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AUSTRALIAN NATIONAL UNIVERSITY  
NATIONAL LAW REFORM CONFERENCE  
CANBERRA, 15 APRIL 2016

ACADEMIC AND INSTITUTIONAL LAW REFORM IN  
AUSTRALIA: PAST, PASSING AND TO COME

The Hon. Michael Kirby AC CMG

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The Hon. Michael Kirby AC CMG\*

*Once out of nature I shall never take  
My bodily form from any natural thing,  
But such a form as Grecian goldsmiths make  
Of hammered gold and gold enamelling  
To keep a drowsy emperor awake;  
Or set upon a golden bow to sing  
To lords and ladies of Byzantium  
Of what is past, or passing, or to come*

W.B. Yeats<sup>1</sup>

I.  
ACADEMIC

*What is Past*

It is surprising that it has taken until 2016 to summon together Australia's academic talent to describe the wealth of scholarly projects addressed to law reform. Systematic law reform, of course, has been on the academic and professional agenda for decades. Long before institutional responses to the needs for law reform were created, judges,

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\* Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-4); Chairman of the Australian Law Reform Commission (1975-84).

<sup>1</sup> W.B. Yeats, "Sailing to Byzantium" (1927) in W.B. Yeats, *Collected Poems* (Macmillan, London, 1933), 218.

practitioners and scholars would frequently come together, or separately, to propose aspects of the law that needed change.

In the manner of those times, specific law reform statutes were copied from England, as in the *Law Reform (Miscellaneous Provisions) Act 1946 (NSW)*<sup>2</sup> and the *Law Reform (Tortfeasors' Contribution) Act 1952 (Qld)*.<sup>3</sup> Pleas were made for the better reform of the law.<sup>4</sup> Conferences addressed particular aspects of reform. Yet not until now have Australian academics as a group come together to report on their research projects from particular angles of law reform. In the past, the study and teaching of law often considered that it was enough to describe things as they were. It was for others, principally in Parliament, to think about what the law *ought* to be. This was not regarded the true province of lawyers, especially judges.

The fact that this conference has occurred is, I believe, the product of two developments. First, a recognition that every professional lawyer is necessarily involved to some degree in consideration of the defects, injustices and gaps in the law. And secondly, a recognition that the institutional machinery for addressing law reform (whether in Parliament, the courts or permanent institutions of law reform) are insufficient and ineffective to do the job, and increasingly so.

A review of the topics of the papers for this conference shows the cornucopia of subject matters that have come under the academic

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<sup>2</sup> Considered in *Genders v Government Insurance Office of New South Wales* (1959) 102 CLR 363.

<sup>3</sup> Considered in *Unsworth v Commissioner for Railways (Qld)* (1958) 101 CLR 73.

<sup>4</sup> See e.g. P.A. Jacobs, "A Plea for Law Reform", in which the author ascribes the indifference to law reform amongst legislators to the "non-vote-catching nature" of the issues; the disinclination of many judges and lawyers, conversant with the subject, to draw attention to defects; and the "prevailing attitude... of apathy" because "Australia does not care and can't be bothered".

microscope. Some of them involve well-worn subjects that have been under critical scrutiny for decades, if not centuries. Others are subjects of the contemporary world. Some are topics that involve a measure of futurology. I start with well-worn subjects of the past that present areas of the law and legal practice that have been on the reformers' agenda for most of my life. They include, simply as examples:

- \* Gabrielle Appleby and Anna Alijnik: "Constitutional Dimensions of Law Reform";
- \* Andrew Kenyan's "Australian Media Reform and Freedom of Political Communication";
- \* Rebecca Ananian-Welsh: "The Protection of Fair Process";
- \* Scott Stephenson: "Reforming Constitutional Reform";
- \* Russell Hogg: "What is Criminal Law Good For? The Challenge of Over-criminalisation";
- \* Adrian Evans: "Strengthening Australian Ethics and Professionalism";
- \* Dilan Thampapilae: "Rethinking the Presumptions? Undue Influence, Elderly Patients and Adult Children"; and
- \* Anne Wallace: "Australian Criminal Courts: Tackling 21<sup>st</sup> Century Problems in a 19<sup>th</sup> Century Paradigm?"

Some of the old and familiar topics address particular aspects of tried and trusted subjects:

- \* Graham Orr: "Compulsory Voting: Elections Yes; Referendums No";

- \* Wayne Morgan: “Torrens Mortgage Conundrums: Unresolved Conceptual Incoherence”;
- \* Pauline Ridge: “Tracing in Australia”;
- \* Prue Vines: “Apologies, Liability and Civil Society: Where to From Here?”;
- \* Robyn Carroll: “Offering to Make Amends: What can We Learn From Australian Defamation Law?”;
- \* Joachim Dietrich: “Recreational Activities and Personal Injury Compensation”;
- \* Robyn Honey: “Consent in Contract and Property Law”; and
- \* Vivienne Holmes: “The Ethical Climates: Observations from an Empirical Study of New Australian Lawyers”.

None of the foregoing is concerned with a truly new subject area of the law. Each involves the study of well tilled fields that continue to offer up new puzzles and challenges for the would be reformer.

### *The Present*

However, some topics presented for consideration relate to new issues of the here and now. A number of them would not have been considered (or even mentioned) when I was admitted to legal practice in 1962:

- \* Julie Debeljak: “Human Rights, Dialogue Under the Victorian Charter”;
- \* Tom Campbell: “Deliberative Democracy and the Implementation of Human Rights”;
- \* Wendy Larcombe: “Rethinking Rape Law Reform”;

- \* Anthony Hopkins: “Compassion as a Foundation for Criminal Justice Law Reform”;
- \* Simone Degeling and Kit Barker: “Reparation Schemes”;
- \* Mary-Anne Noone: “Lawyers Who Act as Mediators”;
- \* Colin James: “Legal Practice on Time: The Ethical Risk and Inefficiency of the 6 Minute Unit”;
- \* Virginal Marshall: “Overturning Aqua Nullius: Pathways to National Law Reform”;
- \* Natalie Stoianoff: “A Governance Framework for Indigenous Ecological Knowledge Protection and Use”;
- \* Dominique Dalla-Pozza: “Parliamentary Committees and the Continuing Challenge of Australian Counter-Terrorism Law Reform”;
- \* E. Godden: “Substantial Inclusion of Indigenous Peoples Interest in Environment, Resources and Energy”;
- \* Kim Rubenstein: “Court Records, Archives and Citizenship”;
- \* Suzanne Le Mier: “Taking Independence to Australian Superannuation Fund Boards” ;and
- \* Jeffrey Pfifer: “Jury Selection in Australia”.

Most of the categories contained in the foregoing list did not exist as an active topic in the law 50 years ago. Or, if they did exist, the insights now given would have been completely unimaginable then.

### *The Future*

Many of the papers prepared for this conference look to the future of the law and legal practice. They challenge the participants to engage in rational speculation about the future. This is a difficult task for most

lawyers whose vocation finds it hard enough to be contemporary, let alone futuristic. Examples of the studies that fall into this category include:

- \* Lael Weis: “Does Australia Need a Popular Constitutional Culture?”;
- \* Ron Levy: “The Deliberative Case for Referendums and Plebiscites”;
- \* Ann Wardrop: “Creating the Virtuous Financial Institution: Looking Beyond Conventional Regulatory Methods”;
- \* Leela Cejnar and Rachel Burgess: “Australia’s Role in Contributing to the Development and Implementation of ASEAN’s Competition Agenda”;
- \* Bronwen Morgan: “The Legal Roots of a Sustainable and Resilient Economy”;
- \* James Prest: “Clean Energy and the Law: Competition and the Solar Revolution”;
- \* Benjamin Richardson: “Fossil Fuel Divesting Campaigns and Environmental Governments Reform”;
- \* Cameron Holley: “Future Water”;
- \* Paul Maharg: “Disintermediation”;
- \* Christine Parker: “Lawyers [who] Blow the Whistle on their Firms and Clients”;
- \* Amanda Kennedy: “Environmental Law for Future Rural Landscape Governance”;
- \* Elise Bant and Jeannie Patterson: “Statutory Interpretation and Soft Law Guidelines in Developing a Coherent Law of Remedies in Australia”; and

- \* Lorana Bartels: “Criminal Justice Law Reform: Challenges for the Future”.

The papers that I have mentioned and the many not included in these lists, demonstrate a breadth and depth of the engagement of the legal academy in Australia with the study of law reform today. Inevitably, this means that the scholars concerned will impart aspects of their knowledge and research in the teaching of law to future generations. It also means that they will promote a culture of law reform. They will convey the principle that lawyers have an ethical responsibility for the law they help to interpret and apply. A cold lack of interest about the state of the law (“I was just not interested in that subject”), when expressed by professionals today often induces an audible gasp. Such an attitude is not true of all professions. But it has tended to be so in law, although it is about the deployment of power and authority. Law is not an ordinary occupation. It is a vocation whose practitioners need to be taught to question their discipline and its inherited rules. And to assume a responsibility for regularly modernising, clarifying, simplifying and rationalising the content of the law.<sup>5</sup>

It is just as well that this is the present complexion of the legal academy in Australia because the times we are living in are all too often discouraging for institutional approaches to law reform. It is to them that I now turn.

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<sup>5</sup> M.D. Kirby, “Unmet Needs for Legal Services in Australia: Ten Commandments for Australian Law Schools” (2016) *Law in Context* (eds Renata Grossi and J. Neoh), La Trobe University, Vol. 34, 115.



## II INSTITUTIONAL

### *The Past*

The common law system had the great advantages of flexibility and the capacity to develop in the hands of independent, professional and highly talented judges. However, the system depended on many chance factors for principled evolution. These include the presentation of suitable cases. Their prosecution by willing litigants and talented advocates. The engagement of appellate courts capable of creating binding rules. The participation of judges in those courts who had an interest and skill in perceiving and advancing legal doctrine.

The foregoing chance factors, stimulated by the arrival of codifiers in post-revolutionary France, led to demands for codification of the common law of England. This led Jeremy Bentham to criticise the complacency common in the exposition of the common law<sup>6</sup> and to demand a methodology that would re-examine the law analytically as it operated in practice,<sup>7</sup> according to a principle of utility.<sup>8</sup> Bentham was highly critical of what he saw as a 'sinister interest' profiteering from the operation, at great cost to the public in an unnecessarily complex and chaotic legal system. In that system in which it was often impossible or very difficult for a litigant to discover and to advocate their legal rights.<sup>9</sup> Bentham's views were often attacked by judges and practising lawyers. However, they had many consequences. One was creation of the first

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<sup>6</sup> As in Blackstone's *The Commentaries on the Laws of England* (1765-1769).

<sup>7</sup> J. Bentham, *A Fragment on Government* (1776) and *An Introduction to the Principles of Morals and Legislation* (1789). In "Bentham, Jeremy" by HLA Hart, in AWB Simpson (ed.) *Biographical Dictionary of the Common Law* (Butterworths, London, 1984) 44.

<sup>8</sup> *Loc cit*, 44 at 45.

<sup>9</sup> *Ibid*, 45-46.

Law Commission for India<sup>10</sup> in which Thomas Babington Macaulay was to become the Law Member and to produce a series of important codifications, many of which were copied throughout the British Empire.<sup>11</sup>

Whilst England itself resisted the reformers' demands for codification, many of the British colonies copied the Indian reforms and encouraged codifications of their own to replace earlier common law systems and to facilitate greater accessibility to the law. The imperial business community, centred in London, began to support law reform in areas important to it. The United Kingdom Parliament began enacting important consolidations of the law under their pressure.<sup>12</sup> There were also early experiments with law commissions in particular colonies, including in colonial New South Wales.

In modern times, the establishment of permanent full-time institutions for law reform in common law countries started with the creation of the successor Law Commission of India in 1955. This was an executive body established by an order of the Government of India, created for a fixed tenure and providing advice to the Indian Ministry of Law and Justice. Undoubtedly, it took its inspiration from the first Law Commission created by the British in 1833. The modern law commissioners served for a 3 year term. The current Commission is the 21<sup>st</sup> Law Commission in the series. It continues a long record of proposing reform of the law. Commonly, but not invariably, it is chaired

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<sup>10</sup> *Charter Act 1833* (3 & 4 Will IV, c 85).

<sup>11</sup> M. Barry Hooker, "Macaulay, Thomas Babington" in Simpson, above n.7, 330 at 331. The laws in question included the draft *Indian Penal Code* (1837); the *Indian Succession Act*; the *Indian Evidence Act*; and the *Indian Contract Act*.

<sup>12</sup> As in the *Bills of Sale Act 1878* (UK) (and the *Amendment Act* of 1882) (UK); *Bills of Exchange Act 1882* (UK); *Partnership Act 1893* (UK); *Sales of Goods Act 1893* (UK); and the *Marine Insurance Act 1906* (UK).

by a recently retired Justice of the Supreme Court of India. Its influence has been considerable.<sup>13</sup>

In 1965, on the initiative of Lord Chancellor Gerald Gardiner, the United Kingdom Parliament established a permanent Law Commissions both for England and Wales and Scotland.<sup>14</sup> Their purpose was to keep the law in its generality under review and to recommend reform where needed. The first chairman of the Law Commission of England and Wales was Sir Leslie (later Lord) Scarman. He was an inspired choice. He helped to create a distinguished body comprising full-time commissioners, supported by a research and administrative staff, including legislative drafters. By the power of its example, the quality of its work, the success of its draft legislation and the impetus it gave to academic and other research activities in the law, a model was created that was quickly copied throughout common law countries and beyond.<sup>15</sup>

Within little more than a decade of 1965, variants of the Scarman model were created throughout the Commonwealth of Nations. By the early 1980s, it was possible to say, as a broad generalisation, that institutional law reform was “in full flower”.<sup>16</sup> There was a great deal of optimism about the potential of this type of law reform agency to change significantly the content and operation of the law, including in Australia. The history of institutional law reform in Australia, and the hopes for their future were explained in the first<sup>17</sup> and second<sup>18</sup> annual reports of the Australian Law Reform Commission (ALRC). Professor Michael Tilbury

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<sup>13</sup> Shree Govind Mishra, *The Legal History of India 1600-1990* (Uppal, New Delhi, 1993).

<sup>14</sup> *Law Commissions Act 1965* (UK).

<sup>15</sup> W. Hurlburt, *The Law Reform Commissions in the United Kingdom, Australia & Canada* (Juriliber, 1986).

<sup>16</sup> M.D. Kirby, *Reform the Law, Essays in the Renewal of the Australian Legal System* (OUP, Sydney, 1983), 30.

<sup>17</sup> Australian Law Reform Commission, *Annual Report, 1975* (ALRC 3).

<sup>18</sup> Australian Law Reform Commission, *Second Annual Report, 1976* (ALRC 5).

and his colleagues, writing of institutional law reform in Hong Kong, described the 1970s and 80s as a “golden age”.<sup>19</sup> Perhaps, at last, an institutional methodology had been developed that would supplement the inescapable limitations of judge made law and help prepare the dysfunctional operation of legislatures, so far as the mechanics of basic law reform were concerned.

I remember well the hopefulness of those years. The Scarman model was on full display in many jurisdictions. It was authoritative, full-time, independent, consultative, usually headed by a judge, and commonly supported by a skilled legislative drafter. When the ALRC came onto the scene in Australia, it quickly won the co-operation of the nation’s state and territory law reform bodies. The variety of those bodies was described in the first annual report.<sup>20</sup> They participated in a conference of law reform agencies in 1975;<sup>21</sup> and in a grander international conference in 1976.<sup>22</sup> These conferences were described in the ALRC’s second annual report. I chaired the second conference. The busy character of the meeting was described in detail in the Commission’s down market newsletter *Reform*.<sup>23</sup>

As it happens, the 1976 conference took place almost 40 years ago (on 8-10 May 1976) at exactly the same venue as used in 2016 to convene this first National Law Reform Conference. Once again, I was delivering an opening address on law reform from the same platform in the hall of University House. Present in 1976 was the Hon. R.J. Ellicott QC, then

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<sup>19</sup> M. Tilbury, S.N.M. Young and L. Ng, “Law Reform Today”, Ch.1 in *ibid*, *Reforming Law Reform – Perspectives from Hong Kong and Beyond* (Hong Kong University Press, HK, 2014) 1 at 5.

<sup>20</sup> ALRC 3, 13-24 [26]-[50].

<sup>21</sup> ALRC 5, 5 [10].

<sup>22</sup> ALRC 5, 6 [12].

<sup>23</sup> [1976] *Reform*, 39.

newly installed as Attorney-General in the Fraser Government. Also present was the Hon. E.G. Whitlam QC who, seven months earlier, had been relieved of his commission as Prime Minister by the Governor-General (Sir John Kerr QC). Sir John himself offered a grand dinner at Government House, described in the language of those times as being “for participants and their wives”.<sup>24</sup> A distinguished array of judges and lawyers from Australia and overseas was welcomed. Amongst them were many officials of the Federal Attorney-General’s Department, led by Mr [soon to be Sir] Clarrie Harders.

The convening of the 1976 conference, in the still fresh controversies of Remembrance Day 1975, required scrupulous political impartiality on the part of the law reformers. This had been a rule observed by the ALRC from the start. In 1975, it had sought and obtained permission to provide a briefing on its work to the then Shadow Attorney-General (Senator Ivor Greenwood QC). This observance of neutrality, and the strong reform instincts of Robert Ellicott, probably saved the ALRC following the change of government. It entrenched a rule of prudence followed by that commission, and its counterparts thereafter. If federalism is legalism and legalism connotes policies and values, it was imperative that the ALRC avoid party politics. In consequence, the ALRC witnessed the appointment of new full-time commissioners (Professor David Kelly from the University of Adelaide, Russell Scott, a Sydney solicitor and Murray Wilcox QC of the Sydney Bar. George Brouwer, from the Prime Minister’s Department, was appointed Secretary and Director of Research. Mr F.G. Brennan QC of the Brisbane Bar, an early part-time member, had his commission extended for 3 years. The ALRC was constantly in the news. Hopes were high. The Attorney-General gave

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<sup>24</sup> *Loc cit.*

strong words of encouragement that its reports would be followed up. Most of those involved were full of optimism that full-time law reform agencies were here to stay. And that their potential for the renewal of Australian law was limited only by resources, personnel and the continued support of the legislatures.

The years rolled by. Occasionally, law reform commissioners from around the Commonwealth of Nations would meet either at the Commonwealth Secretariat premises in London or at events timed to coincide with Commonwealth law conferences held in Edinburgh, UK (1977), Lagos, Nigeria (1980), and Hong Kong (1983). In the heyday of institutional law reform, the commissioners could even laugh at jokes at their expense told by after dinner speakers such as Sir Denys Roberts, Chief Justice of Hong Kong. He declared that the most important character traits of a law reformer was dedication, faith, insensitivity and patience. Insensitivity was sometimes required to keep going in the face of obstruction, indifference and disappointment.<sup>25</sup>

The productivity of the ALRC and other Australian commissions was significant. Major federal legislation<sup>26</sup> gave effect to the recommendations of the Commission. The future seemed assured. However, it was at this stage that some opponents of institutional law reform began to show their teeth. In 1994, an inquiry into the operations of the ALRC was conducted by the Australian Parliament's Legal and Constitutional Affairs Committee. Rumours, which eventually proved

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<sup>25</sup> See ALRC 5 at 7 [14], quoting R.J. Ellicott opening the Australian Law Reform Conference in Canberra, 6 May 1976. His address on the methods of securing uniform law reform is cited *ibid* at 8 [15].

<sup>26</sup> Such as the *Privacy Act* 1988; the *Insurance Contracts Act* 1984 (Cth) and the *Lands Acquisitions Act* (1997). Cf M. Tilbury, "A History of Law Reform in Australia" in B. Opeskin and D. Weisbrod (eds) *The Promise of Law Reform* (Federation, Sydney, 2005) 1, 15.

premature, began to circulate about the abolition or significant downsizing. However, the Commission survived.

By 2005, both in Australia and overseas, substantial changes could be seen on the law reform landscape. As Tilbury et al described it:<sup>27</sup>

“By the late 1980 and early 1990s many governments had lost an appreciation of the need for full-time law reform commissioners and had begun to reappraise the need for them, one reason being that they were regarded as expensive luxuries.<sup>28</sup> The result, particularly in Australia and in Canada, was that law reform agencies were downsized, abolished or simply allowed to wither away.<sup>29</sup> The downsized agencies represented the retreat to the view that had prevailed in the era before full-time law reform commissions were created: that professional law reform could be accomplished through agencies whose members were part-time, though they may be supported by some full-time research and/or administrative staff. Alternatively, the total abolition of law reform bodies could be justified by assigning their work to government departments, particularly to units devoted to legal policy reform within such departments.<sup>30</sup>”

Some bodies, of the kind established by Scarman, continued to exist, as in the two commissions in the United Kingdom. However, on the whole,

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<sup>27</sup> Tilbury et al, above n. 19, 5. See also M.D. Kirby “Reforming Law Reform: Concluding Reflections”, *ibid*, 259 at 261.

<sup>28</sup> See e.g. Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 6 November 1992, 550-552 (Hon. Jan Wade, Attorney-General), justifying the abolition of the Law Reform Commission of Victoria.

<sup>29</sup> P. Handford “The Changing Face of Law Reform” (1999) 73 ALJ 503. After describing successes in England and South Africa, the author states “when we turn to Australia, the sky becomes much more cloudy, and in places extremely dark and gloomy – a far cry from the confident days of the early 1980s.”

<sup>30</sup> Consider the extensive remit of the Programs Branch of the Department of Justice Canada named as a “fair, relevant and accessible justice system”.

by 2005, the tide had turned. As I put it previously,<sup>31</sup> we are now faced with the decline and fall (at least temporarily) of the Scarman model:

“The full-time, professional, well-resourced law reform agency was seriously endangered. In Canada, the Federal body... has been abolished: not once but twice. In Ontario, where a major full-time institution... long flourished, it has been replaced with a part-time body with a small budget. In several Australian States, a hybrid institute has replaced the earlier models. Reliant on busy academics and robbed of significant public subventions. Even the [ALRC] despite the marked success of its implementation track record, has suffered serious blows to its personnel, facilities, programme and funding.”

Has the nadir of institutional law reform been reached? Is the threat to independence being reversed? Will the golden age return in Australia?

### *The Present*

The answers to these questions are in the negative. Throughout the present decade in Australia, things have actually become worse. It did not change favourably with the election of the Rudd Labor Government in 2007. Naive commentators expected that a body, such as the ALRC, established by a reforming Labor Government, would have greater support from a socially progressive political administration. In fact, the reverse was the case. The Rudd Government's appointment of Roger Wilkins to head the Attorney-General's Department resulted in a severe decline in the resources and support provided for the ALRC. At the same time there were huge increases in the resources appropriated to the Attorney-General's Department. The same trend occurred under the

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<sup>31</sup> M.D. Kirby, “Reforming Law Reform” in Tilbury et al, above n. 19, 259 (footnotes omitted).



same administrative official in the specialised federal advisory body on administrative law reform (the Administrative Review Council (ARC)). Ironically perhaps, the ALRC did better during the Howard Government, often labelled as 'conservative'. Of course, true conservatives will sometimes support law reform in order to defend the effective operation of the rule of law. Whatever the explanation, support for institutional law reform has been generally downhill since 2007.

In 2010, during the Gillard Government (2010-2013) additional steps were taken to reduce even further the resources and activities of the ALRC:

- \* In the 2011 Budget, the appropriation for the ALRC was reduced by \$242,000, with prospects of still further reductions of nearly half a million dollars;
- \* The number of full-time commissioners in the ALRC was reduced by two to one commissioner only (the President);
- \* Although subsequently a second full-time commissioner was appointed, this was specifically to conduct an inquiry on an issue deemed urgent by the Government;
- \* In the place of the collegiate self-governing organisation of the ALRC, envisaged by its founding statute, administrative control the commission was transferred to a duumvirate comprising the ALRC President and the Attorney-General (represented by the Secretary of the Department);
- \* The severe budget cuts imposed by the government reduced the outreach programs of the ALRC and its engagement with volunteers and social research assistance;

- \* The printed newsletter *Reform*, which had been published in hard copy since 1976, was abandoned. It was replaced by an electronic document of much reduced size and content;
- \* Because of the cuts, the ALRC had also to reduce substantially its engagement with international law reform bodies;
- \* The Commission's premises in Sydney were moved to be physically contiguous to offices under the control of the Federal Attorney-General, allegedly to encourage use of common library facilities; and
- \* Even the "Michael Kirby Library" of the ALRC is now a pale shadow of its former self. The precious hard copy library of law reform agency reports, unique to Australia, from around the world has mostly been destroyed or discarded. Similar bibliographical barbarism occurred in the Attorney-General's Library itself, with many precious first editions destroyed.

Some of the most important law reforms of the "golden age" were the outcome of administrative law committees (Kerr, Bland, Ellicott) created before the ALRC was created. A key recommendation of the Kerr report of 1971 had been the establishment of the ARC. It oversaw the implementation of an integrated series of federal laws. I know this because the chairman (later president) of the ALRC was *ex officio* a member of the ARC. The task of the ARC included that of resisting demands by powerful public servants for exemptions and exceptions affecting their agencies: a resistance that was well performed. This was a body of law reform upon which Labor and Coalition Governments united in overcoming the resistance of the bureaucracy, by introducing and securing the passage of the reforms. Malcolm Fraser in 2010 declared that the reform of federal administrative law in Australia and the

creation of the Administrative Appeals Tribunal were amongst his greatest achievements.<sup>32</sup> It was an assessment endorsed by Sir Anthony Mason, who had been a member of the Kerr committee. He said:<sup>33</sup>

“Let there be no mistake about this. There was very strong bureaucratic opposition of the Kerr Committee recommendations. The mandarins were irrevocably opposed to external review because it diminished their power. Even after the reforms were in place, Sir William Cole, Chairman of the Public Service Board, and Mr John Stone, Secretary of the Treasury, were implacable opponents of the reforms.”

As late as July 2015, the reforming Attorney-General of the Fraser Government, Robert Ellicott, said of the ARC:<sup>34</sup>

“[It needs] to be seen as the fulcrum of the Administrative Appeals Tribunal and the other things that are happening in administrative law. Their engine room. They are the defenders of the faith, if you like. They are the ones who are driving this pursuit of excellence in review.”

Warning after warning was given by knowledgeable observers<sup>35</sup> of the need to retain the independent posture of the ARC which was unlikely to be replicated in the central bureaucracy itself and the federal public

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<sup>32</sup> Quoted ABC, *7:30 Report*, interviewed by Kerry O’Brien (22 February 2010). See <http://www.abc.net.au/7.30/content/2010s2827147.htm>.

<sup>33</sup> A.F. Mason, “The Kerr Report of 1971: Its Continuing Significance” (Whitmore Lecture, 2007), 2

<sup>34</sup> Address by R.J. Ellicott QC delivered at the Administrative Appeals Tribunal, Ceremonial Sitting, Sydney, 1 July 2015, 9.

<sup>35</sup> Such as Chief Justice Wayne Martin (Chief Justice of Western Australia) who had been a research officer of the ARC. See Wayne Martin, “Forewarned and Fourarmed: Administrative Law Values and the Fourth Arm of Government” (Whitmore Lecture, Sydney, 1 August 2013, 5).

service.<sup>36</sup> Mr Roger Wilkins, as Secretary of the Attorney-General's Department, bided his time to put these virtues in reverse. In recent years, according to the ARC's website, in addition to the changes to the *ex officio* members of the ARC, only two persons were appointed to the statutory office. One of them was Mr Wilkins himself, presumably to be witness to the termination.

On 11 May 2015, the Federal Minister for Finance announced that the ARC would be abolished and its functions transferred to the Attorney-General's Department. The President of the AAT, and judge of the Federal Court Justice, (Justice) Duncan Kerr, asked who now would be R.J. Ellicott's "defenders of the faith" to drive pursuit of administrative law reform, as the ARC had done in the decades past. He added:<sup>37</sup>

“... [T]here is room for scepticism that [the] successors [to Sir William Cole and Mr John Stone] can be relied upon to be enthusiastic supporters of a system which, from to time, may hold decisions they have made to rigorous external account.”

At the time of this law reform conference, the ALRC similarly has only one commissioner (the President, Professor Rosalind Croucher). Presumably, whilst the ALRC exists and enjoys references from the Government, it has been deemed necessary to appoint a president. There are only three part-time commissioners and of the ALRC. As two of them are judges of the Federal Court of Australia,<sup>38</sup> it can be inferred

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<sup>36</sup> Justice Duncan Kerr, "Reviewing the Reviewer: the AAT, ARC and the Road Ahead", Jack Richardson Oration, 15 September 2015.

<sup>37</sup> *Ibid*, 14. Cf M.D. Kirby in *Tilbury et al*, above n. 19, 36.

<sup>38</sup> Justice Nye Perram (12 December 2012) and Justice John Middleton (12 December 2012). A further part-time Commissioner Emeritus Professor Suri Ratnapala was appointed on 17 July 2015 becoming the third part-time commissioner.

that the demands that will be made on their time will be limited by the demands of their judicial duties. The Commission has only one current advertised project namely elder abuse.<sup>39</sup> This is a sad diminution of the once bold venture engaging some of the top lawyers in Australia. There is no immediate sign of rescue from this decline.

## *The Future*

### *Tackling the Causes of Decline*

If the future is to witness an improvement in the current state of things in institutional law reform in Australia (at least the ALRC has not been abolished), it is important to examine the probable contributors to the current state of affairs. Can any of them be corrected, so as to turn things around? I earlier suggested a number of causes, for the present decline, some at least of which may be susceptible to reversal:<sup>40</sup>

- \* *Political engagement and champions:* In so far as some of the problems have arisen out of political hostility, attempts need to be made to rekindle the commitment to the idea of systematic law reform on all sides of current federal politics. In the beginning, there was strong support from the Australia Labor Party (Whitlam and Murphy) and also from the Coalition side (Fraser, Greenwood and Ellicott). In all political parties, there are some who are simply not interested in law reform. They do not see its priority. There is an urgent need today for political champions,<sup>41</sup> whilst always keeping a distance on the part of law reform institutions from political engagement. Commissioners need to brief politicians and stimulate the interests of

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<sup>39</sup> Reference to the Commission on 27 February 2016 by Attorney-General, Senator Hon. George Brandis QC. The report is requested by May 2017.

<sup>40</sup> Kirby in *Tilbury et al*, above n.19, 259 at 261, 264.

<sup>41</sup> *Ibid*, 264.

potential champions, particularly those who have had experience in legal practice.

- \* *The financial case*: Some law reform proposals inevitably involve cost consequences for government. The English Law Commission has recruited experienced economists to help cost those projects that have potential cost significance.<sup>42</sup> Yet there are important opportunity costs in failing to reform and modernise the law. If a national jurisdiction were a corporation whose officers did not institute routine, systematic procedures for updating the law, their fitness for office would be questioned. A scientific, or at least systematic, approach has distinct advantages from an economic point of view. Failure to attend to this challenge imposes a large economic cost that needs to be brought home to politicians, officials and citizens alike.<sup>43</sup>
  
- \* *Timeliness*: One reason sometimes advanced for bringing matters of law reform back into the departmental hub is that ministers and departmental heads can crack the whip more effectively than commissioners in independent law reform institutions. There may be some truth in this complaint. Indeed, some projects of the ALRC seriously overran time estimates and expectations. (the projects on *locus standi* (later ALRC 27) and *Aboriginal Customary Law* (later ALRC 31) are cases in point. On the other hand, many outstanding reports of the ALRC were produced quickly and efficiently and with the benefit of widespread consultations. Such engagement is much harder (or even impossible) to achieve through a department of state. Later federal attorneys-general have imposed deadlines on the

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<sup>42</sup> M. Partington (Ch. 5 in Tilbury, above n.19), cf Kirby, *ibid*, 266.

<sup>43</sup> M.D. Kirby, "Reforming Law Reform: Concluding Reflections" (Ch. 14, Tilbury et al, above n.19, 262).

ALRC. These have generally been met. It is sometimes a reasonable requirement. It helps to prevent unreasonable delay.

\* *Defusing Controversy:*

Departmental officials can, it is true, protect political ministers from the controversies that sometimes surround an independent inquiry.<sup>44</sup> They can help to avoid entanglements that they do not wish or that they feel ministers (if they thought about it) would not wish to confront.<sup>45</sup> However, in the ALRC, some such dangers can be avoided by the framing of the terms of reference for the matter referred to the Commission. For others, such as the projects on *Complaints Against Police*<sup>46</sup>, *Human Tissue Transplants*<sup>47</sup> and *Privacy* protection<sup>48</sup> the very engagement with public consultation may help to defuse public animosity and hostility. It can demonstrate a process in which antagonists have had an opportunity to have their say. This can ease the political path of reform in ways denied to enquiries by officials that are not transparent in their methodology.

*Independence and Control:*

Another suggested reason for returning to full departmental control of the processes of law reform has been based on a political theory. This is that, in our constitutional system, Ministers in the Executive Government are responsible to the Parliament. They are thus entitled to have the assistance and advice of officials whom they appoint, can remove and can expect to help them avoid political pitfalls and dangers.

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<sup>44</sup> Kirby loc cit.

<sup>45</sup> Ibid, 262.

<sup>46</sup> ALRC 1 at 9.

<sup>47</sup> Australian Law Reform Commission, *Human Tissue Transplants* (ALRC 7, 1977).

<sup>48</sup> *Privacy* (ALRC 22, 2013).

Independent commissions will not feel obliged to do this, certainly to the same degree.

Apart from the somewhat 'romantic'<sup>49</sup> view about ministerial responsibility as it is actually practised in contemporary Australia, this is an ultra-cautious and overly timorous view of the value of independent and sometimes discordant, sources of information and advice to elected governments. Institutional law reform bodies can much more readily assemble such advice through the appointments of commissioners and engagements of consultants or through public hearings. These processes of opening up differences and opportunities for public debate should be seen as mechanisms for improving and expediting the development of sound legal policy. Keeping differences in a department observing a high measure of secrecy or confidentiality, represents an inert conception of tackling the differences that inevitably exist in a modern democracy and which will ultimately surface. The very process of public and expert consultation and engagement with different interest groups will help clarify the differences. It will present the conflicts about policies that need to be resolved if differences are to be resolved, not papered over.

Early in the life of the ALRC, I proposed to the Federal Attorney-General's Department that the Commission should move to Canberra and be housed in, or immediately adjacent to, the Department. The wise secretary at the time, Mr Harders, suggested politely that I needed to reconsider the idea. He said that, if the federal government of the day needed more advice from a department of state, it could easily give the

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<sup>49</sup> A.F. Mason, "Democracy and the Law: The State of the Australian Political Sydney" (November 2005) *NSW Law Soc J* 68 at 69. See also M.D. Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 *ALJ* 299 at 312.



project to that body in the first place. The facility of the ALRC was designed for projects of a different kind. They were large, multifactorial, policy driven and often controversial subjects where procedures of consultation and securing social data were essential to arrive at recommendations that would be effective, well informed and likely to endure.<sup>50</sup> For such projects, the independence of the adviser was a distinct advantage. Second guessing the politics of the issue and presentational attractions of available options was something that should happen at a later stage; not in the development of the preferable recommendation that should be recommended.

I have no doubt that the strong and self-confident ministers in office at the time of the creation of the ALRC, on both sides of politics, would have treated with disdain a view that they should avoid controversy or that they should confine the sources of their advice to their departmental officials. As in the achievement of substantial reforms in administrative law already mentioned, they would almost certainly have ascribed such advice to considerations such as departmental envy, territorialism of responsibility and control over power. Reimposing the traditional straight jacket on law-making institutions is inimical to the many and urgent needs for law reform in contemporary Australia.

#### *Concepts and Band-Aids:*

There is an efficiency consideration that supports the role of independent institutional law reform, separate from the often urgent tasks of legal amendments that often preoccupy politicians and departmental officials.

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<sup>50</sup> Kirby, "Changing Fashions and Enduring Values in Law Reform" Ch.2 in Tilbury et al, above n.19, 24 at 39.

An illustration of the latter is the amendment of the *Corporations Act 2001 (Cth)* by the insertion of s961B (1) and (2) and 961(J)(1) for the purpose of clarifying the duties to be observed by ‘financial product and services providers’ (as defined). The attempted definitions arose out of a report of a parliamentary joint committee in the Australian Parliament that conducted an inquiry into issues associated with the collapse of certain financial product and services providers. The committee’s report (Ripoll Report)<sup>51</sup> necessarily entered a field in which there was already significant federal legislation.<sup>52</sup> There was also a great deal of relevant law concerning fiduciary duties imposed by the general law on people who give financial advice to clients.<sup>53</sup> The result has been a mountain of legal opinions and law review articles trying to clarify the precise meaning of the legislation and its interaction with the preceding law.<sup>54</sup> There have also been several decisions of the Federal Court of Australia. They run into many hundreds of pages as judges struggle to apply statutory texts of considerable opacity concerning the duty of financial advisers in the circumstances found to have existed.<sup>55</sup>

The economic costs of large teams of highly talented judges, legal practitioners and academics trying to sort out the meaning and operation of the complex legislation is enormous. Yet this is the price that must be

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<sup>51</sup> Commonwealth of Australia, Parliamentary Joint Committee on Corporations and Financial Services *Report (Ripoll Report)*, 23 November 2009.

<sup>52</sup> See e.g. *Trade Practices Act 1974 (Cth)*, s51AA (1).

<sup>53</sup> Discussed by K. Lindgren, “Fiduciary Duty and the Ripoll Report” (2010) 28C & SL 435.

<sup>54</sup> P. Hanrahan, “The Relationship Between Equitable and Statutory ‘Best Interests’ Obligations in Financial Services Law” (2013) 7 *Journal of Equity* 48; Simone Degeling and Jessica Hudson, “Fiduciary Obligations, Financial Advisers and FOFA” (2014) 32 C & SLJ 527; Gerard Craddock, “The Ripoll Committee Recommendations for a Fiduciary Duty in the Broader Regulatory Context” (2012) 30 C & SLJ 216; Richard Batten, “Financial Advice in Australia: Principles and Proscription; Management to Banning” (2015) 87 *St John’s Law Review*, 511.

<sup>55</sup> *Wingecarribee Shire Council v Lehman Bros. Aust Ltd in Liq* [2012] FCA 1028, per Rares J (473 pages; 1247 paragraphs); *ABN Amro Bank MV v Bathurst Region Council* [2014] FCAFC 65 (Full Federal Court) (Jacobson, Gilmour and Gordon JJ) (470 pages, 859 paragraphs); *ASIC v Australian Property Custodian Holdings Ltd (Receivers and Managers Appointed) in Liq [No.3]* [2013] FCA 1342 (217 pages; 770 paragraphs).

paid when legislatures move away from conceptual principles towards statutes containing provisions of great particularity. The cascading consequences of such complex legislation need to be subjected to economic evaluation. Sometimes, spending a little more time and effort getting basic concepts clear, and expressing the governing law in terms of those concepts, can save huge sums in uncertainty and the teaching, application and enforcement of the law need to be more simple and economical.

The provisions of the legislation enacted in consequence of the Rippoll Report may be contrasted with the comparative simplicity, clarity and certainty of the *Insurance Contracts Act* 1984 (Cth) based on the ALRC report on insurance contracts.<sup>56</sup> Scarce federal funds spent prudently on getting the concepts of right can end up promoting a more efficient legal system. In the evaluation of a body such as the ALRC, one hopes that the Treasury and Finance Departments of the Commonwealth take into account the opportunity costs of ad hoc amendments of the burgeoning federal statutes when evaluating the direct costs of providing proper funding for an agency dedicated to the conceptualisation, and simplification of law, based on thorough empirical examination and appropriate consultation rather than perceived political imperatives.

### *Different Roads to Reform*

There is a further advantage of institutional law reform that should not be overlooked. Both in the ALRC and in other law reform agencies have welcomed the participation in their work of experienced judges and legal practitioners as well as academic teachers and scholars of the law. Most of these persons, engaged either as full or part-time

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<sup>56</sup> Australian Law Reform Commission, *Insurance Contracts* (ALRC 20, 1982).

commissioners or as statutory consultants or other participants, would probably never have been available to the Commonwealth (certainly not for any modest fees paid) if the opportunity of contribution to the work of the ALRC had not presented. This was therefore a precious intellectual transfusion of high talent into federal law-making. Only those with a quasi-incestuous view closed to outside talent, would opt to terminate such an economical source of ideas, advice and experience. One day an analysis will be undertaken of the role played by academics in the tasks of law reform undertaken by the ALRC and by its state and territory counterparts in Australia. Most of the comments made relating to the winding back of institutional law reform apply equally, or with greater force, in respect of the sub-national law reform bodies in Australia that have been abolished or severely reduced in recent years.

There is another consideration that concerns the indirect impact of law reform reports. Some of them have consequences that go beyond the immediate preparation and implementation of a report by the enactment of statutory law. For example, the ALRC report on Aboriginal Customary Law, which was eventually concluded under the leadership of Professor (now Judge) James Crawford,<sup>57</sup> has the distinction of being the report of the Commission that receives the most visits on the ALRC's website. The proposed amendments to federal law, advanced in the report,<sup>58</sup> have not so far been substantially adopted by the Federal Parliament. Nevertheless, the report contributed greatly to the academic, professional and political discussion of the relationship between Australia's indigenous peoples and the Australian legal system. It was out of this public discourse in the 1980s that the environment was laid

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<sup>57</sup> Now H.E. Judge James Crawford AC, Judge at the International Court of Justice.

<sup>58</sup> Australian Law Reform Commission, *Aboriginal Customary Law* (ALRC 31, 1986).

whereby the decision of the High Court of Australia in *Mabo v Queensland [No.2]*<sup>59</sup> became possible. It was in that decision that a majority of the High Court took what was undoubtedly a bold but necessary, step in legal innovation.

The previous land law governing indigenous claims to land, dating back to Privy Council decisions of the 19<sup>th</sup> century, was revisited. The applicable law was re-expressed. What the judges had declared to be the law (that native title of the indigenous people did not survive acquisition of the Australian continent by the Crown) was held to be in need of reformulation. The key that unlocked the door to this outcome was another legal innovation, expressed in the *Bangalore Principles* on the application of international human rights law.<sup>60</sup> Although not expressly mentioned in the High Court's reasoning, in *Mabo* a similar approach was invoked.<sup>61</sup> The law was re-expressed. The ALRC report on Aboriginal Customary Law contributed to the *Zeitgeist* that made reconsideration of the previous judge-made law possible.

The engagement of academic scholarship through institutional law reform has enhanced the influence of such work, well beyond what would be possible through the pages of texts and law reviews. Depending on one's point of view, this engagement has proved beneficial to the institutions involved in Australian governance. Moreover, the engagement of academics in an institution designed to enhance efficient law-making, enhances their capacity to understand,

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<sup>59</sup> (1992) 175 CLR 1.

<sup>60</sup> M.D. Kirby, "The Role of the Judge in Advancing Human Rights in Reference to International Human Rights Norms" (1988) 62 ALJ 514, to which are annexed, as an appendix (at 531), *The Bangalore Principles*, (531-532).

<sup>61</sup> (1992) 175 CLR 1 at 42.

and reflect, the challenges of law-making and the social dynamics that it invokes.

### *Consultation and New Methods*

Another distinctive feature of legal scholarship in the context of law reform institutions have been the processes of consultation. More than is ordinarily the case of research and publication by individual scholars, work undertaken in a law reform commission has usually been put to the bracing test of the opinions of other lawyers; the submission to social science investigation; and subjection to criteria such as practicality and achievability.

Consultation with the public (through public hearings and other means) has also been useful not only for feedback but also for raising an expectation of reform outcomes.<sup>62</sup> This is not possible in the case of judicial reform. It is sometimes given as a reason why controversial reforms should not be undertaken in the courts.<sup>63</sup> Although there remains a place for judicial reform (even substantial judicial reform, as *Mabo* demonstrates) the possibilities are restricted and the outcomes are often disappointing.<sup>64</sup> Legislatures will sometimes avoid enacting reforms because of powerful political interests, apathy, the distraction of lawmakers because of more popular issues or indifference about problems concerning minorities or small numbers of citizens affected.<sup>65</sup>

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<sup>62</sup> ALRC 5 at 24-25 [45], 49-50 [93]-[94].

<sup>63</sup> *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617 at 633 per Mason J. Cf *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 535 [39] per Gleeson CJ. (diss); and at 592-597 [207]-[219], per Kirby J.

<sup>64</sup> *D'Orta v Ekenayke v Victoria Legal Aid* (2005) 223 CLR 1. Cf *Attwells v Jackson Lalic Lawyers Pty Ltd* [2006] HCA 16; (2016) 90 ALJR .

<sup>65</sup> See New South Wales Legislative Council, Parliamentary Standing Committee on Law and Justice, *Remedies for Serious Invasions of Privacy in New South Wales* (March 2016).

The failure of Australian parliaments to enact civil remedies for serious breaches of personal privacy, despite repeated recommendations to that effect over four decades, made by the ALRC and other institutions, is a case in point.<sup>66</sup> A persistent log jam in the implementation of institutional proposals for reform is not a reason for abandoning law reform agencies. For those who believe in reform as an attitude of the rule of law itself, these are reasons for improving the process of reform, including transparent official attention to reports once delivered.<sup>67</sup> Apart from finding other elements of dysfunctionality in the current political system in Australia, the machinery for orderly reform of the law is seriously ineffective. If a systems and management expert were to assess the Australian constitutional system as it presently operates, they would be horrified by its inadequacy and indifference to orderly law reform.

Governments often boast that ‘no one will be left behind’. However, the plain fact is that anyone with a complaint about the unfairness, inadequacy or sheer indifference to law-based injustice in Australia will usually despair of getting anything done. Unless the issue captures the attention and interest of the relatively small number of politicians elected in marginal seats, the likelihood is overwhelming that nothing will be done. The repeated demonstration of grave miscarriages of justice in the criminal appeals system is a case in point. An institutional solution to the defects of the *Criminal Appeal Act* 1907 (UK), which was the template for criminal appeal part legislation throughout the British

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<sup>66</sup> Proposals for such a remedy have been made by the ALRC repeatedly. See ALRC 11 (1979); ALRC 108 (2008); ALRC 120 (2009); ALRC 123 (2014). See also Victorian Law Reform Commission and NSW Law Reform Commission (April 2009) and South Australia Law Reform Institute (2016).

<sup>67</sup> ALRC 5, 10-13 [18]-[22]. The Law Commission of England and Wales has negotiated a “fast track” procedure for the parliamentary consideration of “non-controversial” proposals for law reform.

Empire, including Australia, was recognised in the United Kingdom *Criminal Appeal Act* 1995 (UK). That Act provided for the establishment of a Criminal Cases Review Commission (CCRC) as an independent non-departmental public body set up in January 1997 to scrutinise seriously unsafe convictions. Despite recommendations for analogous reforms in Australia, based on similar needs, no such body has been created anywhere in Australia. This is despite the demonstrated utility and urgency of such a remedy in the country from whose legal system the criminal appeal systems were derived.<sup>68</sup>

To improve the defective remedy of criminal appeals and petition to the Executive Government, legislative change to allow a post-appeal application to the courts has been advocated; but only in South Australia and Tasmania has it been enacted.<sup>69</sup> This remedy has been shown to have utility by several decision following grants of leave to appeal. Yet something holds up the process of law reform in all other Australian jurisdictions. For the most part, this is indifference to the cries of innocence.

On the basis of equivalent statistics in Britain, this attitude suggests that many people in Australia are probably serving custodial sentences, (often extended) who would have been released elsewhere. Some such prisoners are actually innocent. However, there tend to be no votes in reforming criminal appeal legislation and review legislation. Such laws might have resulted in the release of prisoners. Here nothing gets done.

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<sup>68</sup> Bibi Sangha and Robert Moles, "Post-Appeal Review Rights: Australia, Britain and Canada (2012) 36 *Criminal LJ*, 300.

<sup>69</sup> *Criminal Law Consolidation Act* 1935 (SA), amended May 2015. See R.N. Moles, *A State of Injustice* (2014).



The community interest in finality trumps all other considerations, including (in some cases) justice.

The application of arbitrary power may be inconsistent with the rule of law. However, ultimately that is the rule that applies. In Australia, no effective human rights or constitutional remedy can be invoked to afford relief. For those who have witnessed, or participated (usually unconsciously) in miscarriages of justice in criminal proceedings in the courts,<sup>70</sup> the situation is distressing. Yet such distress is not widespread. The more typical emotion is indifference. A few concerned academics and idealistic law students take part in “innocence projects”. They are poorly funded. These are swamped with complaints. The participants are bereft of any official status.<sup>71</sup> In some Australian jurisdictions, parliaments, at the behest of governments, have even enacted laws forbidding civil society organisations, in receipt of public funds, from proposing or urging reliant reform of the law. Inhibiting legislation of this kind shows how far we have travelled, in the business of law reform in Australia, since the optimistic bipartisan days of 1975.

### III REFLECTIONS

There was a time when Australia was more open to law reform, including on important topics. The adoption of the system of registered title to land; the enactment of industrial conciliation and arbitration; the acceptance of judicial authority to vary unfair provisions of wills; and the

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<sup>70</sup> The reference is to *Mallard v The Queen* (2005) 224 CLR 68, read with (1997) 191 CLR 656. See B. Sangha and R. Moles, *Carriages of Justice, Criminal Appeals and the Rule of Law in Australia*, Lexis/Nexis, Sydney, 2015.

<sup>71</sup> M.D. Kirby, “Establish Clinics and Miscarriage Projects in Law Schools” in Kirby, above n.5.

inclusion of women in the franchise all spring to mind. These are instances where Australians were amongst the first in the world to embrace the change.

However, even in these instances, law reform adopted was often derivative. The first registered land title was copied from Germany. The other reforms were copied from New Zealand.

Copying UK legislative models is now much less common than it was last century. Although human rights legislation modelled on the *Human Rights Act* 1998 (UK) was substantially copied in the *Human Rights Act* 2004 (ACT) and the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), the recommendation by an approved inquiry that such a law be enacted by the Federal Parliament was rejected both by Labor and the Coalition. The constitutionality of a key provision of the Victorian statute only survived a challenge in the High Court by a whisker.<sup>72</sup>

Copied legislation today is just as likely to come from the United States of America, as did the *Marriage Amendment Act* 2004 (Cth), forbidding same-sex marriage in Australia and the recognition of such marriages lawfully conducted elsewhere.<sup>73</sup> No constitutional provision in Australia affords relief against such legislation. On the contrary, although the High Court of Australia affirmed the existence of full power in the Federal Parliament to enact a law on the subject, the path towards such a law has been interrupted by the interposition of a non-binding plebiscite.

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<sup>72</sup> *Momcilovic v The Queen* (2011) 254 CLR 1 (French CJ, Crennan, Kiefel and Bell JJ; Gummow, Hayne and Heydon JJ dissenting, held that the making of a declaration under s 36 (2) of the *Victorian Act* did not impair the constitutional integrity of the Supreme Court of Victoria and did not impinge on the constraints derived from Ch.III of the *Australian Constitution*).

<sup>73</sup> *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441. The 2004 legislation copied the Defence of Marriage legislation (DOMA) in the United States. That legislation was declared unconstitutional by the Supreme Court of the United States in *Obergefell v Hodges* 135 SCt 2071 (2015); 576 US (2015).

This is the first time in a century that an enactment of a federal law affecting individual rights and duties has been impeded in such a way.<sup>74</sup> Clearly, the winding back of institutional law reform bodies in Australia must be seen in wider political, institutional and social setting.

Despite this, there is now much greater interest in the operation of law, including international law, in connection with existential questions of growing significance for increasing numbers of citizens. These include nuclear non-proliferation in its connection to human rights.<sup>75</sup> Climate change and protection of the environment as essential to the biosphere in which human rights law must be attained is another topic requiring law reform.<sup>76</sup> So is the attainment of the Sustainable Development Goals 2015 of the United Nations, including SDG3 which declares the need for access by all to essential medicines by 2030. The attainment of rights by sexual minorities is another international priority with large legal implications.<sup>77</sup> So likewise is the operation of the *Refugees Convention* and *Protocol* in the context of the huge population movements in the world today. International law has come into an enlarged significance because each of those large topics presents new problems of law reform. This is why, in future national law reform conferences involving legal academics, it is essential to include an enlarged attention to international law. It affects municipal law reform as well as inviting attention to specific needs on the international stage.

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<sup>74</sup> Since the Australian plebiscites on subscription for compulsory military service in the Great War conducted in 1916 and 1917. See F.B. Smith, *The Conscription Plebiscites in Australia 1916-17* (Melbourne, Victorian Historical Association, 1966). Both plebiscites registered a majority against the law. A conscription plebiscite was held in Canada in 1942 and carried by majority of 65.62% with only the Province of Quebec voting against (72%).

<sup>75</sup> J.H. Lee (ed.), *Seoul Dialogue for Human Rights* (Jonsei Centre, 2015, Seoul).

<sup>76</sup> See e.g. *Oslo Principles on Global Climate Change Obligations* in *Yale Global Justice Programme* (October 2015). Available at [www.socialeurope.eu](http://www.socialeurope.eu). The Principles set out legal obligations of states and enterprises to take urgent measures necessary to avert climate change and its catastrophic effects.

<sup>77</sup> M.D. Kirby, "Asia and Oceania LGBTI Law Reform: Breaking the Log Jam" (2016) 46 *HKLJ* 151.

Law reform in its several manifestations is an essential component of good governance and universal human rights. It is also a necessary ingredient in the global struggle against corruption.<sup>78</sup>

The engagement of the legal profession in all of its branches with stakeholders, civil society and individuals is now made easier by advances in information technology. To supplement public hearings for law reform projects, it is now possible to engage with social media, Twitter, podcasts, online publications and creative use of the law reform agencies' websites. If consultation and outreach are an invariable signature of institutional law reform, the new technology potentially makes it cheaper and more effective to undertake consultation in more effective ways.

The changes over the past 50 years, since the powerful influence of the Scarman model was first felt, have seen that approach come full cycle. What began in 1965 with the winding back of the part-time committees of overworked insiders has now come face to face with forces hostile to full-time, professional, well-funded, multidisciplinary bodies engaged with the social sciences and embarked on broad consultation. Once again, law reform is being handed back to part-time committees, working on necessarily limited topics that are ordinarily unlikely to challenge orthodoxy or upset powerful interests, including in government administration.

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<sup>78</sup> M.D. Kirby, "Corruption, Proportionality and Their Challenges" (Franz Hermann Brüner Lecture) (2016) 18 *Health and Human Rights Law* 1 (online edition).

It must be hoped that having returned to the place where we began, a renewed perception of the inadequacies of the situation will arise. To end complacency about the present state of the law in so many areas. To heighten the sense of urgency about the needs for law reform. To resist professional self-congratulations that mark the current era. Members of the judiciary and the practising legal profession, who see the law from close quarters, day by busy day, shall once again become influential advocates for a return to a model of law reform at once instrumental and more systematic. Yet judges and lawyers are generally distracted by urgent duties. This is why the first National Law Reform Conference in Australia is a source of hope.

So many academics in every part of Australia working on so many subjects many in need of reform - must become, individually and collectively, a voice that demands the re-learning of lessons that we seem so easily and quickly to have forgotten. Not all of the topics described in the reports to the conference require statutory or other changes to the law. But many do. These should be identified, collected and advocated. The voice of persuasion should be heard in the land. Until, in due course, the hostile forces are once again overcome and the optimism and idealism about systematic law reform in Australia is rekindled in a new generation of lawyers and citizens alike.