

Remarks of the Chair, Alan Cameron AO

NSW Law Reform Commission 50th Anniversary Celebration

Parliament House, Sydney, Monday 25 September 2017

Law Reform Now, the Gerald Gardiner and Andrew Martin book¹ which contained their blueprint for what would become the UK Law Commission, started with a proposition; one they took to be axiomatic: “that much of our English law is out of date, and some of it shockingly so.”² They were not wrong, and the same may have been said in NSW in the mid-1960s. The good news is that after 50 years and 143 reports I do not believe any of our NSW law is “shockingly out of date”.

I shall commence with an update on our current references, before turning to the challenges we now face, a few thoughts about how we judge success, and what approach we bring to our work, before some concluding remarks.

The current references – an update

- *Alternative Dispute Resolution in NSW statute law* is a long standing reference, which we expect to wrap up soon.
- *Beneficiary liability to indemnify trustees, or creditors of trustees*, is a new reference designed to see whether a century of sometimes inconvenient Privy Council authority can be sorted out. We are looking at that in conjunction with a proposal which found favour with the Victorian Law Reform Commission, that the company law concept of shareholder oppression should be extended to investors in trading trusts.³
- Our major one is the review of the 1987 *Guardianship Act*. We are well advanced in this long and complex review, aspects of which I shall mention in conjunction with the challenges facing reformers.

Challenges for the Commission

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1. G Gardiner and A Martin (ed), *Law Reform Now* (Gollancz, 1963).
 2. Quoted in R.J.L. Thomas, “‘Law Reform Now’ in 21st Century Britain: Brexit and Beyond” (Sixth Scarman Lecture, Greys Inn, London, 26 June 2017).
 3. Victorian Law Reform Commission, *Trading Trusts: Oppression Remedies*, Report (2015).

If our law is not “shockingly out of date”, what are the challenges 50 years on?

- **Federal issues** – responding to the many well justified calls for consistency in our large and politically and geographically diverse federation. In the guardianship area, for example, the Australian Law Reform Commission (“ALRC”) summed it up as follows:

It is clearly desirable for there to be consistency between Commonwealth, state and territory legislation dealing with individual decision-making, including in relation to terminology. At present, no such consistency exists. ... Such inconsistency causes problems, in particular because the criteria and scope of state and territory appointments vary; and appointments may not be recognised in other jurisdictions ... people commonly travel between jurisdictions or live in towns that straddle jurisdictional boundaries.⁴

- **Dealing with international Conventions** – guardianship being an example. That Act is not shockingly out of date, but it is tired, and does not reflect the 2008 UN *Convention on the Rights of Persons with Disabilities*,⁵ and its emphasis on human rights, and supported decision making – how to do that while ensuring people with impaired decision making ability are not exploited, is our challenge.

- **Responding to technological change** – this challenge is best summed up by Lord Chief Justice Thomas in his Scarman lecture:

As should be readily apparent to us all the future is going to be radically different from the past in many ways. We are all familiar with the challenges the Internet and social media, in particular, pose for as diverse a range of matters as privacy, jury integrity, and the efficacy of court orders. Digitalisation equally raises challenges to, for instance, our concepts of ownership, of contract, of employment status and rights, of intellectual property rights, and consumer rights. With the development of coded currencies such as Bitcoin questions arise concerning regulation, ... and the prevention of fraud.⁶

- **Resources** – you would probably not be in this room unless you saw the importance and value of dedicated professional law reform, but Treasurers with a keen eye for the bottom line need reminding and persuading that there is a need for a well-resourced law reform commission.

How do we judge our success?

4. Australian Law Reform Commission, *Equality Capacity and Disability in Commonwealth Laws*, Final Report (2014) [10.35]-[10.36], [10.39].

5. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

6. R.J.L. Thomas, “Law Reform Now’ in 21st Century Britain: Brexit and Beyond” (Sixth Scarman Lecture, London, 26 June 2017) [8].

- It cannot be in reference to the speed of delivery of the report, although we must not be dilatory;
- Nor can it be by the adoption of our reports (neither the speed of adoption, nor whether adopted at all!), otherwise we will produce popular reports, not well reasoned results;
- It can be relevance, but how is that to be judged, and by whom?
- Our reports can be useful even when they are not adopted – as when they receive judicial comment. In 2016, 17 LRC publications were referred to 32 times by Australian superior courts of record – an excellent score.
- And then there is the use of our reports by text writers and practitioners (the leading examples being our company title and dividing fences reports);
- If our popularity among applicants for internship is the test, we are a roaring success.
- I am mindful, too, that the best outcome may sometimes be no legislation at all. For example Nicholson J, writing extra judicially in 1995, commented:

In identifying “legal issues” relating to intellectual disability, it should ... be borne in mind that the law may not always provide the appropriate solution. To put it another way, in identifying the need to change the law, it is appropriate to debate whether the subject matter of the change can be achieved otherwise than by the law.⁷

How does one count the work of the law reform commission if that is the outcome?

The question of human rights

Do we bring an attitude or bias to our work? Yes. We are not just neutral drafters of technically perfect laws; we are in favour of human rights and dignity. But there is no specific reference to human rights in our Act. Bathurst CJ talked about these matters in his opening of Law Term address in 2016. He noted that:

the only other scrutiny review mechanism in this state, beyond the Legislation Review Committee, is the New South Wales Law Reform Commission.⁸

The Chief Justice, being the Chief Justice, is of course right, but it was nevertheless a jolt to hear that, simply because it is not said anywhere in our enabling legislation. Perhaps a small

7. RD Nicholson, “Waving the Magic Wand: Solving Key Legal Issues Relating to Intellectual Disability” (1995) 2 *Journal of Law and Medicine* 270, 271.

8. TF Bathurst, “The Nature of the Profession: The State of the Law” (Opening of Law Term Address, Sydney, 4 February 2016) [27].

piece of future law reform in the law reform area, might be to make explicit, a protection of human rights agenda for this Commission, as it is for the ALRC.

So we are 50

What else is 50? The AM radio program on the ABC, Meals on Wheels, Australia Square, Sergeant Pepper's Lonely Hearts Club Band, the 6 day war.

In 1967 UK Law Commission was 3 years old, Harold Holt had not yet gone swimming at Cheviot Beach, Donald Trump was studying real estate at the Wharton School of the University of Pennsylvania, and the ALRC was still a gleam in Michael Kirby's eye. New Zealand had to wait another 20 years or so.

So what is our role?

The then Chairman of the Law Commission in 2013 said:

We have to look of course at the question of whether the law is up to date, whether it continues to meet the needs of changing social conditions, the changing needs of commerce and whether it keeps up to date with technological developments. In addition to that, we are looking at the quality of existing legislation. It is fundamental that legislation, that the law generally, should be accessible and intelligible.⁹

We would adopt that completely.

Conclusion

It is an honour to chair this Commission, and the Commissioners, Tracey Howe, Justice Brereton and I, are honoured by your presence to celebrate this anniversary. I thank the Attorney General for hosting this event; my staff, especially Erin Gough and Anna Williams; and I thank you all for your attendance.

9. RJL Thomas, "Law Reform Now' in 21st Century Britain: Brexit and Beyond" (Sixth Scarman Lecture, London, 26 June 2017) [35] quoting D Lloyd-Jones.