

Australian Law Reform Commission

40th Anniversary Celebration

Chief Justice Robert French AC
23 October 2015, Sydney

President Rosalind Croucher, Attorney-General Senator George Brandis, Sir Gerard Brennan, Chairman Emeritus Michael Kirby, my colleague Justice Susan Kiefel, your Honours, ladies and gentlemen. I thank the Australian Law Reform Commission for the invitation to participate in this important celebration of 40 years of its existence. I join with everybody here in congratulating the Commission on the immense body of work which it has done in that time and the positive effects of that work on the making of Australia's laws.

In the presence of foundation Commissioners and their successors, full-time and part-time, who have been closely involved in the work of the Commission over the years, it would be presumptuous of me to talk about its long and fruitful history. I do want to say something, however, about its ongoing value. The value of which I speak is not readily discerned by reference to the usual measures of assessing the performance and output of public agencies. Such measures have their place but have to be handled with care — some will reveal the price of everything that is done but the value of nothing — or as James Spigelman said, in the context of court performance measures — 'not everything that counts can be counted'.¹ The value of the Commission lies in its contribution to the democratic function of law-making in our society and the understanding of the law by practitioners, academics and the courts.

The primary function of the Commission is to respond to perceived needs for review of the law reflected in referrals from government. While the Executive Government may obtain advice from a variety of sources in relation to legislative change, the Commission

¹ JJ Spigelman, 'Measuring Court Performance' (2006) *Journal of Judicial Administration* 69, 70 — an observation dubiously attributed by some to Albert Einstein.

provides it with a well-established methodology of thorough research, wide-ranging consultation and reflective and interactive development of its reports and proposals.

Sir Owen Dixon once described what he called 'the method of a modern representative legislature and its pre-occupations' as an obstacle to 'scientific and philosophical reconstruction of the legal system ...'² Laws may be enacted which reflect policy responses to short-term political imperatives generated by the issues of the day. Laws may be enacted which seek to accommodate contending interests in a parliament in which government does not have a majority in both houses. Laws enacted under those circumstances may suffer from lack of coherence in purpose and expression. We can of course complain about that fact but we might as well complain about the weather. It is part of the price which we accept for a representative democracy. We are not, nor want to be, governed by philosopher kings however enlightened.

Nevertheless, we live in an age in which changing social and economic conditions and the astonishing rapidity with which new technologies displace those only a little less new, require government action particularly in the legislative field which is timely, responsive and adapted to meet those changes. To coin the word of the day we need to be 'agile' as a society. That requires, more than ever, clever law-making. The Australian Law Reform Commission in our time is an institution which has a record of achievement, corporate memory and the methodological tools to assist government and wider Australian society in ensuring that our laws keep up with, and ahead of, the wavefronts of change.

Given the experience and achievements of the Commission and its accumulated expertise it was hard to understand the rationale for the severe funding cuts applied to it a few years ago. The result of those cuts, as a Senate Committee³ reported, was a reduction to one full-time Commissioner, significant reductions to staff numbers and discontinuance of the educational outreach programs. There must necessarily have been a corresponding diminution in the number of references to which it could respond in the depth which is part of

² Sir Owen Dixon, 'Science and Judicial Proceedings' in Woinarski (ed) *Jesting Pilate* (William S Hein & Co Inc, 2nd ed, 1997) 11.

³ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Australian Law Reform Commission* (2011) 23–24.

its tradition. I have had the privilege of working as a part-time member of the Commission prior to my appointment as Chief Justice. I have had the opportunity to observe at close quarters its research and consultative processes at work. The reduction of its resourcing in 2011 seems to have been a case of government giving itself a little bit of a lobotomy. The Commission has adapted as it had to. The question is whether the needs of our time for high quality inputs in difficult areas of law reform are being met as best they could be. Appreciating, as I do, the fiscal constraints on government today, I hope that some opportunity to review the Commission's position will present itself in the not too distant future.

Speaking of value, I would like to acknowledge the value to the profession, the Academy and the courts of the very large deposit of published works by the Commission since its establishment in 1975 in the form of Issues Papers, Discussion Papers and Final Reports. Each of them offers a comprehensive overview of the relevant area of the law as at the date of publication. That overview enhances public understanding of the scope and purpose of laws made in the implementation of the report. Even when a report has not been implemented, its discussion of the relevant area of the law has always been a valuable resource.

We have no direct equivalent in Australia of the Restatements of the Law published from time to time by the American Law Institute. The reports of the Australian Law Reform Commission are perhaps the closest approach on the topics with which they deal. Testimony to their value in this regard is the long and continuing history of reference to the reports by courts throughout Australia.

In the High Court there have been many cases in which, when interpreting statutes, the Court has referred to the relevant Commission report. Examples in recent years include

— *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*,⁴ the Report on Foreign State Immunity,⁵ *Collective Investments: Other People's Money* which reported on the enactment of Ch 5(C) of the *Managed Investments Schemes Act 1998* (Cth),⁶ the oft cited *General Insolvency Inquiry*,⁷ the Report on *Insurance Contracts*⁸ and the massive report on *Managing Justice: A Review of the Federal Civil Justice System*.⁹

In a submission to the Senate, Legal and Constitutional Affairs Committee in 2010, the Federal Court acknowledged the great benefit it derived from the Commission's reports, research and analysis of complex areas of law within federal jurisdiction. It said:

More often than not, an ALRC Report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented ... In this way, the ALRC's reports have assisted the Court in the tasks of ascertaining the law, interpreting statute and developing the common law.¹⁰

I respectfully endorse those remarks.

⁴ Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999); see, eg, *Milne v The Queen* (2014) 252 CLR 149, 155 [7]–[8] and 165 [39] (French CJ, Hayne, Bell, Gageler and Keane JJ).

⁵ Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984); see, eg, *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, 245 [7] and 248 [18] (French CJ, Gummow, Hayne and Crennan JJ); 261 [65] (Heydon J).

⁶ Law Reform Commission, *Collective Investments: Other People's Money*, Report No 65 (1993); see, eg, *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129, 135–136 [10]–[11] (French CJ, Crennan, Kiefel and Bell JJ); *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 89 ALJR 24, 29 [14] (French CJ, Crennan, Kiefel and Bell JJ).

⁷ Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988); see, eg, *Lehman Brothers Holdings Inc v City of Swan* (2009) 240 CLR 509, 526 [49] (French CJ, Gummow, Hayne and Kiefel JJ).

⁸ Law Reform Commission, *Insurance Contracts*, Report No 20 (1982); see, eg, *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* (2009) 240 CLR 391, 398–400 [11]–[14] and 402 [20] (French CJ, Gummow and Crennan JJ).

⁹ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000); see, eg, *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 211 [92] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁰ Federal Court of Australia, Submission No 22 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Australian Law Reform Commission*, 2 February 2011, 2.

The Australian Law Reform Commission has had the benefit over the years of its existence of the involvement of some of Australia's finest lawyers, legal academics and judges as full-time and part-time Commissioners. It has had the involvement of committed staff and an intern program which has been able to attract fine young legal talents to assist in its work. A number of those, including the foundation Chairman Michael Kirby and foundation Commissioners, Sir Gerard Brennan, Gareth Evans and John Cain are with us tonight. We congratulate them on what they began. We congratulate those who came after them for what they continued. I hope that in the decades to come their successors and mine will assemble to mark the continuing vitality of the Commission and its contribution to our democracy. Thank you.