INTRODUCTION: JUSTICE BEHIND THE SCENES

PROFESSOR ROSALIND CROUCHER—DISCUSSANT[*]

I REFLECTING ON THREADS

I take my task as 'discussant', as noted in the program for the proceedings, to bring together the intellectual 'threads' of the three papers in this session. Having read the papers diligently prior to the day and then listening intently through their presentation, it seems to me that there are two key 'justice' threads in their subject matter: first, access *to* justice at a high level; and, secondly, justice *solutions*—through change in the law itself; through change in court practice; and through change in government policy. I will draw these out a little further after adding my own reflections on a critical thread in 'justice behind the scenes'—the theme of this first set of papers. That thread is the power of people, in which serendipity and accidental meetings can play an intriguing part.

II OF SERENDIPITY AND ACCIDENTAL MEETINGS

To illustrate this idea I want to take you to a meeting on a campus much like this, some 37 years ago. It was a meeting between a gardener and a couple of academics. The gardener's name was Koiki or 'Eddie' as he was known. In 1974 Koiki had a conversation with James Cook University academics Professor Noel Loos and Henry Reynolds about his land on Mer (Murray Island) that started a ball rolling that ended up, nineteen years ago today, on 3 June 1992, in the High Court's decision in *Mabo & Ors v Qld (No 2)*, upholding the continuity of Koiki Mabo's title to his land on Murray Island and with it, signalling the end of *terra nullius*. It was a fortuitous—serendipitous—meeting, combining principle, passion and champions.

The 'happenchance' of history, of propelling moments that can bring about change to the law can be found in many stories. I would like to add just one more. When Dora Montefiore's husband died she went, as one would, to see the family solicitor. He—as they were all 'hes' at the time—said something to the effect that she was fortunate that her husband had not appointed a guardian of the (*her*) children, so she would be their guardian, otherwise he could have willed them away from her.[1] From that moment, she said, she became 'a suffragist'. She became the first secretary of the NSW Womanhood Suffrage League.[2] And the efforts of women like Mrs Montefiore propelled the law reform energies that led to the introduction of female suffrage and also to changes in the laws that affected women—including the guardianship of children. Some of their stories I have told elsewhere.[3] For today it is enough

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[*] President, Australian Law Reform Commission (ALRC) and Professor of Law, Macquarie University (on leave for the term of appointment at the ALRC). The observations in this summary are my own and do not represent views of the ALRC.

[1] D Montefiore, *From a Victorian to a Modern* (1927), 30–31.

[2] See H Radi, 'Whose Child? Custody for children in NSW 1854–1934', in J Mackinolty and H Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788–1979* (1979) 119–138.

[3] See, eg, R Atherton, 'New Zealand's *Testators' Family Maintenance Act* of 1900—the Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 202-221; R Atherton, 'The *Testator's*

to say that researching their stories when I undertook my own doctoral research impressed upon me how extraordinarily idiosyncratic and *individual* were the stories in law reform moments. And how very much it is the story of the power of people.[4]

III THE POWER OF PEOPLE

In researching for a series of presentations in 2008 to mark the sesquicentenary of the introduction of the Torrens system of land title in South Australia,[5] I came across two observations that resonated with me. They are particularly pertinent today in the context of a session that is looking at justice 'behind the scenes'.

I was to give the Alex Castles Memorial lecture, named in honour of a fine and very much lamented late legal historian, Professor Alex Castles, of Adelaide law school and later a Professorial Fellow at Flinders University. Alex had also been one of the founding Commissioners at the ALRC, under the Chairmanship of the Honourable Michael Kirby. In writing a tribute to Alex in the *Australian Journal of Legal History*,[6] Kirby cited a passage quoted by Sir Victor Windeyer in an article published in the *Alberta Law Review* in 1973, on the topic of 'History in Law and Law in History'. (As he retired in February 1972, this signalled Sir Victor's transition into the very thoughtful 'post-retirement' phase).[7] It was a comment from Professor Cecil HS Fifoot (of 'Cheshire and Fifoot on Contracts' fame) in his Selden Society Lecture in 1956, entitled 'Law and History in the Nineteenth Century':

> Legal history, as has often been said, is the history of ideas. But ideas are not self-sown. They are coloured by environment and conditioned by the climate of opinion; but they are, after all, the creatures of men's minds and to isolate them from the pressure of personality, even if it were desirable, is impossible.[8]

Following along this excellent track I delved into Windeyer's article and found another marvellous quote. Sir Victor referred to Thomas Carlyle's description of history as 'the essence of innumerable biographies',[9] but distinguished it, saying rather that 'it is the essence of the lives of innumerable men, not all of whom have had biographies'.[10] This really struck a chord with me. In my legal historical excursions in the past, I have been singly affected by how much the stories of individuals lie behind the story of law—and particularly of law reform through legislation.

Family Maintenance and Guardianship of Infants Act 1916 (NSW): Husband's Power v. Widow's Right' (1991) *Australian Journal of Law and Society*, 97-129. (Note, before 2004 I published under the surname 'Atherton').

[4] This was a theme I addressed specifically in R Croucher, 'Law Reform as Personalities, Politics and Pragmatics—the *Family Provision Act 1982* (NSW), A Case Study' (2007) 11(1) *Legal History* 1–30.

[5] Published as: '150 years of Torrens—Too much, Too Little, Too Soon, Too Late?' (2009) 31 *Australian Bar Review* 245–278 (the Forbes lecture on Legal History); '*Delenda est Carthago*! Sir Robert Richard Torrens and his Attack on the Evils of Conveyancing and Dependent land Titles: A Reflection on the Sesquicentenary of the Introduction of his Great Law Reforming Initiative' (2009) 11 (2) *Flinders Journal of Law Reform* 197–262 (the Alex Castles Memorial Lecture); and 'Inspired Law Reform or Quick Fix? *Or*, "Well, Mr Torrens, What do You Reckon Now?"' A Reflection on Voluntary Transactions and Forgeries in the Torrens System' (2009) 30(2) *Adelaide Law Review* 291–327 (from the Sesquicentenary forum on Torrens Title held by Adelaide University Faculty of Law).

[6] M Kirby, 'Alex Castles, Australian Legal History and the Courts' (2005) 9(1) *Australian Journal of Legal History* 1.

[7] I note that his own son, William Victor Windeyer, has recently retired from the Supreme Court of New South Wales.

[8] V Windeyer, 'History in Law and Law in History' (1973) 11 *Alberta Law Review* 123, 137.

[9] T Carlyle, 'On History', *Critical and Miscellaneous Essays* (1838).

[10] Sir Victor Windeyer, above n 8, 135.

When one looks at legislation at many times removed, the need for the introduction of, or change to, the law may seem self-evident—hindsight and retrospect tend to generate judgments like that. But looking at it, in its time and space, often reveals an entirely different and delicately woven story—and it is a story of people; and sometimes quite a few of them. How law changes, and particularly how new legislation is born, is very much a story of personalities. And where Thomas Carlyle described history as 'the essence of innumerable biographies', Windeyer preferred to say that 'it is the essence of the lives of innumerable men not all of whom have had biographies'.[11] To that I would add at least one caveat—and *women*. At times there are other quirky factors that come into play. One worth mentioning is the quirk of weather and timing.

IV THE ACCIDENT OF TIMING

To illustrate another element of the power of people combined with climate—both climate of opinion and climate as in weather—I want to take you to Adelaide in the January of 1858.[12] South Australia in the 1850s was a place of intense speculation in land, but land titles were in *serious* disarray and conveyancing cost a fortune in searching fees.[13] The situation was 'like a time bomb—threatening to destroy what for many was their main source of wealth and status in the community'.[14]

Robert Richard Torrens provided the solution in a land title system that bears his name: the 'Torrens system'. He was elected to the first House of Assembly in South Australia after it became self-governing in 1856,[15] on the strength of his platform of land law reform. 'The hour for action seemed to have arrived', he said,[16] and at the conclusion of moving the first reading of the Real Property Bill, having railed against the ills of land law, lawyers, conveyancing, search fees, and the problems of derivative title, he declared that '*Delenda est Carthago*' must be the motto.[17]

The second reading took place in the early heat of an Adelaide summer,[18] on Wednesday 11 November 1857, and on its third reading it was passed 19 to seven.[19] On January 6 it had

[11] T Carlyle, 'On History' in *Critical and Miscellaneous Essays* (1838) cited by Windeyer in V Windeyer, above n 8, 135.
[12] See '*Delenda est Carthago*! Sir Robert Richard Torrens and his Attack on the Evils of Conveyancing and Dependent land Titles: A Reflection on the Sesquicentenary of the Introduction of his Great Law Reforming Initiative' (2009) 11 (2) *Flinders Journal of Law Reform* 197–262 (the Alex Castles Memorial Lecture).
[13] The distinguished historian of South Australia, Professor Douglas Pike, estimated that it was probable that the documents for three-quarters of the titles had been lost: D Pike, 'Introduction of the *Real Property Act* in South Australia' (1960) 1 *Adelaide Law Review* 169, 172, relying on South Australian Register, 8, vii, 1856; 23, vii, 1856; *Report of the Real Property Law Commission, with Minutes of Evidence and Appendix*, Parliamentary Paper No 192, South Australia (1861) [102].
[14] A Castles and M Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia 1836–1986* (1987), 175.
[15] *Statistical Record of the Legislature 1836–2007*, Parliament of South Australia, 49.
[16] Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859), vi.
[17] 'Carthage must be destroyed!': South Australia, *Parliamentary Debates*, House of Assembly, 1857–58, 4 June 1857, [206].
[18] The heat of Adelaide summers at this time is recalled in R Harrison, *Colonial Sketches: Or, Five Years in South Australia, with Hints to Capitalists and Emigrants* (1862), chapter ii and 125. For example, for November 1860, 5 days exceeded 90° F.
[19] South Australia, *Parliamentary Debates*, House of Assembly, 1857–58, [706].

its second reading in the Legislative Council, and on 26 January, with a majority of five, and the summer heat unbearable—the mercury reaching over 100° Fahrenheit every day from 22 January till 30 January[20]—the Bill was passed.[21] The next day, on 27 January 1858, the Real Property Bill received the Royal Assent and Parliament was prorogued.[22]

The history of ideas that is the Torrens system is coloured in all the ways that Professor Fifoot so rightly deduced. The environment that gave birth to Torrens title was one of aspiration—that the wealth of nations is built upon the ideal that every man should have, and be secure in, his own castle. It is also one of a colony of speculators, of chaos in surveying, and of *heat*—the overbearing unrelenting hot summer of 1857–58.

V PULLING THE THREADS TOGETHER

The threads that I would like to pull together from the three presentations concern principle, people and personalities, pragmatism and the coalescing power of institutional law reform bodies. When the Vice-Chancellor, Professor Stephen Parker, opened the conference this morning he emphasised the importance of ensuring that deep theoretical reflections underpinned our various topics throughout the day. For me this means, in the context of the three papers in this particular session, locating 'justice behind the scenes' within a sound conceptual or theoretical framework. That framework of principle provides the foundation upon which justice behind the scenes, as translated into law reform, is soundly based. Without it, there is a danger that justice outcomes may be confused or ad hoc or short-sighted.

A Principle

Each of the three papers has a distinct thread that can be labelled 'principle'. The paper of Anne Wallace and Leisha Lister, on reforms in Indonesian Religious Courts, illustrates this point well. There is a consideration of the different kind of models that may be used in devising a law reform strategy; a discussion of the importance of building an appropriate evidence-base on which to support reform proposals; the identification of a key conceptual structure, based on access to justice, to drive the reforms and to ensure their ongoing support in practice; and a consideration of the value of reflective partnerships in court reform, in this case involving the Family Court of Australia in conjunction with the Indonesian Religious Courts.

Understanding the rationale behind legislation is identified as a crucial premise in driving law reform in the first of the session's papers, by Professor Patricia Easteal and Jessica Kennedy, exploring the contextual background to the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT). Examining the relationship between the policy of access to information in contemporary democratic societies—the 'information lens'—and its translation into practice forms a focus of the 'meditation' of Bruce Arnold in the third of the presentations.

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[20] R Harrison, above n 18, 13. 22 January: 103.0; 23 January: 110.0; 24 January: 109.0; 25 January: 113.0; 26 January: 116.3; 27 January: 112.2; 28 January: 107.8; 29 January: 109.0; 30 January: 107.1. While Harrison dubbed temperatures over 90° as 'intensely hot', those over 100° he described as 'a struggle for life': 12.

[21] No 15 of 1857–58.

[22] South Australia, *Parliamentary Debates*, House of Assembly, 1860, [794].

The power of principle as rhetoric, and particularly one that relates to 'access to justice', is woven into Wallace and Lister's paper, noting 'the strong emphasis in national rhetoric and policy on access to justice'. Arnold reflects on the rhetorical nature of the assertion of a 'right to information' and also focuses on the ideas of 'access to justice' incorporated in the *Strategic Framework for Access to Justice in the Federal Civil Justice System*, a report of the Australian Government Attorney-General's Department's Access to Justice Taskforce, released in September 2009.

B People and personalities

A second very strong thread concerns the role of individuals in propelling the law reform initiatives under consideration—a potent dynamic in 'justice behind the scenes'. It is here that I felt a great resonance with my own work over the years, as I have described in the opening part of this summary contribution. In Wallace and Lister's paper it is seen in the strong leadership of the 'dedicated and specialist court administrator' of the Indonesian Religious Court, that was crucial to effecting and embedding the reforms in that Court discussed by them. For Easteal and Kennedy, what ensured the translation of reform recommendations in relation to sexual assault proceedings into law were 'influential people, with a vested interest in the area'. The role of such people was a crucial aspect of the story behind the 'birth' of the amending legislation featured in their presentation.

C Pragmatism

The third thread is one of pragmatism—of the nature of the process of translating principle into practice and the dangers and tensions inherent in having to navigate the shoals of government policy-making and parliamentary processes. Easteal and Kennedy illustrate this process in a blow-by-blow description of the introduction of an amending law, expressed aptly in the main title of their paper: 'The Conception, Gestation and Birth of Legislation'. Their exploration of the 'history and politics' behind the legislation in the focus of their paper demonstrates these tensions admirably. Wallace and Lister analyse the stages in building an evidence base and utilising, in a very practical way, what they describe as 'grassroots organisations' and suggest the value of the model of forging 'a useful operating partnership' in other contexts, such as in relation to the delivery of court services to Indigenous Australians. Arnold's paper takes us into the field of access to information and access to justice to meditate on, amongst other things, 'public policy conundrums' and questions about 'rights and responsibilities' in this context. He focuses on the practical difficulties of accountability without sufficient 'teeth', when he describes the limitations on the role of the Ombudsman, being reliant on a 'naming and shaming' approach. Arnold makes a tough judgment that also poses a broad challenge within the theme of 'justice connections':

> Substantive rather than merely procedural justice requires understanding, an understanding of legal principles and processes by members of the public and an understanding (informed by consultation) by legislators and official decisionmakers.

Such a judgment led Arnold to lament the 'serious cutbacks' to the funding of the Australian Law Reform Commission that may have a detrimental impact on the ability to be sufficiently 'informed by consultation'. At this point I have to declare an obvious interest, as the President of that body. My feelings on this particular subject were also made public in giving evidence in the Senate inquiry in to the resources and funding of the ALRC instigated by

Senator Barnett, and which reported in March 2011.[23] I likened the impact of the budget cuts to the image of the Black Knight in the film, Monty Python and the Holy Grail—a ridiculous, but fitting image, as I described it. The point of Arnold's observation was, however, to underscore the vital role that institutional law reform bodies can play as a coalescing force in 'justice behind the scenes' and that their ability to do so needs to be preserved.

D The coalescing force of institutional law reform bodies

Observations similar to Arnold's on the value of an institutional approach to law reform are found in the two other papers presented in this session. Easteal and Kennedy note the force of the report of the inquiry conducted by the ACT Office of the Director of Public Prosecutions and the Australian Federal Report in 2005 concerning responding to sexual assault,[24] in leading to the legislative changes that are the focus of Easteal and Kennedy's paper. Wallace and Lister identify the role of non-government organisations in the reform process.

While affirming the utility of an institutional approach to law reform, Arnold found it 'perplexing' that the *Strategic Framework*, for example, was not supported by appropriate funding to the ALRC. He argued that reduced funding may jeopardise the ability of such bodies to conduct the kind of consultation—and one not solely reliant on electronic contact—that can lead to the substantive justice Arnold described. In the context of his discussion of access to information as being pivotal to access to justice, he argued that:

> it is important in a liberal democratic state for bodies such as the ALRC to be seen to be accessible and committed to public consultation with people who live on the disadvantaged side of the information highway.

I agree with Arnold wholeheartedly about the *importance* of public consultation—as broadly as the subject matter requires and which an inquiry timeline will accommodate. Where budget is limited, however, something has to be affected, even if the commitment remains as strong as ever. But in this context it is interesting to add in the observations in Wallace and Lister's paper about the use of 'information highway' solutions, to adopt Arnold's phrase. They note that SMS mobile phone technology is widely available in Indonesia, offering an 'easy to use tool that can be mobilised quickly' and that it has been deployed as such through the development of a system called 'SMS Gateway'. Their information highway caveat, however, concerns the simplistic dropping of 'pre-defined solutions' into developing countries without thoroughly considering the local situation:

> These solutions sometimes provide unsuitable for adaption to the local system, for a range of reasons, including lack of supporting infrastructure, adequately trained personnel, ongoing budget for technical support and, critically, a failure or inability to adapt or adjust them to the needs of the local court system.

Returning, then, to Arnold's challenge about the need to maintain the commitment to, and practice of, consultation through a variety of means and recognising the strengths and weaknesses of the 'information highway' solutions, I should also point to the challenge

[23] A transcript of my evidence is on the ALRC website: *Senate Committee Inquiry into the ALRC* (16 March 2011) Australian Law Reform Commission <http://www.alrc.gov.au/publications/alrc-brief-february-2011/senate-committee-inquiry-alrc#statement>. It is also in the Hansard for 11 February 2011, included in the Senate Committee's webpage: *Australian Law Reform Commission (ALRC): Public Hearings and Transcripts* (9 March 2011) Parliament of Australia: Senate <http://www.aph.gov.au/senate/committee/legcon_ctte/law_reform_commission/hearings/index.htm>.

[24] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, 'Responding to Sexual Assault: The Challenge of Change' (March 2005).

inherent in the final part of his paper, and it is one I direct to the audience today, largely coming from the academic world. It is an 'over to you' challenge; or rather 'why aren't you?' challenge. Institutional law reform bodies, and other public bodies that are engaged in law reform projects, such as parliamentary committees, are committed to building an evidence base that is drawn in large measure from community contributions in the form of submissions and consultations. Academics can play a critical role through participation in the 'justice (not quite behind) the scenes' work that law reform projects in such contexts can achieve. I share some sympathy with Arnold's edgy conclusion that:

> The disengagement of academia from providing advice, offering ideas and questioning pieties through public consultation processes such as parliamentary committee hearing and responses to calls from government agencies for submissions is striking. An in-progress tabulation of submissions to parliamentary committees demonstrates that few people are contributing and that submissions by academics, including law academics, are rare.

Rather than ending in this rather solemn tone, I would prefer to pick up what I consider to be the overarching thread in a conversation about justice behind the scenes, and that is what I described at the beginning of this summary contribution as the power of people. Standing in front of a room filled with eager students, academics and other interested parties of great standing, enthusiasm and commitment—evidenced by your very presence today—I conclude by saying that you, too, can perform a role in law reform and play your part. The coalescing force of institutional law reform draws upon the power of people: many individuals—like you—contributing your ideas, suggestions, criticisms and inspiration, to connect, to forge, and to achieve 'justice connections' through your own 'justice behind the scenes'.

3 June 2011