosophy of social security has not yet emerged, although some important trends are evident. This is true, both of the approach of the law and lawyers to social security and of general community attitudes. One clear trend is that lawyers and legal institutions are becoming more closely involved in social security. Some commentators have espoused a theory of property in claims to income support as the justification for greater legal protection being accorded to social security claimants. This theory, while perhaps of some political value, does not provide a satisfactory rationale for the increasing concern of the law for social security claimants, largely because a claim to income support, vital as it is to the individual concerned, cannot properly be described as "property". It is simpler and more convincing to rely on the values of dignity and self-respect, as well as the need to promote material well-being, in urging the case for limiting the scope for administrative discretion by legal techniques and the intervention of lawyers on behalf of claimants. In a society which accepts that states of dependency arise through causes by and out of the control of the individual it is essential as a matter of fair play to ensure that the victims of dislocations are not to be denied the safeguards accepted as basic in other contexts.

If it were accepted that claimants satisfying objective eligibility criteria had a legally enforceable right to social security, this would be only one element in shaping community attitudes towards social security and the quality of administration of the system. Ultimately, political and social beliefs, including the myths that seem to flourish in times of economic hardship, may be more influential than the formal legal position in determining the day-to-day treatment accorded to social security claimants. Nevertheless, the approach of the law may be important in shaping attitudes generally. More precise legislative statements of eligibility criteria, more thorough and independent review procedures and the changing perspectives of other branches of law to social security are likely to have an impact not only on individual claimants but on the overall administration of social security and public attitudes towards beneficiaries. The acceptance of a philosophy of entitlement to social security will do much to clarify the basis of the welfare state in Australia.