

## *Melbourne University Law Review Annual Dinner*

### **The Chief Justice and the Governor-General**

**Chief Justice Robert French**

**29 October 2009, Melbourne**

It would be something of an exaggeration to describe Law Reviews as the only drivers of intellectual discourse about law, justice and the legal system. In fact they have been rather harshly treated in the past in the United States and in Australia. Fred Rodell's famous denunciation "Goodbye to Law Reviews" was published in 1936 in the *Virginia Law Review*<sup>1</sup> and in 1999 in the *Australian Law Journal*<sup>2</sup>. His paper, bolstered in the Australian Law Journal by some like-minded sentiments from John Gava, included laments about bad writing, mediocrity and lack of humour. As to the last, he observed:<sup>3</sup>

The best way to get a laugh out of a law review is to take a couple of drinks and then read an article, any article, aloud. That can be really funny.

On the other hand a defence and some praise was offered by Justice Kirby in 2002 in his piece "Welcome to Law Reviews" published in this University's Law Review. He said:<sup>4</sup>

---

<sup>1</sup> F Rodell, "Goodbye to Law Review" (1936) 23 *Virginia Law Review* 38.

<sup>2</sup> F Rodell, "Goodbye to Law Reviews" (1999) 73 *Australian Law Journal* 593.

<sup>3</sup> F Rodell, "Goodbye to Law Reviews" (1999) 73 *Australian Law Journal* 593 at 594

<sup>4</sup> M Kirby, "Welcome to Law Reviews", (2002) 26 *Melbourne University Law Review* 1 at 11.

Law reviews can have a value that transcends even the work of the High Court of Australia. They must criticise, cajole and analyse the law. They must question received wisdom and current orthodoxy. Authors must remain free to follow their own star, wherever it may lead. A judge cannot always do this, for a judge is controlled by the *Constitution*, and often by legislation or binding judicial authority.

The discourse of legal scholarship is conducted at many levels. Indeed, even within Australia the number of generalist and specialist law journals, monographs, essay collections and the like is remarkable and has grown significantly in recent years. The *Constitutional Law and Policy Review* edited by the late Professor George Winterton demonstrated that high quality legal writing can even be found in a publication that looks like a newsletter.

Acknowledging the diversity of the outlets for legal writing, the best of the articles in the best of the University Law Reviews have been significant vehicles for the development of legal scholarship and in that connection the *Melbourne University Law Review* is an outstanding contributor. No doubt it is a matter of considerable satisfaction to a law student at this University to have the opportunity of participating in the selection and editing of articles submitted for publication. Tonight, you properly celebrate your *Review* and the participation of many of you in it. It is however not necessary to speak at length on its virtues to this audience. Having been given the freedom to choose my topic, I thought it might be of interest to some of you if I were to reflect a little upon the role of the Chief Justice in relation to the tendering of advice to the Governor-General.

Events surrounding the provision of judicial advice to the holders of vice-regal office have commonly been associated with a degree of public controversy. The level of controversy about the dismissal of the Whitlam Government by Sir John Kerr in 1975, following advice from former Chief Justice Barwick, was, to put it mildly, substantial. This is not the occasion to fan the embers of old passions by commenting

upon the rights and wrongs of decisions taken by the Governors-General and Chief Justices or earlier in Australia's history by Colonial or State Chief Justices advising Governors. Their decisions were shaped by the perspectives of their times. It is difficult at our remove to define a reliable framework for judgment about them. That does not prevent reflection upon history and upon the principles which might guide choices today.

Prior to Federation it was not uncommon for a colonial governor to seek advice from the Chief Justice of the Colony. An early example occurred in 1808 when Governor Bligh relied upon legal advice from convict attorney, George Crossley and Judge Advocate Richard Atkins, who was the Chief Judicial Officer of the Colony. It was the time of the "Rum Rebellion". The Court of Criminal Jurisdiction which was to try John Macarthur refused to sit with Atkins even though the relevant statute required that the Constitution of the Court include the Judge Advocate.<sup>5</sup> Atkins recommended to the Governor that the members of the Court be charged with treasonable practices. He argued that the conduct of the officers who were the other members of the Court "amounted to an unlawful usurpation of judicial power and was calculated and intended to incite an actual rebellion".<sup>6</sup> HV Evatt observed in his book *Rum Rebellion*:<sup>7</sup>

even from a strictly legal point of view, the result of this assistance was by no means unsatisfactory. The inference is that Macarthur was of the opinion, not that Atkins and Crossley were making a bad legal job of it, but that they were making too good a legal job of it.

Sir Francis Forbes the first Chief Justice of New South Wales from time to time gave advisory opinions to the Governor. It is perhaps not surprising that he felt free to

---

<sup>5</sup> 27 Geo 3 c 2.

<sup>6</sup> HV Evatt, *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (Angus & Robertson ed, 1938) at 212.

<sup>7</sup> HV Evatt, *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (Angus & Robertson ed, 1938) at 203.

do so. Not only was he Chief Justice, he was also a member of the Legislative Council and the Executive Council. He was also required by the *New South Wales Act* to certify that colonial legislation was not repugnant to English law.<sup>8</sup> During his term he provided Governor Darling with opinions on topics including the powers of the Governor<sup>9</sup>, the respective rights of convicts and their masters<sup>10</sup> and the competency of convicted persons whose sentences had expired or been remitted to be jurors in England.<sup>11</sup> When Governor Darling perceived himself to be under siege by a critical press, particularly the *Australian* and *Monitor* newspapers, he introduced restrictive laws into the Legislative Council. Forbes advised Darling that some of his proposed legislation was repugnant to English law.<sup>12</sup>

As Chief Justice of the Colony of Queensland, Sir Samuel Griffith gave advice to Queensland Governors on more than one occasion. In November 1893 he was asked to advise Governor Norman in relation to a dispute between the Governor and the Administrator of British New Guinea, one William MacGregor. The dispute concerned MacGregor's term of office. Griffith gave advice to both men and urged compromise. As a result, MacGregor who had wanted to resign his administration, returned to the position for a second term.<sup>13</sup>

---

<sup>8</sup> 4 Geo 4 c 96, s 29.

<sup>9</sup> Enclosures in Darling to Bathurst, 15 December 1826 in *Historical Records of Australia*, Series 1, Vol 12 at 755-757.

<sup>10</sup> Enclosures in Darling to Bathurst, 8 November 1827 in *Historical Records of Australia*, Series 1, Vol 13 at 607-612.

<sup>11</sup> A Tainted Jurors' Opinion (1833); *Sydney Herald* 12 August 1833.

<sup>12</sup> Enclosures in Darling to Bathurst, 8 May 1827 in *Historical Records of Australia*, Series 1 Vol 13 at 282-285. These "opinions" are also available online: B Kercher, *Decisions of the Superior Courts of New South Wales, 1788-1899* [www.law.mq.edu.au/scnsw/](http://www.law.mq.edu.au/scnsw/).

<sup>13</sup> See R Joyce, *Samuel Walker Griffith* (1984) at 249.

Professor Geoffrey Sawer writing in 1977 referred to the established tradition of colonial and state Chief Justices giving advice to their Governors. He said:<sup>14</sup>

The Chief Justices of State and previously colonial Supreme Courts have always been regarded as proper sources for advice to State Governors, as Sir Samuel well knew from his previous experience as Chief Justice of Queensland.

Sawer made the point, however, that State Chief Justices had always been Lieutenant-Governors and often Acting Governors and had close social relations with the Governors. Moreover the occasions for constitutional adjudication under State Constitutions in State Supreme Courts had been infrequent. Nevertheless, and not surprisingly, the practice of the Colonies and the States which they became spilt over into the new Commonwealth of Australia.

Don Markwell, in an interesting article published in the *Public Law Review* in 1999<sup>15</sup>, cited a number of cases in which Governors-General had, during the first two decades of the Federation, consulted with both the Chief Justice of the High Court Sir Samuel Griffith and Sir Edmund Barton. It is useful to refer to several of those cases here.

In August 1904, the first Federal Labor government was unable to secure the passage of its Arbitration Bill through the House of Representatives. Prime Minister Watson asked for a dissolution of the House, but the Governor-General, Lord Northcote, refused. Earlier that year Griffith had predicted that Watson would be defeated and had evidently discussed that likelihood with the Governor-General. On the day that the Government was defeated Northcote requested that Griffith come and see him. Griffith

---

<sup>14</sup> G Sawer, *Federation Under Strain: Australia 1972-175* (1977) at 157.

<sup>15</sup> D Markwell, "Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development" (1999) 10 *Public law Review* 280.

recorded in his papers that Northcote "consulted me about the political position".<sup>16</sup> In 1909, Griffith also advised Governor-General Dudley in relation to the request of Prime Minister Andrew Fisher for a dissolution following his defeat in the House of Representatives. Griffith recorded in his diary of 31 May 1909 that he had lunch with Lord Dudley and "Wrote Notes for him re proposed dissolution".<sup>17</sup>

In 1914, the Cook Liberal government requested a double dissolution from the new Governor-General, Sir Ronald Munro Ferguson. Munro Ferguson's immediate predecessor, Lord Denman, had given him a written briefing about how he might seek assistance in dealing with the anticipated request for a double dissolution. Denman wrote:<sup>18</sup>

I suppose Griffith and Barton are the most reliable authorities, should you want advice. Isaacs is a judge who I believe is thought well of by the Labour party (it is sad how everyone in this country, even the judges, are supposed to have partizan leanings), but perhaps Griffith and Barton might hardly like a third opinion being sought.

Denman also advised his successor that Professor Harrison Moore, was considered both able and impartial and that his opinion might be worth asking privately.

When Cook sought a double dissolution from the new Governor-General, the Governor-General asked whether he could consult the Chief Justice. Cook had no difficulty with that notion and the Governor-General saw the Chief Justice on the

---

<sup>16</sup> *Griffith papers*, ML MSS 363/44 fol 92, Mitchell Library, Sydney cited in D Markwell, "Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development" (1999) 10 *Public Law Review* 280 at 283.

<sup>17</sup> MS Q197, Griffith diary entry for 30/5/1909, Dixson Library, Sydney cited in D Markwell, "Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development" (1999) 10 *Public Law Review* 280 at 284.

<sup>18</sup> *Novar papers*, MS 696 fol 7399, cited in D Markwell, "Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development" (1999) 10 *Public Law Review* 280 at 284.

following day. Griffith evidently told him that he had full discretionary power to decide for or against a double dissolution independently of the advice from his Ministers. The government argued that the Governor-General was bound to accept the Prime Minister's advice. The Governor-General did not agree with that proposition. Nevertheless he granted the double dissolution because there was no alternative government which could muster a majority.<sup>19</sup> At the request of the Governor-General, Griffith later reduced his advice to writing. The Chief Justice also advised the Governor-General on how to deal with Fisher's resignation as Prime Minister in 1915.

In 1916, when the issue of conscription arose in relation to the First World War, the Governor-General Munro Ferguson apparently received advice from the Chief Justice that, in his opinion, the government had no power to conscript for overseas service. Markwell set out in his article the text of a striking letter written by Sir Samuel Griffith to the Governor-General on 19 May 1916:<sup>20</sup>

I have today ascertained that the question of the validity of some of the War regulations is about to be brought before the High Court. It would be a public calamity if the Court were compelled to pull down the whole fabric.

Under the circumstances, and as Parliament is sitting, I think it is consistent with my duty to the Sovereign to suggest to you that you should invite the attention of Ministers to the danger, for there is no doubt that the extent of the powers conferred by existing legislation is open to much question; which can only be solved by Parliament or the Court.

Any help I can give you in planning any necessary legislation is, as I told Mr Hughes before he left for England, at the service of the Government.

---

<sup>19</sup> D Markwell, "Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development" (1999) 10 *Public Law Review* 280 at 284-285

<sup>20</sup> *Novar papers*, MS 696 fols 3739-3741, National Library Canberra cited in D Markwell, "Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development" (1999) 10 *Public Law Review* 280 at 289.

Sir Samuel's diary subsequently recorded that he lunched at Government House with the Acting Prime Minister, Senator Pearce, and discussed the War Precautions Bill.<sup>21</sup>

There are a number of other examples cited in the Markwell paper about consultations with Griffith and Barton between 1915 and 1919.

The evidence of consultations between the Governor-General and Chief Justice of the High Court after the first two decades of the Federation, is limited.

There were a number of instances in which a State Governor received advice from the Chief Justice of his State. In 1922, the Governor of Queensland, Sir Mathew Nathan, was asked by the Premier Edward Theodore to assent, as a matter of urgency, to a Bill which would authorise voting by proxy in the Legislative Assembly. The Opposition had refused to provide pairs for government members absent from the Assembly because of illness. The Government had "wheeled" its sick members into the Assembly and pushed through a Bill which would authorise voting by proxy.<sup>22</sup> The Bill was carried after 23 divisions on the Speaker's casting vote. When it was presented to the Governor he told the Premier that he did not like the measure as it was designed solely to keep the government in office. He asked the Premier if he could obtain the advice of Chief Justice McCawley and the Premier agreed. After having been advised by the Chief Justice and also by the Attorney-General, the Solicitor-General and leading barristers who had been consulted by the government, the Governor assented to the Bill.<sup>23</sup>

Events which led to the dismissal of the Lang Government in New South Wales in 1932 were preceded by communication between the Governor, Sir Philip Game, and

<sup>21</sup> D Markwell, "Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development" (1999) 10 *Public Law Review* 280 at 289.

<sup>22</sup> See N Cain, "Theodore, Edward (1884-1950)" *Australian Dictionary of Biography*, Vol 12 197 at 198.

<sup>23</sup> A Morrison, "How Australian Governors Get their Advice", *Sydney Morning Herald*, 24 March. 1983 at 6.

Chief Justice Philip Street. Lang had issued a circular instructing public servants not to pay money into the Federal Treasury as required by law. In Game's opinion this was illegal. Lang refused to withdraw the circular and the Governor dismissed him on 13 May 1932. There were close communications between Chief Justice Philip Street and the Governor in the days leading up to the dismissal. In a letter written by Lady Game to her mother on 15 May 1932, she said that the Governor and the Chief Justice had spent the night before Lang was dismissed discussing whether the Governor could refuse assent to the Mortgages Taxation Bill. They had formed the view that assent could not be refused.

Not long before he died, Lang was interviewed by Andrew Morrison who reported that Lang blamed Street for Game's refusal to accept his advice and spoke of "our enemies led by the Chief Justice of New South Wales...". Morrison wrote:<sup>24</sup>

This consultation was frequent and extensive and was without the permission of the Cabinet, although it was, apparently, suspected by Lang. It is, however, clear that Game's final decision was his own. As he stated in his telegram to the Secretary of State of April 23, 1932: "I presume – and the Chief Justice concurs in this view – that I have no other responsible adviser and that I must decide the question of illegibility for myself in the end". (sic)

In 1952, Sir Dallas Brooks the Governor of Victoria, took advice from the Chief Justice of Victoria and the Chief Justice of the High Court, Sir Owen Dixon. The question was whether he should grant a dissolution requested by Mr Hollway, whom he had recently commissioned as Premier following the refusal of supply to former Premier McDonald. Governor Brooks said:<sup>25</sup>

---

<sup>24</sup> A Morrison, "How Australian Governors Get their Advice" *Sydney Morning Herald*, 24 March 1983 at 6.

<sup>25</sup> See J B Paul, "The Dismissal: History Justifies Barwick's Advice" (March 1983) *The Bulletin* at 58; on Dixon's involvement see also P Ayres, *Owen Dixon* (2003) at 235-238, 249.

... I felt it advisable to seek the advice of the Chief Justice of the Supreme Court of Victoria, Lieutenant-General the Honorable Sir Edmund Herring. After discussing the matter with Sir Edmund Herring and hearing his views, I felt it wise also to seek the advice of the Chief Justice of the High Court of Australia, the Right Honorable Sir Owen Dixon. Having informed Sir Owen Dixon of what passed between myself and the four leaders of the respective parties, I had the advantage of hearing the view of Sir Owen Dixon expressed independently of that of Sir Edmund Herring. Both Chief Justices expressed the same view; namely, that I ought not to grant a dissolution to Mr Hollway.

When Sir Garfield Barwick was Chief Justice, Lord Casey as Governor-General sought his advice following the disappearance of Prime Minister Harold Holt. It appears that Lord Casey asked Sir Garfield whether he should immediately appoint an Acting Prime Minister or wait for further news about Holt. He also asked Sir Garfield whether he should appoint the Deputy Prime Minister, Mr McEwen, who was the leader of what was then the Country Party, or wait until the Liberal Party elected its own leader. Barwick records his advice that an Acting Prime Minister should be appointed immediately and that it should be John McEwen on condition that he resign when the Liberal Party had elected a leader.<sup>26</sup>

It is unnecessary to recount in detail the events of 1975. It suffices to say that the Whitlam Labor Government had a majority in the House of Representatives, but not in the Senate. The Senate refused supply until the government agreed to "submit itself to the judgment of the people". On the morning of 10 November 1975, at the request of the Governor-General, Sir Garfield Barwick called upon him at Admiralty House in Sydney. The Governor-General told him that he had decided to terminate the ministry's commission and to appoint a caretaker Prime Minister who could obtain supply. According to Barwick's account of it, the Governor-General asked him if what he proposed to do was within his constitutional power given the circumstances then prevailing. In the book *A Radical Tory*, Barwick explained what then happened:<sup>27</sup>

---

<sup>26</sup> G Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (1995) at 290.

<sup>27</sup> G Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (1995) at 291.

I responded to a request by the Governor-General for an answer to a question he asked. It was a legal question – not a political question – and its answer did not involve the expression of any political opinion, though of course Sir John's action in withdrawing the ministry's commission was likely to have, and did in fact have, political consequences.

Having heard his question and having decided to give the Governor-General an answer to his question, I knew of instances in which a Chief Justice and other judges of the High Court had given legal advice personally to a Governor-General. I knew also that the Chief Justice of the High Court had on an occasion given such advice to a State governor.

...

I was satisfied that what I was asked did not involve a justiciable question; no court would interfere with the exercise of the Governor-General's discretion to choose or dismiss a ministry. In the case of his choice, the Parliament alone can approve or disapprove it. In the case of a dismissal it is the electorate which will decide whether or not the dismissed ministry will or will not be returned to office. What the Governor-General proposed to do was to dismiss a ministry of which the Parliament, that is to say, the whole Parliament, did not approve. That was not a matter in which any court could interfere.

The Chief Justice then wrote a letter to the Governor-General and concluded with the words:<sup>28</sup>

Accordingly, my opinion is that, if Your Excellency is satisfied in the current situation that the present government is unable to secure supply, the course upon which Your Excellency has determined is consistent with your constitutional authority and duty.

The rights and wrongs of Sir John Kerr's decision, the merits of Sir Garfield Barwick's advice and the propriety of furnishing it with or without the consent of the Prime Minister, have been much debated. Much of that debate, particularly with

<sup>28</sup>

G Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (1995) at 292.

reference to the position of the Chief Justice, appears to have been focussed on historical precedent.

In considering whether it would be appropriate today for a Chief Justice to provide legal advice to the Governor-General, it is necessary to consider the constitutional position of the holder of that office. That position is accorded little exposition in the *Constitution* itself. It is mentioned in s 71, which provides:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

The terms and conditions of appointment and removal of Justices of the High Court are set out in s 72. There is no distinction drawn between the Chief Justice and the other Justices of the High Court in that respect. Section 71 is the only provision of the *Constitution* in which the Chief Justice is mentioned.<sup>29</sup>

The function of the Chief Justice as a justice of the High Court is to exercise and participate in the exercise of the judicial power of the Commonwealth and jointly, with the other justices, in the management of the Court. There is nothing in the *Constitution* or the *Judiciary Act 1903 (Cth)* or the *High Court of Australia Act 1979 (Cth)* to support the proposition that it is an incident of the office of Chief Justice that he or she can be called upon to provide independent legal advice to the Governor-General relating to the discharge by the Governor-General of his or her powers.

Such advice, if provided, would have no constitutional standing to distinguish it from legal advice received from a senior barrister or a constitutional law expert, or a retired Chief Justice of the High Court or any other court. And it is difficult to see any

---

<sup>29</sup>

*Judiciary Act 1903 (Cth)* and *High Court of Australia Act 1979 (Cth)*

basis upon which there could be erected a constitutional convention that would entitle a Governor-General to seek such advice, with or without the consent of the Prime Minister. Undoubtedly there have been historical precedents. But the nature and circumstances of those precedents are not such as to provide any sound foundation for the existence of a convention. So far as the precedents relate to Colonial and State Chief Justices they were located in a different constitutional framework and a different relationship between the Chief Justice and the Colonial or State Governor. They did not occur within a Colonial or State constitutional framework mandating separation of judicial and executive power. The early examples of advice tendered by Sir Samuel Griffith and Sir Edmond Barton may be seen against the background of their pre-federation experience. The contemporary understanding of separation of powers and the nature of the judicial power under Chapter III of the *Constitution* was not developed to the extent that it is today. And the concept of justiciability in relation to the exercise of gubernatorial powers under a written Constitution had not been the subject of much debate.

This is not an occasion to theorise upon the limits of the justiciability of the acts of the Governor-General, whether in the exercise of reserve powers or otherwise. It is sufficient to say, that even the most confident judgment that a matter upon which advice is sought is not justiciable or unlikely to come before the court may be confounded by events. And even if a judgment about justiciability were proved correct, that vindication might come only after the question of justiciability had been agitated in a challenge in the Court to the exercise of vice regal power or things done in reliance upon its exercise.

It is unnecessary for present purposes to expound further upon matters of principle. The life of the law as experience rather than logic always suggests the exercise of caution before taking an absolute position on anything. However, it is difficult to conceive of circumstances today in which it would be necessary or appropriate for the Chief Justice to provide legal advice to the Governor-General on any course of action being contemplated by the holder of that office, whether such advice were tendered with the prior consent of the government of the day or otherwise. If, in

some constitutional crisis requiring consideration of the possible exercise of reserve powers, the Governor-General felt the need to seek independent legal advice, there are plainly sources other than the Chief Justice to whom he or she could resort. Indeed, it might be that some agreed mechanism could be established against the rare event that it is thought desirable to have access to independent counsel. A small group of independent experts, perhaps even including one or more retired Justices of the High Court, could be established for the purpose.

In a eulogy in honour of Sir Garfield Barwick, delivered on 5 August 1997 and recorded in Volume 187 of the Commonwealth Law Reports, Sir Gerard Brennan, then Chief Justice, referred to Sir Garfield's tendering of advice to Sir John Kerr and said of that event:

It was, and remains, a controversial matter but, if only on that account, will not happen again.

I agree with that sentiment.