REFLECTIONS ON LAW REFORM AND THE HIGH COURT

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In this article, delivered originally as the inaugural Neville Wran Lecture at the NSW Parliament in November 2008, the author reflects on his experience in institutional law reform and in the appellate judiciary. He suggests ways in which each of these institutions might be improved, better to serve the people of Australia. His suggestions include large and small proposals, some of which would require a change of constitutional texts or conventions and others that could be introduced immediately with little trouble.

Reflections on law reform

In 1975, Lionel Murphy called me to be appointed as the inaugural chair of the Australian Law Reform Commission (ALRC). I served until 1984. That decade was highly influential for my professional career, as it subsequently unfolded. It changed me from a fairly typical product of the common law tradition — pragmatic and impatient with too much doctrine — into a lawyer concerned with the entire mosaic of the law. In the ALRC, conceptual thinking, which was Lionel Murphy's great strength as a lawyer, became second nature to me.

I came to appreciate the particular contributions that academic scholars, empirical researchers and public opinion could play in the design of the law. I threw off some of the formalism in which I had been trained at law school. I questioned the outcomes of legal cases. I became impatient with purely ad hoc solutions to legal problems.

My decade in the ALRC witnessed the institutional success of that body. I am proud of the ongoing achievements of the ALRC, under successive Presidents and Commissioners. I believe that Lionel Murphy, who pioneered the legislation establishing the ALRC[1] would be glad with the Commission's high reputation and its record for impartial and expert advice to succeeding federal and state governments. Since 1975 there has not been a serious proposal that the ALRC, like its Canadian counterpart, should be abolished. The Canadian Law Reform Commission was abolished by the repeal of its statute in 1992 and, after its revival, its successor was effectively abolished by the termination of funds.

Successive governments and Ministers in Australia have found the ALRC a very useful source of independent advice, founded on widespread expert and community consultation. The ALRC enjoys a high level of implementation of its reform proposals, approximating about half of them in toto. By the world's standards, this is an excellent achievement, particularly so given the often controversial subjects that have been assigned to the ALRC for its report.

Nonetheless, there are a number of institutional weaknesses in the model of law reform bodies created along the lines adopted in England under the leadership of Lord (Leslie) Scarman[2]. In fact, the basic institutional flaw was noted in the first *Annual Report* of the Australian Law Reform Commission for 1975:[3] how does one convert excellent reports on law reform into legislative or administrative action where that is proposed? At least, how does one ensure that recommendations are considered in the practical world of political controversy, electoral distractions, parliamentary divisions, party conflicts and competing community proposals?

During the 1980s an important change came over the way Australians were governed. The change involved the increasing concentration of decision-making power in the parliamentary leader of the governing party; a comparative decline of effective parliamentary and even party control; the concomitant growth in the power of the executive government as against all other players — the Crown, the courts and Parliament itself; the growth in the influence of the media and other lobby groups; and the rise in the focus on personality politics, making the effective leadership of political government crucially important.

If a political leader were actually interested in law reform (as NSW Premier Neville Wran was) much could be achieved. But if the leader was not a lawyer or, even if he was, but was not specially interested in the subject, legal reforms were much harder to procure. Law reform reports would lie unread and unimplemented. This is not just an Australian concern. It is an institutional concern that faces law reform bodies everywhere.

In an address paying tribute to Leslie Scarman's creation of the template of the Law Commission of England and Wales, I remarked:[4]

> As we enter the 21st century, the very notion of the 'sovereignty' of Parliament has become a somewhat inapposite description. Certainly this is so in a country like Australia that divides the sovereignty of the people among a number of institutions, federal and State, that make the written laws. In Britain, talk of the sovereignty of Parliament is quite popular. However, there is a marked disparity between the *theory* of representative and responsible government and the *reality* of authorising everything that

REFERENCES

1. *Law Reform Commission Act 1973* (Cth). See now *Australian Law Reform Commission (Repeal, Transitional and Miscellaneous) Act 1996* (Cth).

2. Michael Kirby, 'Are We There Yet?' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005), 434. See also Michael Kirby, 'Law Reform, Human Rights and Modern Government: Australia's Debt to Lord Scarman' (2006) 60 *Australian Law Journal* 299–309ff.

3. Australian Law Reform Commission, *Annual Report* (ALRC 3), 1975, 20–24 [44]–[50].

4. Michael Kirby (2006) 80 *Australian Law Journal* 299 at 313 (citations omitted).

follows in the elected government's lawmaking. Sir Anthony Mason recently concluded that the notion that Parliament is responsive to the will of the people, except in the most remote, indirect and contingent way, must now be regarded as 'quaint or romantic'. The need is for a modern form of democratic government that will prove workable over time.[5]

Acknowledging the logjams that can sometimes impede the processing of law reform reports and recommendations — simply because of the inability to secure the attention of Ministers, and especially of the head of government — consideration has been given in recent years in England to the adoption of a parliamentary procedure to ensure that at least some law reform recommendations pass into law with a high degree of regularity — even semi-automatically, in the manner of subordinate legislation.

Of course, any such procedure would not be suitable, or acceptable, for highly controversial or politically-charged reform proposals. Yet somehow, the lawmaking process needs to reform itself. It needs to find a median path so as to isolate the reform proposals that are suitable for bipartisan non-controversial treatment as a technical change in the law (to be accepted unless there is an objection), distinguishing such proposals from those that necessitate a full parliamentary debate and intensive political consideration.

Often in the courts we notice seemingly uncontroversial, black-letter, even boring subjects of law reform that have been recommended in reform reports that have simply not been interesting enough to capture the decision-makers' time, parliamentary attention and implementation. A recent example was a reform to the *Bankruptcy Act* 1966 (Cth), s 82, recommended in 1988 by the Australian Law Reform Commission report *General Insolvency Inquiry*[6]. Hardly riveting stuff. The proposal, of a highly technical kind (which had already been implemented for corporate insolvency), has for some mysterious reason never been accepted in the context of general insolvency. No satisfactory explanation has been given as to why this has been so.

The default in implementation was drawn to attention by the High Court in *Coventry v Charter Pacific Corp Ltd*[7]. Seemingly, the subject is just not sexy enough to procure legislative action. It is hard to believe that party branches have risen in fervent opposition to the change. But in an overburdened parliamentary agenda, vote-winning is the name of the game. Changes to bankruptcy law are unlikely to contribute much to the votes in marginal seats.

Securing the institutional attention of Parliament to law reform proposals is still an important challenge in our system of government. Neville Wran helped to address this by showing a lawyer's interest in such matters and by having a strong personal commitment to law reform. This was because of his own particular professional background as a barrister, civil libertarian and a lawyer in politics. No NSW Premier since his day has been a lawyer. Indeed, the number of experienced lawyers now elected to our parliaments, federal and State, seems overall to have declined. Of course, there are notable exceptions. But the willingness of experienced and senior lawyers to offer themselves for service in Parliament, as Neville Wran did, seems generally to have declined in recent decades.

Other institutional concerns that need to be addressed include attracting lawyers of the greatest capacity to serve, particularly as full-time Commissioners, on the permanent law reform bodies, federal and State. In England, this problem has recently been addressed in a typically British way. A convention has been accepted that senior practitioners who are willing to serve full-time in a law reform body, and who thereby demonstrate their sense of public service, are virtually guaranteed a judicial appointment after three or four years service. Not only will they be better judges for their service in law reform. This has proved a way, at once, to enhance the intellectual quality of the law reform body and the bench. Conventions like this take a long time to emerge, especially in Australia. Only within the past few months, the British government has apparently accepted a further convention that the Chairman of the English Law Commission will automatically be appointed to the English Court of Appeal. It is in the community's interests, as well as that of the long-term orderly development of the law, to attract the best people to institutional law reform.

The defects in the institutional parliamentary procedures which I have mentioned are a further reason for the need to consider in Australia a Charter of Rights, such as has been enacted in the Australian Capital Territory and in Victoria[8]. The need for such a measure has been opposed by some politicians on both sides of Australian politics on the footing that it threatens to replace parliamentary lawmaking with rule by judges. However, if Parliament neglects the nooks and crannies of the law, it will sometimes be useful (at least in fundamental matters of human rights) for the judges to have a role to stimulate the parliamentary process. This is all that the current Charter of Rights proposal does.

The opposition to a Charter by parliamentarians is misconceived and based on a failure to consider the actual design of the Charter proposal and the way in which it has been operating for a decade past in the United Kingdom[9]. In my opinion, supporters of parliamentary democracy will approve of such measures, given that, under them, Parliament has the last say. It is no coincidence that one of the first and major modern proponents of such a reform in the United Kingdom was the founder of modern law reform, Leslie Scarman himself.[10]

Thoughts on departure from the High Court

Reforming the High Court is as difficult as reforming the parliamentary institutions of our country. Indeed, possibly more so because of the principle of the separation of powers and the constitutional role which the High Court plays in the nation's governance.[11]

Some reforms would have to come from within the High Court itself. Some might even require reform of the *Constitution*, a notoriously difficult task to accomplish

5. The reference to Chief Justice Mason is to Sir Anthony Mason, 'Democracy and the Law: The state of the Australian political system' (2005) 43(10) *Law Society Journal (NSW)* 68, 69.

6. Australian Law Reform Commission, *General Insolvency Inquiry (Vol 1)* (ALRC 45, 1988), 16.

7. (2005) 227 CLR 234 at 275–276 [140]–[141].

8. *Human Rights Act 2000* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

9. Since the passage of the *Human Rights Act 1998* (UK) and its commencement in 2000.

10. Leslie Scarman, *English Law: The New Dimension* (Hamlyn Lectures, 1984) 16.

11. *Australian Constitution*, s 70. The provision for appointments, resignations and removals appears in s 72.

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in Australia. Nevertheless, in a democratic society, no institution is beyond the contemplation of reform, the High Court included. The following initiatives might be considered in order to improve the operations of the High Court of Australia, as viewed today:

In the Court, there needs to be an improved and mutually respected assignment of work duties amongst the Justices. There was such an assignment system in the New South Wales Court of Appeal where the President (at one time myself) distributed the sitting list which was accepted by all of the Judges of Appeal. That list indicated the allocation of the writing of the opinions for the Court. This methodology led to mutuality and an intense respect amongst the judges for one other. In the High Court, there is no equivalent arrangement. Even suggested assignments by the Chief Justice have not always been respected. As a consequence, there is a big difference between the ethos of the High Court and of the intermediate courts in which I served. In my view, it is a difference that does not operate to the benefit of the highest court of the nation.

If moves are made to change the appointment procedures for the High Court, some could be quite easily taken in the right direction. For example, there could be no objection to suitable practitioners and judges signifying their willingness to be considered for appointment. This is now commonly done in the State and Federal courts below the High Court. I would oppose any move to assign a final or semi-final appointment veto to retired or serving judges or lawyers, however distinguished. It is part of the genius of our *Constitution* that a democratic element is introduced into judicial appointments, especially at the level of the High Court, by the fact that the appointments are ultimately made by elected politicians. Assigning the appointment process to so-called 'experts', to retired or serving judges and to other lawyers, would not, in my view, be a desirable development. Already there is too much of an 'old boys' club' in sections of the senior legal profession. I would not favour any enlargement of its power or influence.

Obviously, the highest courts make decisions that are affected by values and judicial philosophy. In my opinion elected politicians are more likely to make wise decisions on the appointment of judges than a cohort of lawyers. Constitutional adjudication, in particular, is not a value-free zone or a purely technical skill. There is no reason to believe that lawyers with special skills in insolvency or trusts law have the essential skills for adjudicating the great constitutional conflicts in our nation. Most politicians know this. Some lawyers never learn this truth.

One change that certainly needs to be made by appointing governments is a wider spread of appointments throughout the Commonwealth. In Canada, a constitutional requirement obliges the appointment of at least three of the nine Justices of the Supreme Court from the Province of Quebec. This has led to a convention of appointments across that continental country. In Australia, there has never been an appointment to the High Court from South Australia or Tasmania. Nor from the Northern Territory of Australia. Each of those jurisdictions has produced very fine judges and lawyers of the greatest distinction.

Leaving aside judges who are still serving, I think, for example, of Chief Justice Bray, Justice Howard Zelling, Chief Justice King, Justice Wells and Justice Roma Mitchell in South Australia, of Justice Andrew Inglis Clark, Justice Neasey and Justice Underwood in Tasmania, and of His Honour Tom Pauling QC, now the Administrator of the Northern Territory, who was one of the finest advocates I ever saw before the High Court. These and other lawyers from those jurisdictions would have graced the High Court bench. There is a need for more geographical diversity in appointments and an appreciation that the High Court is a final court of the entire Australian nation.

There should be a leavening of occasional academic scholars on the High Court, or at least of practising lawyers who have taught and written intensively about the theory and doctrines of the law. This is the approach now taken in the composition of the highest courts in England, Canada, New Zealand and South Africa. Scholarly training commonly makes one question the received 'wisdom' of the past. After critical analysis, that inheritance sometimes requires a thorough overhaul. If re-expression and re-conceptualisation of basic principles of law are not performed by the final court, everyone down the line gets the message. Old rules are mechanically applied despite the existence of new and changed circumstances. Innovation, which is the genius of the common law's judicial tradition, is under-valued. The law is fossilised. The complacent win the day. All this is realised in other final courts. The Australian High Court should not be left behind.

Media reportage of High Court decisions is truly abysmal in Australia. Unless there is something bizarre, entertaining, humorous or allegedly shocking in the

decision of the Court, it is normally not reported. The High Court of Australia, like much else now, travels on the infotainment highway. The issues in the High Court that tend to get reported are personality issues that have little to do with the long-term significance of the decisions for the law and society. Media reportage in the United Kingdom, the United States, and Canada is much more effective, detailed and accurate. In this respect, at least, there is a need to lift the media game in Australia. If this would mean the engagement of a highly skilled court communicator for television and radio, this is something that the High Court should explore. After all, most people now get their news and information about law and society in electronic form, not from the print media.

Relying solely on the printed word is not sufficient, given the failings and comparative lack of interest of the general Australian publishing media. The cases decided in the High Court are important. Most of them are also quite interesting, if well presented. They concern values upon which there can sometimes be acute differences. It is important that such questions should be reported and placed before the citizenry for their knowledge, judgment and, if so decided, legislative correction.

Closed-circuit television should be extended to a dedicated channel beamed to the public, such as the one that now brings the Supreme Court of Canada's proceedings to the public of that country. There is no risk that this facility would diminish the respect for the High Court of Australia which is, after all, one of the branches of government of the Commonwealth. Is there any reason to believe that there would be misbehaviour on the part on courts or judges? Not really. In any event, the public has a right to see the High Court in action. For those who cannot come to Canberra, an edited dedicated television channel would be appropriate and well overdue.

Whilst it is valuable to work towards joint opinions in the High Court, and initiatives in recent times have promoted that end, it is also important to have concurrent and dissenting opinions, for that is the tradition of our legal system. This is the way by which the law develops and changes over time. Demands by some sections of the legal profession for total concurrence and single Court opinions is understandable. But it is also necessary for the Court's reasons to reflect the diversity of opinions in the High Court and not to suppress or sink these in an ill-considered quest for unanimity at any price. The plain fact is that, since the introduction of universal special leave for appeals to the High Court, no case arrives there for decision that has not already been recognised as arguable both ways and hence one that could be decided in either party's interests. Disagreement should therefore cause no surprise. It is inherent in a legal tradition that cherishes judicial integrity and transparency of decision-making.

The fall-off in the grant of special leave to appeal to the High Court in recent years is potentially significant. The number of appeals being heard in the High Court, as in other final courts, has fallen in recent years[12]. In the Supreme Court of the United States of America, where the number of appeals heard is roughly the same as in Australia, the aggregate caseload has fallen by about half since the days of the Warren Court in the 1970s. Perhaps if the High Court Justices accepted more appeals, there would be a greater effort towards concurrence where it was justified and a more diverse exploration, particularly in matters of common and State law, than tends to happen in the present High Court.

The Court should welcome amici curiae to its proceedings. These are interveners who, whilst not actual parties to the case, offer to give assistance to the Court as friends of the court. In recent years, the law on the reception of amicus curiae briefs in the High Court of Australia has changed somewhat. To some extent there is a greater willingness to receive such submissions, at least in writing. So much has been noted in the authorities[13]. The Court should be open to the receipt of information on the record concerning decisions of other final courts throughout the world that have dealt with common problems. It should also receive information on international law which is increasingly affecting the state of Australian law.[14] This is not always permitted.[15] As Australians, we need to look outwards. The growing impact of international law upon our law is one of the most important developments that has occurred in the law of Australia during my professional lifetime.

One constitutional change that I would favour would be to limit the length of service of Justices of the High Court. The Constitutional Court of South Africa and the Constitutional Court of Germany as well as many other regional courts and tribunals offer their judges non-renewable terms of years. In Australia, once appointed, a Justice of the High Court serves until resignation, death or retirement at the constitutional age of 70. Some commentators have urged the repeal of the constitutional amendment that requires Justices to retire at 70. I disagree. Ensuring change and turnover, fresh ideas and different generational outlooks, is a vital aspect of a dynamic and open-minded final national court. In my view, a term of no more than ten years would be appropriate. Any change would require a constitutional amendment and I recognise the difficulty of procuring this.

Justices of the High Court should not linger on beyond their 'used by' date. The experience of most of those who have served on the Court is that, after about ten years, the same types of problems re-present themselves in new guises. Nothing is stable and certain in the law. Challenges are constantly being made to old doctrines as their instability is demonstrated by new applications. This is what the philosopher Heraclites taught in Ancient Greece. It remains true in Australia today. It suggests the need for a thoroughly healthy phenomenon of renewal. Change tends to produce anxiety and resentment in at least some old people, which is why it is a good idea to provide for their compulsory departure. Without a little encouragement, some might never conclude that they should move on.

12. The numbers of dispositions by the Full Court of the High Court of Australia (other than special leave applications) exceeded 100 in the reporting year 05/06. However, in the years 01/02, 04/05, 06/07 and 07/08 there were fewer than 80 and in two of those years they were barely more than 60. See Annual Reports of the High Court of Australia: <hcourt.gov.au/publications_01.html> at 9 February 2009.

13. See, eg, *Attorney-General (Cth) v Alinta Ltd* (2008) 82 ALJR 382 at 390–391 [28]–[33] of my own reasons; 396–397 [63]–[68] per Hayne J; 405 [104] per Heydon J; 242 ALR 1 at 9, 10; [2008] HCA 2.

14. See, eg, Michael Kirby, 'Transnational Judicial Dialogue, Internationalisation Law and Australian Judges' (2008) 9 *Melbourne Journal of International Law* 170.

15. *Wurridjal & Ors v The Commonwealth* [2008] HCA Trans 348 at 10, 95 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ; Kirby and Crennan JJ dissenting).

The growing impact of international law upon our law is one of the most important developments that has occurred in the law of Australia during my professional lifetime.

I have heard it said that a referendum proposal should be presented to reverse the provision for retirement at age 70 or to permit Federal Parliament to extend the agony. That would be quite the wrong way to go. Most of the voices critical of the 1976 amendment for compulsory retirement in the High Court have tended to be judges. It is an inescapable fact of nature that older people are sometimes disconnected from the values and aspirations of younger people. There must be rules, and the rules should provide for regular and seemly exits.

Australian judges generally, but the Justices of the High Court in particular, should be encouraged, every year, to take part in international meetings with judges of other courts and to form professional associations with such judges. They share with them unique responsibilities. Judges, like other professionals, can learn from their counterparts in other countries. They can obtain insights into comparative constitutionalism, comparative law more generally and the perspectives of the likely developments of the Australian legal system as it inter-relates with international and domestic law. This encouragement should be underwritten by appropriate travel to conference venues, even occasionally in pleasant surroundings, however much this may upset some mean-spirited and petty-minded scribblers of the Australian media. An investment in the broadening of the mind of Australian judges and other lawyers is purchased cheaply by a few tickets to such encounters.

For ten years I have been privileged to participate in the Yale Constitutionalism Seminar with judges of final courts of the United States, Canada, Europe, Japan, India and elsewhere. It is amazing to learn how many problems we share in common. There is no need for Australian judges to reinvent the wheel. Attendance at such meetings pays an efficiency divided. Our laws are different. But in a globalised world, the issues are astonishingly similar.

It would be desirable that the High Court building should be opened to the public on weekends and on public holidays. This facility was terminated during the Howard Government, following a cut in funding for the Court. With the opening of the National Portrait Gallery building, in December 2008, in the vicinity of the High Court, the number of schoolchildren and other tourists visiting this part of the constitutional triangle in Canberra is likely to increase. It is highly desirable that the High Court, like all central governmental institutions, should be available to visitors throughout the year, for it is their Court. It should not be locked up at the very times when a large number of people come to the surrounding institutions.

The High Court should have its own visitors' shop selling memorabilia and historical items at reasonable cost to the public. The Court should be an interesting place to visit, in and out of hearing days, especially for the young. We should be encouraging more visitors and, by the internet, enhancing the position that the Court holds in its central site in Canberra and in the imagination of the people.

Because of the former tyranny of distance, Australians have sometimes been resistant to new ideas from overseas. In the past, the only comparative law Australian lawyers would tolerate was that derived from England. It is time we grew up. Lionel Murphy was one of the first to see, and say, this.

Conclusion

Given a second opportunity, there are many things that I would fix up and do better than has proved possible. But second chances do not present themselves, except in the fantasy of cyberspace and virtual lives. So all that we can do, who are still around, is to offer suggestions, based on own experiences. On the brink of the precipice of retirement, I therefore offer these random thoughts. The Australian Law Reform Commission and the High Court of Australia are fine institutions with an outstanding past. The people of Australia, and especially the judges and lawyers, must make it their business to ensure that the future is even more admirable and deserving of pride and praise.

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