

Introduction

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This volume emerges from the inaugural National Law Reform Conference held in April 2016 at The Australian National University. The conference's animating idea was that, for reasons of effectiveness, efficiency and equity, directions in the development of the law should be planned carefully, and that academics can and should take the lead in this process. The conference organisers' intention was to provide an opportunity for academic experts to incubate considered proposals for contemporary law reform in Australia. The 60-plus academics in attendance were invited to focus on future directions that the law ought to take in their areas of expertise. They addressed these central questions:

To what challenges should [your area of law] be geared in the near-to-medium term future; what should be the legal and policy responses, and why?

The conference deliberations were broad in scope and organised into six streams: commercial activities, criminal law and evidence, environmental law, private law, public law, and legal practice and legal education. Indigenous perspectives on law reform were encouraged across all streams. An informed group of 160 conference participants, drawn from government, practice and the academy, discussed, evaluated and helped to improve the resulting papers.

The conference opened with an address from the Honourable Michael Kirby AC CMG, former Justice of the High Court of Australia. In his historical survey of law reform in Australia, Mr Kirby reminded us

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that at the same venue 40 years earlier, as President of the Australian Law Reform Commission, he had addressed the second Australasian Law Reform Agencies Conference. It is fitting that the foreword to this book is by him. The keynote address, which now appears in revised form at the outset of this book, was delivered by Professor Margaret Davies. She advocated for a sophisticated and nuanced approach to law reform, and urged participants to challenge accepted meanings of both ‘law’ and ‘law reform’ – a challenge which some took up in their contributions. A selection of conference papers was revised, edited and double-blind peer reviewed to produce the remaining 50-plus chapters of the book.

Like the conference itself, this book provides a national focal point for legal innovation. The chapters provide a bird’s-eye view of the current state and the future of law reform in Australia. The book’s six main parts mirror the six subject streams of the conference; each part contains a set of reform ideas, drawing on theoretical, sociolegal and doctrinal work, and encapsulated in short, digestible 3,000-word essays. We hope that the book will be of value to policymakers, media, law reform agencies, academics, practitioners and the judiciary. The proposition that academic research serves the public interest in Australia is strongly supported by efforts such as these, especially in an era of reduced public resourcing of law reform agencies.²

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Keynote: Reforming Law

In the opening chapter, Margaret Davies provides a provocation to the conventional understanding of law reform. Although legal positivism remains the dominant legal theory that underpins both law and law reform, Davies encourages us to transcend a narrow conceptualisation. Feminist, sociolegal and pluralist legal scholars have shown that law comprises far more than that found in the statute books for, as Sarat says, it is in fact

2 One notable previous effort in Australia – albeit one focused primarily on the *process* of institutional law reform – is Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005).

‘all over’. Accordingly, we need to think about meta-legal reform, that is, new concepts of law that transcend the realm of legal experts. Alternative ways of thinking about law reform have the potential to effect a shift in legal consciousness so that we can imagine justice in new ways.

Part I: Commercial and Corporate Law

The chapters in this Part, organised thematically, propose new directions for law to address challenging issues in commercial and corporate activity. The first three chapters address corporations, consumers and taxation. Ross Grantham argues that ‘an increasingly self-executing, enclosed system’ of corporate activity has significant implications for the form of the *Corporations Act*. Further, his research shows that this shift to corporate self-regulation significantly reduces the supervisory role of the court. Grantham argues that the exercise of corporate power is now largely unaccountable, creating ‘a significant democratic deficit’. Russell Miller puts his account of reforming the anti-competition provision (s 46) of the *Australian Consumer Law* in the context of consumer protection reforms in Australia since the 1990s. He describes the difficult journey of the Harper Panel’s proposed reforms which negotiated ‘vigorous debate’ over two approaches to the same end, neither of which ‘could be said to be entirely right or entirely wrong’. John Passant discusses the role of taxation in addressing social inequality. He argues that taxation can ameliorate ‘the fundamental inequality between capital and labour’, and canvasses two possible tax reforms: a net wealth tax; and a minimum threshold, or ‘Buffett rule’, for individuals and companies. Passant makes the argument to direct policymakers towards measures that can ‘address growing inequality and the threat that poses to our democracy and economy’.

The next three chapters move to specific issues of employer regulation and home lending. Joellen Riley proposes a way of regulating the new, shared economy. Riley focuses on the current inadequacy of the protection of the rights, pay and conditions of workers in the new economy, and suggests that existing small business regulation in Australia offers models for regulating unconventional work arrangements. With similar attention to protecting workers’ pay and conditions, Tess Hardy examines the measures for holding ‘lead firms’ liable for employment contraventions in their supply chain, corporate group or franchise network. Drawing on existing models of third party liability, she reviews proposals for statutory measures to reconceptualise legal responsibility for employment contraventions.

Gill North notes the large proportion of household debt represented by residential property mortgage debt in Australia, and proposes three policy reforms that protect against possible future consumer losses and hardship should the housing market decline sharply.

This Part closes with two chapters addressing our understanding of corporate whistleblowers. Kath Hall and Heather Cork challenge two limiting assumptions about whistleblowing – that whistleblowers act alone, and that reporting involves a single disclosure – and propose definitional reforms to broaden the reach and protection of whistleblowing laws. Suzanne Le Mire and Christine Parker also promote a broader understanding of whistleblowing, focusing on lawyers and their potential as ‘gatekeepers for justice’. Le Mire and Parker propose a reexamination of lawyers’ ethical duties to enable lawyers to disclose information that they hold of corporate wrongdoing.

Part II: Criminal Law and Evidence

The first chapter in this Part, by Lorana Bartels, explores the need for reform in criminal law and critiques Australia’s ‘addiction to prison’. She posits a new future in which all public policy proposals must hold the promise of decreasing the imprisonment rate. She points to the recent increase in the incarceration rate, its cost, the unfairness of the over-incarceration of Indigenous people, and the fact that prison is not an effective crime reduction tool. Both victims and offenders could be better served, she argues, by reallocating resources away from prison. In the second chapter, Simon Bronitt reviews the past few decades’ practice in law reform commissions in the United Kingdom and Australia, especially in relation to criminal law. He asks whether, as in the past, our aspirations for criminal law reform should extend no further than the ‘liberal promise’ of a more ‘principled and codified’ criminal law. Next, Wendy Larcombe advocates a new approach to rape law, arguing that the law should better support the needs of sexual violence victims. Larcombe contends that, in spite of 40 years of law reform, the system does not provide accessible and effective resolutions for the vast majority of victims. She argues that trials for sexual offences should be heard by a judge alone, and that innovative and restorative justice alternatives to criminal prosecution should be provided to give victims of sexual assault more options. In another chapter that focuses on sexual assault cases, John Anderson argues that the dichotomy between tendency and context

evidence is false: relationship or context evidence must be presumed prejudicial and inadmissible unless the prosecution can show its probative value outweighs its prejudicial effect. Jonathan Clough takes a broader reform scope in his chapter which proposes improving the mechanisms for prosecuting transnational corporate crime. He argues that corporate criminal liability continues to evolve, and that Australia must make sure it has appropriate structures in place so that large transnational corporations can be effectively prosecuted.

Several chapters place the focus of reform on jury activity. Blake McKimmie examines the influence of stereotypes on jurors, and argues that changes should be made in the manner of presenting expert evidence and in the appearance and positioning of defendants in the courtroom. Diane Sivasubramaniam suggests that the potential divergence between the deliberative legal and the retributive community notions of justice may not be reduced by restorative justice and preventative detention reforms. She argues that the retributive impulse is a strong human response and must not be ignored in the process of implementing legal reforms. In another chapter that relates to jury decision-making, Helen Fraser reviews a case in which the jury listens to a covertly made recording of a conversation between police and the accused. In accord with standard practice, the jury read a transcript of the conversation written by a detective acting as an ad hoc expert. Fraser examines the recording and concludes that the transcript is inaccurate. Because the process of involving the police in making a transcript is flawed and invites injustice, Fraser advocates designing a system that will produce reliable transcripts. In the final chapter in this Part, Anne Wallace looks at criminal courtroom processes and finds that they are in transition toward a more efficient system that makes use of online resources and is more user-centric. She points to reforms that she sees leading the courts into the 21st century.

Part III: Environmental Law

Irene Watson begins this Part with the provocative proposition that ecocide of First Nation territories parallels the genocide committed against First Nation peoples. She rejects conventional law reform because of its unlawful colonial foundation associated with *terra nullius*, and argues for a re-emergence and acknowledgement of the ancient laws of the land which, she avers, would be truly mainstream. Virginia Marshall's chapter also addresses the impact of the postcolonial legacy on the

environmental interests of Indigenous peoples, with particular regard to water to overturn *aqua nullius*. She is critical of the characterisation of Indigenous peoples as a minority interest, and argues for a focus on international human rights principles as expressed in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which would more effectively give expression to the exercise and enjoyment of Indigenous communities' rights to water. In her chapter, Natalie Stoianoff describes Australia's slow progress towards recognising Indigenous ecological knowledge (IEK) in conserving biological diversity and managing natural resources. She reports on the development of an Indigenous governance framework for environmental management, the 2014 NSW Office of Environment and Heritage White Paper, *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management*.

Beginning with the idea that the earth's life support systems are experiencing profound and potentially devastating change, Jan McDonald takes on the task of reforming environmental law to make it more responsive. She identifies a reform agenda for environmental law, comprising techniques and tools for building in flexibility to environmental decisions and environmental law-making processes more generally. She argues that law reform must be part of a broader shift towards polycentric and adaptive governance that recognises system complexity.

Cameron Holley's chapter considers one of Australia's central environmental challenges: sustaining the supply of water. He considers a suite of reforms to improve upon past initiatives in the area. In the final chapter, Paul Martin, Amanda Kennedy and Jacqueline Williams provide one of several 'meta-reform' perspectives in this book. They examine the proliferation of laws on rural biodiversity and, finding past efforts wanting, suggest changes to the process of reform: future law-making should take a 'whole-of-landscape, socioeconomically realistic' approach.

Part IV: Private Law

The first group of chapters on private law exposes the perils of statutory law reform in areas traditionally governed by judge-made law. Darryn Jensen provides a simple illustration: a perceived flaw in the common law concerning receipt of misapplied trust assets was corrected by legislation in some states. But these 'piecemeal' reforms have proved to be problematic and redundant. Matthew Harding and Joachim Dietrich expose serious

problems that may arise from the interaction of legislation and common law in a federal system. Harding explains how the proliferation of statutory definitions of ‘charity’ has created complexity, inconsistency and, in some instances, rule of law concerns. Dietrich criticises the extraordinarily complex package of tort law, contract law and legislation concerning liability for personal injuries sustained during performance of a contract for recreational services. He illustrates his theme by reference to the differing tort defences under different regimes, the failure of legislatures to further the objective of a uniform national consumer law, and the uncertainty surrounding contractual exclusion of liability. Elise Bant and Jeannie Paterson consider the challenges of ‘meta-legislation’ such as the *Australian Consumer Law (ACL)*. Using the remedial provisions that respond to misleading conduct and unconscionable conduct, the authors consider how coherent development of the law can be achieved and how to ensure that the *ACL*’s density and complexity do not undermine its efficacy. They recommend, among other measures, soft law practice notes for consumers and decision-makers. Finally, in the first group of chapters, Robyn Carroll and Catherine Graville explain the potency of alternative remedies to damages for defamation, and evaluate the efficacy of alternative remedial schemes in the current uniform defamation laws. They argue for inclusion of a ‘reasonable apology’ requirement in an offer to make amends.

The second group of chapters uses private law theory to inform regulatory design. Simone Degeling and Kit Barker argue that corrective justice provides the most morally and ethically appropriate framework for reparative schemes to redress grave historical injustices. They make important recommendations for the improvement of existing reparation schemes, such as the scheme established to redress abuse within the Australian Defence Force, and for the design of new schemes, such as that proposed to redress institutional child sexual abuse. Prue Vines also focuses on corrective justice. She argues that the law of negligence for personal injury responds inadequately to the parties’ symbolic, emotional and monetary needs and that an apology may better meet the corrective justice objectives of tort law.

The third group of chapters identifies two areas where fundamental reform is required. Robyn Honey argues for a more nuanced understanding of capacity and consent in property and contract law. She proposes a set of reform principles that will avoid paternalism and appropriately promote autonomy. Ian Murray’s chapter concerns the point in time

at which a charity should be expected to produce a public benefit from currently held resources. He argues on theoretical and practical grounds that more attention should be paid by charities to intergenerational balance in accumulating or applying charity funds, and he spells out how this might be done.

Part V: Public Law

The chapters on public law offer 10 proposals, including blueprints for dramatic legal change. Initial chapters argue for meta-reforms: ways to reform the process of law reform itself. Graeme Orr's chapter takes on the vexed question of compulsory voting in constitutional referendums. Orr argues that, given the distinctive nature of constitutional law and reform, voting at constitutional referendums should be voluntary. Scott Stephenson's chapter also rethinks constitutional referendums. His solution to the problem of Australia's stalled process of constitutional change is the use of citizens' assemblies – randomly selected, rigorously informed and demographically representative bodies empowered to draft referendum questions. As dramatic as Orr and Stephenson's reforms would be, the next two meta-reforms arguably would be even more fundamental. Lael Weis compares the culture of constitutional reform in Australia to that of the United States, where a 'popular constitutional culture' sees many or even most Americans deliberate about the meanings and directions of their founding document. Weis advocates approaches to help 'cultivate' an Australian popular constitutional culture. Gabrielle Appleby and Anna Olijnyk in turn consider an important set of cases where the constitutionality of a legislative Bill is uncertain. Their proposed reforms aim to enhance parliamentary constitutional deliberations.

The first four chapters described share a common focus on deliberation – a dominant concern in academic studies of politics, and an emergent concern for public law scholars. Two more chapters also consider deliberation, in particular in relation to human rights. Dominique Dalla-Pozza's chapter assesses the Commonwealth's Parliamentary Joint Committee on Intelligence and Security, while Julie Debeljak's examines the first decade of judicial decisions – and legislative reactions – under the Victorian *Charter of Human Rights and Responsibilities*. Both models leave parliaments ultimately sovereign, yet both seek to increase the scrutiny of legislation against rights standards. Before recommending key reforms, each author recounts the recent histories of the respective rights models.

The next chapter, by Andrew Henderson and Kim Rubenstein, reflects some of the themes Debeljak raises. But Henderson and Rubenstein invert these themes by considering how courts can constitute an historical record of key Australian debates and events.

Three final chapters rethink particular subjects in public law. Andrew Kenyon's chapter charts expanding notions of free speech in jurisdictions including Germany. Kenyon lays out a case for speech interests to be understood not only in classical negative terms (i.e. anti-censorship), but also as a positive and collective interest requiring, for example, the airing of diverse points of view. Melissa Castan and Paula Gerber explore the profound personal and social significance of a seemingly innocuous document: the Australian birth certificate. Noting how the certificate's absence is both a consequence and a cause of social disadvantage (e.g. among immigrant and Indigenous communities), they suggest specific reforms. Daniel Stewart closes this Part by bringing to light problems in government secrecy laws. He considers law reforms that would better manage disclosure and privacy interests in relation, for instance, to immigration detention centres and public servants' uses of social media.

Part VI: Legal Practice and Legal Education

In this final Part of the book, six chapters are devoted to the reform of legal practice and three to legal education. The first three chapters address the perennially vexed issue of ethics in legal practice. The *Legal Profession Uniform Law (LPUL)* (so far enacted only in NSW and Victoria) represents an important step towards uniformity, but Vivien Holmes, Stephen Tang, Tony Foley and Margie Rowe argue that the *LPUL* adopts a retrograde stance in regard to ethics. They advocate a return to the proactive model of ethics management devised in NSW only a few years earlier. In evincing concern about the complicity of lawyers in the unethical conduct of their clients, Adrian Evans identifies numerous weak points in lawyer education and training. Rather than institutional reform, he argues for a heightened awareness on the part of individual practitioners. In contrast, Justine Rogers advocates that the ethical focus should be on the team, the typical organisational unit within firms. She recommends that attention be accorded to 'teamthink' in legal education, professional regulation and scholarship.

The next three chapters offer reformist perspectives on discrete aspects of legal practice. First, Bronwen Morgan, Joanne McNeill and Isobel Blomfield consider the legal ambiguity confronting sustainable economic initiatives in response to environmental challenges. As this type of entrepreneurialism falls between for-profit and not-for-profit models, Morgan et al recommend that attention be paid to creating a dedicated professional network for legal practitioners and service providers. Second, Mary Anne Noone addresses the challenges that arise when lawyers act as mediators, as required by courts and tribunals, because the lawyer then becomes both an officer of the court and third party neutral. Noone suggests that the tension be minimised by making parties aware of their rights, reporting systemic issues and placing a prohibition on immunity from liability. Third, Liz Curran articulates her concern that the voices of the marginalised are rarely heard in the law reform process. She argues that, with imagination and little cost, it is possible to empower marginalised people, a proposition she illustrates with examples.

The final trio of chapters is concerned with the reform of legal education. The first, by Craig Collins, draws attention to the Renaissance movement of Ramism that harnessed the power of printing, and to the textbook, which became central to legal education. As technological change is effecting the end of Ramism, Collins argues that less weight be paid to academic requirements and more to practical legal education. Paul Maharg addresses the complexity of the increasingly onerous regulation requirements of legal education, which are subject not only to mediation and intermediation, but also to the disruptive process of disintermediation. Maharg argues for a neutral space where regulators and others can meet and deliberate, a process likely to improve the quality of regulation. Finally, Margaret Thornton highlights the disjuncture between the standardised curriculum and the reality that most law graduates no longer enter traditional private practice. She argues that the Priestley 11 should cease to be mandatory, enabling law schools to develop diverse curricula that would better equip graduates for a range of destinations.

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