RE-IMAGINING LAW REFORM – MICHAEL KIRBY'S VISION, HUMAN RIGHTS AND THE AUSTRALIAN LAW REFORM COMMISSION IN THE 21ST CENTURY

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I INTRODUCTION

Vice-Chancellor Peter Lee, Deputy Vice-Chancellor Research Professor Geraldine Mackenzie, Dean Rocque Reynolds, Professor Bee Chen Goh and – the Hon Michael Kirby AC CMG, Chairman Emeritus of the Australian Law Reform Commission.

I would like to echo Bee Chen in her warm acknowledgment of the traditional custodians of the land and pay my respects to elders past and present, particularly as this evening's address takes place in NAIDOC week. I liked very much Bee Chen's inclusion of 'emerging Elders' in her opening words – a lovely sentiment.

Thank you for giving me the honour of presenting the Ninth annual Michael Kirby Lecture.

On Saturday evening I was dining with my parents, or rather every Saturday they dine with me and my patient and long-suffering husband, Professor John Croucher AM. On Saturdays I relieve my mother from now over 70 years of cooking dinner for my father. They are both 93 – and a half. Collectively, nearing a double century. They are both very acute of mind, and mostly of body. Except my mother is getting a little deaf. I was talking to my father, who has known Mr Kirby for a very long time (although my father is *decades* older than him). I mentioned that this week's highlights, and challenges, included the giving of the 'Michael Kirby Lecture'. My mother misheard this as the 'microsurgery lecture'. Entirely unruffled, though perhaps a little curious, she

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* President, Australian Law Commission. My Professorial Title belongs to Macquarie University, from which I am on leave for the duration of my appointment at the ALRC. While this lecture draws from my experience at the ALRC, many views expressed are personal ones.

assumed that it was perfectly in order for me to be giving a lecture on such matters! Anyway, we all laughed when I corrected her, gently, as one does with one's aged mother. They both send their very warm greetings to the eponymous subject of my presentation this evening.

In my presentation I will refer to Mr Kirby by the title he said that he would like to be called in his fine 'passing out parade' in the High Court in February 2009, when he returned to the state of ordinary citizen (or perhaps this designation is like doctors who become surgeons, and eschew their doctor title for the higher rank of 'Mr').

The story of my mother's mishearing of the title of this lecture reminded me of the legend surrounding the one that Mr Kirby presented in Zimbabwe – on breastfeeding. As mischievously told by the late Roddy Meagher, a fellow justice of the Court of Appeal of New South Wales, due to differences in accent and the vagaries of long-distance telephone communications, he suggested that Mr Kirby had misheard his topic, and that he was supposed to be delivering a presentation on 'press freedom'.[1] It was, in fact, an invited – and very learned – address on 'Bioethics, Breastmilk and Commonwealth Cooperation'.[2] The late Gordon Samuels, Court of Appeal colleague and later Governor of NSW, said to Kirby on his return, 'Kirby, is there *nothing* you will not speak about?'[3] What Michael Kirby has demonstrated, in his collected works, now in many, many volumes, is that there is nothing he is *unable* to speak about.

In my presentation this evening I will begin with Michael Kirby's vision for the Australian Law Reform Commission and speak about human rights and the ALRC's work. I then turn to the idea of 're-imagining' law reform – of seeing law reform through different lenses. So much has already been written about law reform commissions, particularly marking singular anniversaries,

1 Justice Meagher on Justice Kirby, 2 February 2004. See, <http://www michaelkirby.com.au/images/stories/speeches/2000s/vol53/2004/1912-Justice_Meagher_on_Justice_Kirby.pdf>.

2 In introducing the ABC's 'Science Show' in March 1983, which featured Michael Kirby's paper on the subject, Robin Williams said: 'You might be forgiven for wondering what a judge, even a law reforming judge such as Mr Justice Kirby, was doing at a conference on this topic. Well, the conference was organized jointly by the Commonwealth Secretariat, the World Health Organisation and UNICEF to examine the implementation of the WHO International Code on Marketing of Breast-milk Substitutes. The Commonwealth Secretariat in London arranged for Mr Justice Kirby to attend the Zimbabwe· meeting because of the experience of the Australian Law Reform Commission in preparing Australian legislation on human tissue transplants.' See, <http://www.michaelkirby.com.au/images/stories/speeches/1980s/vol11/1983/383_ABC_%28The_Science_Show%29___Bioethic_Breastmilk_and_Commonwealth_Co_Operation.pdf>.

3 This is recounted in Michael Kirby, 'Boring Speeches – The Ten Deadly Sins', World's Most Boring Lecture Competition, ANU, 6 October 2000: see, <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_anu htm>.

like 25th or 30th anniversaries.[4] And in the UK, tomorrow and Saturday,[5] they are marking the 50th of the Law Commission of England and Wales by an international conference in London. This year is the 40th anniversary of the Australian Law Reform Commission, hence I wanted to use this occasion, and the fact that Michael Kirby was the foundation Chairman, as the catalyst for the 're-imagining' I will do this evening – to 'look through the looking-glass' in different ways. I present this as a triptych, thus:

- Pebbles in a Pond
- A Mannered Dance
- *Mille Fleurs*

I will conclude with some reflections on the ALRC in the 21st century.

II Michael Kirby's Vision for the ALRC

Michael Kirby's life's work is threaded through with a deep and abiding commitment to human rights. He also has a deep understanding of people and the power of communication. He was a perfect fit as the foundation Chairman of the ALRC, or 'Law Reform Commission' as it was then called – no matter how serendipitous may have been the now-legendary meeting of the then 35 year old Michael, in the lift with then Attorney-General, Senator the Hon Lionel Murphy, and the champagne-laced discussion, that included Geoffrey Robertson, still with the accent of his youth, that cemented it.[6]

I am very privileged to be the current incumbent of the position, or Mr Kirby's 'successor-in-title' as he dubbed me.[7] The role is now as 'President', rather than 'Chairman', but its ethos and mission remain the same – and just about everything at the ALRC bears the imprint of Michael Kirby's vision.

4 For example, the book written to commemorate the ALRC's 30th anniversary, Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005); and Michael Tilbury, Simon NM Young and Ludwig Ng (eds) *Reforming Law Reform* (Hong Kong University Press, 2014). *Reforming Law Reform* originated from a conference on law reform organised by the Centre for Comparative and Public Law in the Faculty of Law of the University of Hong Kong, held on 17 September 2011, following the 30th anniversary of the Hong Kong Law Reform Commission in 2010. There is also an excellent collection of essays in *Windsor Yearbook of Access to Justice* (Faculty of Law, University of Windsor 2005) 23.

5 10–11 July 2015.

6 See, eg, Kirby's account of it in his speech at the 25th anniversary dinner for the ALRC, 'ALRC, Law Reform and Equal Justice under the Law', 19 May 2000. A large collection of Mr Kirby's speeches is found on his website: <http://www michaelkirby.com.au>. Geoffrey Robertson also recalls it: see, Ian Freckleton and Hugh Selby (eds) *Appealing to the Future* (Thomson Reuters, 2009) xxii–xxiii.

7 In a handwritten personal note in the front of his autobiography: Michael Kirby, *Michael Kirby – a private life* (Allen & Unwin, 2011).

In pride of place, hanging on the wall at the entrance to our offices, there is a photograph of the initial Commissioners. They were appointed by an instrument signed by the Governor General and Senator Murphy, dated 31 December 1974 – no office close-down between Christmas and New Year in those days.

In that photograph, seated in front, are Michael Kirby, on the cusp of 36 years of age, a bearded Gareth Evans, only 30 years old and then a Senior Lecturer at Melbourne Law School, and Associate Professor Gordon Hawkins, the late Sydney University criminologist, nude sunbather and star of 1960s daytime television.[8] They are sitting on rather elegant velvet-covered Victorian armchairs – Kirby's red, the others green. Behind them stand Gerard Brennan QC (as he then was), 46, (included, as Kirby commented, to 'add weight and gravitas' to the group),[9] the late Professor Alex Castles (41 years old) – legal historian par excellence, and John Cain, 43.

Mr Kirby was a dapper young man, in double-breasted pinstripe suit, white handkerchief tucked neatly in breast pocket, looking confidently at the camera. If you look more closely you see the well-scuffed soles of his shoes and, although, possibly unawares, displaying a little leg above his sock. (These days it would be photoshopped out!) There is a freshness, innocence even, commitment, confidence and optimism in the faces that are captured in the photograph. What an impressive line-up to begin the work of the newly constituted Commission!

What was the blueprint that Kirby imprinted on the Commission? While he had the model of the Law Commission of England and Wales as the forerunner and benchmark of the modern institutional law reform commission to refer to, and the influence of the great Lord Leslie Scarman,[10] Kirby had virtually a blank slate upon which to write: the 'power to do all things necessary or convenient to be done for or in connexion with the performance' of the ALRC.[11]

8 See the obituary written by Judge Greg Woods QC: <https://www.law.berkeley.edu/files/hawkins_obituary%281%29.pdf>.

9 An observation included in Michael Kirby's audiofile contribution to the ALRC's 40th anniversary timeline (described later): <http://www.michaelkirby.com.au/images/stories/speeches/2015/2755%20%20PRESENT%20AT%20THE%20CREATION%20OF%20THE%20ALRC.pdf>.

10 Described, eg, in Michael Kirby's Inaugural Scarman Lecture: Michael Kirby, 'Law reform and human rights – Scarman's great legacy' (2006) 26(4) *Legal Studies* 449–474. Julian Burnside QC described Scarman as 'one of his heroes': Julian Burnside, 'Final Thoughts' in Ian Freckleton and Hugh Selby (eds) *Appealing to the Future* (Thomson Reuters, 2009) 889.

11 *Law Reform Commission Act 1973* (Cth) s 8.

Kirby's 'brief' was set out in the first Act,[12] expressed in how the Commission was to perform its functions. It was a 'rights and liberties' focus:

> 7. **In the performance of its functions**, the Commission shall review laws to which this Act applies, and consider proposals, with a view to ensuring –
>
> (a) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and
>
> (b) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights.

This provision was the result of an amendment moved during the debates by then Shadow Attorney-General, Senator Ivor Greenwood QC – a number of 'significant amendments' moved by the Shadow Attorney and accepted, even welcomed, by Murphy.[13] It was also the *first* reference in an Australian statute to the International Covenant on Civil and Political Rights,[14] predating the establishment of what was to become the Australian Human Rights Commission by several years.[15] Writing in 1976, Kirby predicted that this obligation 'may in time become a provision of considerable importance'.[16]

The ALRC was born with an eye to the impact of law and law reform on personal rights and liberties. This brief has remained essentially the same today.[17] In speaking at the celebration of the first 25 years of the ALRC, Kirby remarked that '[i]nternational human rights law had at last reached Australia in a practical way'.[18]

12 *Law Reform Commission Act 1973* (Cth).

13 Michael Kirby, 'Human Rights: The Challenge for Law Reform', The University of Tasmania Turner Memorial Lecture, 14 October 1976, 17–18: <http://www.michaelkirby.com.au/images/stories/speeches/1970s/vol1/1975-1976/17-Uni_of_Tas_-_Defamation_and_the_Law,_Human_Rights_-_The_Challenge_for_Law_Reform.pdf>. Murray Wilcox, a former Commissioner and Chairman of the ALRC, noted that another demonstration of this bipartisan support was that a change of government did not lead to the dissolution of the ALRC, suggesting that the initial Attorney-General in the subsequent Fraser government, Robert Ellicott QC, had a key role in this: Murray Wilcox, 'The Law Reformer', in Ian Freckleton and Hugh Selby (eds), *Appealing to the Future* (Thomson Reuters, 2009) 639.

14 Kirby points to its origins in the principles adopted by the Australian Senate Regulations and Ordinances Committee, established in 1932: 'Human Rights: The Challenge for Law Reform', The University of Tasmania Turner Memorial Lectures, 14 October 1976, 17. Kirby noted the words of Senator Greenwood: Commonwealth of Australia, *Parliamentary Debates,* Senate, 6 December 1973, 2603.

15 The Human Rights and Equal Opportunity Commission was established in 1981. In 2008 it became the Australian Human Rights Commission.

16 Michael Kirby, 'Human Rights: The Challenge for Law Reform', The University of Tasmania Turner Memorial Lecture, 14 October 1976, 18.

17 *Australian Law Reform Commission Act 1996* (Cth) s 24. An addition from the original casting of the functions in legislative language is this provision, added in 2010: s 24(3). In formulating its recommendations, the Commission must have regard to any effect they might have on the costs of getting access to, and dispensing, justice.

18 Michael Kirby, 'ALRC, Law Reform and Equal Justice Under Law', Address to the ALRC's 25th

Kirby's approach to law reform in practice was, as he has said, 'significantly different from overseas commissions':

> We took our proposals to the general public to whom the law ultimately belongs. We used radio and television shamelessly. This was very difficult for a naturally shy person like me.
>
> Because our methodology from the start was distinctively Australian, our approach was congenial to a country of robust individualists.[19]

His objective was to provide, through the processes of consultation, an 'institutional voice' for those beyond 'the big end of town', particularly 'the poor and the powerless'.[20]

In the introduction to the large tome written to mark Kirby's retirement from the High Court in 2009, *Appealing to the Future – Michael Kirby and His Legacy*, Dr Ian Freckelton QC said that 'law reform Kirby-style was different'. It was 'more inclusive, more energetic and with a broader vision'.[21] This was Kirby's blueprint: to consult – take the ideas to the public, and ensure that all the public was included; and to develop recommendations for reform in accord with international human rights law.

III Human Rights and the ALRC

The ALRC is a *law* reform commission, but a focus on rights and liberties is not only embedded in our functions but also within the common law – and well before they became 'human rights'. In this part of my talk I want to reflect on where the ALRC fits in in this age of intense focus on the rule of law, the relationship between citizens and their government, a focus that is heightened by the fact this is the 800th anniversary of the sealing in 1215 of the first iteration of what has become known as the Magna Carta, or 'great charter'.[22]

First, a word about Magna Carta and rights as they are expressed in the common law. While Magna Carta has achieved somewhat iconic proportions,

Anniversary Dinner, Regent Hotel Sydney, Friday 19 May 2000: <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_alrc26may00 htm>.

19 Ibid.

20 Ibid.

21 Ian Freckleton and Hugh Selby (eds) *Appealing to the Future* (Thomson Reuters, 2009) 14.

22 The various iterations of the document are described by James Spigelman, 'Magna Carta in its Medieval Context', Banco Court, Supreme Court of NSW, 22 April 2015: <http://www.supremecourt.justice nsw.gov.au/Documents/spigelman_22042015.pdf>. See also, Paul Brand, 'Magna Carta and the Development of the Common Law', Academy of Law Patron's Address, Sydney, 18 May 2015: <http://www.academyoflaw.org.au/publication?id=17>.

and the reality of it is far more modest,[23] its symbolism is undeniable. Nicholas Cowdery AM QC, Chair of the Magna Carta Committee of the Rule of Law Institute of Australia, speaking at a special service at St James' Church Sydney on 14 June, said that the significance of the Magna Carta 'lies not so much in the text (or any versions of it) but in the principles behind the text – the values and concepts that support it, the idea of the Magna Carta itself'.[24]

The language of rights and liberties has been carried along with the 'idea' of Magna Carta over the centuries – and well before the adjective 'human' was added in the modern, post World War Two, context. It is not surprising that the Universal Declaration of Human Rights of 1948 was described, by Eleanor Roosevelt, as a 'declaration that may well become the international Magna Carta for all men everywhere'.[25] Many of the rights and liberties that are now enshrined in the conventions and covenants of the international community of nations may be seen as creatures of the common law evolving from Magna Carta. In a sense the international conventions captured, in a very formal way, the agreed set of fundamental freedoms and rights at the time – and in the wake of the horrors of the global cataclysm of the times.

The Hon James Spigelman AC QC has become somewhat of a Magna Carta rock star with excellent and erudite speeches on the subject this year.[26] Spigelman says that '[w]e can legitimately trace the strength of our tradition of the rule of law to this document'. And the support of liberties has developed in the wake of the demarcation between the great organs of state.[27] The Magna Carta, and its companion offspring, the Forest Charter, he said, 'stand in, and propagate, the tradition of organic legitimacy'.

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23 See, eg, the sobering article by the Hon Justice Patrick Keane AC: Patrick Keane, 'Magna Carta and beyond – the rule of law 800 years on', *Proctor* (June 2015) 22.

24 Nicholas Cowdery AM QC, 'Magna Carta – 800 years young', *Occasional Address*, St James' Church, 14 June 2015, 3. See also the observations of Lord Bingham, the former Senior Law Lord quoted by James Spigelman, 'The Rule of Law and Liberty', Centre for Independent Studies, 15 June 2015, 7. The address is found at: <http://www.cis.org.au/media-information/media-releases/article/5639-magna-carta-the-rule-of-law-and-liberty-address-by-james-spigelman>.

25 Eleanor Roosevelt, Address to the United Nations General Assembly on the adoption of the Universal Declaration of Human Rights 1948, delivered on 9 December 1948, Paris, France, cited by Cowdery, 'Magna Carta – 800 years young', above n 24, 4.

26 James Spigelman, 'Magna Carta in its Medieval Context', Address at Banco Court, Supreme Court of New South Wales, Sydney 22 April 2015. The address is found at: <http://www.supremecourt.justice nsw.gov.au/Documents/spigelman_22042015.pdf>; James Spigelman, 'The Rule of Law and Liberty', Centre for Independent Studies, 15 June 2015, 7. The address is found at: <http://www.cis.org.au/media-information/media-releases/article/5639-magna-carta-the-rule-of-law-and-liberty-address-by-james-spigelman>.

27 Spigelman says that 'The *Charter* has often been deployed in support of the development of liberties, but that deployment was, at best indirect. The liberties often associated with the *Magna Carta* were the product of the institutions of Parliament and the Courts, over the course of centuries': James Spigelman, 'The Rule of Law and Liberty', 2015, above n 24, 1.

> What we came to know as civil liberties or, in earlier centuries as the 'rights of Englishmen', were the practical manifestations of experience of the law over the centuries as manifest in judicial decisions and in legislation.[28]

Our common law, anchored as it is in English constitutional history, is redolent with the principles that were born of Magna Carta and its compact with the King. The protection of the 'rights of Englishmen' by the common law became embodied in principles of statutory interpretation. As the Hon Robert French, Chief Justice of the High Court remarked:

> many of the things we think of as basic rights and freedoms come from the common law and how the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms.[29]

But while intrusions upon rights should be minimised, the interpretation of legislation by Courts is something that occurs 'against the backdrop of the supremacy of Parliament':

> which can, by using clear words for which it can be held politically accountable, qualify or extinguish those rights and freedoms except to the extent that they may be protected by the Constitution.[30]

Whether the words of parliament *are* clear enough, is expressed in terms of the principle of legality – a rule of statutory interpretation. If Parliament 'squarely confronts' the issue of intrusion upon rights and the intention is clear and unambiguous, then the statute will be interpreted as having its desired effect.[31] In other words, subject to the *Constitution*, Parliament *can* modify or extinguish common law rights, but it must confront encroachment squarely, own it politically, and defend it in legislative terms unambiguously. And, I should add, suffer the political consequences: political accountability means you can get voted out.

There are other ways of protecting rights in law. Just because Australia does not, at the federal level, have some formal 'bill' or 'charter' of rights, does not mean there is no respect for rights. Indeed I would like to take as a given, that rights-mindedness informs much of the actions of people in our community, even though people differ in the answers they may give to the same questions.[32]

28 Ibid 7.

29 Chief Justice Robert French, 'The Common Law and the Protection of Human Rights', Address to the Anglo-Australian Lawyers Society, 4 September 2009, Sydney, 2.

30 Ibid.

31 See Lord Hoffmann's observations in *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

32 See, eg, Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346–1406.

This is not the occasion to argue for or against further entrenching into our constitutional structure a bill or charter of rights. This has been the subject of two excellent Kirby lectures already – by Pamela Tate SC and the Hon Margaret McMurdo AO.[33]

The idea of protecting rights from encroachment is also the centrepiece of the ALRC's work in this Magna Carta anniversary year. Hard on the heels of completing an inquiry into aspects of the *Native Title Act 1993* (Cth), we are in the final stages of an inquiry that looks at encroachments in Commonwealth laws on traditional rights, freedom and privileges, and whether such encroachments are justified.[34]

In the absence of a bill or charter of rights, justification for, and limitations upon, encroachments on rights takes place through what has been called 'political rights review' or 'legislative rights review' processes, in which the impact on rights is considered in multiple places.[35] For example, the Parliamentary Joint Committee on Human Rights, established in 2011, assesses the compatibility of proposed legislation against a range of international conventions, as part of the parliamentary scrutiny processes for proposed legislation;[36] and the Senate Scrutiny of Bills Committee, established in 1981, assesses legislative proposals against standards that are like those in the ALRC's own Act.[37]

33 Pamela Tate, 'Human Rights in Australia; what would a federal Charter of Rights look like?' (2009-10) 13 *Southern Cross University Law Review,* 1; Margaret McMurdo, 'An Australian Human Rights Act: quixotic impossible dream or inevitable natural progression?' (2009-10) 13 *Southern Cross University Law Review,* 37.

34 The Terms of Reference are included on the ALRC's website: <http://www.alrc.gov.au/inquiries/freedoms>.

35 Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7, 9. Hiebert refers to the 'multiple sites for non-judicial rights review (government, the public service, and parliament), which distinguish this model from the American-inspired approach that relies almost exclusively on judicial review for judgments about rights'.

36 There are multiple parliamentary committees that review legislation, and three committees have a particular role in considering whether proposed laws are compatible with basic rights: the Senate Standing Committee for the Scrutiny of Bills, the Senate Standing Committee on Regulations and Ordinances, and the Parliamentary Joint Committee on Human Rights – established in 2011. There is also the important work of the Parliamentary Joint Committee on Intelligence and Security and the Parliamentary Joint Committee on Law Enforcement.

37 Set out in Senate, *Standing Order 24* (15 July 2014).

The scrutiny processes also extend before and after the work of Parliament. The Attorney-General's Department, for example, plays an important role in providing advice about human rights law and often assists agencies to prepare statements of compatibility and explanatory memoranda.[38]

In terms of the 'post' review processes, the ALRC routinely considers rights and freedoms in our inquiries – and especially in our current inquiry. All our work takes place within an obligation to consider the impact on rights and liberties, with the international conventions sitting on our collective shoulders. A recent example is the inquiry I led on *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124, August 2014). We were asked to consider 'how maximising individual autonomy and independence could be modelled in Commonwealth laws'. A centrepiece of the reform recommendations was a set of National Decision-Making Principles and a Commonwealth decision-making model, reflecting the paradigm shift signalled in the United Nations *Convention of the Rights of Persons with Disabilities* (UNCRPD) to recognise people with disabilities as persons before the law and their right to make choices for themselves.

Graeme Innes AM, who was then Disability Discrimination Commissioner but wearing a second 'hat' as Part-time Commissioner for the Inquiry, described the report as 'an internationally groundbreaking examination of the implications of the UNCRPD for laws and legal frameworks that might disempower people with disability'.[39]

As part of the broader rights-review processes I should also mention the role of the Australian Human Rights Commission. The Commission, established in 1986, and its predecessor, the Human Rights and Equal Opportunity Commission, established in 1981, have as their express purpose, working

> for the progressive implementation of designated international conventions and declarations through representations to the Federal Parliament and the executive,

38 Valuable resources about human rights may be found on the Attorney-General's Department website: <www.ag.gov.au>. See also: Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011); Attorney-General's Department, 'Tool for Assessing Human Rights Compatibility' <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Toolforassessinghumanrightscompatibility.aspx>. In addition to these guides, agencies are encouraged to consult early and often with relevant areas of the Attorney-General's Department where rights encroachment issues arise. See, eg, *Drafting Direction No. 3.5 – Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers* [7], [54].

39 Commonwealth of Australia, Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws: ALRC Report', Media Release, 24 November 2014: <http://www.alrc.gov.au/news-media/equality-capacity-and-disability-alrc-report>. Graeme affectionately refers to the convention as the 'DISCO'.

> through other public awareness activities, and where appropriate through intervention in judicial proceedings.[40]

No less importantly, laws are commonly scrutinised by the public and in the press. So, there is a lot of 'justification' going on: questions being asked, challenges put. Rights-mindedness permeates the body politic. But this doesn't mean that Parliament necessarily gets it 'right' – the pragmatic is not necessarily 'pure' – this is where political accountability comes in – and the work of bodies like the ALRC. Our work this year is infused with consideration of rights in our very wonderfully wide Terms of Reference and also in our statutory mandate.

IV Reimagining Part One – Pebbles in a Pond

How do we know we are doing well? To justify our existence over 40 years we must be doing something 'good' (to paraphrase sister Maria in *The Sound of Music*).

'Implementation' data is one way – the darling of those who like KPIs. But it is not all about statistics. A lack of implementation, of itself, does not mean failure. It is not even a very good guide to performance.[41] (Although our 'numbers' are good: as of June 2014, over 88 per cent of ALRC reports had been substantially or partially implemented).[42]

My personal conviction, after nearly nine years at the ALRC, is that an assessment of the contribution that law reform work makes must be seen through another lens. It is like a pebble in a pond. There are ripples that run over the surface of the pond – the extending, echoing impact, long after the pebble has disappeared beneath the surface of the water.

The ripples are multiple and overlapping. Here are some …

A *Ripple one – the value of the reports*

Here one must necessarily have a long view. The assessment of the contribution must be seen in the light of legal history. Law reform publications – especially the final reports – provide an enormous contribution to legal

40 Ivan Shearer, 'The Relationship Between International Law and Domestic Law', in Brian Opeksin and Donald Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 55.

41 A sentiment echoed by Michael Tilbury in 'Why Law Reform Commissions?' (2005) 23 *Windsor Yearbook of Access to Justice* 313–341, 327.

42 Commonwealth of Australia, Australian Law Reform Commission, *ALRC Annual Report 2013–2014*, Report 125, 26–27.

history, through the mapping of law as at a particular moment in history. When I was working on my PhD, I found the reports of the UK Real Property Commissioners of the 1830s just the most wonderful resource. Each law reform commission report not only reviews the past, it also maps the present. In reviewing the submissions and consultations ALRC reports also provide a snapshot of opinion on the issues being considered – again providing a fabulous contribution to legal history, and increasingly locating that within its particular social context at a given time.

A good example is the inquiry undertaken by the ALRC into the recognition of Aboriginal Customary Laws, completed in 1986 – almost 30 years ago.[43] That was a mammoth nine-year inquiry, the ALRC's 31st report – running to over 1,000 pages. It remains one of the most-visited reports on the ALRC website – and, since 2010 when we started counting these things, visited nearly 200,000 times.[44] It is also the fourth most downloaded of all our reports – over 5,500 times, counting just our website alone.

This kind of interest, and especially in work such as the Customary Laws report, continuing now almost 30 years after the report was completed, signifies a dimension of importance of the ALRC's work and impact, even where specific recommendations may not yet find their way into specific legislative action. And, significantly, the reflections in that report were ones we returned to in the Native Title inquiry. The report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, was launched on 29 June this year.

It is not only law students who use ALRC reports for their university assignments (although there is enormous traffic of this kind). As Kirby observed in a contribution he wrote for the 30th anniversary of the ALRC:

> It is beyond question that courts and academic institutions are increasingly turning to law reform reports as a significant, intensive and accurate source of legal authority, principle and policy. In this way, even if unimplemented by the Parliament, a law reform report can influence the development of the law by the courts, and also by officials and other agencies.[45]

43 *Recognition of Aboriginal Customary Laws* (ALRC Report 31, 1986).

44 Specifically, it has been visited by 85,831 unique users 194,804 times. Two chapters of the Customary Laws Report also have the highest 'unique page views': 'Changing Policies Towards Aboriginal People' (Customary Laws, 1986) (128,435 upv); 'Impacts of Settlement on Aboriginal People' (Customary Laws, 1986) (77,681 upv).

45 Michael Kirby, 'Are We There Yet?', *The Promise of Law Reform* (Federation Press, 2005), 433–448, 439. See also the observations of my predecessor, Emeritus Professor David Weisbrot AM: 'Law Reform, Australian-Style', *Appealing to the Future* (Thomson Reuters, 2009) 607–637, 625.

In support of such observations, I note here the remarks of the Federal Court in 2010:

> The Court benefits greatly from the ALRC's reports, research and analysis of complex areas of law within federal jurisdiction. … 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.[46]

A recent example from Western Australia brought this home to me. It was the decision of Justice Mitchell in *Wilson v Ferguson* [2015] WASC 15. The case is a classic example of what has become known – sadly – as 'revenge porn', where private and sometimes explicit photographs and videos taken in the course of a romantic relationship are posted publicly on the internet after the relationship has broken down. The aggrieved party brought an action for breach of confidence seeking an injunction and 'damages'. (Mitchell J took issue with the last aspect of the pleadings – as he should – and read it as a claim for equitable compensation). The plaintiff succeeded: an injunction was granted; equitable compensation of just under $50,000 and costs were awarded. Notably, the compensation was expressed to be 'for the damage she has sustained in the form of significant embarrassment, anxiety and distress'.

In the ALRC's report, *Serious Invasions of Privacy in the Digital Era* (Report 123, June 2014), a chapter was dedicated to the equitable action for breach of confidence and we recommended as follows:

> **Recommendation 13–1** If a statutory cause of action for serious invasion of privacy is not enacted, appropriate federal, state, and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the plaintiff's emotional distress.

Given the nature of the law reform brief, which was, among other things, to design a statutory cause of action for serious invasions of privacy, we went with a legislative recommendation, but recognised the clear trajectory of the common law in that direction.

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46 The submissions are found at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/lawreformcommission/submissions>. The Federal Court's submission is Submission 22. In 2003 Kirby said that the 'willingness of contemporary judges' to use ALRC reports 'is a notable achievement': Michael Kirby, 'The ALRC – a winning formula' (2003) *Reform* 58–63: <http://www.austlii.edu.au/au/journals/ALRCRefJl/2003/11 html>.

In reading Mitchell J's decision I was greatly heartened as the learned judge's conclusions were entirely consistent with the analysis in the ALRC's report. Indeed, I wrote to him to this effect, to which he responded: 'I was aware of the ALRC report and found that it provided invaluable background reading when I was preparing my reasons for decision – a well researched and insightful analysis of the issues.' It is a good illustration of the impact of our work – a pebble in a pond.

As Kirby remarked, 'The process of implementation, like the ways of God, can be mysterious and unexpected'.[47]

B *Ripple two – the relationships*

The process itself has both an immediate, and a long-lasting impact – other ripples in the pond. The success of the consultation process is that it is *personal*. Commissioners personally lead the consultations with a wide range of stakeholders in each inquiry. Respectful relationships are established and built through the 12 months or so of an inquiry, and often continuing from inquiry to inquiry.

Building relationships is one way in which the reputation for independence is nurtured and protected. You have to have the confidence of stakeholders that their opinions carry weight, that they will be listened to and evaluated respectfully – with the outcomes not determined in advance. We 'start with questions, never answers', is what I say as a mantra in opening the conversation with those we wish to embrace in any new inquiry.

Respectful relationships with government and stakeholders across the spectrum of interests in any inquiry enables the ripples of effect to continue over the years.

Relationships are built not just with stakeholders, but also with other law reformers. Many come to visit, to learn by watching and being mentored in our processes – like our colleagues from Samoa and the Solomon Islands. On occasion we are enlisted to provide hands-on training, as for example in Papua New Guinea and Botswana (in both cases led by my predecessor, Emeritus Professor David Weisbrot AM). We have hosted many visits at the ALRC, like those from Vietnam, Thailand and China, wanting to know about our processes and practices. Last week we were visited by members of the Korean Crime Commission – South Korean – who were seeking to use our

47 Michael Kirby, 'Are we there yet?', above n 45, 439. This observation was made with particular reference to the report on the ALRC's *Human Tissue Transplants* report: Australian Law Reform Commission, *Human Tissue Transplants,* Report No 7 (1977).

experiences for their own review of laws to make them more robust against corruption.

In a presentation at the Alberta Law Reform Institute in June 2008, on 'Law Reform – Past, Present and Future', Mr Kirby referred to the camaraderie that developed among law reform agencies, and how the downsizing or abolition of one was 'like a death in the family', reminding each other commission of their 'vulnerability and mortality'.[48]

Through the up hills and down dales of our international and national colleagues, and vicissitudes of our own (mainly in the downwards direction in terms of scale and budget), we have just kept keeping on. ('Keep Calm and Carry on', together with my family motto of 'Fortitude', are deployed regularly.) And periodically we are called upon to defend our existence. As Kirby observed, wryly, 'No one owes a law reform agency a free lunch'.[49]

Here is where having built good relationships goes a long way.

In 2010 we were called into the trenches. The ALRC's budget was to be significantly reduced; the other two full-time Commissioners were not renewed. I was left as the sole full-time Commissioner – and President – of the ALRC. There were also to be significant changes in the governance structure and financial management to commence from 1 July 2011. Concerns about the impact of these changes led to an inquiry by the Senate Legal and Constitutional Affairs References Committee over the summer of 2010–2011, the Committee delivering its report in April 2011.[50] The Committee focused in particular on the role, governance arrangements and statutory responsibilities of the ALRC and 'the adequacy of its staffing and resources to meet its objectives'.

In my opening statement in giving evidence to the Committee on 11 February 2011, I drew upon analogy to convey the impact of the budget cuts ('savings' in government-speak):

> the image that kept returning was that of the Black Knight in the film, Monty Python and the Holy Grail. After he lost one arm defending his turf he said, 'Tis but a scratch!'; after the other one was lopped off, 'Just a flesh wound!'. After both his legs were also chopped off he still managed to say, defiantly, 'The Black

48 Michael Kirby, 'Law Reform – Past, Present and Future', Address to the Alberta Law Reform Institute, Monday 2 June 2008, 10. The address can be accessed here: <http://www hcourt.gov.au/assets/publications/speeches/formerjustices/kirbyj/kirbyj_2jun08.pdf>.

49 Ibid 11.

50 The report is on the Australian Parliamentary website: <www.aph.gov.au>.

> Knight Always triumphs!'. Ridiculous, but fitting. The reduction in budget to the ALRC makes us feel like that poor knight.[51]

What was heartening through that process was to see those who came to our defence, in making submissions to the Senate inquiry. Some were fellow law reform agencies: the New South Wales Law Reform Commission (the oldest institutional law reform body in Australia); the New Zealand Law Commission and the Northern Territory Law Reform Committee. Many were legal centres and NGOs, and representative bodies, such as the Law Council of Australia. Some were academics. The Federal Court also leapt to our defence, as did the Office of the Australian Information Commissioner and the Australian Academy of Law. The relationships we had built, and the reputation we had established, supported our case and the conclusion of the Committee of the importance of our work – and our existence.

C *Ripple three – the flame of ideas*

I would like to end this part of my 'pebbles in the pond re-imagining' with a rather aspirational conclusion. While implementation statistics tell one picture, other lenses of imagining give a wider and more enduring sense of impact. In a collection of essays published in 1983, Mr Kirby reflected that 'the role of the ALRC in promoting community debate and professional acceptance of the needs of reform may be a more lasting and pervasive contribution to law reform in Australia than any particular project'.[52] And in 2008, 25 years later, he expressed this as 'the flame of ideas' kept alight by permanent law reform bodies.

> The flame of law reform affirms a central concept of the rule of law itself: legal renewal. As I repeatedly saw in Cambodia in work I did there for the United Nations, one of the greatest causes of corruption in the world is the absence of regular machinery to modernise and change the law to accord with contemporary values and needs. Where there is no law reform, corruption grows up because it may be the only way of getting things done.[53]

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51 The opening remarks are included in the transcript of the hearing on 11 February 2011 and on the ALRC website: <http://www.alrc.gov.au/publications/alrc-brief-february-2011/senate-committee-inquiry-alrc>. The analogy was very effective. On subsequent appearances before the Senate the Senator who chaired the Committee observed that he 'could not get the Black Knight out of [his] head!'.

52 Michael Kirby, *Reform the Law – Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983), 19. Kirby noted however that, 'because public discussion about law reform may raise expectations of reform and the acceptance (in community, professional and administrative attitudes) of the necessity of change' this was a constraint on law reform – the seventh in his list: Ibid 19.

53 Michael Kirby, 'Law Reform – Past, Present and Future', Address to the Alberta Law Reform Institute, Monday 2 June 2008, 29–30.

In helping to keep the flame of ideas alight we have adopted new technologies to expand our modes of communication and our community reach. When Kirby was Chairman, he used cassette tapes to convey messages. We now use their contemporary equivalent, 'podcasts'.[54] We tweet. We offer 'ePubs'. We publish all submissions on our website. We use wikis – even using one to assist in building a catalogue of encroaching laws through crowd sourcing in the Freedoms inquiry. We have over 9,000 twitter followers and this year we were selected as a finalist in the Excellence in eGovernment awards – not bad for a small agency! We accompany all our reports with a short précis version, as a separate Summary Report.[55] Through a commitment to, and practice of, accessibility, we help to fan the flame.

V Reimagining Part Two – A Mannered Dance

Here I will turn the lens to the relationship with government. Respectful relationships involve communication with and remaining clearly at arm's length from government – including being seen to be non-political/non-partisan. A simple example is when I encountered a previous Attorney-General in passing at Canberra airport – a not uncommon occurrence. The then Attorney remarked about some people he thought should be on an Advisory Committee for an inquiry for which he had given us Terms of Reference. I thanked the Attorney, said I would welcome his suggestions, but the appointment to the Committee was for the ALRC (code: and, not for him).

The fact of being seen to be non-political was tested almost two decades ago in an event that triggered another specific inquiry.

On 29 September 1997, a major controversy broke as to whether Attorney-General Daryl Williams had suppressed a submission from the ALRC to a Parliamentary Committee regarding the Howard government's Wik amendments (its '10-Point-Plan') to the *Native Title Act*. The ALRC submission was highly critical of constitutional aspects of the draft legislation. Shadow Attorney-General, Senator Bolkus, alleged that the Attorney-General had sought to dissuade the ALRC from making a submission. In a doorstop interview at Parliament House that day, Senator Nick Bolkus said: 'It's quite

54 Such as the podcast on 3 March 2012 by Professor Terry Flew, Commissioner, on the recommendations made in the Classification Review's Final Report: <www.alrc.gov.au/news-media/2011-2012> at 9 October 2012; and the podcast I did on 17 December 2010 on Indigenous issues and consultation in the Family Violence Inquiry: <www.alrc.gov.au/news-media/family-violence/podcast-indigenous-issues-and-consultation-family-violence-inquiry> at 9 October 2012.

55 They have to satisfy one simple practical principle: that they will fit in a briefcase and be capable of being read on the plane between Sydney and Canberra: 'Defending Independence' (2014) 34(3) *Legal Studies* 515–535, 533. This was a review essay written as an extended book review of *Reforming Law Reform.*

apparent that the Federal Government is now at war with one of the most senior and respected of public servants in Australia, Alan Rose.' Alan Rose AO, a former Secretary of the Attorney-General's Department, was then President of the ALRC.

On 2 October 1997, Senator Bolkus referred the matter of possible improper interference to the Committee of Privileges.[56]

What had led up to this inquiry? On 3 July 1997, a form letter was sent from the Wik Task Force, seeking comments on from the ALRC on the draft Native Title Amendment Bill. This is the kind of request that comes regularly into my in-tray.[57] A month later, the ALRC provided a submission to Senator Minchin, Parliamentary Secretary to the Prime Minister, with a copy to the Department of Prime Minister and Cabinet. No copy was provided to the Attorney-General, the Hon Daryl Williams.[58]

The Attorney-General was, to coin a phrase, 'not amused'. He wrote to Alan Rose, pointing out the ALRC's functions under its Act, 'are confined to matters referred to it by the Attorney-General', and that he, as Attorney-General, should have been consulted before providing comments to Government 'on a matter which is unrelated to any current Reference on which the Commission is working'.[59]

Rose apologised to the Attorney-General for not providing a copy of the submission, but said that the ALRC's decision to make the submission was on the basis that many of the issues associated with native title have a 'real and continuing connection' to many of the matters dealt with in the ALRC's customary laws report.[60]

56 The Terms of Reference are set out in the Report: Parliament of Australia, Senate Standing Committee of Privileges, *Possible Improper Interference with a Potential Witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* (1997). See also, *Journals of the Senate*, 2 October 1997, 2611. The report can be accessed here: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/1996-99/report_73/~/link.aspx?_id=7FF471DF80414E4994F474EBAA930ED2&_z=z>.

57 For example, two days ago, on 7 July, I received a letter from the Secretary of the Legal and Constitutional Affairs References Committee, regarding an inquiry the Committee is conducting 'into the payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats'.

58 Parliament of Australia, Senate Standing Committee of Privileges, *Possible Improper Interference with a Potential Witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* (1997), [1.10].

59 Ibid [1.11].

60 Ibid [1.13].

Richard Ackland got onto it.[61] The Acting Deputy Secretary wrote a letter to the Editor.[62] Alan Moir did a cartoon. The phones and fax machines (the then primary means of communication) were running hot between Canberra and Sydney.

The Attorney-General's Department (through the Acting Deputy Secretary Richard Moss) expressed it simply, in asking if the ALRC 'had a death wish' – the continued existence of the ALRC, if it pressed on making a submission on 'such a controversial issue'.[63] Although Rose was invited to give oral evidence at a committee hearing,[64] the ALRC decided not to press ahead.[65]

The nub of the disagreement was a matter that went to the ALRC's independence.

The Committee concluded that the decision of the ALRC to withdraw from the native title inquiry was the ALRC's and was not 'induced', 'by force or threat, or by other improper means' and therefore no contempt was found. But the Committee considered that it was necessary for the Legal and Constitutional Legislation Committee to take a long hard look at the powers and functions of the ALRC.[66] This began in 2003, but petered out.[67]

Where independence is our guiding mantra, the relationship with government is necessarily a sensitive one for law reform bodies – as this episode confirms. It is a mannered dance.

If you overreach it, and lose the confidence of government as a result, then, as Michael Tilbury (a very experienced law reform commissioner) observed, a law reform commission 'is effectively functionless for the period that government is in power'.[68]

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61 *Sydney Morning Herald*, 5 December 1997.

62 Published 12 December 1997. See Parliament of Australia, Senate Standing Committee of Privileges, *Possible Improper Interference with a Potential Witness before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* (1997), [1.22].

63 Ibid [1.21].

64 Ibid [1.15]–[1.18].

65 Ibid [1.36].

66 Ibid [2.36].

67 Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission* (April 2011), [1.11]. The report can be accessed at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/lawreformcommission/report/index>.

68 Michael Tilbury, 'Why Law Reform Commissions?: a deconstruction and stakeholder analysis from an Australian perspective' (2005) 23 *Windsor Yearbook of Access to Justice* 339.

Ensuring there are 'no surprises' for the Attorney-General is a different concept entirely from taking direction, which is anathema to independence. As Martin Partington, former Law Commissioner and Special Consultant to the Law Commission of England and Wales, observed, independence 'does not mean that law reform bodies should work in isolation from government'.[69]

Having a regular, respectful and informative communication loop is good practice – and an eminently sensible policy. This is part of what Patricia Hughes, Executive Director of the Law Commission of Ontario and former Professor and Dean of Law, University of Calgary, Alberta, described as being 'nimble'.[70]

In England reforms introduced in 2010 formalised the relationship between the Lord Chancellor and the Law Commission, setting out how government departments and the Law Commission should work together 'to deliver law reform in the most effective way possible'.[71]

While the ALRC does not have a formal protocol, we maintain an active communication loop with the Attorney-General's Department and with the Attorney. And, after the Rose/Wik episode, the practice of the ALRC is to restrict commentary to matters that the ALRC has worked upon over the years (not just current inquiries), using the parliamentary inquiry process to draw to the attention of particular committees what our reports recommend, and perhaps where there are differences with our recommendations in the proposed legislation. So, for example, in June 2013, we made a submission to the then Independent National Security Legislation Monitor, Bret Walker SC, in relation to his review of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) and related legislation. Our submission referred to our previous work,[72] to recommendations that were substantially implemented, and the areas of consistency between our recommendations and the NSI Act as pointed out on the Attorney-General's Department website.

69 Michael Tilbury, Simon NM Young, and Ludwig Ng (eds) *Reforming Law Reform* (Hong Kong University Press, 2014) 84.

70 Ibid 103.

71 *Law Commission Act 2009* (UK) and see *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No 321, 29 March 2010 (HC 499): <http://lawcommission.justice.gov.uk/docs/Protocol_Lord_Chancellor_and_Law_Commission.pdf/>. The protocol came into force on 29 March 2010. The protocol covers the various stages of a law reform project: before a project commences – in determining the programme of law reform; at the outset of the project; during the currency of the project and after a project is completed: see chapters 4 and 5 of Michael Tilbury, Simon NM Young, and Ludwig Ng (eds) *Reforming Law Reform* (Hong Kong University Press: 2014) for good accounts.

72 Particularly the report: Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004).

But additional comment was confined to this observation, addressed to the key question Mr Walker had asked:

> However, the ALRC has no ongoing involvement with the operation of the NSI Act. Therefore, we have no comments to make on whether its provisions remain necessary, have been effective or should be amended in some way.

If we were given Terms of Reference which raised such questions, we would answer them – through the means of that inquiry.

In a presentation that Mr Kirby made in 2008 in Alberta, he said that one difficulty to the job of law reform was law reformers being 'constantly torn between getting too close to politicians and the media, in order to attract interest in, and action on their proposals. Or keeping too great a distance, in order to avoid seduction and so as to maintain product differentiation in the creation of reforming ideas'.[73]

It is a delicate line. But a vital one. A mannered dance.

Distrust is not helpful to independence.

VI Reimagining Part Three – Mille Fleurs

When I was reflecting upon how to mark the ALRC's 40th anniversary, I wanted to capture what I describe as the '*mille fleurs*' nature of the process. In another chapter of my life I studied and played a lot of early music, as a longtime member of the *Renaissance Players* of the University of Sydney. I loved the tapestries of the late Middle Ages and Early Renaissance, typified by the exquisite series housed in Paris at the Musée de Cluny, 'The Lady and the Unicorn'. There is another at The Cloisters in New York, 'The Hunt of the Unicorn'.[74]

A distinct feature of these tapestries is the thousands of tiny flowers and animals scattered all through the design. I imagine law reform as like the *mille fleurs* of those wonderful medieval tapestries. There are so many contributions of so many people, each a flower in the large design, integral to its overall power and beauty.[75]

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73 Michael Kirby, 'Law Reform – Past, Present and Future', Address to the Alberta Law Reform Institute, Monday 2 June 2008, 20. Referring to P North: 'Law Reform: Problems and Pitfalls' (1999) 33 *UBC Law Review* 37, 45.

74 A recreated medieval structure, incorporating parts from five European abbeys which were disassembled and shipped to New York City, it is a most intriguing place. Out of time and out of place. But it is quite magical.

75 The nearest contemporary analogy may be the digital images of, say, a face, but as the focus gets closer and closer a myriad of smaller scenes emerge.

I wanted to convey the nature of law reform other than through the now 126 reports that mark its institutional chapters, to reveal it as something far more organic and rich. And peopled.[76]

So we are creating a virtual interactive archive of the ALRC, to be launched in October when we formally celebrate our 40th birthday. It is a timeline which captures some of the *mille fleurs* of our history. Its beauty is that it is not finite, like a book, but a living, growing thing and infinitely extendable. It includes recorded reflections and greetings – 'voicecards' – from past Commissioners through the decades.

In reading through the vast library of contributions that Michael Kirby has made on the subject of law reform, I was struck by his sense of the same thing, although perhaps not through the eyes of an erstwhile medievalist. It was in his speech at the 25th anniversary. He focused on the people of the ALRC – from the team he assembled to the Secretaries of the Department. It is full of names with fond reflections. He remembers with particular affection the 'originals' in the photograph I mentioned, which, in his imagining, resembled a sextet – although it is a curiously constructed one.

> The violin – soaring temperamentally and making an awful lot of noise – was Gareth Evans … A soothing French horn was Gordon Hawkins, Professor of Criminology, always dependable. Silent when the other noise was going on. Yet with important solo pieces of his own. On the timpani was Alex Castles, doyen of Australian legal history. One was never quite sure what sound would come out. But the mercurial harmonies were usually brilliant. The oboe was John Cain, shortly to become Victorian Premier. He was constantly demanding that we get back to the main theme.

(As an oboist myself, I recognise this quality!)

> Then a young, talented barrister from Brisbane, Mr Gerard Brennan, lately appointed Queen's counsel, came in as the double bass. A strong, deep, powerful harmony was added to make up the sextet of the Foundation Commissioners.[77]

Kirby added that the Commission was also fortunate in the staff assembled in its first years. And fortunate in the Presidents and Commissioners that came after him. Concluding his musical metaphor, he said:

> A great orchestra was summoned forth. Its symphony is still heard in the land. It is unique. It is different. It is still playing to packed houses.

76 When I developed the idea for 'Retro', the publication to mark the 30th anniversary of Macquarie Law in 2005, I wanted to get away from the heaviness of institutional histories and produced a book that was based principally on the recollections and memories of alumni, like a collective 'album' of reminiscences.

77 Michael Kirby, 'ALRC, Law Reform and Equal Justice Under Law', Address to the ALRC's 25th Anniversary Dinner, Regent Hotel Sydney, Friday 19 May 2000.

(Perhaps a tendency to indulge oneself freely in the delightful use of metaphor is also a prerequisite for the Presidency of the Commission!)

VII Concluding Thoughts – The ALRC in the 21st Century

Why did the early Commission work so well? What lessons does this tell us on how to fare in the 21st century? Kirby reflected wryly on this in his voicecard contribution to our 40th anniversary timeline. Why did the Commission work 'like clockwork'?

> It was because we had wonderful employees, great Commissioners and, above all, an outstanding Chairman!

Kirby imbued the ALRC with a great sense of collegiality from the outset. Weisbrot described, as part of Kirby's 'legacy' in his leadership of the ALRC, 'an enduring institutional culture that places a premium on collegiality, staff development, and a capacity – indeed an enthusiasm – for hard work'.[78] Kirby referred to the 'generally democratic' structure, with the staff 'at every level' being regarded 'as part of the ALRC team'.[79] I refer to the team of legal officers and staff at the ALRC as like a team of 'elite athletes' and our process of writing (to continue and extend my fluvial metaphors) as one involving a pile of rough pebbles, tossed into a fast flowing river. After a process of tumbling in the stream – the process of reviewing, criticising and editing our own and each other's work – a pile of uniformly smooth and shaped pebbles emerge. The democratic nature of the process is also reflected in the way we credit participants. Have a look at any report and see the list of those who participated. From interns to Commissioners and to those who made submissions – all are acknowledged for their contributions to the work represented in the report.

One of the aspects of the ALRC that is central to its legitimacy and survival as an independent and effective law reform body is that it is generalist.[80] Its only specialism, if I can call it that, is in the process of law reform itself. Not being allied, or seen to be allied, with particular views on any given subject is an expression, both in fact and perception, of intellectual independence.[81] This is another aspect of being 'nimble', being able to take on board inquiries

78 David Weisbrot, 'Law Reform, Australian-Style' in Ian Freckleton and Hugh Selby (eds) *Appealing to the Future* (Thomson Reuters, 2009) 633.

79 Michael Kirby, 'The ALRC – a winning formula' (2003) 82 *Reform* 58.

80 An essential characteristic also identified by my predecessor, David Weisbrot, in the speech, 'What's the Value of a Full Time Standing Law Reform Commission?', at the 2002 Australian Law Reform Agencies Conference in Darwin.

81 Tilbury comments that 'specialist bodies usually have a more or less defined agenda that compromises their intellectual independence, even assuming their independence from government control': 'Why Law Reform Commissions?', above n 41, 338.

across the vast range of matters embraced by Commonwealth laws, and to lead projects that involve the complex federal interactions of Commonwealth and state and territory laws.[82]

That generalist capacity has also taken the ALRC way beyond projects that might be called 'black letter', and to undertake inquiries of a broadly social justice kind.[83] The expertise in subject areas is obtained as needed for each inquiry through the practice of appointing Advisory Committees, and sometimes Commissioners, full or part-time. Kirby initiated this practice, in the appointment of 'consultants'[84] – and it has proved a most enduring, effective and enriching aspect of the ALRC's mode of law reform process. Being nimble, through being generalist is part of the strength, and survival, of an independent law reform agency. Human Genetics, Copyright, Disability, Evidence, Client Legal Privilege, Secrecy provisions, Family Violence – we can dance nimbly over any inquiry that the Attorney-General and government of the day may seek to give us, and, if it comes to it, I daresay we *could* do an inquiry on microsurgery.

The ALRC in the 21st century has as much of a role now as it had at its birth. It has earned the respect in which it is held, both nationally and internationally. But it is not something that I, or my successors, can ever take for granted. We have a high reputation to maintain. We have demonstrated our independence. We must continue to demonstrate the right to keep it.

But there is a shadow …

We all have to be constantly vigilant against the threat of the ALRC's extinction. There is a danger of disappearance, either in law or in fact, that is always a shadow on the horizon for institutional law reform bodies. We *are* vulnerable. We *are* mortal.[85] The Law Reform Commission of Canada, for example, was established as a federal body, like the ALRC, in 1971. It was disbanded in 1993, and its successor, the Law Commission of Canada, although created by statute in 1997, did not have its funding renewed in 2006.[86] Closer to home, Western Australia's Law Reform Commission disappeared into that state's Attorney-General's department in 2013.

82 Examples include the Uniform Evidence Laws project and the first Family Violence reference.
83 Examples include, in recent years, the Family Violence, Age Barriers and Disability inquiries.
84 Michael Kirby, 'The ALRC – a winning formula' (2003) 82 *Reform* 58.
85 To pick up the passage quoted earlier from Michael Kirby, 'Law Reform – Past, Present and Future', Address to the Alberta Law Reform Institute, Monday 2 June 2008, 10.
86 Michael Tilbury, Simon NM Young, and Ludwig Ng (eds) *Reforming Law Reform*, (Hong Kong University Press, 2014), 92.

Just last year, in 2014, the National Commission of Audit, initiated by the Treasurer, included in its report a list of 'Principal bodies for rationalisation' – a word that sends shivers down the spine of law reformers world-wide. The list included bodies that were to be abolished, those to be merged and those that were to be consolidated into departments.[87] The ALRC appeared in that last category. Nothing has happened – so far.

But I would prefer a 'half-full' ending. In 2011 Lord Justice Munby, then Chairman of the Law Commission of England and Wales, concluded his Denning lecture in words that resonate in my own experiences at the ALRC.

> Some of what I have said may have sounded rather downbeat, even depressing. These things need to be said, if only so that Government may hear them. But I should not want you to go away downhearted on our behalf. The Law Commission has never been in finer shape. The morale and enthusiasm of our staff ride high. It is a privilege indeed to lead so dedicated and committed a team. We have survived the storm. The future holds great promise.[88]

This is a message that will be the hallmark of our 40th anniversary celebrations.

At the end of his autobiography, *Michael Kirby – a private life*, Mr Kirby ends with a somewhat J Alfred Prufrock lamentation,[89] in a series of observations prefaced with, 'if only ...'. I mention one: 'If only the inexorable ticking of the clock could be stopped and the beauty of the present could be kept forever'.[90] The clock cannot be stopped, nor even slowed – although we did add a second to it a couple of weeks ago – but we of the Australian Law Reform Commission can fill its seconds with a very busy present tense, conversation after conversation, inquiry after inquiry, report after report, honouring and doing justice to Michael Kirby's vision, and to our statutory charter to ensure that the law reform recommendations we make are consistent with Australia's international obligations and 'do not trespass unduly on personal rights and liberties' of its citizens. We must continue to keep the flame alight.

Thank you Bee Chen Goh again for giving me the honour of being able tonight to present the Ninth Michael Kirby Lecture. Mr Kirby, I doff my cap to you. Thank you all.

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87 National Commission of Audit, *Towards Responsible Government. The Report of the National Commission of Audit – Phase One* (2014), Annexure C. The report is at <http://www ncoa.gov.au/report/phase-one/index html> accessed 28 January 2015.

88 Lord Justice Munby, 'Shaping the Law – the Law Commission at the Crossroads', Denning Lecture for 2011, Inner Temple, 29 November 2011: <http://www.lawcom.gov.uk/wpcontent/uploads/2015/05/20111129_Denning_lecture_Lord_Justice_Munby.pdf>.

89 TS Eliot, 'The Love Song of J Alfred Prufrock', 1920.

90 Michael Kirby, *Michael Kirby – a private life* (Allen & Unwin, 2011) 192.

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