

25TH ANNIVERSARY CONFERENCE DINNER

REGENT HOTEL, SYDNEY

FRIDAY 19 MAY 2000

ALRC, LAW REFORM AND EQUAL JUSTICE UNDER LAW

The Hon Justice Michael Kirby AC CMG

AUSTRALIAN LAW REFORM COMMISSION
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I want to tell you about the beginnings of the Australian Law Reform Commission (ALRC). I want to do so tantalisingly. My brother has always had a view about French cuisine that its purpose is to send the eater home wishing that there had been more. I always leave his dinner parties ravishingly hungry. The pilgrimage home usually takes me past the nearest McDonalds. I want to do the same to you. You should be given a few exquisite morsels so that you will applaud thunderously, begging me for an encore. Or for a set of published essays and reflections on the history of the Commission. Perhaps a book or two on its early characters and their quirky personalities.

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

The Act establishing the Commission was adopted by the Federal Parliament in 1973. Yet it was not until 1975 that its first members were appointed. Even then it happened apparently by accident. It is a truism that the life of the law is experience not logic. I was about to learn that the birth of law reform was inexperience and illogical.

I walked into an elevator in Temple Court, Sydney, in December 1974. Who should follow but Lionel Murphy, Federal Attorney-General. I had just been appointed a judge of the Arbitration Commission. In those days, under the High Court, this was the most important federal tribunal in Australia. I was 35 and I don't mind telling you I was rather pleased with myself. I had even bought an English hat at Henry Bucks.

I was in charge of the maritime industry of the nation. As I boarded ships, racked with industrial strife, committing myself to offering the salving balm of conciliation and arbitration, I could almost hear the bosun's whistles welcoming me aboard. In the crevices of my mind I could see the ships flashing their signals, one to the other, on the dark seas: "Winston's back!" In my own fancy, I imagined my life as that of a terribly important person with a fleet second only to that at Jutland under my personal command. "Winston's back indeed", I thought to myself:

"We will fight them on the beaches. We will fight them in the air. We will never surrender".

It was very stressful to carry all that responsibility at such a tender age. I was worn out after only 40 days and 40 nights. I was looking around for something else to do. Anything else. And then Lionel Murphy walked into that elevator.

"Come up and have a glass of champagne", he demanded. "You're just the person I'm looking for".

As chance would have it a young fresh-faced Australian, Geoffrey Robertson, with (at that time) a deep Northbridge drawl was in town after his Rhodes scholarship sojourn at Oxford. This was long before he embarked on his inevitable trajectory, still on course, to the woolsack. Somehow Geoffrey (always a somewhat pushy fellow) muscled his way into my champagne invitation. Classy people like champagne. Mary Gaudron is the same.

"I want you to be chairman of the Law Reform Commission", said Lionel.

I blinked. My reactions were those of the typical lawyer. "Law reform! Law reform! Aren't things bad enough as they are"?

But Lionel was persistent. I could not keep up with his capacity in champagne. Geoffrey Robertson was also insistent that I accept. And that I have more champagne. In a state of alcoholic miasma I accepted. Lionel lifted his glass. I can remember his words as clearly as if it was yesterday:

"Here's to Michael Kirby. Chairman of the Law Reform Commission - the first step to the High Court!"

Unsteadily I lifted my glass. Down the hatch.

"Better send a wire to the fleet, 'Winston's had it. He's gone'", I thought to myself.

The signal flashed around the mighty coastline of the only nation on earth that celebrates being "girt by sea". A collective sigh (was it of relief?) was heard on land and sea throughout Australia. Abruptly, my days in the Arbitration Commission were over.

II

The first thing to be done was to get premises and staff. I quickly learned how the well oiled machinery of the Commonwealth could move into vibrant action. Nothing whatsoever happened for quite a time. Thinking that I should bestir myself I gathered around me, somewhat in the manner of Moses, my personal staff. The luxury of my judicial chambers were put behind me. All that the Commonwealth could find was a tiny office in the anteroom to the court of the Federal Judge in Bankruptcy (Bernard Riley). With me to this humble room came my devoted secretary, Jennifer Seeley, who had given a lifetime to working for me at the Bar. As I was only at the Bar for seven years I suppose it can hardly be called a lifetime. In fact she had worked with me for about six months. My Associate Bill Koeck also came along. It

was just as well to have him because, although a decade younger than I, he was tall, looked distinguished and was frequently mistaken to be the young judge. He saw a lifetime in industrial relations law, which he had so carefully planned, crumbling before his very eyes.

There should be a brass plaque in that little room in the La Salle Building in Sydney where the ALRC started. It is like the ALRC manger. But the three wise men from Canberra never turned up. At last inspection the room was a hairdressing salon. Somehow I do not think that the customers in their rollers care very much that they are sitting in the very presence of history.

When I suggested that something slightly better than the anteroom to the Bankruptcy Court might possibly be suitable for the new national commission, in the long term, a look of bewilderment came over the faces of the officers of the Commonwealth assigned to help establish the ALRC. Yet within weeks (or was it months?) a flurry of activity had occurred. Rae Hay, later to be my secretary, came on board. Keith Johnson was looking round for a job to put marmalade on the table whilst he pursued his noble endeavours to record Australian genealogy. The Woodhouse Inquiry into National Composition was finished; so Keith Johnson was received into the Law Reform Commission. Fortunately, he knew all of the places where federal skeletons were buried. Naturally, his training as a genealogist had taught him these most vital skills. He brought along another federal guru, the young Garry Mahlberg.

If I open the *Australian Government Directory* of 1974 the names that are recorded there under Attorney-General's Department come crowding back with memories. Sadly, many, perhaps most, of those who helped our little team to start the ALRC have died, some of them quite recently. Clarrie Harders, later Sir Clarrie, was the secretary of the Attorney-General's department. Frank Mahony was the deputy secretary. He was the LBJ of the federal bureaucracy. Everything was solved on the telephone. Ewart Smith was another deputy secretary, truly quirky and brilliant. Andrew Menzies, Kevin Crotty, Lindsay Curtis. All sadly gone. Happily, many who took part are still alive. They include Patrick Brazil, Dennis Rose QC, Peter Loof, Trevor Bennett, Len Glare, Alan Neaves. They were a formidable team. Mind you, this was long before the federal government had moved in its foolhardy fashion into the big-time in law, courts and law reform. Setting up the ALRC was as much a puzzle and an adventure for the people I have named as it was for us, sitting there in Justice Riley's anteroom, watching him pass by four times a day: each time looking more melancholy than the last. Bankruptcy, after all, is not a fun jurisdiction.

III

Although I naturally like to portray those earliest days as a solo recital, the fact is that we, the old Originals, were a sextet. The violin - soaring temperamentally and making an awful lot of noise - was Gareth Evans (lately re-christened from the "Garry" of his University days). 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 timpony 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. John Cain would always insist on puritan communal exercise, something he doubtless learned from Chairman Mao. It was something the rest of us were sure we could do without. 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. Captured in a green-hued photograph of the time we look out at Australia and the world with confident optimism.

In due course further most beautiful instruments were added. A brilliant, sparkling trumpet in the form of Professor David StL Kelly. A magnificent golden harp that was Sir Zelman Cowen whose lustrous chords were to sooth a nation unsettled by the enveloping events of November 1975. Murray Wilcox. Xavier Connor. Elizabeth Evatt. Alan Rose. David Weisbrot. One by one others came and then departed. Each one adds to the special harmony.

A truly brilliant move was made back in 1975 when we chose George Eugene Pascal Brouwer as the first secretary and director of research of the Commission. Trained in ruthlessness successively by the École National d'Administration in Paris and Malcolm Fraser, he became our conductor. He saw us through ever so many Razor gangs

conceived by political shakers long forgotten, long departed from the scene.

Fortunate was the Commission in the staff assembled in its first years. Roy Jordan and later Virginia Purcell in the library. Noel Sexton and later John Ewens QC and Stephen Mason, our legislative draftsmen. Brilliant law reform officers at every level, the first of whom was Bill Tearle. So many of the Commissioners and staff have gone on to judicial office (such as Murray Wilcox, Jim Spigelman, Bruce Debelle, Tony Fitzgerald, Peter Nygh, Tim Smith, Theo Simos, John von Doussa, Mark Weinberg, Jack Goldring and Kevin O'Connor) or office as Queen's Counsel or Senior Counsel (such as John Karkar, John Basten, Bryan Keon-Cohen and Steven Crawshaw), office-holders in federal and State tribunals (such as Duncan Chapell and Sue Tongue) and other notable service to academe and our community (including Russell Scott, Howard Schreiber, James Mazza, Sir Maurice Byers QC and many more). 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.

IV

As I stumbled out of Lionel Murphy's office and was helped downstairs, in a state of dazed bewilderment, by the young Geoffrey Robertson, I do not believe that I could have conceived what was to come to pass in a quarter of a century. We were the lucky ones who were there at the creation of the ALRC. We started from nothing. We

approached institutional law reform in Australia in a way that was 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. Ours is a nation that, by and large, is committed to equality and justice for all of its peoples - not just for the majority. Those who pay most attention to the symphony of law reform - those who fill its concert hall - tend inevitably to be those who are sceptical about the great boast of the legal system of equal justice under law. I refer to the groups who, from the start, have had the special attention of institutional law reform in Australia.

On the symbolic eve of *Corroboree 2000* I would mention first Aboriginal Australians and Torres Strait Islanders, too often the victims of the inequality of the law as it works in practice. Women. The young and the aged. The humble citizen overborn by big and powerful government. The insolvent and those who cannot cope with the credit economy. Consumers. Victims of domestic violence. People dislocated by marriage breakdowns and property disputes. An accused criminal suspect facing the mighty power of the State. A brave citizen who makes a complaint against police. Prisoners. Members of our multicultural society not fluent in English. In short, the people who otherwise often lose out. They were all a major focus of the ALRC's

endeavours. Justice for them was an important motivation of the Commission. It still is.

To some extent the big end of town and the big battalions could look after themselves. But in the process of legal change the poor and the powerless are often disadvantaged. Now they had an institutional voice in the ALRC. It was a voice that was commanded by the Federal Parliament to ensure that its proposals should be in accord with the *International Covenant on Civil and Political Rights*. International human rights law had at last reached Australia in a practical way.

I wish, in those far-off days, that the humours of the time, and greater courage on my own part, might have led me to do more for another minority taught by the centuries to hide itself - homosexuals and others disadvantaged by law because of their sexuality. The ALRC has never been required by the Attorney-General to enquire into that matter, although in all truth there is work enough to be done.

Instead, the passion that taught me to understand disadvantage, discrimination, denigration, humiliation and oppression by law was channelled, with the ALRC, into different causes: causes of injustice, discrimination and disadvantage equally urgent, equally important. If you taste the cup of discrimination in life, the dregs are bitter. But they give you a special strength to make sure, when you can, that others do not suffer wrongs through law. More powerfully than Lionel Murphy's champagne, those bitter dregs teach you that the good old days in the law were not so good after all. That equal justice under law is an

aspiration yet to be realised in Australia. That law reform is vital to a civilised society. That the Australian Law Reform Commission's mission, and that of the other law reform institutions in Australia and beyond, is a noble one. It is one which strengthens and deepens the rule of law itself. It helps Parliaments to bring equal justice under law to all people.

I honour those who in my day and since have made the ALRC such an important institution in Australia. After a quarter century it is now an established part of our nation's institutional furniture. Its reports are regularly adopted and enacted by the Parliaments. They are used all the time throughout the judiciary. They are an important stimulus to the ideas of law and justice in our country.

On this Silver Anniversary, and on behalf of the Founders - commissioners, staff, consultants and supporters - I presume to offer a nation's grateful thanks for the past. But more important is this abiding message: Law is often unjust and often unattainable for the ordinary Australian. The business of law reform is to help law-makers to balance the scales for all Australians - our national community - without discrimination. It is a message that it is still important for Australians to hear. On the eve of *Corroboree 2000* it is a message that goes beyond mateship, ANZAC, snapped tall poppies and claimed egalitarianism. It goes to the very essence of what it should be to be Australian.