

Foreword

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Academic lawyers in Australia have long played a vital role in the national project of law reform. They thought about it; they wrote about it; they worried about its haphazard ways; and they taught their students, and others who would listen, about the need for a more systematic and effective approach to the challenge.

As I discovered, soon after my appointment as inaugural Chairman (as the office was then styled) of the Australian Law Reform Commission (ALRC), many members of the judiciary and practising branches of the legal profession were hostile to, or apathetic about, law reform.² It was substantially left to academic scholars and civil society organisations and individual politicians to stimulate the demand for reform and to propose the directions that it should take.

In part, this impasse came about because judges and practitioners were distracted by the daily tasks of resolving, according to the law, the large and often mundane problems presented for the application of the existing law. Although that task frequently revealed imperfections, uncertainties, antiquities and inconsistencies in the law, there was a great deal of complacency. Where injustice was revealed, this was ascribed to the inevitable deficiencies of law since ancient times, against which victims might protest but would rarely prevail.

1 Chairman of the Australian Law Reform Commission (1975–1984); President of the New South Wales Court of Appeal (1984–1996); Justice of the High Court of Australia (1996–2009).

2 See, for example, P A Jacobs, 'A Plea for Law Reform' (1940) 13 *Australian Law Journal* 398.

Whereas many judges and practitioners retained this attitude well into the life of the ALRC, academics were much more ready to challenge the law and to urge changes that would bring it into line with contemporary social attitudes, perceptions of justice, technology and needs for rationalisation and simplification.

The ALRC quickly became a vehicle by which Australia's academic lawyers were brought into a more active contact with the formal law reform process in Australia. They were appointed commissioners (full-time and part-time), consultants and staff members of the ALRC. They were consulted, listened to, engaged with and involved in the development of the program of law reform and with its fulfilment. Many of them found the opportunity to serve for a short time stimulating to their careers and their interests in legal doctrine and useful to their professional tasks of teaching, analysing and writing about the law. This was one of the useful consequences of establishing full-time institutional law reform commissions in Australia, after the model established in England by Sir Leslie Scarman in 1965.

By the 1970s and 1980s, such full-time bodies had been created in Australia in the federal sphere and in New South Wales, Victoria, Queensland and Western Australia. Commissions or Committees with part-time members were created in the Australian Capital Territory, South Australia and Tasmania. In addition to these bodies, particular statutes created advisory bodies to perform specialised law reform work.³ Academic lawyers continued, of course, in their lectures and publications to propose both small and large projects of law reform. These supplemented their engagements with law reform commissions. But the latter enhanced the role and function of Australia's legal academics in contributing to actual improvements in the legal system. It gave many of them a direct voice to government. It also encouraged them to think more systematically about law reform and to view it more emphatically, as part of their duties as legal scholars. This meant not only chronicling and describing the law as it existed, but also critiquing its provisions and identifying faults and deficiencies so as to make the legal system work more efficiently and fairly for the people governed by it.

3 Such as the Administrative Review Council, the Family Law Council and the Australian Institute of Criminology.

The manifest inefficiencies of the traditional part-time model for institutional law reform gave rise to full-time law reform commissions in India, the United Kingdom and Australia. Unfortunately, hostility towards the resulting bodies in Australia did not disappear with the established efficiencies and successes of the agencies. Right into the present time, a number of members of the Australian judiciary and practising legal profession have exhibited animosity towards institutional law reform. Such critics never comprised a majority of the practising profession. But their voices were loud and influential. They tended to undermine the credibility of, and respect for, the law reform institutions in circles where this mattered. They played into the hands of bureaucratic opponents who viewed full-time law reform agencies as a challenge to the power and control they had held over the emergence of law and public policy, which they desired to centralise in their own hands. Ostensibly, their antagonism was justified by reference to cost saving and such noble causes as the protection of ministers, the government and the Westminster system itself.

An instance of the hostility to which I refer was given a voice in the recent retirement speech of a distinguished and capable judge in New South Wales. Surveying the perceived defects in the law that had emerged during his lifetime, astonishingly he included amongst the worst offenders institutional law reform. He revealed that they were, with journalists, amongst his ‘pet hates’. According to a whimsical description by one such journalist of these retirement remarks, the judge described law reformers as people who have an ‘unwholesome ambition for personal power and aggrandisement, or people who, to speak frankly, are ... unstable’.⁴

Perhaps the judge on this occasion was speaking with tongue in cheek. His own subsequent engagement with academic life suggests that this might have been the case. But his words were seen by the journalist as ‘blowing a gasket’.⁵ However, if so, he was not the only one to react to institutional law reform in this way.

In the years after the ALRC was created in 1975, we witnessed in Australia the rise and ascendancy of institutional law reform. However, this was quickly followed by a decline and fall. From a thriving body – usually with

4 Richard Ackland, ‘A Sully Serve for Sullied Media, Law Reformers’, *The Sydney Morning Herald*, 30 March 2017, www.smh.com.au/news/opinion/a-sully-serve-for-sullied-media-law-reformers/2007/03/29/1174761664005.html.

5 Ibid.

three or four full-time commissioners (many academics) and five or more part-time commissioners (many judges, academics and practitioners) – the Commission shrank in the number of its members; the recruitment of consultants; the engagement of staff; and the enlistment of social scientists, whose empirical research capacity was designed to support the quality of the Commission’s reports.

At the time of the blown judicial ‘gasket’ over institutional law reformers, the ALRC had but one full-time commissioner and two part-time (judicial) commissioners. Its budget had been slashed from former times. Its work program limped along but without a substantial program. No longer could it be described as a thriving, busy assistant to the Federal Parliament in diverse tasks necessary for the reform, modernisation and simplification of the law. Instead, it was crippled by the lack of multiple references from the Attorney-General; resources suitable to viability and effectiveness; and personnel essential to be taken seriously if it were to fulfil the function envisaged for it under its statute.⁶ Describing such a body as ambitious for ‘personal power and aggrandisement’ could only be viewed as absurd, unless the near demolition worked upon it was itself a consequence of a similar view held by the successive ministers and officials who had brought the body to this fate.

For small mercies one must be grateful in recounting this chronicle. The Law Reform Commission of Canada was abolished not once but twice. State law reform commissions in Australia have also been abolished on the suggested ground that they were ‘expensive luxuries’.⁷ As one writer, after describing the successes of institutional law reform in England and South Africa, laments: ‘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’.⁸

It is distressing to write in this way, and in this book, about the institutional law reform scene in Australia today. It has lacked political engagement from a new generation of champions who see a need for a proper system of auditing and modernising the legal system of the nation.

6 *Law Reform Commission Act 1973* (Cth) s 6; now *Australian Law Reform Commission Act 1996* (Cth) s 21.

7 Michael Tilbury, Simon N M Young and Ludwig Ng, ‘Law Reform Today’, in Michael Tilbury, Simon N M Young and Ludwig Ng (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong University Press, 2014) 5.

8 John Hannaford, ‘The Changing Face of Law Reform’ (1999) 73 *Australian Law Journal* 503, 511.

It lacks advocates who can point to the economic and financial case for constantly and systematically reforming the law in a country pretending to adherence to the rule of law. It ignores the generally good strike rate of the full-time commissions in the conversion of their law reform recommendations into enacted law and implemented policy. It overlooks the capacity of such independent bodies to consult the community in ways that politicians and the public service could not do, and thereby to defuse unsettling controversy in society. It removes the academic and the private legal profession's talent and inclination for independent thinking and criticism of the law. It lacks reform derived from conceptual thinking and empirical data. It returns the landscape of law reform in Australia to a thing of shreds and patches, of band aids and political fixes: something to be done in tiny projects by overworked part-time volunteers at the fag-end of the week, over a glass of whisky or two.

When, as is occasionally the case, I am invited to return to the Attorney-General's Department in Canberra, I remember the very different place it presented on my first visit in 1975. There I found a small, highly talented, expert cadre of excellent federal lawyers enthusiastic for institutional law reform. Now it is a huge undertaking, greatly expanded by the addition of larger operational functions of federal police, security and anti-terrorism. Whilst these tasks are surely essential features of a modern society that protects the rule of law, so also is institutional law reform. Withdrawal or radical reduction of the budget subventions for institutional law reform represents a shift from an optimistic and liberal view of the role of the law in Australian society to a controlling and pessimistic view which should not be allowed to predominate. At least it should not be allowed to eviscerate the regular institutional improvement of the law by the use of expert, well resourced and full-time machinery to that end. If we ran a large corporation without incorporating institutional means of examining, updating, simplifying and reforming its processes, we would soon run into trouble from the shareholders.

One of the saddest consequences of the decline and fall of institutional law reform in Australia has been the substantial withdrawal of the engagement of Australia's distinguished legal academics in law reform, which was a hallmark of the splendid work, in federal, state and territory jurisdictions, that was performed in decades gone by. This book shows that the involvement of Australia's legal scholars in issues of law reform continues. It is most valuable. I praise and honour it. However, engagement

in the processes of government has been substantially lost or certainly radically reduced. This is a tragedy for the conversion of bold ideas for law reform into action and implementation.

I hope that the former state of affairs will be restored. And that the legal scholars of Australia will raise their voices to complain about the institutional breakdown we have witnessed. This is not a partisan political appeal. Each of the major political groupings in Australia has contributed to where we have now ended up. Each of them needs to reconsider the simple proposition that the rule of law in our nation requires more than rules. It requires rules that are just, modern, efficient and in harmony with the values of a free and democratic people. And that means a revival of the confident days of the past and the restoration of well-funded public institutions of law reform, appropriate to a period of rapid social, economic and global change.

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