

LAW REFORM IN THE 21ST CENTURY

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Annual Tony Blackshield Lecture, delivered at the Federal Court of Australia, Sydney, 8 November 2016.

I SIGNIFICANCE OF ANNUAL LECTURES

Several weeks ago, I had the honour of chairing the Tristan Jepson Memorial Lecture in this very room as chair of the Tristan Jepson Memorial Foundation, dedicated to responding to issues of mental health and wellbeing in the legal profession. Macquarie students and alumni have been actively involved in the Foundation from the start and are now.

After that, I attended the annual Charles Perkins Memorial Oration, at the University of Sydney, a regular opportunity to focus on indigenous issues. On this occasion, three of our five indigenous members of federal Parliament and a distinguished Torres Strait Islander were on a panel to discuss the significance of Charles Perkins some 50 years after the Freedom Ride, and the chances of meaningful constitutional recognition — sometime in the next 50 years? I will of course be attending the City of Sydney Peace Prize lecture on Friday night, with Naomi Klein.

Tony Blackshield reflected on the concept of the annual lecture 31 years ago, almost to the day, when delivering the Meredith Memorial Lecture at La Trobe University. He said:

An annual series of memorial lectures plays an important symbolic role in the life of a university. On the one hand such lectures are one small way in which universities can demonstrate their capacity for topical ‘relevance’, for public contribution to the fabric of community life.

On the other hand, such lectures also remind us of the values of tradition and continuity in university life. The continuity and community that we celebrate on such occasions link our generation of academics with all the earlier generations of individual men and women whose dedication to the stream of knowledge — to maintaining it, transmitting it, and if possible extending its boundaries — has defined the meaning of universities since they first came into existence. And all this reminds us even more deeply that when we, in our own generation, pursue the goals just mentioned — the goals of maintaining, transmitting and extending the stream of knowledge — we can do so only through dialogue; and that this is a dialogue not only between the men and women of our own generation but between our generation and all the generations before us.¹

His message was directed at academics, but I think it is equally true of alumni — and even if you do not do what you must be thinking I do and make a habit of attending this kind of lecture, this evening may be the only time each year on which you reflect on your university days as well as catch up with your former class mates, and that has to be good. Nor is it necessary to have died to have a lecture named after you, as Tony demonstrates so well!

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¹ Anthony R Blackshield, ‘The Legitimacy and Authority of Judges’ (1987) 10(1) *University of New South Wales Law Journal* 155, 155.

II TONY BLACKSHIELD AND I

It does seem to be obligatory for the speaker to reflect on their own acquaintance with the honouree, and it is a pleasure to do that this evening. I was a student of Tony's at Sydney Law School. Tony obviously regarded teaching me or my year as the apex of his career there, and left Sydney Law School almost immediately after. You can read the rest of his career highlights in the first Blackshield Lecture delivered by the Hon Michael Kirby.² It was a career with political overtones, of course, and not a little controversy. And he remains in the newspapers to this day — his analysis of the recent history of the laws on political speech in *The Saturday Paper* of 8 October this year is as sharp and erudite as ever,³ and a delight to read, I suspect, even for lay people.

My diverse career after that did not include teaching law except for my being sent just a few years later to teach law at the law school in Medan, North Sumatra, Indonesia. The aim was to introduce teaching along the model of the Anglo-American case law system to a law school steeped in teaching based on the traditional civil law-type system based largely on the Dutch law, in combination with the local *adat* law. In preparation for that, I was encouraged to visit the new generation of law schools, UNSW, Monash and of course Macquarie Law School in 1975 — to study methods of legal education there. I was greatly impressed by what I saw — far more active involvement between staff and students than I had seen at Sydney as a general rule, excepting of course classes taught by Tony and his ilk.

III LAW REFORM

I am not talking about law reform by judges, sometimes called judicial activism. I am talking about deliberate or deliberative reform — enacted by legislators, and the process by which that is enhanced through interactions outside the legislature. Professor Gerard Quinn from the University of Ireland in Galway said in Sydney recently:

Dean Roscoe Pound used to insist that 'all law decays inevitably.' What he meant was that, either the facts that the law was intended to address have materially altered or that the values that originally animated the law have also changed. Law reform to him meant a re-adjustment of the law to meet current exigencies with new animating values.⁴

I went back with his assistance to find the precise quote — '[I]legal systems have their periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence'⁵ — which was the title of the celebrated 1908 *Columbia Law Review* article from which the quote is drawn. But I prefer Gerard Quinn's paraphrase, 'all law decays inevitably', as summing up the challenge to which law reformers are directed today, our *raison d'être*. Tony will be pleased at any Roscoe Pound reference.

A *Law Reform's Long History*

I recently came across in Richard Fidler's book, *Ghost Empire*, this description of law reform in Roman times:

² Michael D Kirby, 'A R Blackshield and Realism in Australian Constitutional Law' (2013) 11 *Macquarie Law Journal* 8.

³ Anthony R Blackshield, 'The Constitution's Implied Freedom', *The Saturday Paper* (Carlton, Victoria), 8 October 2016, 7.

⁴ Gerard Quinn, 'From Civil Death to Civil Life — The Decay and Re-Birth of Legal Capacity Law Around the World' (Paper presented at Australian Guardianship and Administration Council Conference, Sydney, 17–18 October 2016).

⁵ Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605, 607.

[In 528 at] Justinian's instigation, John [the Cappadocian] set up a ten-man commission to sort through the entire corpus of Roman law. The Roman legal system was one of Rome's greatest civilisational achievements, but by the sixth century, the code had grown into a gigantic hodge-podge of conflicting and out-of-date laws that hobbled the administration of justice, which in turn undermined the authority of the state. '... the law [we have found] to be so confused that it is extended to an infinite length and is not within the grasp of human capacity.'

The commission got to work, discarding contradictory and redundant laws, reassembling what was left into a more coherent form, and introducing new ones as needed to supersede the confusion.⁶

This was substantive reform — not just tidying, as can be seen from the following:

Theodora [the Empress] instigated her own program of law reform to improve the status of Roman women. It became easier for women to own property, a husband could not take on a major debt without his wife giving her consent twice, the killing of a wife for adultery was outlawed, and rape became a crime punishable by death.⁷

That reference to women owning property triggered in me, as it may have done in some of you, a distant recollection of the *Married Women's Property Act 1882* (UK), the Act that allowed married women to own and control property in their own right. It was a model for similar legislation in Victoria in 1884, and eventually New South Wales in 1893 — a mere 1360 years later.⁸

And while we are on this frolic, what about that reference to husbands not taking on a major debt without the wife's consent, *given twice*? I went back to Richard Fidler's source, not the Latin admittedly. Here is the full quote — 'Before a husband could encumber an ante-nuptial donation [think dowry] with debt, the wife had to give her consent twice; this was because on the first occasion she might have been won over against her better judgement by her husband's blandishments and later changed her mind.'⁹ These days law reformers would probably be explicit in requiring the two consents to be separated by a number of days, say, or a number of weeks, but no such requirement is obvious in the Codex.

So how did John's commission go in delivering on its brief from Justinian — Richard Fidler again:

The commission delivered its draft of the *Codex of Justinian* on 8 April 529, the first comprehensive and coherent body of Roman law in the empire's history. It had been completed in just thirteen months, an astonishingly short period. Justinian crowed as he announced its publication: 'Those things which seemed to many former emperors to require correction, but which none of them ventured to carry into effect, we have decided to accomplish at the present time, with the assistance of almighty God.'¹⁰

A stunning achievement indeed. Law Reform Commissions today rarely complete anything in less time, but then unlike the Romans, we do engage in extensive stakeholder consultation.

These references to Justinian provoke me into acknowledging Richard Ackland, publisher of the magazine of that title, graduate, old friend, and most recently the recipient of an honorary degree from your University. Congratulations, Dr Ackland!

⁶ Richard Fidler, *Ghost Empire* (Harper Collins, 2016) 86.

⁷ Ibid.

⁸ Married Women's Property Act 1882 45 & 46 Vict c 75; The Married Women's Property Act 1884 (Vic); Married Women's Property Act 1893 (NSW).

⁹ Lynda Garland, *Byzantine Empresses: Women and Power in Byzantium, AD 527–1204* (Routledge, 1999) 16.

¹⁰ Fidler, above n 6, 86–7.

B *Establishment of NSWLRC*

It was 1417 years after Justinian, on 20 March 1946, that Lt Col Murray Robson, then the member for Vaucluse in the NSW Legislative Assembly, said about a piece of legislation:

I am certain that the Attorney-General will be the first to agree that this is a highly technical measure. There exists a need for a standing committee on law reform to deal with a measure such as this. The leader of the Country Party has mentioned the difficulty that he, in common with other hon. members who have not had the advantage, or the disadvantage, of being members of the legal profession, has experienced in studying this measure. Though I have had some legal experience, and notwithstanding the Minister's very clear explanation, I should not say that I am fully seized with the implications of the bill. That emphasises the necessity for the appointment of a standing committee to deal with a measure such as this, which affects the civil rights of every subject in New South Wales.

I am not au fait with its details, and I have a rather uneasy feeling about it. If hon. members had the advantage of the studied opinion of a law reform committee that had the imprimatur of the Attorney-General, I have no doubt that their way would be made much easier.

I would, therefore, ask the Minister to give consideration to my suggestion that whenever a measure such as this is contemplated as a matter of Government policy, it should be submitted to a committee ... a committee outside the House, composed of experienced lawyers, so that we could have the benefit of their advice when a measure comes before the House.¹¹

Some 20 years later, the New South Wales Law Reform Commission (NSWLRC) was formally established as, what that unreliable authority Wikipedia, calls the 'first permanent body established in Australia to continually conduct and investigate law reform.'¹² How can you rely on Wikipedia when it so egregiously splits an infinitive? The Commission was set up initially by administrative act on 1 January 1966, and by its own Act of Parliament on 25 September 1967.¹³ But there had been earlier versions.

The first Law Reform Commission in New South Wales was set up by letters patent in 1870 and was charged with the revision and consolidation of the statute law, the reform of the practice and procedure of the courts, and the removal of inconveniences resulting from separate law and equity jurisdictions. It is said that a lack of interest within Parliament meant that its only success was the *Criminal Law Amendment Act* of 1883 and the Commission itself soon lapsed. In 1893, a Royal Commission was appointed to consolidate the statute law, 'although it was not to make or suggest any amendments'¹⁴ — I suppose you could do that, but it sounds like much effort to little avail!

Skipping several iterations of little interest today, a permanent — though part-time — Law Reform Committee was established in 1961 under the chairmanship of Justice L J Herron, who soon afterwards became Chief Justice. Its charter was to recommend reforms, particularly in practice and procedure, which would increase efficiency and economy in the administration of justice. According to Professor David Benjafield, who served on the

¹¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 March 1946, 2811–12.

¹² *Law Reform Commission of New South Wales* (10 March 2017) Wikipedia <https://en.wikipedia.org/wiki/Law_Reform_Commission_of_New_South_Wales>.

¹³ See William H Hurlbert, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, 1986) 123. Those who wish to pursue the history of law reform in greater detail than this talk should consult Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) and Michael Tilbury, Simon N M Young and Ludwig Ng (eds), *Reforming Law Reform* (Hong Kong University Press, 2014).

¹⁴ NSWLRC, *Precursors of the NSW Law Reform Commission (1870–1965)* (16 March 2004) <www.web.archive.org/web/20070904135453/http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_history1>.

Committee, the chief deficiencies of the Committee were that it was limited to considering matters of procedure unless other matters were referred to it by the Attorney-General; that it was recruited on a part-time and purely voluntary basis, with virtually no research facilities; and that it often produced majority and minority reports which the Government felt were unsafe to implement in the absence of unanimity.¹⁵

The new government elected in 1965 had made the establishment of a commission an election promise. Under the *Law Reform Commission Act 1967* (NSW) s 10:

The Commission, in accordance with any reference to it made by the Minister:

- (a) shall consider the law, enacted or promulgated by the Legislature of New South Wales or by any person under the authority of that Legislature, with a view to, or for the purpose of:
 - (i) eliminating defects and anachronisms in the law,
 - (ii) repealing obsolete or unnecessary enactments,
 - (iii) consolidating, codifying or revising the law,
 - (iv) simplifying or modernising the law by bringing it into accord with current conditions,
 - (v) adopting new or more effective methods for the administration of the law and the dispensation of justice,
 - (vi) systematically developing and reforming the law,
- (b) shall consider proposals relating to matters in respect of which it is competent for the Legislature of New South Wales or any person under the authority of that Legislature to enact or promulgate laws, and
- (c) may for the purposes of this section hold and conduct such inquiries as it thinks fit.

Clearly the Commission had the task, at least in part, to address the same issues as John the Cappadocian did! It must have been fun in those early days to address the ‘gigantic hodge-podge of conflicting and out of date laws that hobbled the administration of justice, which in turn undermined the authority of the state’, and to sweep away the ‘ancient and irrelevant laws’.¹⁶ One of the earliest reports,¹⁷ was about the application of Imperial Acts in NSW, and recommended repeal of hundreds of them — you may be pleased to learn that those saved included *Magna Carta*, and the *Treason Act of 1351*,¹⁸ as well as the 1688 *Bill of Rights*.¹⁹

The second part of the exercise led to Report 10 in 1971,²⁰ which addressed out-dated and anomalous NSW Statute laws. It recommended repeal of some Acts as obsolete because they dealt with a transient situation or an event long since passed, such as the *Australia’s One Hundred and Fiftieth Anniversary Celebrations Act 1936* (NSW) and others, because of social and industrial change, such as the *Coal-lumpers Baskets Act 1900* (NSW). This unlamented statute had regulated the size of baskets to be used by coal-lumpers in discharging coal from ships, a coal-lumper being a person who carries coal by manual labour. Hopefully the practice of coal lumping had stopped. Some had expired by effluxion of time, such as the *Legal Practitioners (War Service) Amendment Act 1940* (NSW),²¹ which had been enacted to continue in force for the duration of the war between His Majesty and Germany and her allies and until the 30th day of June in the year next following the year in which peace is declared, and no longer.

These were the bread and butter of law reform, the Justinian-like brief — and possibly what most people assume is all we do. They probably also assume we go and find laws that need to

¹⁵ Ibid.

¹⁶ Fidler, above n 6, 86.

¹⁷ NSWLRC, *Application of Imperial Acts*, Report 4 (1967).

¹⁸ *Treason Act 1351* 25 Edw 3.

¹⁹ *Bill of Rights 1688* 1 Wm & M sess 2.

²⁰ NSWLRC, *Statute Law Revision*, Report 10 (1971).

²¹ *Legal Practitioners (War Service) Amendment Act 1940* (NSW).

be fixed and report on those, but in fact we act only on references given us by the Attorney-General.

IV CHALLENGES OF THE 21ST CENTURY?

I want to focus on some of the current challenges for law reform, with particular reference to one of our three current projects, the law of guardianship.

Before doing so I should touch on the other two. One is statutory alternative dispute resolution (ADR) in NSW — a situation Justinian would recognise — more than 50 statutes with different ways of describing ADR. We have revived this reference after a long hiatus.

Then there is s 6 of the *Law Reform Miscellaneous Provisions Act 1946* (NSW) — anyone remember that? That section is intended to protect a claimant who has a right of action against an insured defendant and wants to claim against the insurer. The protection is provided by imposing a statutory charge on the proceeds of the policy. The section has been the subject of judicial criticism for many years. The NSW Court of Appeal described the section as ‘somewhat enigmatic’ and unclear, and called for it to be ‘completely redrafted in an intelligible form so as to achieve the objects for which it was enacted.’²² The very same Justice Kirby said of this section in one case that it was ‘undoubtedly opaque and ambiguous’ and in another that ‘ambiguity may be its only clear feature.’²³ So you may think it hardly surprising that it was referred to us for consideration.

And guess what — it was that very Act which led to Lt Col Murray Robson’s suggestion of a standing committee which I quoted earlier. So there you have it — 70 years ago, section 6 was adopted, 50 years ago the Commission was set up, and this year the Commission is asked finally to review the section. Full circle. We have made considerable progress on this reference, consulting with affected stakeholders, and expect to report shortly. It is a perfect example of essential law reform to address a well-recognised problem, where our consultation process will give the government, I hope, confidence that our solution will be acceptable, and will work.

In general terms, what are the challenges?

A *Adoption of Reports*

The Australian Law Reform Commission (ALRC) publishes the track record of implementation of its Reports on its website, which you may think is a brave thing to do. It shows some reports have not been responded to, and far less implemented in whole or in part, over many years. We do not do that ourselves, but I will think about doing so, perhaps when my term is about to expire!

The reluctance is for this reason. I am not myself persuaded that the adoption into law of the work of a law reform commission is the best test of our success — the best KPI. It’s a version of a familiar problem for public authorities. In a previous life,²⁴ I argued that successful prosecutions were not the right test for law enforcement agencies. Adopting such a test would lead to risk averse behaviour by prosecutors. Similarly for law reform agencies. If enactment is the test, then the commission will strive just for that, whereas our task ought to be dispassionately and apolitically to report our best view of what the law ought to be,

²² *Chubb Insurance Company of Australia Ltd v Moore* [2013] NSWCA 212 [5], [55].

²³ *New South Wales Medical Defence Union v Crawford* (1993) 31 NSWLR 469, 479; *McMillan v Mannix* (1993) 31 NSWLR 538, 542.

²⁴ As Chair of the Australian Securities and Investments Commission from 1993 to 2000.

without regard for the politics of having that view accepted at a point in time — especially when governments often do not have control of both houses of the legislature.

B Resources

It is the simple fact that law reform commissions are no longer well-funded — some apparently barely funded, as with ALRC itself.²⁵ Others have even been disestablished, as in Victoria, which was only revived in 2000 after 8 years in wilderness. The NSWLRC did go for 2 years without a designated chair.

It was not always thus. I played a role in the first reference of the ALRC which produced Report 2, *Criminal Investigation*. That work occupied my time and paid the mortgage while I was awaiting my visa for Indonesia in 1975. Looking at the Report again after all these years, it is clear why so many regard the work of that Commission as the high water mark of law reform in this country.

The Terms of Reference dated 16 May 1975 required ALRC to inquire into and report as to the appropriate legislative means of safeguarding individual rights and liberties in relation to the law enforcement process by the Australia Police under Australian and Territorial law and to report thereon not later than 15 August 1975. Three months.

Quoting from the Report:

Immediately upon receipt of the terms of reference, the Commission met to formulate research guidelines, appoint consultants and arrange for the invitation of submissions from the public. The Commission at this stage comprised only the Chairman, [a then barely known lawyer called Michael Kirby, fresh from a thriving practice at the NSW Bar] three part-time members and limited staff. ... A team of fourteen consultants, produced by the first week in July 1975 substantial research papers on particular aspects of the reference. ... Some tentative views were then formulated at a three-day conference at the Australian National University in Canberra on 5-8 July 1975 attended by all members of the Commission and all consultants. The Commission then held a series of advertised public hearings in the capital cities of every State and in the Northern Territory and Australian Capital Territory from 9 to 23 July 1975. In the course of these hearings, oral submissions were received from a total of 115 persons. ... The Commission met again in Canberra on 25-27 July 1975 for a further intensive three-day session to establish its conclusions and recommendations in the light of all the comment received. A draft report was then written and the Office of Parliamentary Counsel instructed to prepare draft legislation in accordance with the report. Further meetings to refine conclusions and to settle the draft legislation were held in Sydney on 16-17 and 30-31 August 1975.²⁶

The Report was dated 5 September 1975, the date to which the deadline had been extended — a law reform world speed record! Note the extent of the consultation. Note the money which had to be spent in a short period to corral 14 consultants plus part time commissioners and put them up over meetings lasting days at a time. Note the speed generally! Law Reform Commissions do not operate that way today.

²⁵ The Chair of the ALRC:

‘ During 2015-16, the ALRC worked on only one inquiry rather than the usual practice of working on two inquiries concurrently. This change to our anticipated work plan was necessitated by a significant reduction in our budget as a MYEFO efficiency savings measure. The ALRC managed this reduction by requesting that the Attorney-General not appoint a second Commissioner and agree to our only undertaking the one inquiry.’ ALRC, *Annual Report 2015-2016*, Report No 130, (2016) 5.

²⁶ ALRC, *Criminal Investigation*, Report No 2 (1975) [4].

C *Technology*

It is compulsory these days to mention the effect of technology. In fact, I have little to say other than, as with legal practice, the availability of information through technology means that, whatever the subject matter, we have a mass more material to deal with than our predecessors. Information overload. Our attention is drawn in the context of the guardianship review, for example, to the latest developments in places as diverse as Texas and Bulgaria. Where should one draw the line?

D *Approach*

So, what attitude are we supposed to bring to the task? Are we supposed to be biased, for example, towards any view such as protecting individual rights, or protecting the community by enhancing the powers of government? No guidance leaps at you from the words of the statute.

Surprisingly, you may think, I missed the opening of Law Term dinner this year. Surprising because it is another example of an annual lecture, when the Chief Justice speaks on the state of the profession. The Sydney Morning Herald reported the following day that Chief Justice Tom Bathurst had said that it was ‘questionable’ whether mechanisms for scrutinising bills in the state were ‘translating into an effective protection of fundamental common law rights’ and that ‘the only other scrutiny review mechanism in this state, beyond the [parliamentary] Legislation Review Committee, is the NSWLRC.’²⁷ I confess that I was, initially at least, taken aback to read that. It did rather sound as if the commission had an explicit role in protecting human rights generally.

In his speech, the Chief Justice drew attention to the parliamentary scrutiny processes at a Commonwealth level including the Senate Standing Committee on Regulations and Ordinances, the Senate Standing Committee for the Scrutiny of Bills, the Parliamentary Joint Committee on Human Rights, the Senate Standing Committee on Legal and Constitutional Affairs, the Parliamentary Joint Committee on Intelligence and Security and, finally, the Parliamentary Joint Committee on Law Enforcement. In contrast, at a state level in New South Wales, as he said, ‘there is the one joint standing Legislation Review Committee. This Committee was set up in response to the Legislative Council’s Law and Justice Committee’s inquiry in 2001. That inquiry recommended that instead of NSW having a bill of rights it have a committee to scrutinise bills.’²⁸

He then noted that

obviously our state has no equivalent to the Australian Human Rights Commission, or a counterpart to the Victorian Equal Opportunity and Human Rights Commission. Admittedly, international human rights obligations bind the states as much as the Commonwealth. Nonetheless, it would appear that the only other scrutiny review mechanism in this state, beyond the Legislation Review Committee, is the New South Wales Law Reform Commission.²⁹

Our ability to perform that role is limited first, as he knew, by the requirement that we can only consider matters referred to us by the Attorney General, but as you will see, we can be

²⁷ Tom F Bathurst, ‘The Nature of the Profession: the State of the Law’ (Speech delivered at the Opening of Law Term, Sydney, 4 February 2016); Michaela Whitbourn, ‘Chief Justice Tom Bathurst warns of Threat to Basic Legal Rights’, *Sydney Morning Herald* (Sydney), 5 February 2016.

²⁸ *Ibid.*

²⁹ *Ibid.*

and are usually given guidance in the references as to what approach we should bring to each task.

We do have the word ‘reform’ in our title. Michael Kirby, who now appears for the fourth and last time in this talk, said about this:

[Speaking in the debate on the *First Reform Bill* in 1831] Macaulay made this point by reference to the etymology of the English word ‘reform’. He urged ‘reform that you may preserve’. In other words, reform implies some degree of preservation or conservation of the object of the reform exercise. What is produced at the end of the day is ‘re-formed’. It may well be changed, with a view to improvement. But what is produced is designed to fit within the order that is being reformed, although with modifications, developments and adaptations necessary for new times, new needs, new circumstances.³⁰

So all law decays inevitably, but we must be careful to preserve, to some extent.

E *The Relevance of International Conventions*

Modern law reform is often triggered by, and always needs to have regard to, international conventions. I mentioned earlier the ALRC Report 2 *Criminal Investigation*. Its terms of reference included that it should have regard to

the commitment of the Australian Government to bring Australian law and practice into conformity with the standards laid down in the International Covenant on Civil and Political Rights;³¹

Despite that, at least according to the Report’s index, there is only one explicit reference to the International Covenant on Civil and Political Rights in the report:

The Commission’s attention is called to the International Covenant on Civil and Political Rights by s 7 of the *Law Reform Commission Act 1973*. That Covenant provides in Article 7 that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment’ and in Article 10 that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. It is appropriate that these general provisions should be incorporated into any Australian legislation dealing with the rights of persons in custody and the obligations of those detaining them there. Such general provisions do not, of course, exhaust the need for more explicit rules. Accordingly a number of specific rules are recommended. First, medical treatment should be obtained forthwith for any person in custody who either requests it or reasonably appears to need it. There is no reason why the cost of such treatment should not normally be borne by the person in custody. Secondly, we regard it as axiomatic – but no less necessary in statutory form for that – that persons in custody be provided with reasonable toilet facilities, food and drink. Thirdly, we recommend that persons, if held in custody for more than four hours, should be given, where reasonably possible, the opportunity to wash or shower, shave and obtain a change of clothes prior to their appearance in court.

There is ample evidence now accumulated to show that prospects of acquittal of persons who appear in court directly from custody are substantially less than if they answer a summons or have been released on bail. Although obviously other factors play a role, part at least of the reason for this phenomenon has been thought to be the kind of physical dishevelment – crumpled clothes, unshaven faces, and the like – which is an almost inevitable concomitant of spending a night in the cells in most parts of this country. Such factors cannot fail but to create a disadvantageous impression. Physical appearance is

³⁰ Michael D Kirby, *Reform the Law* (Oxford University Press, 1983) 8, citing Jean Beetz, ‘Reflections on Continuity and Change in Law Reform’ (1972) 22 *University of Toronto Law Journal* 129, 138.

³¹ ALRC, above n 26, ix.

also, of course, an important morale factor, partly determining the extent to which persons, especially those in a novel situation, can pull themselves together before their court appearance. It might be said that this recommended provision is somewhat unusual in its specificity about a somewhat undignified subject-matter. However the Commission regards it as no less desirable for that. It seems important, if practical effect is to be given to the Covenant to which the Statute [and I would add — the Terms of Reference for that Enquiry] directs our attention, that there should be no shying away from the articulation of practical consequences and explicit legislation.³²

Enlightened and sensible material, if somewhat genteel, from 1975. All of these concepts and some of these precise words are awfully familiar to me, as I had then just stepped down from my role with the NSW Aboriginal Legal Service. And it strikes me as prophetic of the concerns which were to lead about 10 years later to the Royal Commission into Aboriginal Deaths in Custody — if only this Report in 1975 had been more fully accepted and adopted. And if only that Royal Commission Report had been more fully implemented, the ALRC may not have needed to be asked to review the appalling level of indigenous incarceration in Australia, as recently announced.

V THE GUARDIANSHIP REFERENCE

So — to guardianship. First, our Terms of Reference:

To review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) having regard to:

1. The relationship between the *Guardianship Act 1987* (NSW) and the *NSW Trustee and Guardian Act 2009* (NSW) the *Powers of Attorney Act 2003* (NSW) the *Mental Health Act 2007* (NSW) and other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas³³. The 2014 report of the ALRC *Equality, Capacity and Disability in Commonwealth Laws*.³³
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular, the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.
5. Whether the language of ‘disability’ is the appropriate conceptual language for the guardianship and financial management regime and to what extent ‘decision making capacity’ is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision-making incapacity.
7. In the light of the requirement of the UNCRPD [United Nations Convention on the Rights of Persons with Disabilities] that there be regular reviews of any instrument

³² Ibid [135].

³³ ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.

8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.
9. Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.³⁴

You will have noticed the references to the United Nations *Convention on the Rights of Persons with Disabilities*. Professor Quinn, after quoting Roscoe Pound about law having decayed because ‘the facts that the law was intended to address have materially altered or that the values that originally animated the law have also changed’ commented as follows:

The facts here [with respect to disability] have not altered. Persons with intellectual disabilities continue to be persons with intellectual disabilities. What has altered – and altered very significantly – is how we see, frame and value persons with intellectual disabilities – and I would say not just because of the UN convention. In this regard, in my view at least, the convention confirms and reinforces rather than establishes profound shifts that have been happening out there for other reasons and in many domains beyond the law.³⁵

Professor Quinn may well be right that attitudes to people with disability have been changing, which in turn led to the adoption of the convention. Nevertheless, I believe that the facts may have altered in several respects. The terms of reference note the ageing population; matters dealt with under the *Guardianship Act 1987* (NSW) used overwhelmingly to relate to people with intellectual disability. Now they are largely related to older people, due to the increasing prevalence of dementia in our community. And then there are many people who survive accidents or illness but have acquired brain injury. Even the establishment of the National Disability Insurance Scheme is a new fact with which anybody dealing with people with disability must now deal.

Conventions produce an obvious complication for Australia as a federation. As you all know, it is Australia, the Commonwealth, which signs Conventions, and it is the states and territories which have to respond in those areas which are their responsibility. Queensland, Victoria and the ACT have already completed and published reviews of their guardianship laws,³⁶ but no change has yet been enacted other than supportive power of attorney provisions in Victoria. NSW only referred the matter to the Commission when I was appointed at the end of last year. This law has always been state and territory law, and not identical, although some mutual recognition provisions do apply. Having wide divergence in these matters would be difficult in view of family members living in different states and people moving freely between states. Putting those matters aside, it is the fact of the Convention which may now require the states and territories to align their laws and practices even more closely – and that would have to be a good thing.

It is in that context, in response to a reference from the federal Government, that the ALRC has completed a report (excellent, by the way – credit being due to your former Dean Professor Rosalind Croucher AM, and another of your graduates, Graeme Smith, the NSW Public Guardian) providing guidance for States and Territories.³⁷ I will rely heavily on the ALRC description of the Treaty and its implications, for two reasons, or perhaps three – it’s excellent; I don’t see any point in re-doing such excellent work even if I could; and I don’t

³⁴ *Review of the Guardianship Act 1987* (5 May 2017) NSWLRC
<http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Guardianship.aspx>.

³⁵ Quinn, above n 4.

³⁶ Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010); Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012); ACT Law Reform Advisory Council, *Guardianship Report* (2016).

³⁷ ALRC, above n 33.

want to give away too much about what my Commission is thinking about the issues at this stage of our inquiry. The point of interest is that what the Convention means, is not necessarily clear.

Let's look at what Article 12 of the Convention says. It may not sound remarkable at first hearing.

Article 12 — Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.³⁸

Article 12 is the main point of contention, but for completeness note Art 19.

Article 19 — Living independently and being included in the community

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.³⁹

I suspect many of you are wondering what is contentious about any of that. You may not spot it unless you have been involved in some way, with a family member being subject to adult guardianship or utilising an enduring power of attorney, for example. Let me quote from the report of the UN General Committee monitoring what has been happening since the convention was adopted:

3. On the basis of the initial reports of various States parties that it has reviewed so far, the Committee observes that there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention. Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision making. The aim of the present general comment is to explore the general obligations deriving from the various components of article 12...

³⁸ *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008) art 12.

³⁹ *Ibid* art 19.

16. Article 12, paragraph 3, recognizes that States parties have an obligation to provide persons with disabilities with access to support in the exercise of their legal capacity. States parties must refrain from denying persons with disabilities their legal capacity and must, rather, provide persons with disabilities access to the support necessary to enable them to make decisions that have legal effect.

17. Support in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making.⁴⁰

Even if you have not been involved, you probably know that our system of guardianship involves what looks and sounds like substitute decision-making – other people making decisions for those who cannot make their own decisions, by reason of some disability – dementia, mental illness, brain injury or whatever, and making those decisions in the best interests of the relevant person. The UN Convention, or the Committee, or both, seem to be saying that is no longer acceptable, and that that the rights, will and preferences of the person are what counts, not what someone else thinks is their best interests. You can take it from me that in substance all Australian jurisdictions at least until very recently, have had guardianship laws which provide for substitute decision making, and for that to happen having regard to the best interests of the person concerned. Reasonably modern laws, all of them, dating from the mid 1980s – and you might think, enlightened and beneficial. So your reaction may well be – how did Australia sign up to a Convention on such a different basis?

The ALRC Report explains that when signing up to the Convention, Australia signalled an understanding about the convention in rather different terms from the General Committee

2.57 Australia has set out its understanding about art 12 in one of three Interpretative Declarations. In relation to art 12, Australia declared its understanding: Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. *Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.*

2.58 This Declaration was made in the light of the contentiousness of guardianship in the discussions surrounding the development of the text of the *Convention on the Rights of Persons with Disabilities* (CRPD) and the criticism of what was described as ‘substituted’ decision-making. A number of other countries made similar declarations that the CRPD permits substitute decision-making in certain limited circumstances and subject to appropriate safeguards.

2.59 There are differing views about the effect of Australia’s Interpretative Declaration, particularly in relation to the role of substitute decision-making. The ALRC considers that this is driven by conceptual confusion that is impeding reform. To appreciate the significance of this tension, and to provide the context for the formulation of legal policy responses in this Inquiry, the following section explores some key concepts and the emergence of the concepts of ‘supported’ and ‘substitute’ decision making.⁴¹

I am going to save you that discussion, as my interest for tonight’s purposes is in the effect of the Treaty on domestic law reform in Australia and how to interpret and apply it. The ALRC has given very helpful guidance for the states and territories as to how to do so. We can note in passing that Australia chose not to lodge what it called a reservation, but what it called an interpretative declaration, asserting how the Convention should be interpreted and how it intended to interpret it – which you might think would not have been necessary if the words had been clear. While it is beyond my scope tonight to dwell on this, I think we can work on

⁴⁰ United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [3], [16]–[17].

⁴¹ ALRC, above n 33, [2.57]–[2.59].

the basis that the title does not matter – if the ‘Declaration’ excludes or modifies the legal effect of certain provisions of a treaty in their application to the State in question, it is a reservation.⁴²

Apart from that piece of semantics, the lawyer in me wants to understand the status of the General Comments – are they a binding interpretation?

You will recall that the General Comment asserted that there had been a paradigm shift, from substitute to supported decision making, and that states parties (and the members of the Committee do have Australia among others, in mind), are not getting it. The ALRC discusses this in these terms:

2.56 General Comments are provided by way of guidance and are different from legally binding obligations as reflected in the CRPD itself. The Rules of Procedure of the UNCRPD provide that it may prepare General Comments ‘with a view to promoting its further implementation and assisting States Parties in fulfilling their reporting obligations’. Some of the tension arising from the discussion about models of decision-making is evident in the submissions made in response to the UNCRPD’s General Comment on art 12...

2.79 The UNCRPD commented on Australia’s Interpretative Declaration in its concluding observations on the initial report of Australia to the Committee in September 2013. The Committee noted the referral to the ALRC of this Inquiry, but expressed concern ‘about the possibility of maintaining the regime of substitute decision-making, and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity’...

2.83 Australia welcomed the initiative [*don’t you love the diplomatic language?*] to clarify the scope of States Parties’ obligations under art 12 and noted ‘the Committee’s perception of a general failure of States Parties to recognise that the human-rights based model of disability implies a shift from the substitute decision making paradigm to one that is based on supported decision-making’:

Australia acknowledges the importance of supporting decision-making where this is possible, but considers that a human rights-based model of disability does not preclude all substituted decision-making. Such decisions should only be made on behalf of others where this is necessary, as a last resort, and subject to safeguards.

2.84 Australia considered the discussion of art 12(1) and (4) ‘particularly helpful’, [*more diplomatic language*] but was critical of the characterisation of art 12(3) ‘as never permitting substituted decision-making’, and [*was critical*] that the General Comment

did not acknowledge situations where no amount of support will assist, such as where a person may have a severe cognitive or psychiatric impairment and is unable to understand, make or communicate a decision. It is unfortunate (sic) that the complexities of this issue are not acknowledged and discussed in the current draft.⁴³

So are we right to be rejecting the General Comments as being binding on us? It would seem that we are entitled to do so. A UK group of academics and practitioners in the guardianship area conduct what is known as the Essex Project, and in a report published earlier this year they devoted an appendix to the status of these Comments, concluding as follows:

We undertook a survey of published views expressed on this matter, consulting academic discussion as well as UK and UN source material. The results of the survey showed a

⁴² Annebeth Rosenboom, ‘Reservations and Declarations in Multilateral Treaties’ (Presented at Capacity-building workshop on Treaty Law and Practice and the Domestic Implementation of Treaty Obligations, Wuhan, China, 13–17 October 2009).

⁴³ ALRC, above n 33, [2.56], [2.79], [2.83]–[2.84].

remarkable consistency: all the published materials that we were able to identify agreed in holding that General Comments issued by UN treaty bodies are not legally binding. We were unable to identify any published statements of the contrary view. We found a range of opinion as to the proper positive characterisation of the standing of General Comments.

To summarise, while states that ratified a treaty and entrusted a UN Committee with certain functions regarding the interpretation and application of the treaty provisions have an obligation to engage with the UN Committee's views and interpretation in good faith and give it important weight, states are not bound by General Comments or their applications in concluding observations or individual complaints procedures and will not necessarily be in breach of their treaty obligations if they reject an interpretation adopted by a UN Committee.⁴⁴

So we are off the hook there. My point in the context of law reform is that the meaning of international treaties is critical to the modern domestic law reform process. It does matter what the Treaty says and what it means, when we write new laws in Australia on subjects covered by those treaties. Can I remind you what Professor Quinn said?

The facts here have not altered. Persons with intellectual disabilities continue to be persons with intellectual disabilities. What has altered — and altered very significantly — is how we see, frame and value persons with intellectual disabilities — and I would say not just because of the UN convention. In this regard, in my view at least, the convention confirms and reinforces rather than establishes profound shifts that have been happening out there for other reasons and in many domains beyond the law.⁴⁵

We in NSW, and indeed the rest of Australia, still have to deal with these matters, to recognise the human rights of Australians with disabilities, *and* to give effect to the convention according to its best interpretation. Those who wish to explore the subject further can find a background paper and three Question Papers on our website now. More question papers will follow. We will welcome responses.

I quoted Roscoe Pound earlier on the law decaying and requiring reform, and Michael Kirby as suggesting some degree of preservation is required. A balance must be struck. Nevertheless I am grateful, I think, to former Chief Justice Spigelman, a classmate of mine and therefore also a student of Tony's — for drawing my attention to another Roscoe. The late former US Sen. Roscoe Conkling, politely described as a notorious Tammany Hall politician, or in NSW talk, a well-known racing identity, said:

When Dr Johnson defined patriotism as the last refuge of a scoundrel, he ignored the enormous possibilities of the word reform.⁴⁶

⁴⁴ Wayne Martin et al, *The Essex Autonomy Project: Three Jurisdictions Report: Toward Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK*, Position Paper (2016) 53.

⁴⁵ Quinn, above n 4.

⁴⁶ Chief Justice Spigelman, 'The New Liability Structure in Australia' (Speech delivered at Swiss Re Liability Conference, Sydney, 14 September 2004) 8, citing Dorothy S Truesdale, 'Rochester Views the Third Term 1880' (1940) 2(4) *Rochester History* 1, 5.