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**THE FEDERAL ATTORNEY-  
GENERAL'S DEPARTMENT:  
PAST, PRESENT, FUTURE**

Attorney-General's Department,  
Canberra, ACT, Australia

14 February 2011

The Hon. Michael Kirby AC CMG

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### PAST

I thank the Solicitor-General of the Commonwealth, Stephen Gageler, for welcoming me to this new building housing the Attorney-General's Department, one of the founding departments of the Commonwealth of

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\* Deputy President of the Australian Conciliation and Arbitration Commission (1975-84); inaugural chairman, Australian Law Reform Commission (1975-84); member, Administrative Review Council (1976-84); Judge, Federal Court of Australia (1983-4); President, NSW Court of Appeal (184-96); Justice of the High Court of Australia (1996-2009).

Australia<sup>1</sup>. As he has stated, we share several things in common. He chose not to mention that we were, on successive years, chosen as members of the top 100 celebrities in Sydney. Neither of us survived to the next year's list. Celebrity is such a fleeting experience.

We do share an acquaintance with most of the distinguished law officers whose photographs are displayed in this building. I knew, and worked with, all of the Attorneys-General of the Commonwealth from Sir John Spicer and Sir Garfield Barwick on. I knew, and worked with, all of the Solicitors-General from the Hon. Robert Ellicott and Sir Maurice Byers. I have known all of the Secretaries of the Department, and heads of the Commonwealth Crown Solicitor's Office (as it was called), from 1975. I am greatly relieved to hear that the Lionel Murphy Library in this building still bears the name of that creative Attorney-General, Lionel Keith Murphy. It comes as somewhat of a surprise because I was told last week that the Michael Kirby Library at the Australian Law Reform Commission (ALRC) has been abolished. The Michael Kirby Librarian has been retrenched, allegedly for reasons of economy. How one can have a law reform agency without a dedicated library and librarian, is a mystery to me. Institutions should honour their histories and the personalities who breathed life into them. They establish the standards that subsequent officers must uphold. Indeed, that is why I accepted the invitation of the Secretary to come to the Department today: to remember and honour the officers I have known.

My original federal appointment was to the office of Deputy President of the Australian Conciliation and Arbitration Commission. I was welcomed to that office in December 1974. At the time, that body was one of the

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<sup>1</sup> R.R. Garran, *Prosper the Commonwealth* (Angus & Robertson, Sydney, 1958), 143, 154.

great tribunals of the nation, second only to the High Court in history, influence and national impact. It was an area of the law in which I had practised at the Bar. I expected it to occupy my life.

However, Lionel Murphy persuaded me to accept appointment in the new Law Reform Commission (ALRC) and, from February 1975, to be its chairman. Amazing to look back on it, how, at first, I resisted his offer. Imagination is not commonly the first quality of lawyers. When I accepted appointment to the ALRC, I came to Canberra to meet the departmental officials with whom I would have to work. Already, because of briefs I had received as a barrister, I knew many of the leaders of the Crown Solicitor's Office: Alan Neaves (later a Federal Court Judge, CCS), Jean Austin (DCS), Len McAuley and others. They were all fine lawyers with special talents in the fields of federal and constitutional law.

Even before my ALRC appointment, I had also met Clarrie Harders, later Sir Clarence Harders OBE, Secretary of the Department under Murphy and his successors. He was there with Murphy, Byers and the rest of the team when we walked into the old High Court building at Darlinghurst in Sydney in 1974. Until the case was called, we did not know whether Murphy or Byers would present the Commonwealth's arguments in *Cormack v Cope*<sup>2</sup> (the Joint Sittings case). Murphy did. And won. In the conferences, Clarrie Harders showed great nimbleness and subtlety of mind. I was to see much evidence of this in the ALRC years that followed.

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<sup>2</sup> (1974) 131 CLR 432.

Like many leading officers of the Department, Clarrie Harders came from South Australia. His middle name was Waldemar and he was Lutheran. He was appointed Secretary of the Department in 1970. He had been Deputy Secretary from 1965. Yet nothing before the Whitlam Government, sworn in December 1972, could have prepared him for the tidal wave of legislation and policy changes that were to be the responsibility of this Department in the creative years after 1972.

Sir Clarrie Harders seemed, at first sight, diffident and tentative. But that was a mask. Behind it was a mind of great subtlety and distinction. And enormous experience in the federal sphere. He was able to bring his great talents to the support of successive Attorneys-General. After the initial shock, I think he enjoyed the Murphy years. And the Ellicott years in the Fraser government that were to follow.

At one stage, hoping to provide an institutional solution that would overcome the disappointing experience of other law reform agencies, I proposed that the Commission should have a branch embedded in the Attorney-General's Department. Harders showed respect for my motives and even for the idea. But he cautioned me. Drawing on his wisdom and experience he said, in effect: "The unique quality that the Law Reform Commission can bring to government is its independence; its availability to draw on alternative sources of information and advice; its distance from politics and proximity to the practising profession and academics". This was wise advice. We followed it. I drafted my proposal. Surprising therefore, in 2011, to discover that now, the ALRC will now be embedded in facilities in Sydney surplus to the needs of the Australian Government Solicitor. And will no longer require the Michael Kirby Library because its officers will merge with AGS officers and have

access to some of their library facilities in Sydney. This was not the way of thinking in 1975. The ALRC and the Department should reflect on Sir Clarrie Harder's advice. Independence is more than a theoretical construct.

The Deputy Secretary of the Department at the time was Frank Mahony CB, OBE. He had been Deputy since 1970 and before that Deputy Commonwealth Crown Solicitor from 1963. It was this inter-mixture of practical, professional and departmental service that made the top talent of the Department so impressive to me, an outsider. Frank Mahony was a positive, can-do personality.

In those days, long before the birth of email, Mahony would solve every problem by telephoning the source. He was known as the "LBJ of Canberra", because this also was President Johnson's strength. He never accepted a difficulty. He searched for, and invariably found, the solutions. Mahony was a great ally to the ALRC.

When he retired, Mahony was replaced by Trevor Bennett OBE. He was much more cautious, a great worrier. He saw all the problems and reasons for delaying action. Needless to say, he got on well with Attorney-General Peter Durack, who succeeded Bob Ellicott QC in that office. Durack was perturbed by the engagement of the ARLC with the general public and the media. Yet it was that engagement, and strict bipartisanship in its performance, that ensured the Commission's survival after the fall of the Whitlam Government. Moreover, Bob Ellicott, like Murphy, was a great reforming Attorney-General. He knew where the problems were, particularly in administrative law. He and Murphy successively pioneered much of the reforming legislation that put the

federal service in Australia in a leadership position in reform, not only in the Commonwealth, but in the world.

Another Deputy Secretary at the time was Ewart Smith OBE. He was a medallist from Sydney University. His experience had originally been in the Department of External Territories, the Crown Solicitor's Office and legislative drafting. He was a brilliant mind, as indeed they all were. Working with them as a still young lawyer was, to deploy a much over-used adjective today, awesome. No-one I have ever known (including Justice McHugh who had a photographic memory) came near these officers in a detailed knowledge of constitutional decisions and the federal law of the nation.

Amongst the brilliant First Assistant Secretaries of the Department, Lindsay Curtis AM stood out. He had come from Melbourne University and, like Ewart Smith, had served in Papua-New Guinea (PNG) in the last decade of Australia's territorial responsibilities there. At an early stage, he had been an examiner in the Patents Office, which was later to become the physical home of the Department, before it moved across the road to this new building. Curtis too had served a time as a parliamentary draftsman and indeed a secretary for law in PNG and official member of the House of Assembly in PNG. He was a skilled adviser to the officials in that nation as they moved towards an autochthonous independence constitution and political freedom.

Within the Department, Lindsay Curtis had special responsibilities for law reform. But his preoccupation in the years that I knew him was with the particular challenge of federal administrative law reform. It was he who took the leading role in the Department in the collection of statutes

that brought the changes into operation: the *Administrative Appeals Tribunal Act* 1975; the *Administrative Decisions (Judicial Review) Act* 1977; the *Ombudsman Act* 1977; the *Freedom of Information Act* 1982; the *Privacy Act* 1986. With Justice (later Sir Gerard) Brennan, me and a small band of others, Lindsay Curtis worked with ferocious energy in the Administrative Review Council, created in 1976 pursuant to the *Administrative Appeals Tribunal Act*. He was sharp, taut, sometimes querulous, but always hugely energetic, creative and diligent.

Almost singlehandedly, Lindsay Curtis compressed into a remarkably short statute in 1977 the mass of up-to-date English and Australian judicial review decisions. And he then sold the resulting reform to officials of the Department and other Departments who were often extremely dubious, if not sceptical or downright hostile. He was strongly supported throughout by Harders and Mahony. Above all, he was supported by Attorneys-General Murphy and Ellicott. It was truly a golden age of law reform, and administrative law reform in particular. The ALRC also had great support from the Department and from the law officers during this time. And it did not alter with the change of government in 1975.

In my life, I have experienced, mostly, good fortune. Amongst the good fortune, I wish specially to acknowledge my associations with the officers of the Attorney-General's Department in Canberra. Recently, I participated in a conference on the fortieth anniversary of the *Copyright Act* 1968 (Cth). It was addressed by Professor Adrian Sterling, now of the University of London but originally a young Sydney law graduate and Phillip Street barrister. In his paper, Sterling paid tribute to Attorney-General Nigel Bowen, himself an expert in intellectual property law and

“a great lawyer”. But his special tribute was for Lindsay Curtis, officer of this Department, for piloting and negotiating the proposed reforming legislation<sup>3</sup>:

“Lindsay was the perfect civil servant, courteous, receptive and impartial, and more than that, highly intelligent, an excellent draftsman and blessed with a warm personality and a great sense of humour. There was much drafting of submissions and exchange of views, not only about this issue but also on the issue of conditions applying in respect of the compulsory licence to make sound recordings ... The pattern was that we would meet Lindsay Curtis and put a proposal on behalf of the industry. Lindsay would convey this to the “other side” and we would meet again in a few days to consider the reply: this process continued for weeks ... and the legislation was enacted.”

I too pay my tribute to the officers high and low of the Attorney-General’s Department of the 1970s and 80s. It was a remarkable time. The Department was magnificent, informed, devoted and energetic. It gave leadership in the interests of the people of Australia. The names of these officers are mostly unknown to the citizens whom they served. But they are heroes of the Commonwealth. The Department can be proud of those I have mentioned and of many that I have not named, such as Charles Comans CBE, QC, First Parliamentary Counsel, John Ewens CMG, CBE, QC, a past office holder of that office, Geoffrey Kolts OBE and Noel Sexton, also federal drafters of great distinction. What happy memories their names bring flooding back. They provide an example of the very best in the federal public service of our country. I honour their service to the Commonwealth and their achievements. You who are here today follow in their footsteps. There should be a gallery of their photographs, so that their contributions are never forgotten by their successors.

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<sup>3</sup> A. Sterling, “The Copyright Act 1968: Its Passing and Achievements” in B. Fitzgerald and B. Atkinson (Eds), *Copyright Future Copyright Freedom* (Sydney University Press, Sydney, 2011, forthcoming), 60 at 66-67..

## PRESENT

The immediate question presented by this small history of outstanding personalities is, of course, are we who have followed equal, in different times, to those whom we remember from earlier years?

Of course, there were features of the Department when I first knew it that are quite different from the Department today and that will never be re-captured:

1. It was very much smaller in the numbers of officers – effectively a core *cadre* of elite and brilliant officials;
2. It was mainly a Department for legal advice, not operations. I understand that a very large cohort of the Department's present officers work on so-called "homeland security", an Orwellian phrase borrowed from the Americans. There was nothing like that in 1975, which was before the creation of the Federal Police (originally to have been called the Australia Police);
3. The Department was then the key advisor to the Commonwealth and to Departments and agencies of the Commonwealth across the board. The officers at its head were required to provide constitutional and legal counsel to every branch of the federal administration. Now, virtually all departments and agencies have their own in-house lawyers to advise them;
4. In those days, as from virtually the beginning of the Commonwealth, there was little, if any, outsourcing of legal advice to private legal firms. Interestingly, Robert Garran records, at the beginning of the Commonwealth, there then being no Commonwealth Crown Solicitor's Office, that: "For a while we had done without a Crown Solicitor by distributing the work among

private firms. But in 1903, the first appointment of Commonwealth Crown Solicitor went to Charles Powers, then Queensland Crown Solicitor who organised the office with agents in the States until the work grew sufficiently to justify setting up state branches.”<sup>4</sup> Of course, the Commonwealth Crown Solicitor briefed members of the private Bar to supplement the occasional advocacy of the Attorney-General himself and the more regular advocacy, in the Commonwealth’s interest, of the Solicitor General. At my appointment in 1975, the Commonwealth Solicitor General was Robert Ellicott QC, soon after to be elected a member of the House of Representatives and later himself the Federal Attorney-General. He was a most distinguished leader of the Department and a mighty law reformer; and

5. Above all, the Commonwealth Crown Solicitor’s Office was closely associated in daily discourse with the senior personnel of the Department. Leaders of the Department were invariably lawyers with very strong backgrounds of experience in the practical world of advising and preparing the cases of the Commonwealth for hearing before courts and tribunals, federal and state. It was the coming and going of officers between the intensely practical worlds of federal law and administration that gave a distinctive edge and experience to the leaders of the Department. They were not administrator only, or even mainly. They were hard-nosed lawyers with a profound and unique experience, across the widest possible range of federal legal questions.

The growth of the size of the federal public service since 1973, the increasing demands placed upon it by successive governments and the

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<sup>4</sup> Garran, *ibid*, n1 above, 152-3.

shift of many operations from state to federal responsibilities has meant a change of arrangements since 1975. In all probability, this change cannot now be reversed. However, it is important to make the point that the alteration in the character of the Attorney-General's Department from the time when I first knew it to the present time has inevitably resulted in a decline in its influence across the Commonwealth service. And a commensurate diminution in the role of the Attorney-General, as Minister and as a political office holder who is also the chief legal adviser to (and legal influence upon) the federal government.

This may, in turn, have affected the type of person, as politician, who is appointed to be Attorney-General of the Commonwealth. Once it would have been unthinkable for that office holder to be other than a leading lawyer, preferably a barrister and senior counsel, as all of Robert Garran's Attorneys-General had been<sup>5</sup>. In the state sphere in Australia, it has not been unusual, in some states, for decades to pass without a lawyer holding office as Attorney-General. Whilst this has not happened in the federal sphere, it is by no means unthinkable now, taking into account the change in the operations and character of the Department.

In-house lawyers and private contractors can certainly give sound advice to the Commonwealth. However, there was a special strength in the unity and principle that came from concentrating the leadership of the Commonwealth's legal advice in the Attorney-General, and daily working closely with lawyers of special experience who headed up the Attorney-General's Department. Consideration should, in my view, be given to restoring some aspects of the former state of things. Combining the standard-setting and advice-giving in a single political office holder was

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<sup>5</sup> Ibid, 159-160.

beneficial both to the consistency of the advice proffered and to the high standards that political Attorneys-Generals could demand of their colleagues in government and in the Cabinet and Ministry.

Now a very large part of the burden that was formerly shared amongst ten or so leading federal lawyers devolves substantially (to the extent that it survives) on the Solicitor-General and the Chief General Counsel operating in the AGS. The extent of advocacy performed by Chief General Counsel appears to vary in accordance with the times and the inclinations of successive office holders. From close up experience I can say that there was great merit in the former arrangements – including for the operational features of the rule of law in the Commonwealth. My opinion is based on long and intimate association but also on close observation during the decade that I served as inaugural chairman of the ALRC.

## **FUTURE**

If little change can be expected in the short term in the arrangements just described, there is one specially different feature of the Commonwealth's legal work today that, in my view, should be re-evaluated. I refer to the enormous increase over the past ten years in the outsourcing of legal advice, not just from the Attorney-General's Department to other departments and agencies, but to private sector legal firms, necessarily operating for profit to their partners. This outsourcing has, in my impression, significantly weakened the availability to the Commonwealth of consistent, coherent, service-wide, efficient and less expensive legal advice. Moreover, it has undermined the most distinctive feature of such advice as I came to know it in the 1970s when, without exception, it was recognised that the

Commonwealth was a special client, a model litigant, with a particular and distinctive obligation to uphold the rule of law and high standards of probity and excellence in lawyering.

These features of federal legal work remained virtually unchanged from the earliest days of the Commonwealth, described by Robert Garran, until about 1996, when the Howard Government was elected to office. In keeping with that government's commitment to privatisation of federal governmental activities, steps were taken quite quickly to let out legal advice and representation to private legal firms. What began as a relatively modest activity (advised by a New Zealand businessman imported for the purpose) expanded to an astonishing degree, so effectively as to alter the normal provision of legal advice by officers of the Commonwealth, dedicated to that purpose. Recently, an investigation of a limited kind was undertaken by Tony Blunn, former federal departmental head. However, this was restricted to the specific issue of tendering for private legal advice<sup>6</sup>. It did not have a general remit.

According to a graph reproduced in the Blunn report, the growth of spending by the Commonwealth on private outsourced legal advice was as follows:

1995-6	\$198m
1996-7	N/A
1997-8	N/A
1998-9	\$144m
1999-2000	\$308m
2000-1	\$302m
2001-2	\$363m
2002-3	\$409m

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<sup>6</sup> Attorney-General's Department, *Report of the Review of Commonwealth Legal Services Procurement* (AGPS, Canberra). Released by Attorney-General Robert McClelland MP, 8 January 2010.

2003-4	\$446m
2004-5	N/A
2005-6	\$342m
2006-7	\$408m
2007-8	\$512m
2008-9	\$555m

There are many difficulties in this huge and unprecedented growth in private legal advising:

1. It inevitably diminishes the unity and consistency of the advisings across the fields of federal statutory and constitutional law;
2. It entails huge expenditures by private sector legal firms, bidding for the work, by tendering. This process itself introduces a cost factor that must ultimately be borne by the legal sector and, inferentially, be passed on to clients, in this instance the Commonwealth itself;
3. It imposes on Commonwealth departments and agencies time-consuming and costly engagement in the tendering process which, of itself, imposes costs to be borne by the Commonwealth without a single hour of actual legal advice being afforded. Anecdotal evidence shows that the total costs to agencies and service providers of outsourced legal advice, enlarged by tendering, are substantial. The AGS alone spends \$6 million a year on tendering which, from the point of view of actual advice to the Commonwealth, is virtually dead money;
4. By reason of the size, not the obligations assumed, tendering for federal legal work has tended to favour large legal firms, some of them with political links which cannot harm their prospects of success;
5. Inevitably, in-house lawyers will often see themselves as freed from the whole-of-government interests of the Commonwealth

itself and as dedicated to the particular department or agency that employs them. Likewise, private sector lawyers may bring to bear the different ethos that exists in advising a private corporation, when compared to advising the Commonwealth which is, in a constitutional sense, the representative of all the people of Australia. Anecdotally, the introduction of a private sector ‘winning mentality’ has sometimes reduced observance of the special rules that formerly marked the special role of the Commonwealth as a model litigant;

6. To the extent of the growth of the provision of private legal advice to the Commonwealth and its dispersal over many outlets, the unity, consistency and experience previously centred in the Commonwealth Crown Solicitor’s Office (now AGS) has been diminished. It is perhaps no coincidence that the special feature of the Attorney-General as a unique political guardian of the rule of law (and defender of the judiciary), began to change at about the same time as the introduction of outsourcing of legal advice to the private sector<sup>7</sup>; and
7. The opportunities for interchanges between departmental and AGS personnel are reduced to the extent of this outsourcing. So is the economical provision of advice to the Commonwealth. In former times, top legal graduates would seek employment with agencies of the Commonwealth, at lower incomes than they might have earned in the private sector because of the interest, public relevance and importance of the work. Now, private firms receiving outsourcing contracts compete with the federal legal

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<sup>7</sup> The High Court has noted the different role of the Attorney-General in Australia as compared to the United Kingdom. See *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 284 [107], per Hayne J. Some observers date the clearest indication of the change to the announcement by Attorney-General D.M. Williams QC that it was not his role to defend the judiciary from political attacks. M.D. Kirby, “Attacks on Judges – A Universal Phenomenon” (1998) 72 ALR 599.

advisers at a cost that must be borne by taxpayers of the Commonwealth.

Although the present Attorney-General, Mr. Robert McClelland, has indicated that the rate of growth of outsourcing has declined (possibly itself occasioned by economic restraining factors like the GFC rather than a fundamental change of policy), no fundamental reversal or even review of the trend set in place after 1996 has been undertaken. The failure specifically to ask the Blunn enquiry to report on the marginal utility and benefits of the continuing and growing use of private sector legal service providers, at least to the extent now occurring, was a serious error and in my view surprising<sup>8</sup>.

A return to a monopoly on legal advice in the AGS is neither possible nor necessarily desirable. However, there are other models for outsourcing observed in comparable countries such as the United Kingdom and Canada. Most especially, the expensive, time-consuming and inefficient system of tendering for such services needs serious reconsideration. A progressive reversal of the current trend appears desirable. The ultimate criterion must be the assurance of the highest standards of legal advising to the Commonwealth; the preservation of a measure of unity given the special features of the Commonwealth's legal needs; and the insistence on the most economical funding and rigorous and regular scrutiny of whether the Commonwealth, and its taxpayers, are receiving best value for money under the present arrangements.

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<sup>8</sup> E. Willheim, "The Mounting Legal Bills of an Ideological War", *The Public Sector Informant*, Canberra, March 2010, 3.

These are simply personal views. However, they are based upon extensive observations of the earlier arrangements that endured for nearly a century before being overthrown and effectively abandoned. A measure of competition may well be beneficial to the Commonwealth, as may some access to legal perspectives outside the Department and the public sector. Still, the present erosion of work to the private sector has, in my opinion, gone too far. Some at least of the motivation for the intensity of the trend to outsourcing may have been ideological rather than service driven. Certainly, this explanation has been suggested by an experienced former officer of the Attorney-General's Department.<sup>9</sup> There is a need to rebuild the Commonwealth's system, grafting on to it the best features of the Department and the Solicitor's Office as I first knew them. Only those who did not know and appreciate the strengths of the old arrangements would have built the new without preserving the chief strengths, so that they could be handed on to future generations.

I may be wrong, but it is my belief that if Murphy, Ellicott, Barwick, Byers, Harders, Mahony, Bennett, Curtis, Ewens, and the other great lawyers of the Commonwealth were here today with me, they would be saying much the same thing. Not out of nostalgia. But out of a sense of pride in the high traditions of Commonwealth lawyering: consistency and excellence, integrity with fidelity to the standards that were demonstrated over the first nine decades of the Commonwealth's existence.

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<sup>9</sup> *Ibid.*