

AUSTRALIAN LAW REFORM COMMISSION

DINNER SYDNEY 20 MAY 1999

TRIBUTE TO ALAN ROSE AO

RETIRING PRESIDENT OF THE ALRC

The Hon Justice Michael Kirby AC CMG

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A NOTABLE TRIBUTE

I had lunch today with my old judicial colleague, Justice R P Meagher. I do this from time to time to keep in touch with radical opinion. Contrary to some professional expectations, Justice Meagher and I are the firmest of friends. He is a connoisseur of great art. He therefore enjoyed the cartoons which I used to share with him when we sat together on the Court of Appeal of New South Wales. I always portrayed one unnamed colleague of those days (not myself and certainly not Justice Meagher) with a halo around his head to signify his saintly virtues. Justice Meagher promises to exhibit my cartoons in due course when I am dead and beyond a

* Foundation Chairman of the Australian Law Reform Commission (1975-84). Justice of the High Court of Australia.

defamation writ. Alas the cartoonist's muse dried up on my translation to the High Court.

I told him of this occasion. I asked whether he had any friendly greeting which he would wish to pass on to the assembled law reformers. Tell them, he said as he reached for an olive, that they have already done far too much reform. Tell them that there is nothing left to reform. And tell that Alan Rose that he should go at once to a lush tropical island so that he is never tempted to return to the work of law reform in Australia.

I know that Alan Rose will regard this as the ultimate accolade. Could there be a more handsome tribute to mark his retirement?

EARLY DAYS

Alan Rose is the fifth head of the Commission. I was the Foundation Chairman (as the office was then called) and served between 1975 and 1984. I was succeeded by the Honourable Xavier Connor AO, former judge of the Federal Court of Australia and of the Supreme Court of the Australian Capital Territory. The Honourable Murray Wilcox succeeded to hold the fort for a short time. Then the Honourable Justice Elizabeth Evatt AC served with great distinction. Alan Rose became President in 1994. His have been a notable five years.

It is appropriate on an occasion such as this to remember the beginnings of the Commission. My involvement in it was almost accidental. I was ascending in an elevator at Temple Court in Sydney. The Federal Attorney-General, who had secured the passage of the *Law Reform Commission Act 1973 (Cth)*, Lionel Murphy, entered and said "You are the one. I want you. Come up to my Chambers". In that way my adventure with law reform began. But for that accidental encounter I might still be a presidential member of the Industrial Relations Commission.

The Law Reform Commission began life in Temple Court. We were set up in the anteroom to the Chambers of the Federal Judge in Bankruptcy, the Honourable Bernard Riley. I was 35 years of age and still in awe of judges. When Justice Riley entered and left the room, I automatically stood and bowed. Without too much delay, and with the assistance of Keith Johnson and officers of the Attorney-General's Department such as Kevin Crotty, we moved across the street to 99 Elizabeth Street. The Commission remained there well past my decade.

Soon after my appointment I did something that was both proper and wise. Wisdom is usually proper. Propriety is usually wise. I called on the Shadow Spokesman on Attorney-General's matters, the Honourable Ivor Greenwood QC. We talked about the Commission and how it could help the Parliament. I believe that it was this action which helped ensure the survival of the ALRC when

the Whitlam Government was dismissed from office in November 1975.

The foundation Commission was impressive by any account. Mr F G Brennan QC, then a Brisbane barrister, went on to become Chief Justice of Australia. Mr John Cain went on to become Premier of Victoria. Mr Gareth Evans went on to be a most distinguished Minister for Foreign Affairs and the holder of many portfolios of great difficulty and responsibility. Professor Alex Castles is one of the great teachers of Australian legal history. Professor Gordon Hawkins, a splendid humanist, was always a voice for liberty and tolerance. The Commission accepted a reference, and produced on time reports, on *Complaints Against Police*¹ and *Criminal Investigation*². The former was fully implemented. The latter has been implemented in part and picked up by the judiciary in other parts. I quickly learned that in law reform one must have patience and the vision of decades.

The first full-time Commissioner was David Kelly, a distinguished academic from Adelaide. He was a great teacher not only of his students but of his colleagues in the Commission. When

¹ ALRC 1, 1975.

² ALRC 2, 1975.

he arrived, we were working on a report on *Alcohol, Drugs and Driving*³. In a modest display of brilliance I had written the whole report cover to cover within a fortnight. David Kelly's first day at the Commission involved a call on me. He arrived with my report in hand, his face wreathed with smiles. But then, in the middle of my room, he ripped the manuscript into little pieces, throwing it to the winds. His criticism was that I had recounted blood alcohol laws in every exotic jurisdiction which I could find. David Kelly said: "We were asked for legal analysis, not a geographical tour of jurisdictions". He taught the importance of conceptualising legal issues. The common law tends to solve problems. From David Kelly, and from the Law Reform Commission, I learned the essential lesson that we all must learn: conceptualisation of legal analysis.

Soon the Commission was blessed with the appointment of George Brouwer, the first Secretary and Director of Research. He came from the Department of Prime Minister and of Cabinet. In fact, he started his service for the Commonwealth on the same day as Alan Rose did. He was a most able and distinguished officer. He was also prudent. He kept me in check so that the more outrageous media statements were suppressed. The Commission was always

³ ALRC 4, 1976.

kept on the rails. Financial probity was his watchword. Fortunate was the Commission in these early officers.

We were also fortunate in our early Attorneys-General. The Honourable Bob Ellicott, first Attorney-General in the Fraser government, was an outstanding supporter of law reform. He had a deep commitment to reform which could be traced, I believe, to his Methodist upbringing. He saw the law as an instrument of justice for the improvement of society. He gave the Commission exciting, relevant and challenging references such as those on *Human Tissue Transplants*⁴ and *Privacy*⁵. These helped to keep the Commission before the public. That fact helped to insure it against political indifference.

But from the start, the Commission was also reliant on officers of the Australian Public Service. Like Alan Rose, there were many wonderful and faithful officers of the Commonwealth at that time who helped steer the Commission in the right direction. The Secretary of the Attorney-General's Department was Sir Clarrie Harders, one of a legion of federal lawyers from South Australia. The Solicitor-General was Sir Maurice Byers QC. Maurice Byers was a noble spirit. He

⁴ ALRC 7, 1997.

⁵ ALRC 22, 1983.

was a great supporter of the Commission and was later to become a distinguished part-time member. Our initial point of contact with the Attorney-General's Department was Frank Mahony, Deputy Secretary. He was the LBJ of the Australian Public Service. Whenever a problem arose he would get on the telephone. Quickly the problem would be solved. He had a positive attitude. Nothing disconcerted him.

Later our point of contact was changed to Trevor Bennett. He was a brilliant lawyer but much more cautious. He was a great worrier and I regret to say that the Commission and I gave him plenty that he felt he had to worry about. He was a lawyer of the old school and found the public performance of the work of law reform a trifle disconcerting. I recall that when he gave the Commission its reference on *Foreign State Immunity*⁶ he said with glee: "Now even you will not be able to make a headline out of this". Imagine his despair when, within days, sovereign immunity was on everybody's lips.

Alan Neaves, later a federal judge, was a Commonwealth lawyer of outstanding capacity. Pat Brazil, who went on to become Secretary, had a marvellous insight, at the right moment, about

⁶ ALRC 24, 1984.

Australia's legal place in the world. He established the links with international agencies, including UNIDROIT, to which Alan Rose was to succeed. The excellent and mercurial Lindsay Curtis was a master of administrative law. He helped pioneer the magnificent achievements of the new administrative law of the Commonwealth. I sat with him, and with Justice Brennan (as he had become) on the Administrative Review Council of the Commonwealth. This was to be an important partner for the Commission in law reform and many were its achievements.

Andrew Menzies, who recently died, was a sweet and highly talented man. Ewart Smith, was a brilliant, quirky and somewhat eccentric lawyer but with a first-class brain. John Q Ewens was First Parliamentary Counsel of the Commonwealth and later became a part-time member of the Commission. I recall being with him in the Commission's offices in Sydney when he saw, for the first time, a word processor. The look of anguish on his face was horrible to see. I could observe him thinking of the reams of retyped drafts of Bills that could have been avoided if only he had had this instrument in his long service to federal law.

These were all magnificent lawyers and officers of the Commonwealth. They are largely unsung and unknown to the people they served. But I sing their praises. I express thanks for their support to law reform and to the work of the Australian Law Reform Commission. John Ewens came to Canberra from Adelaide to fill the position left by the retirement of Robert Garran. Garran's

history *Prosper the Commonwealth* is a tale of the legal talent that served the Commonwealth in the first fifty years of federation. It has been my privilege to know the talent that has served the Commonwealth in the second fifty years of federation. Alan Rose walks in the footsteps of Garran and Ewens and of all the other faithful servants of our democratic nation. Lucky is the land with legal advisers such as these.

Of course, there are always ups and downs and disappointments in law reform. Much depends on the enthusiasm, energy, imagination and support of the Minister. If he or she is behind you, great things can be achieved. In my journey I discovered that support was not a matter of party politics. On each side of the political divide there are enthusiasts for reform and legal conservatives. Ellicott was a reforming Attorney-General, as if designed by central casting. And so was Gareth Evans. Within days of attaining office with the Hawke Government, Gareth Evans asked for advice on what should be done immediately. I gave him a short shopping list. Appoint John Ewens as one of Her Majesty's Counsel. If anyone was learned in the law of the Commonwealth, it was he. A narrow minded legal profession had resisted this title; but he richly deserved it. Subscribe Australia's name to the OECD Guidelines on Privacy which had been drafted by the Expert Group

on the OECD which I had chaired. Those Guidelines later became the principles, recommended and adopted in the privacy legislation put forward by the Commission⁷. Pass the *Insurance Contracts Act*. Gareth Evans did all three things without delay. Each was a victory, not just for the Commission but for Australia.

Other Ministers were less enthusiastic. Often the problem was obtaining any response at all to the painstaking labours of the Commission. Sadly, the Commission gets blamed for lack of implementation. Yet often the blame lies more truly with the Minister who will not consider the recommendations that have been made. This will not change. But the lesson of the long haul is that there are good times that follow the times of discouragement. That is the nature of the democratic cycle with its changes in political personalities.

ACHIEVEMENTS

Everyone would have a list of the achievements that can be laid at the door of Alan Rose. I would name ten which stand out in my estimation:

⁷ ALRC 22, 1984. See *Privacy Act 1988* (Cth).

1. No one now talks of the abolition of the Commission. The Government has recently called for an indication of interest in the position of President. It is reported that the Attorney-General (the Hon Daryl Williams QC) will shortly take a name to Cabinet. The Commission is now an established institution of Australian government. The appointment of its head is plainly crucial. Alan Rose's leadership has maintained the role of the Commission and he regularly demonstrated its utility to the nation.
2. The impending inquiry by the Senate Legal and Constitutional Legislation Committee is just the latest of many such inquiries by parliamentary and other committees. The establishment of this inquiry should not be seen as a failure or a danger. On the contrary, it may provide an important legacy of Alan Rose's term. My experience is that members of Parliament realise the need which the Parliament has for support in the matter of law-making. In an earlier inquiry the Commission attracted the strong support of Senator Alan Missen. In a later inquiry the Right Hon Ian Sinclair gave stalwart support. It is crucial that the Commission should have its defenders in the Federal Parliament. The establishment of the inquiry should be seen not as a threat but as an opportunity.
3. The reports of the Commission are now regularly cited in courts of law throughout Australia. This was not so 25, 20 or even 10 years ago. One of the most recent decisions of the

High Court of Australia illustrates this trend. In *Thompson v His Honour Judge Byrne and Ors*⁸ the Court had before it a challenge to an earlier decision in *Mills v Meekin*⁹. The case concerned the breathalyser provisions of the *Road Safety Act 1988 (Vic)*¹⁰. In explaining its reasons and reaffirming its earlier decision, the Court drew upon the analysis of the purpose of, and new approach in, breath analysis legislation demonstrated in the ALRC Report in *Alcohol, Drugs and Driving*¹¹. Nowadays, there is no hesitation to look at law reform reports and to cite them where there is ambiguity and where they cast light on the solution to a problem before the court. This is not only in cases where legislation has followed the Commission's recommendations. It is true wherever the detailed analysis of legal history and legal principles contained in law reform reports can assist an Australian court in coming to an informed and accurate conclusion.

4. A distinct achievement of recent times has been that the Commission has been restored to the public consciousness.

⁸ [1999] HCA 16; (1999) 7 *Leg Rep* 27.

⁹ (1990) 169 CLR 214.

¹⁰ s 49(1)(f).

¹¹ ALRC 4, 1976. See [1999] HCA 16 at [36]-[37].

In part, this has flowed from the Commission's fundamental inquiry into the adversary system and the practice of law as it is conducted in Australia. Every judge and lawyer recognises the problem areas. Everyone concerned with justice will welcome the Commission's inquiry. Even those who assert an inextricable link between the adversary system and freedom under law¹² must appreciate the need to rethink some old ways and to go back to fundamentals. In doing this, the Law Reform Commission, under Alan Rose, has not only served the interests of the people of Australia but also the long-term interests of the legal profession as well.

5. The revival of *Reform*, the journal of the Commission, is an important achievement. This represents a way to reach out to the judiciary, the legal profession, other law reform agencies and far beyond. Under Alan Rose the ALRC has reached out to the world. The establishment of a popular website for the Commission is a notable achievement. The record of the number of "hits" shows its popularity and utility.

¹² See eg Chief Justice Spigelman's remarks at the ceremony for the 175th anniversary of the opening of the Supreme Court of New South Wales, Sydney, 17 May 1999.

6. Perhaps connected with the foregoing is the fact that reform of the law is no longer seen as alien to the judiciary or the legal profession. Alan Rose has made a notable contribution to the attainment of this maturity. *Pace* Justice Meagher, most members of the legal profession today recognise that reform is an aspect of the genius of a common law system and a reason for its survival through fast changing times. The fact that the judiciary of Australia are now more candid in its acknowledgment of the choices judges face and of the role of policy in the resolution of such choices is, in part, a further sign of the impact which law reform agencies and their work have had upon the legal psyche.
7. During Alan Rose's term many important reports have been tabled in the Parliament. They have included the Commission's reports on the *Equality of Women Before the Law*¹³, on *Child Care*¹⁴, on *Aged Care*¹⁵, on *Open Government and Freedom of Information*¹⁶, on the *Law of Standing*¹⁷, on

¹³ ALRC 69.

¹⁴ ALRC 70.

¹⁵ ALRC 72.

¹⁶ ALRC 77.

¹⁷ ALRC 78.

*Disability Law*¹⁸ and on *Legal Risks of International Transactions*¹⁹.

These titles illustrate the variety of the work that the Commission has performed under Alan Rose's leadership. In some cases, such as the law of standing, the judiciary has not waited for Parliament. It has gently expanded the notions by which persons with real legal disputes may engage the attention of the courts. In some cases the Government has acted quickly as in the presentation of the exposure draft on the Electronic Transmissions Bill 1999 (Cth). This flows out of the last-mentioned report. In some cases, as in that one, successive governments have not unreservedly endorsed the Commission's recommendations. In my experience, every member of the Commission realises that the final say must belong to the elected representatives of the people. Law Reform Commissions have no right to insist upon the implementation of their recommendations. However, they do have a legitimate expectation that their proposals will be considered promptly and accepted, rejected or accepted with modifications.

¹⁸ ALRC 79.

¹⁹ ALRC 80.

8. New references continue to come to the Commission. The reference on the *Proceeds of Crime Act* was a timely one and, as in the early days, the Commission responded promptly. It must be hoped that the Attorney-General will afford the Commission, under its new President, references that are of interest to him and importance to the Government. Experience teaches that such references are more likely to sustain political commitment and implementation if the report is presented promptly before the Minister or the Government changes.
9. The budget cuts which the Commission has suffered in recent times have reduced the Commission's annual income by 35%. This has resulted in serious reductions in the capacity of the Commission to perform its functions. Positions on the Commission have been left unfilled. But the Commission has survived and, by prudent leadership, has continued its significant output and high standards. Alan Rose has pioneered the certified agreement with staff which has assured improved conditions in return for productivity gains. His implementation of a management review on his arrival was a clear indication of the careful philosophy which he has followed in his deployment of the resources of the Commission.

10. Independence is the key word for the Australian Law Reform Commission and every body of a similar kind. The Commission is in the Executive Government but not of it. It has an independence because that is what justifies its separate existence and advice.

WISE ADVICE

When during the Attorney-Generalship of Senator Peter Durak the Commission seemed to be making little headway, I suggested to Sir Clarrie Harders, Secretary of the Attorney-General's Department, that a solution could be found. It would involve the Commission working closely with the Attorney-General and the Department upon small projects of utility and interest to both. In this way, the Commission's scoring rate would increase. We would be seen as useful to the Minister and his officers.

In response to this proposal Sir Clarrie Harders gave me candid advice. He said "If we had wanted another section of our Department, we would get it. If the Attorney-General wanted further officers in tune with his political viewpoint, he would recruit them. The value of the Commission lies in its independence. Without that independence it has no special value. It might just as well be absorbed in the Department. Guard your independence. It is the very reason for your existence".

These were very wise words. I accepted them. I banished my naïve ideas. The Commission maintained its independence. And it has done so under Alan Rose. This is an important contribution of leadership which must be renewed with each new President, each new member and officer of the Commission.

Looking back on the past five years, there have doubtless been frustrations. Perhaps things have occurred which Alan Rose might do in different ways with the wisdom of hindsight. Which of us would not say that, looking back? Judges are paid to exhibit retrospective wisdom every day. But Alan Rose can take pride in notable achievements. His legacy has been a period of good stewardship of an important institution of the Commonwealth. He has walked proudly in the traditions of the legal officers of the Commonwealth who nurtured and trained him. He can take pride in his years as President of the Australian Law Reform Commission.

As a predecessor, as an Australian lawyer and as a citizen I express grateful thanks.