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Keynote Address
Inaugural Michael Kirby Lecture

Federal Court of Australia, Melbourne, via live streaming

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ACKNOWLEDGEMENTS
Good evening.

I acknowledge the traditional custodians of the land from which I speak to you tonight, the Gadigal people of the Eora Nation.

I pay my respects to their Elders past and present, and also to other Aboriginal and Torres Strait Islander people with us today.

I reiterate the Government's commitment to implementing the Uluru Statement from the Heart in full – beginning with a referendum to enshrine an Aboriginal and Torres Strait Islander Voice in the Australian Constitution during this term of parliament.

I am very sorry that I am unable to be in Melbourne with you today, but so glad that the Australian Law Reform Commission has been able to facilitate my appearance via livestream. I thank the staff of the ALRC very much for their efforts.

I also acknowledge:

- Chief Justice James Allsop of the Federal Court of Australia;
- Chief Justice Will Alstergren and Deputy Chief Justice Robert McClelland of the Federal Circuit and Family Court of Australia;
- Honourable judges and magistrates of federal and state courts;
- President of the Australian Law Reform Commission Justice Sarah Derrington and former President Professor Rosalind Croucher;
- And of course, Justice Michael Kirby, former Judge of the High Court of Australia.

JOHN MIDDLETON
I particularly acknowledge the outgoing Commissioner of the ALRC, Justice John Middleton.

On behalf of the Commonwealth, and the Australian people, I sincerely thank you for your stewardship of a diverse range of law reform inquiries over the past decade, including copyright law, family violence, elder abuse and financial services legislation.

I especially want to thank Justice Middleton for his role on the Advisory Committee for the Inquiry into the National Legal Response into Elder Abuse. This inquiry made 43 recommendations for law reform to safeguard older people from abuse and safeguard their autonomy.

Most recently, his Honour worked on the report entitled ‘Without Fear or Favour: Judicial Impartiality and the Law on Bias’.

This report made 14 recommendations to promote and protect judicial impartiality and public confidence in the Commonwealth judiciary.

These contributions come after more than a decade serving as a Judge of the Federal Court of Australia, as well as his Honour’s work leading the Australian Competition Tribunal and as a presidential member of the Administrative Appeals Tribunal.

This work has made a significant contribution to Australia’s legal system, and I thank him very much indeed.

INTRODUCTION

I am honoured to be invited by the ALRC to deliver the inaugural Michael Kirby Lecture.

This is not the first time I’ve appeared before one of Australia’s most distinguished, gifted and admired jurists, Justice Kirby.

Even though I now appear before Justice Kirby as Attorney-General rather than as counsel, I am conscious I will still be judged on the coherence and strength of my argument.

Justice Kirby’s contributions to this nation are significant, and go far beyond the courtroom.

It is absolutely right the ALRC has chosen to honour its inaugural chair, Justice Kirby, with this lecture series, highlighting his record not only as a jurist but as a great advocate of reform.

He has been a dazzling presence throughout my whole professional life. I can think of no one in the law more worthy of celebration.

THE WHITLAM LEGACY

The ALRC was, of course, a creation of the Whitlam Government, with former Attorney-General Lionel Murphy introducing its foundational Act in 1973.

It was only three days ago, on December 2, we celebrated the 50th anniversary of Gough Whitlam’s election.

In the three short years he was Prime Minister, Whitlam changed the nation through extraordinary and lasting law reform – no-fault divorce, the family court, and the Racial Discrimination Act are only a few examples.

Whitlam’s record of law reform was in fact the subject of a paper in the Federal Law Review by Justice Kirby in 1979.

In this paper Justice Kirby notes an oft-repeated phrase of Whitlam that, and I quote, “the way of the reformer is hard in Australia”.

After a well-informed discussion of Whitlam’s most significant reforms, Justice Kirby concluded his paper with the following observation:

“The way of the reformer in Australia is still hard. But the provision of permanent machinery may ensure that reform is achieved in a routine way and that the notion of orderly renewal of

our legal system, in all its parts, is accepted: change not for its own sake; change for the better."

The ALRC is the 'permanent machinery' Justice Kirby refers to. By nature of its very existence, it positions the Commonwealth in favour of reform. Its work provides the Attorney-General and Government of the day with non-partisan and well-considered advice on pathways to change on even the most controversial of subjects.

There is no doubt the ALRC assists the Commonwealth with the 'hard' task of reform recognised by both Whitlam and Justice Kirby.

Five decades after these observations were made, with a new government in place, it is worth reviewing this question once more – is the way of the reformer still hard in Australia?

A WASTED DECADE

If you can forgive me a moment of reflection – I think it is fair to say the last near-decade under the former government was not an era of ambitious law reform.

It is not accidental that this coincided with a period of shameful underuse of the ALRC.

Over the past decade the parliament did not lead the nation on law reform. Rather, the nation led the parliament.

There are two recent reforms I will discuss which I think illustrate this, one which took place under the former government and one which took place last week – marriage equality, and the National Anti-Corruption Commission.

By the time the Commonwealth legislated for marriage equality, on a joyous day in December 2017, the nation had been waiting a long time.

Cultural mores had shifted years before. When New Zealand recognised marriage equality in 2013, followed by the United States and Ireland in 2015, there was a sense of bewilderment here in Australia. How could we be so badly behind? Were we not mature enough as a nation to make this change?

In truth the delay said little about our nation, but a lot about its politicians. The nation's leaders at that time were not brave enough to do the obvious thing, and the just thing – recognise what all the social research was telling them at the time, that Australians wanted marriage equality. And they wanted the parliament to just get on with it.

In the end, of course, we did get marriage equality – but through the least courageous means. Instead of the parliament doing its job and legislating, the government of the day sent the decision off to a plebiscite.
It was a decision rightfully criticised by Justice Kirby, who said at the time:

"The elected politicians should get to work on what we the people elected them to do — to decide on the law, one way or the other, in parliament."

The results of the plebiscite showed, very clearly, that it was never necessary. Every state and territory voted in favour. Only 17 of Australia's 150 electorates voted no. It cleared the pathway to legislative reform in favour of marriage equality.

But the pathway had been obvious, and clear. It should not have taken a damaging and hurtful plebiscite to get there.

The lack of courage shown by the nation's leaders had an enormous cost.

My second example is the National Anti-Corruption Commission.

This has been described as reform whose time had come. Well the truth is its time came probably a decade ago.

The Commonwealth should have been amongst the first jurisdictions in the country to have an anti-corruption commission, not the last.

Questions about how a National Anti-Corruption Commission would operate are, of course, a matter for legitimate debate. I have been a participant in that debate over recent months through both Cabinet and parliamentary processes.

But the question of whether the nation needed an anti-corruption commission has been clear for a very long time.

By the time this year's election came around, 75 per cent of Australians were in favour of an anti-corruption commission. It's the clearest mandate you could ever have needed. Yet only one party of government took a pledge to legislate a National Anti-Corruption Commission, with teeth, and a deadline, to the May election.

The former government's decision to make a promise to introduce a national anti-corruption commission, and then break it, cost it dearly. This, and its failure to meet community demand for climate action, propelled a wave of teal independents into the national parliament.

While there was debate about the detail, I had little doubt the National Anti-Corruption Commission bills which passed parliament last week would ultimately be successful. No parliamentarian could ignore a mandate that was so clear.

While the reform is historic – and I am immensely proud we got it done when we said we would – it would be wrong to say it was brave because the need for the body had become so widely accepted.

It is another example of Australians leading the national parliament on law reform, when the parliament should have got there much earlier.

TO LEAD OR FOLLOW

All of this begs the question – is this a sorry state of affairs, or not?

Should the nation's parliament wait until the case for major law reform is so clear that the act of legislative change is a formality? Is it not better to approach controversial change when there is obvious and widespread support?

I submit that it is not. There are both practical and theoretical reasons for this.

The first reason is that not every major law reform can or should wait for a specific mandate. In examples I have used, legislative change followed a clear endorsement by the people – a plebiscite in the case of marriage equality, and a federal election in the case of a National Anti-Corruption Commission.

If we were to wait for a vote before pursuing difficult or controversial law reform, there would be a flurry of activity following every election and then nothing for the remainder of the term. It cannot work that way.

The second reason is this. Voters elect leaders to do just that – lead. To make difficult decisions in their name.

To be forward-thinking. To make the case for legislative change even if unpopular.

Sometimes prime ministers and ministers have to stick their heads above the parapet and be brave.

That's what Whitlam did. His reforms are so accepted now that it is easy to forget many were deeply controversial at the time.

When Paul Keating spoke on the 20th anniversary of the Racial Discrimination Act, he called it "a brave piece of legislation". And he was right. He reminded those present that the bill was passed only a few years clear of the White Australia policy.

Keating said:

"The Racial Discrimination Act got through against great opposition. Almost by definition, ground-breaking legislation nearly always faces bitter opponents. But it was good legislation and it has done Australia good".

This brings me back to where I began this speech, with the quote from Justice Kirby in 1979: "the way of the reformer is hard in Australia".

I do not believe this has changed. In fact, perhaps the only good reform is hard reform by its very definition.

In any case, significant law reform still requires bravery.

But one thing can change and must change – our attitude to law reform.

In the last near-decade the nation's leaders became timid. They waited for a roaring call to action before lifting a finger. No longer.

The Albanese Government has already shown it is not afraid to pursue law reform. Indeed, we have committed to the biggest reform of all – constitutional change.

The Prime Minister's commitment to enshrine an Aboriginal and Torres Strait Islander Voice in the Australian Constitution this term is strong, true and heartfelt. It responds to a call by First Nations people for Voice, Treaty and Truth, expressed in the Uluru Statement from the Heart.

The former government should have been responded to the call when it was first made in 2017, but shamefully it did not.

The task of holding this referendum has fallen to the Albanese Government, when it should have been held much earlier. It is a momentous task. But it is a task, once fulfilled, that will change our country for the better.

I have now been Attorney-General in the Albanese Government for six months.

I know that if I finish my time as Attorney-General without pursuing things that are brave I will have failed.

Law reform is hard because it changes the country. Law reform is hard because it sparks heated debate. Law reform is hard because it really matters.

These are reasons to pursue it, not to abandon it.

In this pursuit, I am very glad to have the ALRC at my side. I plan to keep it busy! And unlike some of my immediate predecessors, I will take its recommendations seriously.

In this regard, I note my ready acceptance of the ALRC's recommendation that the Government consider establishing a federal judicial commission.

Having recommended, then legislated, a long-overdue whistleblower scheme when last in Government, last week I introduced a bill implementing 21 of the 33 recommendations made in the 2016 Moss review. It is an important first step in improving Australia's whistleblowing framework for the public sector – one I am determined to see through.

Last week the parliament passed amendments to the Privacy Act including much increased penalties for companies and organisations that don't properly manage the personal information they collect.

Once again, an important first step, with more to be done next year following my department's completion of its review of the Privacy Act.

CONCLUSION

Writing about the ALRC three decades ago, Justice Kirby observed:

"Mobilising some of the best legal talent in the country to work in harmony with people with relevant expertise is the way that more of our laws should be developed. Law reform that is to last will require nothing less."

I heartily agree.

Thank you, Justice Kirby, for being such a guiding light on the principles and practice of law reform.

I hope that by the time the 20th or 30th Michael Kirby lecture is given, there will be plenty of lasting law reform from the Albanese Government to talk about.

Thank you.

ENDS

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