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AUSTRALASIAN LAW REFORM AGENCIES CONFERENCE

CANBERRA, 12 SEPTEMBER 2012

OPENING CEREMONY 2012

ALRAC: 40 YEARS ON – CHANGE & DECAY?

The Hon. Michael Kirby AC CMG

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THE HON MICHAEL KIRBY AC CMG*

IN THE BEGINNING

This assembly – originally the Australian Law Reform Agencies Conference – was first convened in 1973 on the initiative of NSW Law Reform Commission[1]. The meeting, like its successor, the second conference in 1975, was held in Sydney. It included consideration of the establishment of a national law reform commission. That idea was welcomed in 1973 as likely to stimulate projects of uniform law reform[2].

By the time of the second conference, held in April 1975, the Australian Law Reform Commission (ALRC) had been created. But it was still in its establishment phase. The running of ALRAC was still the responsibility of Justice C.L.D. Meares, Chairman of the NSW Law Reform Commission (NSWLRC). An account of the resolutions adopted at the second conference (mainly addressed to the subject of uniform law reform) was contained in the ALRC's first *Annual Report* of 1975[3]. Specifically, it was envisaged that ALRAC would work in co-operation with the then Standing Committee of Attorney's General to identify projects suitable for co-ordinated work involving the new ALRC and the State and Territory law reform bodies. As recorded in the ALRC's *Annual Report*, in the fragile political

* Inaugural Chairman of the Australian Law Reform Commission (1975-84); President of the New South Wales Court of Appeal (1984-96); Justice of the High Court of Australia (1996-2009).

[1] The story is told in Australian Law Reform Commission, *Annual Report* 1976 (ALRC 5), 38 [63].

[2] Ibid, citing the Minutes of the first conference.

[3] The first annual report is: Australian Law Reform Commission, *Annual Report* 1975 (ALRC 3), 36, 51 ff.

circumstances of 1975, the Standing Committee rejected all of the resolutions of the ALRAC. The sole exception was a resolution that had requested the appointment of the ALRC as a clearing house for the work of the Australian law reform agencies. From the start, therefore, the ALRC assumed that responsibility. Presumably opposition to this was suspended because it was viewed as inconsequential and non-substantive.

It was the third meeting by which time the body was renamed as the Australasian Law Reform Agencies Conference (ALRAC) that took place in Canberra between 8-10 May 1976. It saw a measure of harmony emerge, at least between the law reform bodies themselves; the creation of a trusting relationship between their chairmen, commissioners and staff; and arrangements for the exchange of information, reports, experience and opinions.

In the manner of the Australian legal profession, which was much smaller in those days, I had enjoyed close professional engagements with C.L.D. Meares and with Justice Ray Reynolds, the latter by then a Judge of Appeal of New South Wales and a past Chairman of NSWLRC. I had briefed them both when I was a solicitor. I had worked with them both at the Bar. The politicians might have their squabbles. But the lawyers kept their eyes on the challenge of making their respective institutions work successfully, including in activities which brought them together. The ALRAC was one such activity.

With the concurrence of the Australian State and Territory Commissions, all of which had been created long before the ALRC, the new federal agency was invited at the second meeting of ALRAC to act as convenor of the third conference. This took place not far from the venue of the 2012 meeting, at University House within the Australian National University. The opening ceremony in 1976 was performed by the new Federal Attorney-General, the Hon. R.J. Ellicott QC MP. Also present at the ceremony was the Leader of the Federal Opposition (the Hon. E.G. Whitlam QC MP). Until his dismissal on 11 November 1975, he had been Prime Minister of Australia.

Both Mr Ellicott and Mr Whitlam were notable law reformers. Both were accomplished and successful barristers. In office between 1972-1975, Mr Whitlam had achieved significant reforms of the law[4]. As Solicitor-General of the Commonwealth, Mr Ellicott had played an active role in advancing proposals for a new system of federal administrative law. He was keenly interested in, and supportive of, law reform. Whatever differences of a political kind existed between them the members of the ALRAC became quickly aware of the fact that the pace of law reform was likely to increase.

Although there had initially been some suggestion that, following the change of government, the ALRC might be abolished by the Fraser Government, any fear that this would happen was dispelled by the commitment which Mr Fraser gave in his policy speech prior to the federal election in December 1975. This was that, if elected, the Coalition Government would refer to the ALRC the investigation of the Australian law on privacy. I believe that this proposal was one of several that Mr Ellicott was keen to have the ALRC investigate. He took a personal interest in securing the recruitment of the first full time ALRC commissioners (Professor David St L Kelly; Mr Russell Scott; and Mr Murray Wilcox QC). Another factor in ensuring the survival of the ALRC was, I believe, the strictly non-political approach adopted by the Commission from the beginning and its attempt to brief, inform and engage with lawyers from all political parties and from both sides of Houses of Parliament.

In his opening address to the ALRAC's third conference in Canberra, Mr Ellicott welcomed the participation of representatives of the New Zealand Law Reform Council and of the Papua New Guinea LRC. He drew attention to the special difficulties of securing law reform in a federal system of government. He welcomed the ALRC's assumption of its responsibilities as a national clearing house for law reform. He urged regional and international co-operation between law reform agencies in Commonwealth countries.

The third ALRAC conference shaped up as a somewhat grand affair. It was convened in the large hall of University House. Not only were there representatives

[4] M.D. Kirby "Whitlam as Law Reformer" (1979) 10 *Federal Law Review* 53.

from each of the Australasian law reform bodies. There were also participants from the Law Council of Australia (Mr R.D. Nicholson, later a Judge of the Federal Court), the Law Foundations of NSW and Victoria and participants from many foreign countries including Canada, Fiji, Malaysia, Nauru, Nigeria, and Sri Lanka. With the encouragement of the Federal Attorney-General, many of the senior officers of the Attorney-General's Department participated. So did leaders of the academic community, including Emeritus Professor Geoffrey Sawer (ANU) and Mr J.G. Starke QC, General Editor of the *Australian Law Journal*[5].

Two events occurred that were significant at the time. First, I was elected to chair the ALRAC conference. Although the ALRC was hosting the meeting, chairmanship was not a foregone conclusion. In the politics of the time, the tensions between federal and State office holders were initially considerable. The Chief Justice of Victoria (Sir John Young) had expressed his distaste for law reformers. He described them as having an unhealthy commitment to change in the law, whereas stability was what was needed. Careful, patient and courteous work by the ALRC commissioners and staff was necessary to smooth these tensions.

Secondly, the ALRAC participants were invited to a dinner at Government House, Canberra, hosted by the Governor-General (Sir John Kerr). He had a long-standing interest in law reform. His invitation had been extended before the dismissal of the Whitlam Government. At the time, feelings still ran high concerning the dismissal. However, the dinner was pleasant and successful. Neither Mr Whitlam nor any representative of the Labor Opposition came to Government House.

Much of the time of the third ALRAC conference was taken up in considering practical and methodological problems of law reform including:

* The creation of the *Australasian Law Reform Digest*, a project of the ALRC;
* The follow up to, and auditing of, law reform reports and how to achieve this;
* The engagement of legislative draftsmen to enhance productivity and to sharpen law reform recommendations;

[5] ALRC 5, 38-39 [65]-[66].

- The co-operation of projects of uniform law reform; and
- The engagement with overseas law reform bodies, particularly in the United Kingdom and the United States of America.

It was agreed that the next ALRAC meeting would be held in Perth, Western Australia.

One of the overseas participants attending the ALRAC meeting in Canberra in 1976 was Mr Nihal Jayawickrama, Secretary of Justice of Sri Lanka. At the close of the conference, he is recorded as having said[6]:

> "It has been an exhilarating experience for all of us to have been among so many people who give so much of their time and their energy to the development of the law; so many keen and acute minds who are engaged in the task of fashioning the law. I believe this is the first such effort in the field of law reform at the international level to be undertaken by any Commonwealth country. I am sure that the ideas we have gathered and the contacts that we have established during the last three days will be used considerably for our mutual benefit. ... Much of what we have achieved in Sri Lanka in the way of law reform has been due to the efforts of the Australian Law Reform Commission and the Canadian Law Reform Commission. We have borrowed many ideas and we propose to do so in the future."

ELEMENTS OF CONTINUTITY

Following the successful conclusion of the third ALRAC conference in Canberra, the path of co-operation between Australasian law reform agencies, and with overseas bodies concerned in the reform of the law, continued to expand. Not only was a system for formal co-operation established and enhanced (by the exchange of law reform reports; and by the publication and upkeep of the *Law Reform Digest*). Other procedures were introduced to advance co-operation within Australia. These included:

[6] ALRC 5, 41 [72].

- The publication by the ALRC of its quarterly journal *Reform*. This contained news, views, and lists of law reform projects and reports, with comments on personalities and their careers;
- Informal meetings and discussions were regularly held between LRCs at a commissioner level; and
- Co-operation between staff members was enhanced following the recruitment of the ALRC's first Secretary and Director of Research (Mr G.E.P. Brouwer, now the Victorian Ombudsman);
- Co-operation grew up between law reform librarians (led by Roy Jordan and later Virginia Purcell of the ALRC); and
- Co-operation at an administrative level was created (involving Mr Keith Johnson, Mr Barry Hunt and Mr Garry Mahlberg of the ALRC).

Probably, because of his strong connections with the legal profession, Attorney-General Ellicott was able to recruit as part-time and full-time commissioners of the ALRC, lawyers of very high distinction, whose engagement with law reform gave a great boost to the Commission's prestige and clout within the Australian judiciary and legal profession. Amongst the early part-time commissioners, appointed on the proposal of Mr Ellicott, were Sir Zelman Cowen QC (later Governor-General); Sir Maurice Byers QC (on his retirement as Solicitor-General of the Commonwealth); Mr Brian Shaw QC (doyen of the Victorian Bar) and Mr J.Q. Ewens (former First Parliamentary Counsel of the Commonwealth).

The flow of relevant and challenging references and the strong support for the Commission proved a game changer. The ALRC, although young, became a significant player in the institutions of law and law reform in Australia. This likewise enhanced its standing on the international stage. I discovered this soon after the ALRAC meeting in Canberra when I was invited to attend the first meeting of Commonwealth law reform agencies. This convened at Marlborough House (the Commonwealth Secretariat Building) in London. It was chaired by Lord Hunter (Chairman of the Scottish Law Commission).

One difficulty which remained troublesome in institutional law throughout the ALRC's establishment years was how it could ensure a smooth passage of legislative proposal through the parliamentary process so that they would be translated into law. In a note in *Reform,* following the Canberra meeting of ALRAC in 1976, I recorded Attorney-General Ellicott's response to this problem[7]:

> "Mr Ellicott then turned to the suggestion by Mason J. of the High Court of Australia that certain limited delegation of legislative authority to law commissions should be permitted to make sure that parliaments did not fall down on the task of updating areas of private law[8]. He doubted that such proposal would be accepted "at an early date in Australia" because many subjects of law reform have deep "political and practical implications". He instanced the reference to the ALRC on Privacy. However, he was prepared to envisage some areas "essentially non-political", where the proposal by Mason J. might gain acceptance. Statute Law Revision was suggested. The corollary of this view was recognised by Mr Ellicott. If parliaments were not prepared to delegate authority, they must ensure that law reform reports are studied and dealt with. It was for this reason that the ALRC reports tendered to the 29th Parliament had now been referred by him to the Government Parties Committee on Law and Government. "A law reform commission which is mere window dressing to make a government appear progressive can have no justification whatsoever. It is an unnecessary drain on the public purse and eventually will embarrass the government seeking to gain from its existence".

At the stage of the Canberra meeting, and at various intervals thereafter in Australia, there were high hopes that some form of regular parliamentary consideration of law reform reports would be achieved. So far, those high hopes have not been fulfilled in Australia. This position contrasts with the situation that now obtains in the United Kingdom. In March 2010, a protocol was agreed between the Law Commission of England and Wales and the Brown Government of the United Kingdom, with a view to improving the rate at which Law Commissions' reports were implemented. The protocol was not withdrawn when the Brown Government was defeated at the polls and replaced at the general election in 2011 by a Coalition Government led by Mr

[7] The Hon. R.J. Ellicott quoted [1976] *Reform* 43.
[8] (1975) 49 ALJ 573.

David Cameron and Mr Nick Clegg. In devising its 11th programme of law reform, published in July 2011, the Law Commission of England and Wales has worked in accordance with the protocol. Although there has been some progress in the implementation of unimplemented reports of that commission through this procedure, there still appears to be reluctance in governmental circles to implementing a *routine* system for regular consideration of law reform reports.

I have never known any professional law reformer who had an expectation that reports would proceed uncritically and immediately into law, simply because a law reform agency has proposed them. However, it is not an unreasonable expectation, given the expenditure of so much intellectual, financial and emotional capital, that some system would be devised by legislatures to give routine consideration to reports within a given time. This is a way of assuring accountability of government to the people. However that may be, the very reason why governments, of all political persuasions' tend to avoid commitments is that they may occasion political pressures when the politicians are otherwise engaged or unready. Which is most of the time.

ELEMENT OF CHANGE AND DECAY

In an old hymn, which in my youth was sung at every ANZAC Day, a haunting stanza declares:

> "Change and decay in all around I see;
> Oh Thou who changest not abide with me."

Decay may be to overstate slightly the condition of law reform in Australia today. But when I ask whether the same high hopes that existed in institutional law reform in 1976 still exist today, the answer must come back: Not really. Only partly. Times have changed. But hope is not now pitched so high.

So what has happened to the dream of institutional law reform of yesteryear? I tried to answer that question a year ago when offering an address to a conference on law

reform in Hong Kong. Significantly, the conference was subtitled "Does Law Reform Need Reform". My address offered a summing up of the conference. It called upon many of the remarks of the participants, as well as expressing my own feelings and conclusions[9].

Obviously, law reform bodies continue to perform useful work in Australia and elsewhere. Manifestly, their proposals are sometimes adopted and pass into law. The utility of such bodies cannot be seriously doubted. But what can be said is that the dreams and aspirations of a truly effective ongoing institutional adjustment of our law-making system have not been borne out. It remains true today, as it was in 1975, that securing law reform in an orderly and systematic way remains something of a pipe-dream. The raiments of law reform, like the garment of the hero in the *Mikado* has now become "a thing of shreds and patches". Lord Scarman's grand idea, which gave birth to Lord Chancellor, Gerald Gardiner's Law Commissions in the United Kingdom[10] has, to speak bluntly, not been fulfilled. So also in Australia. What is more, there is now evidence of new and different impediments that reduce the effectiveness of law reform agencies to something approaching a truly minor player status. This is so, although an objective efficiency audit of our legal system would demonstrate a need for more systematic institutions and procedures.

So what are the signs of deterioration in the effectiveness of institutional law reform? I would suggest they include the following – and that they are serious:

- The increase in, or return to, institutional territorialism. In 1976, there were hopes in both the ALRC and the Attorney-General's Department that each would play a large and creative role in the business of law reform. It now seems that departments and their heads are inclined to see independent law reform bodies as peripheral, sometimes a nuisance and usually (and rightly) incapable of being controlled and directed as departmental officers can be;
- Government sensitivity to the work of independent agencies appears to be greater today than was the case in 1976. At the heart of the great reforms to

[9] M.D. Kirby, "Summing Up: Reforming Law Reform, unpublished address to conference on law reform in Hong Kong", University of Hong Kong, 17 September 2011 (#2561).
[10] M.D. Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 ALJ 299.

administrative law that were pioneered by the Whitlam and Fraser Governments in the 1970s lay the idea of stimulating officialdom. I cannot imagine reforms of such a size and controversy being accomplished today. Control and management of the politics of reform, rather than stimulus and amenability to novelty, represent the current order of the day;

* The staff component of law reform bodies has been severely reduced. Self-evidently, a law reform agency cannot deliver much if its staff is reduced to tiny proportions. When I look at the Federal Attorney-General's Department today and compare it to the Department as it was under Sir Clarrie Harders as secretary in 1976, the change is truly astonishing. Most especially, there has been the recruitment of huge numbers to perform enforcement and security obligations. Whilst, in the post 9/11 world heightened security is necessary, the enormous expansion of funds and resources for these purposes seems somewhat disproportionate, to say the least. To the extent public funds are spent on enforcement and security officials, they are not so readily available to the steady, but equally essential, work of a democracy: the removal of injustices in law, the updating of the private law and the routine consideration of law reform in consultation with the people most affected;
* The idea of permanently recruiting legislative drafters, to work with law reform bodies, has gone out the window long ago. The many speeches about this idea in 1976 are not even heard today. Even the modest accretion of such facilities in those dreamy years has receded and disappeared. In England and Scotland, a small component of legislative drafters still works with the law reform agencies. Their value is that they help ensure the practical resolution of problems by focusing attention on the actual decisions that must be made. Often those decisions will only become apparent at the time when the drafting of laws is being decided. This is a major change for Australia's law reform bodies. It is some time since a report of the ALRC annexed a draft Bill. Yet this was a standard precaution and practice at the outset of its existence;
* Controversy in law-making was not an impediment for Attorney-General Ellicott any more than for Attorney-General Murphy. They each envisaged for the ALRC highly controversial projects, including (in the case of Mr Ellicott)

the development of the law on privacy[11] and on insurance contracts[12], on human tissue transplantation[13] and on Aboriginal customary laws[14]. Each of these projects resulted in reports that were to prove highly influential. The first three led to laws that virtually enacted seriatim the proposals of the ALRC. The embrace of controversy in law reform enquiries seems much less common today. Controversy, which cannot be controlled, is generally viewed by government and officials as a bad thing;

* Engagement with the public is also much less active and visible today than it was in 1975. Of course, such engagements can sometimes create jealousy and hostility in both official and political circles. But it is difficult to conceive how we could have tackled the projects assigned at the outset of the ALRC without such public engagement.
* Back in 1976 there were cross party champions of law reform in the Federal Parliament. Ralph Jacobi MP, for example, was a Labor backbencher from South Australia. In government and opposition, he was a constant advocate for reform of the Australian law on insurance. His patient and determined stance helped to push forward the project on law reform of insurance law. A constitutional power enjoyed by the Federal Parliament for the 80 years of Federation was brought into action by the adoption of a highly successful measure. It was opposed at the time, tooth and nail, by the Australian insurance industry. Its implementation was later praised and accepted by that industry and by consumers and other users, as well as by lawyers and judges. Where are the Bob Ellicotts and Ralph Jacobis of today?
* Consensus government over proposals of law reform does not equate to a need for total unanimity. It should not be necessary to wait for all hostility to law reform proposals to disappear. Rarely will it do so in our form of society. Take, for example, the ALRC's thrice repeated proposal for a tort providing remedies for unreasonable invasions of personal privacy. These proposals, in various manifestations, have been advanced, with ever stronger arguments and instances to support them. Instead of these recommendations engaging

[11] Australian Law Reform Commission, *Unfair Publication – Defamation & Privacy,* (ALRC 11) 1979; *Privacy* (ALRC 22), 1983. See also ALRC 108, *Australian Privacy: Laws and Practice*.2008 See esp. part [75], 2535.
[12] Australian Law Reform Commission, *Insurance Contracts* (ALRC 20), 1983)
[13] Australian Law Reform Commission, *Human Tissue Transplants* (ALRC 7), 1977.
[14] Australian Law Reform Commission, *The recognition of Aboriginal Customary Laws,* (ALRC 31), 1986.

the attention and the decision of the federal government and parliament, we have seen, once again, the procrastinatory phenomenon for which Australian governance is justly famous. I refer to the committee on the committee. Or the committee on the committee on the committee. A still further (departmental) discussion paper was produced on the proposed privacy tort more than a year ago[15]. Naturally, the proposal was slammed by the major media houses. How surprising. Yet why would it not be so? Why would those who have a track record of invading individual privacy, in sometimes gross and shocking ways, support the provision of legal redress to citizens and others for such invasions? Normally, in a society like ours, great wrongs attract rights to redress in the law. Yet Australia still waits for a decision on this issue[16]. If it is waiting for the unanimity of all stake-holders, it will wait until the Greek kalends;

* Some of the faults in law reform must, it is true, be laid at the door of the Law Reform Commissions themselves. Sometimes they have been over ambitious. Sometimes they have been unduly slow. Sometimes they have missed the chances to secure action. Sometimes they have failed to consider fully the economic costs of proposals and to argue the economic case. Sometimes this is because, starved of funds and staff, they do not enjoy access to such expertise and arguments.
* The number of full-time commissioners in Australia's law reform agencies has completely fallen away. Until recently, there was but one full-time commissioner in the ALRC. This contrasts with the four commissioners, which was standard in the early days of hope and optimism. Of course, engagement of such commissioners involves a public cost. But the cost is laughably miniscule in comparison to the enormous escalation in the size of the legal bureaucracy of the Commonwealth, specifically in the Attorney-General's Department, over the past 15 years. And the systematic review and reform of the law is itself an essential obligation of democratic government. It is as essential as protection and security. It is a marginal cost of proper and efficient governance. It is an antidote to corruption and corner

[15] Australia, Department of the Prime Minister and Cabinet, *Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (2011).
[16] M.D. Kirby "Publication Privacy: Action at Last?"(2012) 17 *Media and Arts Law Review* 18.

cutting and to the debilitating ethos of arrogance and unaccountable power and unrequited injustice and inefficiency. Yet these are initiatives that successive governments seem unwilling to pay. They praise endlessly the rule of law and the merits of a law abiding state. But they will not take steps that are essential to implementing the ingredients necessary to achieve these worthy ends.

THE FUTURE – OR IS THERE ONE?

As I review the continuities and the changes in law reform that I have witnessed over my career, I must confess that I depart this Canberra conference of ALRAC in 2012 much less confident about the health of Australia's institutions of law reform than when I left the third ALRAC Conference in 1976.

A number of the players of 1976 are still alive. They include Gough Whitlam, Bob Ellicott, Gareth Evans, John Cain, Gerard Brennan (now Sir Gerard Brennan), Ted Thomas (now Sir Edmund Thomas) of New Zealand and Nihal Jayawickrama (now co-ordinator of the Judicial Integrity Group of UNODC). Many, of course, have gone to their reward.

I would suggest that, at a future ALRAC conference, a high level symposium should be convened to discuss the future (if any) of institutional law reform. Some of the survivors from 1976, and others, might be called on to reflect on what they think went wrong and what could have been done to avoid and reverse it. Also what could now be done to reinject some of the old enthusiasm, optimism, institutional dedication and civic interest? It would be desirable for leading politicians from all major parties to attend, together with the present commissioners and present and past attorneys-generals. Candour and plain speaking should be the order of the day. Just drifting along with ever diminishing resources and interest is not an acceptable national strategy. If a large corporation took such a half-hearted and lackadaisical approach to systematic renewal for its future, its directors would quite properly be sacked.

No one should be satisfied with the current state of institutional law reform in Australia. Something has gone seriously wrong with the model (or perhaps there were deep flaws in the model that have never been adequately acknowledged and addressed). No institution and no individuals are promised a free lunch in a society such as ours. If there are better ways to achieve law reform in practice, they should be identified, explained, justified and implemented. If the commission model can be improved, this should be done before it is too late.

By chance, the year 2013 will be the fiftieth anniversary of Gerald Gardiner's bold vision for institutional law reform, written in 1963),[17] made flesh by Leslie Scarman's Hamlyn Lectures.[18] That looks like a good anniversary to reconsider the vision and to rediscover where it leads today. More change and decay is not the way to go. Either the old model should be refurbished and renewed. Or a new model should be devised for the systematic reform of the law, and put in its place[19].

[17] G. Gardiner, *Law Reform Now* (Edited with Andrew Martin, London 1963), Victor Gollancz.
[18] M.D. Kirby, "Law Reform, Human Rights and Modern Governance – Australia's Debt to Lord Scarman *English Law – The New Dimension* Hamlyn Lectures, 26th series, Stevens & Sons, London, 1974.
[19] B. Opeskin and D. Weisbrot (Eds.) *The Promise of Law Reform* (Federation Press, Sydney, 2005) 40-41.