

## Edward Gough Whitlam AC QC (1916–2014)



Gough Whitlam photographed at his Sydney office, 28 October 2005. Photo: Fairfaxphotos / Stephen Baccon

In the preface to the first volume of her biography of Edward Gough Whitlam, Jenny Hocking said:

The ubiquitous representation of Gough Whitlam as though he simply emerged – fully formed – into public prominence *circa* 1972 is all the more remarkable given the absolutely fundamental influences these earlier years reveal<sup>1</sup>.

The fundamental influences included his family, growing up in the new capital of Canberra, his war service and his experiences as a barrister.

In his speech at the 1973 Bar and Bench Dinner, Gough claimed to be the only prime minister descended from and married to the legal profession.

Gough was born in Melbourne in July 1916, his father Harry Frederick (Fred) Whitlam was deputy crown solicitor to Sir Robert Garran and then crown solicitor of the Commonwealth. His father had a deep interest in foreign affairs and in particular an interest in international human rights law; Nugget Coombs described Fred Whitlam as having a gentle softly spoken style but as deep a commitment to social reform as his son.

Many of the characteristics usually associated with Gough appear to be inherited from his mother, Martha Maddocks, who was one of eleven unusually tall siblings. She was clever, witty with a sharp tongue and had strong opinions. Family folklore maintained that Martha coughed at the appropriate point during her wedding ceremony rather than say ‘obey’.

After Fred Whitlam won first place in the Victorian Public Service clerical exams, he joined the Victorian public sector but upon federation transferred to the Commonwealth Public Service. His promotion through the Crown Solicitor’s Office

required Fred Whitlam to move to the newly established national capital Canberra. Gough grew up in this bush capital and credited this experience as strengthening his convictions about the central role of the national government in the nation’s affairs.

In his final year of high school Gough won a scholarship to read classics at the University of Sydney. Gough commenced studies in arts in 1935 and law in 1938.

His university extracurricula activities included journalism. He was the editor of *Hermes*, the magazine for undergraduates of the university and a co-editor of the University Law Society journal, *Blackacre*. Gough was a member of the Sydney University Dramatic Society, through which he met ‘Dovey’ - Margaret Dovey - a social work student and champion swimmer.

*Gough’s war service politicised him. During his service he was located in the South Pacific and Northern Australia and while located in Cooktown and Gove, he witnessed discrimination against Aborigines.*

In 1942 Gough made his ‘best appointment’ and married Margaret, hence he had also married into the legal profession as Margaret’s father was Bill Dovey KC, later Justice Dovey of the Supreme Court. Gough’s father-in-law was a colourful, Dickensian character. He smoked a pipe, wore a monocle, loved a scotch and a bet at the races. He also had an imposing physical presence, a sonorous voice and a Shakespearean vocabulary.

Gough’s legal studies continued and he was articled to senior partner, Walter Forsyth of the law firm Sly and Russell. In July 1941 he began work as associate to Justice Victor Maxwell of the Supreme Court of New South Wales, a judge of ‘unrivalled sharpness of mind’<sup>2</sup> and was exposed to trials before civil and criminal juries. It made the law interesting for Gough and he considered it very good training for the bar.

His legal studies were interrupted when he enlisted and joined the Royal Australian Air Force’s 13 Squadron, which had been re-equipped with Navy Ventura aircraft, and in which over the next four years he served as a navigator .

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against Aborigines. In August 1944 his squadron was moved to Yirrkala, where he met the Yunupingu family whose members in the future would agitate for Indigenous rights and land rights (and play in the rock band Yorhi Yindi). Throughout his life, when discussing Indigenous rights, Gough would recall the experience of a young and keen Aboriginal member of the ground staff who, being suitably qualified with a leaving certificate, applied many times to join aircrew. His applications were constantly rejected and his race was his sole disqualification.

*The fourteen power referendum sought to give to the federal government additional powers in peace time, on a variety of issues including Indigenous Australians, national health, corporations and monopolies. The referendum failed to pass, though Gough's Squadron 13 recorded one of the highest 'Yes' votes in the country.*

Gough's interest in constitutional matters arose during the war. His experience of the Curtin Labor government's use of the expanded war time Commonwealth powers, which enabled it to carry out its policies, led him in 1944 to campaign actively for the 'Yes' vote in the post-war reconstruction referendum. The fourteen power referendum sought to give to the federal government additional powers in peacetime, on a variety of issues including Indigenous Australians, national health, corporations and monopolies. The referendum failed to pass, though Gough's 13 Squadron recorded one of the highest 'Yes' votes in the country. Gough's hopes were dashed by the outcome but it inspired him to do all he could to modernise the Australian Constitution.

After resigning his commission in 1946, Gough returned to the University of Sydney to complete his law degree and he worked as associate to Justice William Owen of the Supreme Court.

On 14 February 1947 Gough was called to the New South Wales Bar. He joined Denman Chambers in Phillip Street, where Dr HV Evatt and his brother Clive and Eric Miller QC were members. He shared a room with Ken Pawley (later Justice Pawley of the Family Court).

As a junior barrister, many of his briefs were from the Commonwealth Legal Service Bureau, an innovation created in

1942 by Dr Evatt to provide free legal aid to serving and former members of the armed forces and their families. As this work concentrated in the areas of tenancy and contract law, Gough developed an expertise in these areas and appeared in the High Court in tenancy matters of: *Owen v Woolworths Properties Ltd* (junior to Garfield Barwick QC for the applicant); and *Thompson v Easterbrook* (for the respondent).

Gough appeared as junior to BP MacFarlan QC and Garfield Barwick QC for the respondents in *Grannall v Marrickville Margarine Pty Ltd*, an authority dealing with s 92 of the Constitution, as well as *Saffron v R* as junior to L C Badham QC, and a judgment concerning advisory opinions by the High Court.

The brief which generated most publicity was as junior counsel assisting the Royal Commission into Illegal Activities in the New South Wales Liquor Industry. The royal commission was established in July 1951. Justice Maxwell was appointed as commissioner and Bill Dovey KC was counsel assisting.

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Gough described how the royal commission often recaptured the English low-life depicted by Hogarth and Rawlinson.<sup>3</sup> It was typical Sydney theatre and drew crowds similar to contemporary royal commissions and ICAC inquiries. The royal commission commenced in 1951 and over 2 ½ years heard from over 400 witnesses, including Garfield Barwick's brother, Douglas Barwick, the licensee of the Captain Cook Hotel adjacent to the SCG, who gave evidence on a number of occasions. According to Gough, from time to time Douglas Barwick's appearances received more attention in the press than Garfield's in other jurisdictions. Garfield Barwick's contemporary view of the commission was that the only resemblance between the commission and a court of law was the furniture.

Gough was a member of the Bar Council from 1949 to 1953. In 1957 Gough joined the newly-established Wentworth Chambers on the tenth floor. The chambers were headed by John Kerr QC and Marcel Pile QC and his colleagues included Maurice Byers, Trevor Morling and Hal Wooten. His clerk was Ken Hall.

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Mr White, Mr Arthur Beckhouse (a solicitor and accountant in the Auditor-General's Department), an unidentified man and Gough Whitlam (assisting the Commissioner) attend the Liquor Royal Commission at the Supreme Court in Sydney on 2 September 1952. Photo: Fairfaxphotos / Sun News / Picture by CARTY

Gough became silk in 1962 at the same time as Tom Hughes QC.

Although Gough continued at the bar his main interest and vocation became politics. In the 1950s and 1960s it was not an unusual career path for senior members of the bar also to have a parliamentary career. Many of his contemporaries at the bar, such as Garfield Barwick, Nigel Bowen, John Kerr, Tom Hughes, and Robert Ellicott, were also contemporaries in federal parliament.

After the war Gough pursued his interest in politics, joining the Australian Labor Party in 1945 while still wearing his RAAF uniform. His first appointment within the party was as the minutes secretary of the Darlinghurst Branch. In 1947 Margaret and Gough moved to Cronulla and in 1952 he was elected to parliament as the member for the seat of Werriwa. He remained the member for Werriwa until 1977.

Werriwa which was a 'microcosm of post-war urban Australia' and which 'represented Australian inequality comprehensively':

... the electorate has the highest proportion of migrants, increasingly non-British, the highest birth rate, the highest disparity between total population and enrolled voters, the fewest schools, the worst health services the least public amenity. It grew unplanned and unsewered.<sup>4</sup>

Gough and his family's experiences led to the development of the Whitlam reform strategy. Also while in parliament, Gough acquired an interest in law reform, prompted by constituents' problems. He proposed legislative change concerning the defence of common employment and third-party liability.

His interest in the Constitution was encouraged through his membership in the Joint Parliamentary Committee on Constitutional Review, which made recommendations to the parliament about constitutional reform. His view on the limitations of the Constitution changed over time.

In 1957, in his Chifley Memorial Lecture, Gough addressed the topic of Labor versus the Constitution and he concentrated on the difficulties confronting a reform government. Later, in his 1961 Curtin Memorial Address, he emphasised the opportunities a Labor government would have in carrying out its policies. He identified that through its financial hegemony it could create better conditions in transport, housing, education and health; and through international arrangements it could create the more orderly and equitable production, distribution and exchange of goods and skills. Gough identified the potential of the use of external affairs power to ground Commonwealth legislation.

In the 1960s Gough continued to develop his reform strategy and he progressed within the opposition, becoming deputy

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leader to Arthur Calwell in 1959 upon Doc Evatt's resignation. He became leader of the opposition in 1967.

In 1972, campaigning on the slogan 'It's Time', Gough told the men and women of Australia that their decision on 2 December 1972 was a choice between the past and the future, between the habits and fears of the past and the demands and opportunities of the future. It was a time for a new drive for equality of opportunities. Gough identified that many of the fundamental challenges to be met by the Labor government lay in the field of law reform.

This was consistent with his concept of the rule of law which in 1963 he described as embracing not only Dicey's concepts of civil and political rights but economic, social and cultural rights.<sup>5</sup>

The Labor Party won the general election held on 2 December 1972, however it did not control the Senate.

As if he predicted the frustrations of the next three years and to show that the electoral change was meaningful, Gough immediately embarked on an ambitious package of reforms. As the results in nine seats remained doubtful and dependent upon preferences and absentee votes, the first Whitlam ministry from 5 to 18 December 1972 was a duumvirate consisting of Gough and his deputy Lance Barnard in which they shared all ministries. It was the smallest ministry with jurisdiction over Australia since the first Duke of Wellington formed a ministry with two other ministers 128 years previously. Gough was the attorney general and immediately there was a flurry of activity including the release of seven young men serving gaol sentences under the National Service Act, recognition of the People's Republic of China and an application to the Arbitration Commission to have the hearing on equal pay to be re-opened.

Over the next three years the Whitlam governments revolutionised Australian society by introducing Medibank and free university tuition. The Whitlam program was devised during, and assumed the continuation of, the post-war boom. However, this period was also characterised by a radically changing international economy which saw spiralling oil costs and the emergence of a new economic phenomena: stagflation.

In his speech during the first session of the twenty-eighth parliament on 27 February 1973, the governor-general described the government's program as 'the most comprehensive program of legislation in the history of the Australian Parliament.' Many of the proposed legal reforms were achieved during the three years of government or were implemented subsequently by other governments including the Fraser government.

The legal reforms and innovations included:

- the *Family Law Act 1975* and the establishment of the Family Court of Australia;
- appointment of the first female federal judge, Elizabeth Evatt, as a deputy president of the Arbitration Commission and as the first chief justice of the Family Court of Australia;
- the introduction of a bill to establish what became the Federal Court of Australia;
- briefing of Mary Gaudron to appear for the Commonwealth before the Arbitration Commission in the *Equal Pay Case*;
- established the Australian Legal Aid Office and introduced the Legal Aid Bill into parliament;
- establishment of the Australian Law Reform Commission;
- holding the Woodward Royal Commission into Aboriginal Land Rights and introduced *Aboriginal Land Rights (Northern Territory) Bill 1975* into parliament (subsequently passed by Fraser government);
- in 1975 returning the traditional lands in the Northern Territory to the Gurindji people and inspiring a classic Paul Kelly and Kev Carmody song<sup>6</sup>;
- abolishment of capital punishment under Commonwealth laws as well as other laws over which federal parliament had power, by passing the Death Penalty Abolition Act;

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- obtaining an injunction against France in the International Court of Justice at the Hague, which enjoined France from continuing its nuclear testing in the Pacific;
- as part of its legislation dealing with economic pressure, passing of the Trade Practices Act and proposing a uniform Company Act;
- passing the Racial Discrimination Act, based on the International Convention on the Elimination of All Forms of Racial Discrimination, which the government ratified in October 1975;

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- continuation of the process of abolishing appeals to the Privy Council;
- development of Commonwealth administrative law by passing the Administrative Appeals Tribunal Act and introducing the *Ombudsman Bill 1975*; and
- ratification of 15 significant human rights treaties such as the 1966 International Convention on the Elimination of All Forms of Racial Discrimination.

For a barrister in 2015, it may be surprising to hear these achievements described as radical or as reforms – they are now part of the status quo and are accepted as part of our legal system. So many of our contemporary legal institutions had their genesis in Whitlam's policies.

In 1974 seven government bills, including one to establish a Federal Supreme Court, were rejected on two occasions by the Senate. Governor-General Hasluck accepted Gough's advice as prime minister and dissolved both houses to allow elections to be held on 18 May 1974. The Whitlam government was returned, but it still did not control the Senate.

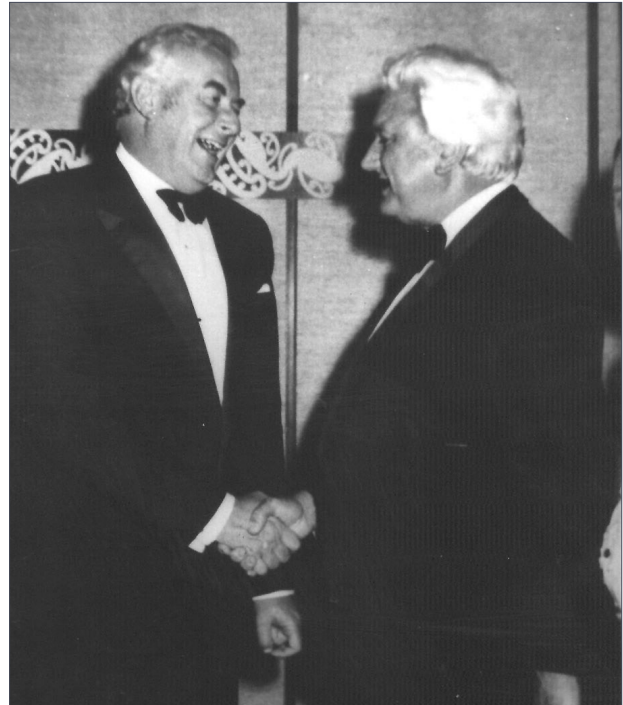
On 11 July 1974 John Kerr was appointed as governor-general.

Throughout 1974 and 1975 the government was criticised for its handling of the economy and ultimately the 'Loans Affair' whereby senior ministers in the government considered circumventing the Loans Council to raise funds from oil-rich Middle East nations. Much government legislation was blocked or rejected by the Senate and this action culminated on 16 October 1975 when the Senate deferred the Appropriation bills, or supply. Supply ran out on 30 November.

In October Gough had a number of discussions with Governor-General John Kerr about the Senate's actions and on 19 October John Kerr asked for Gough's consent to seek advice from Barwick CJ. Gough did not agree. He set out the reasons for his opposition and an advice was obtained from Attorney-General Kep Enderby and Solicitor-General Maurice Byers.

Nevertheless on 10 November John Kerr sought Barwick CJ's advice and on 11 November he dismissed the Whitlam government and appointed Malcolm Fraser as prime minister. In the election held on 13 December the Whitlam government was defeated.

On the 20<sup>th</sup> anniversary of his government's dismissal, Gough said that, like most great dramas, the central plot of the Dismissal was simple enough but in his view the constitutional crisis was essentially a political crisis fully capable of being resolved by political means. Although on the steps of Parliament House



*In 1987 a dinner was held to celebrate the clerk on 10 Wentworth, Ken Hall's 40<sup>th</sup> anniversary as a clerk. Gough attended as did John Kerr; it may be apocryphal but it is said that this was the only function that the two attended knowing the other was to be present post dismissal.*



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on 11 November he urged the crowd to maintain their rage, Gough was not preoccupied with the Dismissal. He maintained that the relevance of those events lay on the development of Australia as a republic. He became friends with Malcolm Fraser and in 1999 he and Malcolm Fraser issued a joint statement urging support for an Australian republic with an Australian head of state. They appeared in a television advertisement for the republic in which Gough said ‘Malcolm, it’s time’ and Malcolm replied ‘It is.’

Although Gough remained as leader of the opposition after the 1977 election in which the Labor Party was defeated, he retired from parliament in 1977.

After his retirement, political journalist Mungo MacCallum asked Gough at the National Press Club whether he was having as much fun as he had in Canberra. Gough replied ‘the fun is where I am’. Gough did not slow down after 1977. The fun arose from his busy post-parliament life. He was appointed as the Australian ambassador to UNESCO, to many university positions, such as visiting professor at Harvard, Adelaide and the Australian National universities and as chairman of the Australian National Gallery. He wrote a number of books and many publications in politics and law.

He continued his association with the New South Wales Bar. In 1987 a dinner was held to celebrate the clerk on 10 Wentworth, Ken Hall’s 40<sup>th</sup> anniversary as a clerk. Gough attended as did John Kerr. It may be apocryphal, but it is said that this was the only function that the two attended knowing the other was to be present post-Dismissal.

In May 1999 Gough spoke on behalf of the New South Wales Bar at the ceremonial sitting to mark the 175<sup>th</sup> anniversary of the Supreme Court of New South Wales. He said that the Supreme Court has made, and continues to make, history and noted that of its 43 judges four are women, it has a chief justice born overseas and it has a Court of Criminal Appeal constituted by women judges. These developments are not radical in 2015, but reflect the changes brought about by the Whitlam government.

Margaret Whitlam passed away in 2012. Gough is survived by his daughter Catherine and three sons Anthony (Tony), Nicholas and Stephen.

His son Tony followed Gough’s vocation and interests. Tony was called to the bar in 1967 and was appointed QC in 1986. He was member for Grayndler from 1975 to 1977 and in 1993 he was appointed to the Federal Court of Australia.



John Howard, Bob Carr and Gough Whitlam at the ceremonial sitting to mark the 175<sup>th</sup> anniversary of the Supreme Court of NSW.

Gough’s achievements in the law and the reform of our legal system are reflected by Noel Pearson’s obituary at the state memorial service:

The achievements of this old man are present in the institutions we today take for granted and played no small part in the progress of modern Australia. The breadth and depth of the reforms secured in that short and tumultuous period were unprecedented and will likely never be repeated.

**By Trish McDonald SC**

### Endnotes

1. Jenny Hocking, *Gough Whitlam A Moment in History*, page xvii.
2. TEF Hughes AO QC, ‘Address to Supreme Court Judges’ Dinner’, 2 February 2006.
3. Gough Whitlam, *Abiding Interests*, page 14.
4. Graham Freudenberg ‘Gough Whitlam: A very public life’, *Sydney Morning Herald* 21 October 2014
5. ‘The Rule of Law in the East’ (1963) 36 ALJ 356; E.G Whitlam QC MP response to paper by Vivian Bose, president of International Commission of Jurists.
6. ‘From Little Things Big Things Grow’.