

*AUSTRALIAN LAW REFORM COMMISSION  
FORTIETH ANNIVERSARY CELEBRATION  
LAW COURTS SYDNEY, AUSTRALIA  
23 OCTOBER 2015*

*FORTY YEARS ON – LESSONS OF THE ALRC*

The Hon. Michael Kirby AC CMG

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*WITH HONOUR, PRAISE & REFLECTION*

Chief Justice, Attorney General, Uncle Chicka, former colleagues in the ALRC, Your Honours, judges past and present, fellow citizens.

Thank you very much, Chief Justice, for your very welcome, typically thoughtful, remarks on this important occasion. Important I suggest for Australia. Thank you for the little sting that was there in the remarks

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\* Inaugural Chairman of the Australian Law Reform Commission (1975-84); Justice of the High Court of Australia (1996-2009). Based on oral remarks on the Fortieth Anniversary celebration held in the Federal Court of Australia, Sydney, on 23 October 2015.

concerning the reduction in the funding of the ALRC in past years. I hope that those remarks will be attended to. And that the work of law reform in the ALRC and in the other commissions throughout our country will get back to the strong position that they became, soon after the establishment of the ALRC in 1975.

Thank you, Attorney-General, for your remarks of praise. Your own commitment to the ALRC is not in doubt. I am glad that Professor Croucher has been reappointed as President. She has been most attentive to the history and involvement and engagement of the past commissioners including myself. I have some mental reservations about the title that she has conferred on me of "Chairman Emeritus", it not being one which existed either in the 1973 statute or the 1996 statute. However, in a long life where I have accumulated a number of titles, I am not saying no to this one. I am perfectly content to accept it in the spirit in which it is being given.

Uncle Chicka can be assured that the ALRC, from the very start, has been very attentive to the position of the Indigenous people of our country. Our first report related to complaints against police and official misconduct affecting the Indigenous people. Our second report on criminal investigation had very important sections to which some of those present contributed greatly in endeavouring to ensure that justice was real for the Aboriginal people. And that where they suffered injustice, by reason of their own culture and traditions, we did whatever could be done in law to repair and correct that injustice.

Further, the ALRC report on recognition of Aboriginal customary law, which was written by that great lawyer, Professor James Crawford (now His Excellency, Judge James Crawford of the International Court of

Justice, supported in his election to that court by the government then itself recently elected) is the most accessed report on the international web that the ALRC has written. This is so although its proposals have not in fact been implemented. Indeed, one proposal which was for a time implemented was based on a decision of a very fine judge in the Northern Territory, Sir William Forster, Chief Justice of the Northern Territory and Judge of the Federal Court of Australia. It concerned a double punishment of Aboriginal accused. It suggested that where they had been punished under their traditional law, they should not be twice punished, or at least not over-punished. A statutory provision that enshrined that rule was later repealed. So we still have a long way to go in correcting the injustice to the Indigenous people. But it is an obligation of all of us, especially those who are present tonight and who know about it, to continue that effort.

### *THE FOUNDATION COMMISSION 1975*

This faded photographic portrait shows the inaugural members of the ALRC. I do not want you to think that this is part of the Barnum and Bailey techniques of promoting law reform that we espoused in the old days. However, this portrait symbolizes those first commissioners. It is no disrespect for those who came later to say that these were a most remarkable team.

First there is Sir Gerard Brennan. I was referring to him this morning in the Parliament of New South Wales. There were a lot of students present. The place was packed with students because today is Global Dignity Day. Tomorrow is United Nations Day. Tonight the Sydney Opera House will be will be bathed in blue, the United Nations' colour. Tonight Uluru/Ayers Rock, with the permission of the traditional owners,

will also be bathed in blue to symbolize the importance of the United Nations for all of us. It is the first time the custodians have agreed for any such thing to be done. But it is to be done tonight.

Sir Gerard, before I came onto the High Court of Australia, when you were there as a Justice, you corrected, with the support of the majority of the High Court, a great wrong which had been done. You found the pathway to judicial reform. It is no accident that, in your official portrait in the High Court of Australia, you are shown holding the volume of the *Commonwealth Law Reports* that contains the decision of the court in the Mabo case. That was one of the greatest of the decisions of the High Court. Along, I would say, with the Communist Party case and other cases. It is a great decision. I told the students this, lest they did not know, I saw them nodding. They were not nodding off. They were nodding in affirmation of what I was saying, a very great decision of the court. A liberating, reforming decision.

Gareth Evans, is there sitting with me in the photograph in the front row. This way precedence. Gareth Evans had been appointed the first full-time commissioner, after myself. It was only for a very short time that he was so appointed. I think only a month. But it was done for the purpose of helping the Commission, as I shall politely put it, to complete quickly the report ALRC 2 on *Criminal Investigation*. Effectively Gareth Evans, as the rest of us will remember, in an amazing performance, wrote that report in draft in the space of a month. Amazingly, because never before had the law relating to criminal investigation in our country been encapsulated in one volume. No academic had tried it. No court had tried it. No parliament had tried it. It is an astonishing report of great intellectual power and it is attributed to the work of Gareth Evans. Many

of its provisions were subsequently enacted by later Parliaments of the Commonwealth and brought into law.

I will never forget the debates we had around the table at University House in Canberra where we had our sessions. Yesterday, I returned to that place: looking at the common room, trying to re-conjure the spirits that had been in that room back in 1975. We worked under great pressure. Yet sometimes, Mr. Attorney, you will know: when you are under pressure, you do your best work. And it was a very good report. It has been implemented in unexpected ways, in the defence services, for example. There were many forward-looking ideas, such as recording on video film and in sound recording confessions to police. This was strongly opposed at the time by police. However, it was a reform that was to become not only a safeguard for integrity but a great weapon in the hands of the Crown for securing convictions which are well merited and safely proved.

John Cain, at the time was executive member of the Law Institute of Victoria and was later to be the Premier of Victoria. A person of great probity. A person whose experience had been in the practical world of solicitors. Who had great experience in that branch of the profession and brought practical wisdom to our table. He kept our feet on the ground. Whenever others might have been a little ethereal, he was realistic. John Cain introduced what is to this day, I hope, still known as the Cain Walk. We were enjoined to walk and talk to each other. I laid before the commissioners a magnificent although economical banquet of sandwiches. Nothing exotic and nothing foreign and certainly, Attorney, no alcohol. We worked very hard. Then John Cain insisted we get up every lunch hour and take a walk in Hyde Park. If I had done that

throughout my life, I would not be of the portly proportions that I am now. John Cain brought conviviality, energy and practicality. In government in Victoria, he pioneered many reforming statutes later copied throughout Australia.

Alex Castles was one of the first scholars who taught Australian legal history. In those days, as I remember, I learned legal history through the forms of action and the history of England. I am not saying that these should not be taught. Indeed, I think the dropping of legal history in Australian universities is a disgrace. How you can understand our Constitution and our legal history and our systems of law without knowing where they all came from? This is a puzzle to me. But Alex Castles brought to our table the special dimension of Australian legal history. That was very important to us because we were in the cusp, then, of moving from being children of the British Empire into being ourselves, alone, down here in the South Pacific. He taught us our own authenticity and responsibilities.

Gordon Hawkins was not a lawyer at all. That was an unusual appointment to make as one of the first five commissioners. He was a sociologist. He had been a prison governor. He wrote *The Honest Politician's Guide to Crime Control*. He pointed to the danger and mistake of putting more and more people in prison who were often a victim of their personal mental and social incapacities and who had been caught up in the laws governing drugs and other such matters. He questioned the assumptions of the law.

This was a most remarkable team. I feel very proud to have worked with them. Soon after that first year, 1975, the Government that appointed us was removed from office and voted out of office by the people in the

election of December 1975. That election ushered in the first Fraser government. Mr. Gareth Evans who was then a commissioner part-time, had to resign his office as a commissioner in order to contest the Senate. In the wonderful pages of *Reform*, which I dictated over the weekend once every quarter, I recorded the melancholy tale that fell upon him on having to resign. And the even greater melancholy, when he was not elected to the Senate. But he lived to fight another political day.

Commissioner Gareth Evans, as we all know, went on to a most distinguished parliamentary career. Just this week, two days ago, I had lunch in Canberra with the Deputy Secretary of Foreign Affairs. He told me about a recent report relating to nuclear non-proliferation. Just one of many things that Gareth Evans has undertaken, this time with Japan. He sat down and wrote an entire report to the astonishment of the Japanese. But it was not to the astonishment of the Australians and certainly not to my astonishment. He was just repeating his amazing feat in the report on *Criminal Investigation*. It was just another bravura performance.

### *LESSONS FROM THE EARLY DAYS*

On the change of the federal government in 1975, there was a somewhat dangerous moment for the ALRC. Mr Fraser established a 'Razor Gang'. Sir Phillip Lynch was in charge of it. There was a question of whether the ALRC would survive. Yet survive we did. And I think we survived because, from the very start, we had the most important principles clearly in our minds. Non-politicisation. Non-



partisanship. Serving the Parliament. Serving the people of Australia represented by their elected government in Parliament. These were our guiding stars.

First, in 1975, I had paid particular attention to briefing the then Opposition, including the then shadow Attorney General, Senator Ivor Greenwood, a very fine lawyer and a QC from Victoria. I think that strong adherence to nonpartisan attitudes has served the Commission very well and continues to do so.

Secondly, I believe we learned a lesson, a great lesson that can be forgotten in the common law system: the technique of conceptualizing the problem and bringing in social data and seeing the legal problems in its social context. I think that has been a great strength of the Commission. I pay a tribute to an absent friend, Professor David St L Kelly, who was the second full-time commissioner, after Mr. Evans, to take office. He was very strong on that, teaching you not to just look at the bits and pieces of the law but to see how it all fitted together.

Thirdly, we embraced the principle of transparency. We had public hearings. We asked the people to say something about our inquiries. We engaged the media. This was very unusual at the time. I think it was a great strength of the Commission. Apart from anything else, it raised the expectation that something would come of it all. That expectation became a strong force for action on the reports.

Interestingly, in the United Nations, they have also, in the past, been adverse to their commissions acting in a transparent way. When I was appointed recently to chair the Commission of Inquiry on North Korea, I talked with my colleagues, both of whom were from the civil law tradition

of law: the Napoleonic tradition. This is an efficient, cost-effective but somewhat autocratic system where the law's business is done in private, often in secret. My colleagues agreed that we should act transparently. We did so. We had public hearings of victims who came forward. They can always tell their stories more powerfully than chroniclers can do.

I believe that the success of getting our report onto the table of the United Nations Security Council depended very greatly on the work of the Australian ambassador in New York. But also on the transparency of the approach which we had adapted from the ALRC. It was brought to bear uniquely in the report on North Korea. That report is now said to be the 'gold standard' of reports of this kind in the United Nations system.

Fourthly, I confess that I was mistaken in 1975 in a particular respect. This a lesson taught to me by Sir Clarrie Harders. Sir Clarrie Harders, Attorney, was the head of your Department at that time. He was a very able lawyer. He came from a German family in South Australia. He was very sharp and he, like us, served faithfully under the elected government of the Commonwealth. I said to him very early in my service succinct words to the effect that, the Commission should move to Canberra. The Commission should be close to the government. The Commission should be set up close to, if not in, the Administrative Building where then was placed the office of the Attorney-General of the Commonwealth and the office of the Attorney-General's Department.

Sir Clarrie Harders was very kind man. But he let me know in no uncertain terms that, as he put it, "If we want you to be another section of the Attorney-General's department, we can get that assistance much more cheaply. It will be under the control of the Minister. It will be under my control. And, before you can count to ten, it will be done that

way. That would not be good for you. It would also not be good for government. What is important for government is that you should be independent and give a different voice and a clear voice. You should have the advantage of bringing in people who would never serve the department. Moreover, you can consult the people. You can consult the interest groups and the stakeholders.”

I saw the wisdom of what Sir Clarrie Harders said. We did not move to Canberra. We did not become close to the department. I think that it is important that the ALRC should continue to keep its distance. It should give quality advice of a slightly different character which stimulates the system to look at itself in a way more critically than Sir Humphrey (or Sir Clarrie) would sometimes feel able to do.

Finally, I am very hopeful, with Prime Minister Turnbull in office, that there will be a new golden era of the ALRC. It was Prime Minister Turnbull, when a young journalist for the Kerry Packer interests, especially *The Bulletin*, who put the work of the Commission in the forefront. Week after week he was very interested in law reform and in the work of the ALRC. He described me at the time as, ‘the reformer performer with non-slip heels’. When I wrote him a very nice letter on his election and appointment as Prime Minister, I said, ‘non-slip heels are available for hire’. Malcolm Turnbull was an outstanding barrister when he presented the *Spycatcher* case before me in the New South Wales Court of Appeal. It was his theory of the *Spycatcher* case which was ultimately upheld by a majority in the Court of Appeal and endorsed by the High Court of Australia. We are fortunate to have a very talented lawyer as Prime Minister. I also believe that he is a friend of the ALRC. I

believe it would be timely to have a reunion dinner of the ALRC commissioners with the Prime Minister.

### *THE PRIVILEGE OF SERVICE TO THE COMMONWEALTH*

I would also like to specifically thank the President, Professor Rosalind Croucher. She has deferred to the old timers in the photographs, taken on this occasion. But she is the present office holder. As they say in the United Nations, she is the mandate holder. She holds the baton. She holds it for a further three years. She has a uniquely personal way of dealing with those who are from the past. However, she knows that in this room can be found a great strength and support for the work that the Commission does today.

I acknowledge the presence here, for example, of Justice Kiefel and former Justice Gummow of the High Court of Australia. There are many people who have served in the ALRC they may be found in all the levels of the courts and in public life. They are happy to be friends. Many scholars and academics have taken part. I think of Justice Wilcox, Justice Elizabeth Evatt and other judges. And of Sir Maurice Byers QC and Mr John Ewens QC who were such a wonderful commissioners and of Sir Zelman Cowen, as the Attorney has mentioned.

Finally, on an occasion like this, where one looks at this photograph and another photograph is taken as has been done every 10 years since 1975, you will understand that the mind of an older member of the ALRC turns to the inevitable question: Will I be there next time? Life is a cycle. No one knows the answer to the question when one gets to this age. Life it is an impermanent thing. Consciousness. Knowing that you exist.

Knowing the beauties of the world. Knowing the problems of the world. Life is a great blessing. But fleeting and brief. Having the opportunity, in life, to serve in a body of the Commonwealth, appointed by the Government of the Commonwealth, serving the Parliament of the Commonwealth and the people of the Commonwealth, is an enormous privilege.

Those of us who have enjoyed that privilege are grateful for it. We stand ready to do what we can. But we know that it is others who must continue the effort. To them we say, good wishes, good luck, keep speaking the truth as you see it, speaking of justice for all people in Australia under the law. We are a much blessed country. We must make our blessings even greater.

I am very proud to be here on the 40th anniversary of the ALRC. I am not donating this large photograph. I am taking it back to my chambers where it has been, with me, every day for the last 40 years. In due course of time it too will pass to other guardians of the memories that it invokes.

Thank you very much, President, for this occasion. Your last remarks remind me to say, in closing, that the Commission is not of course just the commissioners. The commission has had a wonderful team of employees, consultants, colleagues and volunteers right from the start. Some of them came in as junior members of the legal profession. Now they are often judges or distinguished silks and in academic life throughout our country. I would like to acknowledge the presence here of Ian Cunliffe who was the second Secretary and Director of Research. He was preceded by George Brouwer, later the head of the Premier and Cabinet Department in Victoria and Ombudsman; the long-serving

Ombudsman of Victoria. The secretaries and the officers of the Commission have all been wonderful servants of the Commonwealth. I acknowledge their part too.

### *PRESENTATION OF THE KIRBY CUP – ESSAY PRIZE*

Now Justin Penn, please stand in your place as you are acknowledged. It is not quite an honorary degree that I am going to confer on you. But it is an honour that you have earned. To celebrate this occasion, the ALRC instituted an essay prize which they were good enough to name after me. The essay topic asked the question, 'Why is an independent law reform commission good for Australia?' Notice the strategy in the Commission. It did not ask, 'Is a Commission good for Australia?' or 'What is bad about a Law Reform Commission for Australia?', It assumed value and asked for particulars.

A lot of students were attracted to the competition. This was not so much because they would receive prize named after me (although I am sure that was a minor attraction) but because the Commission offers the chance of being an intern of the ALRC. This is a much sought after position. It allows the winner to get a foot in the door of this body and to work with the fine people who head the body, both commissioners and staff.

Justin Penn rose to the occasion. He wrote his essay as independently as the topic would have permitted. He examined the alternatives to a law reform commission: the judicial method of law reform, which is a very important tradition in the common law system. He critiqued that and pointed to the fact that judges do not control the opportunities that come

up. They do not always control the possibilities. The language of statute or authority may be intractable, so that nothing can be done. Also, there are matters which judges should not seek to reform, particularly where they cannot consult widely and the issue requires communal input.

Justin Penn then examined the parliamentary system and the difficulties and delays which the Attorney has acknowledged. Those impediments stand sometimes in the way even of well-thought out proposals for reform. He thereby came to the view that supplementing both of these traditional and constitutional methods of law reform was necessary. That required the invention that we now follow and that has been pursued in the ALRC. His essay is online. It is a brilliant essay. He has richly deserved the much coveted prize.

Chief Justice, Attorney General, President, I have the honour to present to you Justin Penn, penultimate law student in the second last year of his studies at the University of Sydney Law School, for the richly deserved Kirby Cup for his winning entry in the ALRC's 40th anniversary essay prize. Nobody should leave here without noting where they can find why an independent law reform commission is essential for the good governance of the people of Australia. Come forward, Justin and raise the cup.