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CELEBRATION OF VOLUME 40: SIXTY YEARS ON!

The world into which the first volume of the *Adelaide Law Review* emerged was significantly different from the world of today.

Notoriously, the *Australian Constitution* and state constitutions have changed very little in the intervening years.¹ In 1960, when the first volume appeared, the Judicial Committee of the Privy Council, sitting at Westminster, was the highest court in the land. Its jurisdiction was seemingly assured, at least to a substantial degree, by s 74 of the *Constitution*.² However, in a series of quite rapid legislative steps between 1968 and the final quietus of the *Australia Act 1986* (UK) and *Australia Act 1986* (Cth), the judicial role of that venerable imperial court over Australia, was finally terminated.³ As chance would have it, I presided in the last Australian appeal to proceed to the Privy Council. It came from orders of the Court of Appeal of the Supreme Court of New South Wales.⁴ The appeal was dismissed.

The end of the Privy Council appeals, not so long after the establishment of this *Review*, was much more than a rearrangement of the institutions of justice. It marked the severance of the umbilical cord that had tied the Australian legal system to the highest judicial institutions and substantive law and traditions of the United

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¹ The only formal changes to the *Australian Constitution* since 1960 were made by the *Constitutional Alteration (Aboriginals) 1967* (Cth); *Constitutional Alteration (Senate Casual Vacancies) 1977* (Cth); *Constitutional Alteration (Retirement of Judges) 1977* (Cth); and *Constitutional Alteration (Referendums) 1977* (Cth), which came into force respectively on 10 August 1967 and 29 July 1977 in accordance with s 128 of the *Australian Constitution*.

² *Australian Constitution*, s 74 restricts the power of the Federal Parliament to make laws limiting matters in which leave to appeal to the Privy Council might be asked.

³ See *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Australia Act 1986* (UK) s 11; and *Australia Act 1986* (Cth) s 11. Cf *Kirmani v Captain Cook Cruises Pty Ltd [No 2]*; *Ex parte A–G (Qld)* (1985) 159 CLR 461.

⁴ *Austin v Keele* (1987) 61 ALJR 605 (Privy Council); affirming the decision of the Court of Appeal (NSW) dated 16 December 1985. See ‘Current Topics: The Last Australian Appeal to the Privy Council from an Australian Court’ (1987) 61 (October) *Australian Law Journal* 585.

Kingdom since settlement. For some time after the process of abolition, our judges and lawyers continued to display the English case and textbooks on their shelves. Some still do. Many then faithfully applied the English judicial authorities, even where (as in the case of the House of Lords) the court in question was never part of the Australian hierarchy.⁵ Many of the subjects examined in the *Review* in its first volumes could only be ventured upon with a thorough understanding of the then current doctrines of the English judiciary.⁶ Until the writings of Alex Castles a few years later,⁷ legal history for all Australian lawyers (a compulsory subject in their law courses), involved the detailed study of English legal history,⁸ with barely a mention of the peculiarities of that story in Australia.

Few women studied law in Australia's six law schools of that time. This reflected a long-standing antagonism to the participation of women in the law.⁹ Heraldizing a challenge to that aspect of patriarchy, Enid Campbell wrote an article on 'Women and the Exercise of Public Functions' in the first volume of this *Review*.¹⁰ However, so far as I could see, none of the other contributors to the *Review* before volume 5 were women.¹¹ Mary Fisher wrote a book review of the text on *Property Law Cases and Materials* in 1975.¹² That book had been compiled by Ronald Sackville. Perhaps it was coincidental that his co-author was Marcia A Neave. She was a member of the Adelaide Law School before she departed for her distinguished legal career in Victoria.¹³

In the first five years of the *Review*, and indeed thereafter, contributions to the *Review* were dominated by leading scholars in the Adelaide Law School at that time, including CH Bright, Alex Castles, JF Keeler, David St L Kelly, Horst Lücke, Ivan A Shearer (news of whose death was received with universal sadness as this volume was sent to the printer) and WAN Wells. At first, there were few other regular contributors. Very soon other prominent names began to appear. They included alumni who went on to

⁵ Cf *Piro v W Foster & Co Ltd* (1943) 68 CLR 313, at 320, where Latham CJ declared that it would be 'a wise general rule of practice' in cases of conflict between the House of Lords and the High Court of Australia, for Australian courts to follow the decision of the House of Lords upon a matter of general legal principle.

⁶ See JM Finnis, 'Developments in Judicial Jurisprudence' (1960) 1(3) *Adelaide Law Review* 317.

⁷ AC Castles, *An Australian Legal History* (Law Book Co, 1982).

⁸ Eg the standard legal history text was Theodore Plucknett's *A Concise History of the Common Law* (Butterworths, 4th ed, 1948).

⁹ V Bell, 'By the Skin of Our Teeth — The Passing of the Women's Legal Status Act 1918' (2018) 92 (December) *Australian Law Journal* 966.

¹⁰ (1961) 1(2) *Adelaide Law Review* 190.

¹¹ Penny Goode, 'Privacy: Disclosure of Private Facts' (1973) 5(1) *Adelaide Law Review* 13.

¹² Mary Fisher, 'Property Law Cases and Materials (Book Review)' (1975) 5(3) *Adelaide Law Review* 330.

¹³ A Moore, 'Property Law Cases and Materials (Book Review)' (1975) 8(3) *Adelaide Law Review* 351.

great distinction at the University of Oxford (John Finnis)¹⁴ and at the University of Cambridge and later the International Court of Justice (James Crawford).¹⁵ In his first substantive article, James Crawford described the radical changes that had come over the Australian judicial hierarchy following the creation of the Family Court of Australia in 1975 and the Federal Court of Australia in 1976 and the enhancement of federal tribunals and the passage of ‘new’ Administrative Law.

There were further major alterations in the Australian legal system that began in the first decade of this *Review*. By then things were changing in the law. The interest and focus of legal writing was shifting quite rapidly, particularly to focus on the new enhancement of federal jurisdiction. It had been modest in the early years of Australia’s federation. But when it happened, it brought new challenges and opportunities for the legal profession that had not been dreamed of before the advent of the Whitlam and Fraser Governments.¹⁶ Suddenly there were new issues to be addressed in the *Review* and new constitutional and other legal problems to be considered.¹⁷

Further features came to be noticed in the contributions to the *Review* as the years unfolded. The articles chosen for inclusion began to stray from the path of the strict positivist analysis that had constituted the received doctrine of the Australian judiciary under the leadership of judicial proponents led by Sir Owen Dixon, long-time Justice and Chief Justice of the High Court of Australia. He declared:

It is taken for granted that the decision of the court will be ‘correct’ or ‘incorrect’, ‘right’ or ‘wrong’ as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the

¹⁴ JM Finnis, ‘Separation of Powers in the Australian Constitution’ (1970) 3(2) *Adelaide Law Review* 159; JM Finnis, ‘Abortion and Legal Rationality’ (1970) 3(4) *Adelaide Law Review* 431.

¹⁵ JR Crawford, ‘Australian Yearbook of International Law 1970–1983 (Book Review)’ (1975) 5(3) *Adelaide Law Review* 322. See also JR Crawford and MC Harris, ‘The Powers and Authorities Invested in Him’ (1970) 3(3) *Adelaide Law Review* 303; JR Crawford ‘The New Structure of the Australian Courts’ (1978) 6(2) *Adelaide Law Review* 201.

¹⁶ Whitlam Government (1972–75); Fraser Government (1975–83).

¹⁷ E Campbell, ‘Parliamentary Appropriations’ (1971) 4(1) *Adelaide Law Review* 145; JR Crawford, ‘Senate Casual Vacancies: Interpreting the 1977 Amendment’ (1980) 7(2) *Adelaide Law Review* 224. See also AC Castles, ‘Legislative, Executive and Judicial Powers in Australia (Book Review)’ (1976) 5(4) *Adelaide Law Review* 474; JR Crawford, ‘Conventions, The Australian Constitution and the Future (Book Review)’ (1981) 7(3) *Adelaide Law Review* 402; JR Crawford, ‘A Constitutional History of Australia (Book Review)’ (1981) 7(3) *Adelaide Law Review* 412; KP McEvoy, ‘Australia’s Constitution: Time for Change? (Book Review)’ (1983) 9(2) *Adelaide Law Review* 316; and Ross Cranston, ‘Politics of Law Reform (Book Review)’ (1984) 19(1) *Adelaide Law Review* 109. See later J Gava, ‘Losing Our Birthright: “*Singh v Commonwealth*”’ (2016) 37(2) *Adelaide Law Review* 369.

function it performed had lost its meaning and purpose, if there were no external standard of legal correctness.¹⁸

Dixon was the most articulate and consistent Australian advocate of the approach of ‘strict logic and high technique ... rooted in the centuries’.¹⁹

Even after bold and inventive constitutional decisions, apparently based on ‘deep values’ and notions of public policy, such as the decision that struck down the *Communist Party Dissolution Act 1950* (Cth),²⁰ most lawyers in Australia (and most teachers of law in Australia’s law schools) assumed and taught that discovering the legal answer to a question involved no choice on the part of the judge. It was simply a matter of knowing and applying the correct rules of logic, derived from the essential reasoning of earlier cases or (where relevant) the true and only available interpretation of the constitutional text or statutory language.

By the time this *Review* came upon the scene of Australian law increasing numbers of judges, practitioners and law teachers (some of them taught, as I was, by the great writer on jurisprudence at the Sydney Law School, Julius Stone) increasingly accepted that judges did have choices to make in deciding many cases that came before them. One of those who questioned the Dixonian thesis was Dr John Bray, later to be Chief Justice of South Australia, who predicted how the role of the Australian judge might change:

A few years ago the English courts rejected with indignation the suggestion that they had been empowered by Parliament to administer what was contemptuously called palm tree justice, the justice which is traditionally administered in Eastern societies by the *cadi* sitting in the city gate. It seems to me, however, that the Australian judge is going to have to assume more and more the role of the *cadi* in the gate whether he likes it or not.²¹

This uncomfortable awakening was, in part, a consequence of the termination of appeals beyond Australia; in part, a result of the special leave system that narrowed the fields of operation of the High Court of Australia; in part, the influence of scholars like Stone and the critical writing in journals such as this *Review*; and, to some extent,

¹⁸ Sir Owen Dixon, ‘Concerning Judicial Method’ in Severin Howard Zichy Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (Law Book Co, 1965) 152, 155.

¹⁹ *Ibid* 153 (n 1).

²⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

²¹ John Bray, ‘Law, Logic and Learning’ (1979) 3(1–2) *UNSW Law Journal* 205, 209, citing Justinian. Cf R Mitchell and P Kelly, ‘John Bray, The Man and the Judge’ (1980) 7(1) *Adelaide Law Review* 1; C Bright, ‘John Bray in Context’ (1980) 7(1) *Adelaide Law Review* 7.

the consequence of later realism in legal analysis encouraged by the impact of social sciences on the understanding of the actual operation of the law.²²

On top of these institutional and attitudinal changes that confronted the legal profession and academy after 1960 many other changes were influencing the contributions offered for publication in this *Review*. They included the shift in subject matters as new areas of the law opened up; the changes in the interests and focus of research of Australian lawyers and legal academics; the new spirit that was spreading in legal education; the growing impact of international law on our domestic law; and the fresh attention to areas of the law that had been substantially ignored in earlier times.

The new areas that had earlier been ignored included topics of special importance to women in the law and in society;²³ topics affecting Aboriginals and other Indigenous peoples, long neglected by Australia's legal system;²⁴ new subjects of law that were the result of technological changes;²⁵ the growing appreciation of the challenge of

²² D Jackson, 'The Role of the Chief Justice; A View from the Bar' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 21, 22; cf MD Kirby, 'The Mason High Court' (1996) 20(4) *Melbourne University Law Review* 1087.

²³ Campbell, 'Women and the Exercise of Public Functions' (n 10); G Geis, 'Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden' (1978) 6(2) *Adelaide Law Review* 284; Yumi Lee, 'Violence Against Women: Reflections on the Past and Strategies for the Future — an NGO Perspective' (1997) 19(1) *Adelaide Law Review* 45; Ustina Dolgopol, 'A Feminist Appraisal of the Dayton Peace Accords' (1997) 19(1) *Adelaide Law Review* 59; MD Kirby, 'Marriage Equality: 'What Sexual Minorities Can Learn from Gender Equality' (2013) 34(1) *Adelaide Law Review* 141; Renae Barker, 'Rebutting the Ban the Burqa Rhetoric: A Critical Analysis of the Arguments for a Ban on the Islamic Face Veil in Australia' (2016) 37(1) *Adelaide Law Review* 191.

²⁴ MJ Trebilcock, 'Customary Land Law, Law Reform in Papua New Guinea: Law, Economics and Property Rights in a Traditional Culture' (1983) 9(1) *Adelaide Law Review* 191; Thalia Anthony, 'Rights and Redemption: History, Law and Indigenous People (Book Review)' 31(1) *Adelaide Law Review* 95; S Pruijm, 'Ethnocide and Indigenous Peoples: Article 8 of the Declaration on the Rights of Indigenous Peoples' (2014) 35(2) *Adelaide Law Review* 269.

²⁵ Matthew Goode, 'Some Observations on Evidence of DNA Frequency' (2002) 23(1) *Adelaide Law Review* 45; Jerome Squires, '*Google Spain SL v Agencia Española De Protección De Datos* (European Court of Justice, C-131/12, 13 May 2014)' (2014) 35(2) *Adelaide Law Review* 463; Gary Edmond, 'What Lawyers Should Know About the Forensic "Sciences"' (2015) 36(1) *Adelaide Law Review* 33; JD Heydon, 'Evidence of Forensic Scientific Opinion and the Rules for Admissibility' (2015) 36(1) *Adelaide Law Review* 101; Ian Binnie and Vanessa Park-Thompson, 'The Perils of Law Office Science: A Partial Response to Professor Gary Edmond' (2015) 36(1) *Adelaide Law Review* 125; Andrew Ligertwood, 'What Lawyers Should and Can Do Now That They Know About the Forensic Sciences' (2015) 36(1) *Adelaide Law Review* 153.

climate change for Australian society and its laws;²⁶ the increasing impact of international law on our municipal legal systems;²⁷ the growing interest in institutional law reform to which the Adelaide Law School contributed more than most;²⁸ and the increasing awareness of the special features of legal history, in which Adelaide had also long been engaged.²⁹

There have, of course, been many interesting and important articles published in the *Review*, devoted to the core topics of legal doctrine in Australia and elsewhere.

²⁶ Michael I Jeffery and Xiangbai He, ‘Going Beyond Mitigation: The Urgent Need To Include Adaption Measures To Combat Climate Change in China’ (2012) 33(1) *Adelaide Law Review* 79.

²⁷ AC Castles and CH Bright, ‘A New School of International Law’ (1962) 1(3) *Adelaide Law Review* 339; IA Shearer, ‘Australian Yearbook of International Law 1968–69’ (1973) 5(1) *Adelaide Law Review* 87; P Brazil, ‘Resolution of Trade Disputes in the Asian Pacific Region’ (1985) 10(1) *Adelaide Law Review* 49; MD Kirby, ‘The Growing Impact of International Law on the Common Law’ (2012) 33(1) *Adelaide Law Review* 7; Robert Cunningham and Susanah Vindedzis, ‘Four Legs Good, Two Legs Bad? Animal Welfare vs the World Trade Organization (Featuring Article XX of the General Agreement on Tariffs and Trade and Article 2 of the Technical Barriers to Trade)’ (2017) 38(2) *Adelaide Law Review* 311; Jonathon Crowe, ‘Coherence and Acceptance in International Law: Can Humanitarianism and Human Rights be Reconciled?’ (2014) 35(2) *Adelaide Law Review* 251; Peter Burdon et al, ‘Reflecting on Hannah Arendt and Eichmann in Jerusalem: A Report on the Banality of Evil’ (2014) 35(2) *Adelaide Law Review* 427; Dale Stephens, ‘Naval Power in the Indian Ocean: Rising Tension, Maritime Governance and the Role of Law’ (2016) 37(2) *Adelaide Law Review* 307; Samuel Tyrer, ‘An Australia–Indonesia Arrangement on Refugees: Exploring the Structural, Legal and Diplomatic Dimensions’ (2017) 38(1) *Adelaide Law Review* 113; Kim Sorenson, ‘Sisyphus in the Agora? How the United Nations Working Group on the Use of Mercenaries Functions as a Special Procedure of the Human Rights Council’ (2017) 37(2) *Adelaide Law Review* 257.

²⁸ Sarah Moulds, ‘Community Engagement in the Age of Modern Law Reform: Perspectives From Adelaide’ (2017) 38(2) *Adelaide Law Review* 441.

²⁹ AC Castles, ‘The Reception and Status of English Law in Australia’ (1963) 2(1) *Adelaide Law Review* 1; JF Keeler, ‘Some Reflections on *Holyroyd v Marshal*’ (1969) 3(3) *Adelaide Law Review* 360; AC Castles, ‘The Judiciary and Political Questions: The First Australian Experience, 1824–1825’ (1976) 5(4) *Adelaide Law Review* 294; Mitchell and Kelly (n 21); Victor Allen Edgeloe, ‘The Adelaide Law School 1883–1983’ (1983) 9(1) *Adelaide Law Review* 1; EG Whitlam, ‘The Machinery of Democracy’ (1983) 9(2) *Adelaide Law Review* 229; John Doyle, ‘The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest’ (2016) 37(2) *Adelaide Law Review* 547.

These include the law of torts;³⁰ the law of contract;³¹ the law of trusts, property and Torrens title;³² the growing body of administrative law;³³ the ever-puzzling problems of evidence law and its reform;³⁴ and the growing attention to the debates over a charter or bill of rights within the Australian legal system.³⁵

One feature of life in the law that would be noticed immediately by someone who had departed Australia when this *Review* was launched and returned to see this fortieth volume would undoubtedly be the huge increase in the number of women in law school classes; in legal offices; in the academy; at the Bar and on the Bench. This change is reflected in successive volumes of the *Review*.

³⁰ MC Atkinson, 'Personal Injury Awards — Survey of Recent Cases' (1961) 1(2) *Adelaide Law Review* 205; MC Doyle, 'Personal Injuries — Survey of Recent Awards in South Australia' (1968) 3(2) *Adelaide Law Review* 221; MC Doyle, 'Personal Injuries — Survey of Recent Awards in South Australia' (1969) 3(3) *Adelaide Law Review* 380; John F Keeler, 'Three Comments on Damages for Personal Injury' (1984) 9(3) *Adelaide Law Review* 385.

³¹ HK Lücke, 'Striking a Bargain' (1962) 1(3) *Adelaide Law Review* 293; MJ Trebilcock, 'Company Contracts' (1966) 2(3) *Adelaide Law Review* 310; HK Lücke, 'Illusory, Vague and Uncertain Contractual Terms' (1977) 6(1) *Adelaide Law Review* 1; Tareq Al-Tawil, 'Damages for Breach of Contract: Compensation, Cost of Cure and Vindication' (2013) 34(2) *Adelaide Law Review* 351; Angus O'Brien, 'The Relationship Between the Laws of Unjust Enrichment and Contract: Unpacking *Lumbers v Cook*' (2011) 32(1) *Adelaide Law Review* 83; HK Lücke, 'The Intention to Create Legal Relations' (1970) 3(4) *Adelaide Law Review* 419.

³² Fiona Martin, 'The Socio-Political and Legal History of the Tax Deduction for Donations to Charities in Australian and How the 'Public Benevolent Institution' Developed' (2017) 38(1) *Adelaide Law Review* 195; and articles on the Torrens System: Greg Taylor, 'The Torrens System — Definitely Not German' (2009) 30(2) *Adelaide Law Review* 195; HK Lücke, 'Ulrich Hübbe and the Torrens System: Hübbe's German Background, His Life in Australia and His Contribution to the Creation of the Torrens System' (2009) 30(2) *Adelaide Law Review* 213; Rosalind F Croucher, 'Inspired Law Reform or Quick Fix? Or, "Well Mr Torrens, What Do You Reckon Now?"' (2009) 30(2) *Adelaide Law Review* 291; Antonio Esposito, 'Ulrich Hübbe's Role in the Creation of the "Torrens" System of Land Registration in South Australia' (2003) 24(2) *Adelaide Law Review* 263.

³³ Mark Leeming, 'Judicial Review of Vice-Regal Decisions: *South Australia v O'Shea*, Its Precursors and Its Progeny' (2015) 36(1) *Adelaide Law Review* 1.

³⁴ Andrew Ligertwood, 'Cases and Materials on Evidence (Book Review)' (1976) 5(4) *Adelaide Law Review* 474; Tim Smith, 'Evidence Reference — Progress Report' (1985) 10(1) *Adelaide Law Review* 102.

³⁵ Frank Brennan, 'Thirty Years On, Do We Need a Bill of Rights' (1996) 18 *Adelaide Law Review* 123; Alice Tay, 'Human Rights and Human Wrongs' (1999) 21 *Adelaide Law Review* 1; Dianne Otto, 'Human Rights under the *Australian Constitution* (Book Review)' (1999) 21 *Adelaide Law Review* 139; John von Doussa, 'The New Zealand Bill of Rights (Book Review)' (2003) 24(2) *Adelaide Law Review* 305.

Thus, in the first volume, 25 of the contributors were men and only one was a woman.³⁶ In volume 2 there were 17 contributions by men, but none by women. In volume 3 the ratio was 20 men to one woman. However, by the time we arrive at volume 37, there were contributions from 20 men and 16 women. In volume 38 the ratio was 12 men to 14 women. So the tables have now been turned. Today women are major contributors to teaching, researching, practising and writing about law. It would be a worthwhile study on its own to review the articles written by women and about aspects of law of special interest to women to see whether there, or elsewhere, features stand out that can be described as distinctive and different. One feature is clear. It is no longer necessary in a ‘Preface’ of a volume of this *Review* to thank female administrative staff, in order to provide mention of the role of women, as Horst Lücke did in April 1983.³⁷ True, administrative functions in a law journal are vital. But now they are by no means the only, or main, activities of women in the production of this *Review*.

The Adelaide Law School has always exhibited a strong interest in, and engagement with, international law. This has remained a strength of the School to which alumni, who have been leaders in international law and its institutions (like Judge Crawford and Professor Shearer), continue to contribute. Similarly, the School, from the early days, has been an Australian centre on federal constitutional law. This is reflected in many articles over the past 40 years.³⁸ Similarly, since Alex Castles’s day the School has been a centre for the study of legal history. The decline in the interest in, research and teaching of this subject in Australia is a source of much pain and anxiety to me.³⁹

³⁶ In some cases, there is double counting because an author had two or more articles in the same volume.

³⁷ HK Lücke, ‘Preface’ (1983) 9(1) *Adelaide Law Review* v, vi.

³⁸ Campbell, ‘Parliamentary Appropriations’ (n 17); MJ Detmold, ‘Sovereignty: Aspects in Constitutional Law and Jurisprudence’ (1971) 4(1) *Adelaide Law Review* 169; Crawford, ‘The New Structure of the Australian Courts’ (n 15); Crawford, ‘Senate Casual Vacancies: Interpreting the 1977 Amendment’ (n 17); SC Churches (ed), ‘Statutes and the Crown — Prejudice and Benefit — The Crown in a Federation — Parties to Agreements with the Crown’ (1980) 7(3) *Adelaide Law Review* 389; McEvoy, ‘Australia’s Constitution: Time for Change? (Book Review)’ (n 17); Helen Irving, ‘Federalism is a Feminist Issue: What Australians Can Learn from the United States Commerce Clause’ (2007) 28(1) *Adelaide Law Review* 159; Christopher Tran, ‘New Perspectives on Australian Constitutional Citizenship and Constitutional Identity’ (2012) 33(1) *Adelaide Law Review* 199; Greg Carne, ‘Is Near Enough Good Enough? Implementing Australia’s International Human Rights Torture Criminalisation and Prohibition Obligations in the *Criminal Code* (Cth)’ (2012) 33(1) *Adelaide Law Review* 229; Christopher Tran, ‘New Perspectives on Australian Constitutional Citizenship and Constitutional Identity’ (2012) 33(1) *Adelaide Law Review* 199; Luke Beck, ‘The Establishment Clause of the Australian Constitution: Three Propositions and a Case Study’ (2014) 35(2) *Adelaide Law Review* 225; Paul Kildea, ‘Achieving Fairness in the Allocation of Public Funding in Referendum Campaigns’ (2016) 37(1) *Adelaide Law Review* 13; Penelope Mathew, ‘The *Tampa* Issue’ (2002) 23(2) *Adelaide Law Review* 375.

³⁹ MD Kirby, ‘Is Legal History Now Ancient History?’ (2009) 83(1) *Australian Law Journal* 31.

Likewise, as one of the oldest law schools in the nation, Adelaide has long been a centre for the study of different notions about the contents of legal education. This interest is also reflected in many articles in these pages.⁴⁰

It has been my privilege to have a number of my own contributions published, the first of which was in volume 7 in 1980,⁴¹ dealing with Aboriginal customary law — a subject of great interest as demonstrated by the many ‘hits’ upon the website of the Australian Law Reform Commission (ALRC) relating to its report on the subject.⁴² Although legislation recommended in the Commission’s report has not yet been enacted by the Federal Parliament, the opening up of this subject almost certainly helped change the *Zeitgeist* in Australia about Indigenous people and the law. It was followed by very important decisions of the High Court of Australia, upholding, for the first time, the recognition of native title.⁴³ Professors Castles, Kelly and Mr (now Justice) Michael Ball, were engaged, as I was, full-time in the work of the ALRC. Although political and professional support for institutional law reform has declined in recent years,⁴⁴ the long-term future of institutional law reform seems reasonably safe. Law reform reviews methodically our likely professional challenges. It therefore has an essential role in the future of this *Review*. Many of the future themes are already evident from those that have featured in the past. However, others are substantially new and different. The *Review* should continue to raise new awareness and suggest novel topics of law reform.

One theme that was little mentioned in the early days of the *Review*, but has made its mark repeatedly in recent times, is the role of religion in society and the possible need to protect freedom of the spiritual aspects of human life. Back in the 1960s,

⁴⁰ Richard Arthur Blackburn, ‘Law School Curricula in Retrospect’ (1983) 9(1) *Adelaide Law Review* 43; JJ Bray, ‘Plea for Roman Law’ (1983) 9(1) *Adelaide Law Review* 50; Ivan A Shearer, ‘The Teaching of International Law in Australian Law Schools’ (1983) 9(1) *Adelaide Law Review* 61; Paul Babie, ‘125 Years of Legal Education in South Australia’ (2010) 31(2) *Adelaide Law Review* 107; John M Williams, ‘Failing Law Schools’ (2013) 34(1) *Adelaide Law Review* 217; Anne Hewitt and Patrick Keyzer, ‘Foreword: Teaching-Research Nexus in Law’ (2014) 35(1) *Adelaide Law Review* 1; John V Orth, ‘The Strange Career of the Common Law in North Carolina’ (2015) 36(1) *Adelaide Law Review* 23; Nola M Ries, Briony Johnston and Shaun McCarthy, ‘Legal Education and the Aging Population: Building Student Knowledge and Skills Through Experiential Learning in Collaboration with Community Organisations’ (2016) 37(2) *Adelaide Law Review* 495.

⁴¹ MD Kirby, ‘TGH Strehlow and Aboriginal Customary Law’ (1980) 7(2) *Adelaide Law Review* 172.

⁴² ‘The Recognition of Aboriginal Customary Laws’ (ALRC Report No 31, 9 February 1986).

⁴³ *Mabo v Queensland [No 2]* (1992) 175 CLR 1; see also *Wik Peoples v Qld* (1996) 187 CLR 1 (‘*Mabo*’); cf *Fejo v Northern Territory* (1998) 195 CLR 96.

⁴⁴ MD Kirby, ‘The Decline and Fall of Australia’s Law Reform Institutions — and the Prospect of Revival’ (2017) 91 (October) *Australian Law Journal* 841. Cf SC Derrington, ‘Law Reform — Future Directions’ (2019) 93 (May) *Australian Law Journal* 384.

secularism was in the ascendant. Even John Finnis had not fully embraced the engagement with natural law that was to dominate his scholarship at Oxford University and now at Notre Dame Law School in the United States.⁴⁵ Despite the continuing growth of respondents to the Australian national census who declare that they have ‘no religion’⁴⁶ and the growth of the presence of Non-Christian religions in Australia, this has resulted in expressed feelings favouring so-called ‘religious freedoms’ that are electorally significant. They have produced current debates in Australia about law and religion that are likely to continue. Globally, the power of vehement religious beliefs seems likely to expand. This will probably, therefore, continue to attract attention in the *Review*, as it already has in recent years.⁴⁷

Another theme that was totally missing in the early days of the *Review* concerned the law and sexuality. When the *Review* was established, same-sex conduct was uniformly criminalised throughout Australia, even where involving consenting adults acting in private. The first Australian legislation to change this situation was enacted in South Australia in 1972. This was expanded under the Dunstan Government in 1974.⁴⁸

⁴⁵ Cf M White, ‘Jurisprudence as Practical Reason: A Celebration of the Collected Essays of John Finnis (Book Review)’ (2014) 35(2) *Adelaide Law Review* 473. JM Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980); JM Finnis, *Fundamentals of Ethics* (Oxford Clarendon Press, 1983).

⁴⁶ In the Australian Census of 2016, 52.1% of respondents identified as ‘Christian’; with 22.6% as Roman Catholic and 13.3% as Anglican. The category ‘No Religion’ continues to ‘rise fast’. In 2016 it was nearly 30.1% compared with 19% in 2011. See Australian Bureau of Statistics, *2016 Census: Religion* (Media Release, 27 June 2017) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85>>.

⁴⁷ Paul Babie, ‘The Study of Law and Religion in Australia: It Matters’ (2009) 30(1) *Adelaide Law Review* 7; Michael Spence, ‘Speech Given on the Occasion of the Launch of the University of Adelaide Research Unit for the Study of Society, Law and Religion’ (2009) 30(1) *Adelaide Law Review* 11; Carolyn Evans and Leilani Ujvari, ‘Non-Discrimination Laws and Religious Schools in Australia’ (2009) 30(1) *Adelaide Law Review* 31; Pauline Ridge, ‘The Financing of Religion: Guidelines for Legal Regulation’ (2009) 30(1) *Adelaide Law Review* 85; Ben Clarke, ‘Law, Religion and Violence: A Human Rights-Based Response to Punishment (By State and Non-State Actors) of Apostasy’ (2009) 30(1) *Adelaide Law Review* 111; Alex Bruce, ‘Cognitive Dissonance in the Contribution of the Catholic Church to International Human Rights Law Discourse’ (2009) 30(1) *Adelaide Law Review* 149; Mitchell Landrigan, ‘Can the Implied Freedom of Political Discourse Apply to Search By or About Religious Leaders’ (2013) 34(2) *Adelaide Law Review* 427; Paul Babie, ‘Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law (Book Review)’ (2015) 36(1) *Adelaide Law Review* 267; Paul Babie, ‘Freedom of Conscience and Religion (Book Review)’ (2015) 36(1) *Adelaide Law Review* 273; and Liam Elphick, ‘Sexual Orientation and “Gay Wedding Cake” Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach of Religious Exceptions’ (2017) 38(1) *Adelaide Law Review* 149.

⁴⁸ The course of reform is described in MD Kirby, ‘Dr George Ian Duncan Remembered’ (2016) 37(1) *Adelaide Law Review* 1.

Sadly, it took the death of Dr George Ian Duncan of the Adelaide Law School to help propel legislative change.⁴⁹

In recent years there have been a number of articles in the *Review* on this subject.⁵⁰ The recent contribution by Liam Elphick⁵¹ suggests that more cases and increasing legal analysis will be presented as this topic becomes more visible both in Australia and overseas. The rapid change in community attitudes towards minority sexuality is striking. It is reportedly faster than any other recent attitudinal shift.⁵² It now makes the writings of John Finnis, suggesting comparisons between homosexual acts and bestiality,⁵³ appear dated, unscientific and unpleasant. This topic seems likely to remain a global issue over the next 60 years. Every month brings surprising developments concerning sexuality and the law in Australia and globally.

Generic human rights protection, both in Australia and internationally, played little part in the early editions of the *Review*. When I wrote on the growing impact of international law and the common law,⁵⁴ it seemed as if the international institutions for the protection of human rights were well established and likely to expand in influence.

However, these developments have attracted vehement opponents in Australia⁵⁵ who continue to reject even the modest model for the protection of ‘universal rights’ adopted in New Zealand and the United Kingdom. The only human right advocated by many politicians in recent discourse in Australia has been ‘religious freedom’. Seemingly this is to be granted without a counterbalance for the other freedoms that are at stake. Internationally, the United States of America walked out of the United Nations Human Rights Council to which it had been elected not long before.

⁴⁹ Ibid.

⁵⁰ George Selvanera, ‘Gays in Private: The Problems with the Privacy Analysis in Furthering Human Rights’ (1994) 16(2) *Adelaide Law Review* 331; Ngaire Naffine, ‘Are We “Persons” Yet? Law and Sexuality in Canada (Book Review)’ (2002) 23(1) *Adelaide Law Review* 173; Theodore Bennet, ‘Transsexualism and the Consideration of Social Factors Within Sex Identification Law’ (2012) 34(2) *Adelaide Law Review* 379; MD Kirby, ‘John Jefferson Bray — A Vigilant Life (Book Review)’ (2016) 37(2) *Adelaide Law Review* 537.

⁵¹ Elphick (n 47).

⁵² Samantha Schmidt, ‘Americans’ Views Flipped on Gay Rights. How Did Minds Change So Quickly?’ *Washington Post* (online, 7 June 2019).

⁵³ Cited in John Greenya, *Gorsuch: The Judge Who Speaks for Himself* (Threshold Editions, 2018) 47.

⁵⁴ Kirby, ‘The Growing Impact of International Law on the Common Law’ (n 27).

⁵⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562, 586-595 [49]–[74] (McHugh J); cf at 617–30 [152]–[193] (Kirby J). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224–6 [181]–[183] (Heydon J).

Dialogue concerning human rights violations in North Korea with which I have been engaged⁵⁶ have been diverted to issues concerning peace and security alone.

Nevertheless, human rights protections both in Australia and globally, seem likely to remain high on the agenda of this *Review*. Not least will this be so because of the strong tradition of international law at the Adelaide Law School,⁵⁷ as well as the continued contributions of regional courts and international institutions to our understanding of the contents of global human rights and the occasional role of domestic courts in upholding them.

Although the request of Aboriginal Australians for a ‘voice’ in the Federal Parliament, as an antidote to inaction and indifference, has been misrepresented as a suggested proposal for a ‘third chamber’ in our Federal Parliament,⁵⁸ there are many topics on Indigenous rights that need to engage the *Review* in the future. They include the possible needs for other constitutional changes to recognise Australia’s First Peoples in that document; the possible need for generic equality guarantees in the *Constitution*; the desirability of a treaty or *Makarrata* to establish a new legal basis for sovereignty in Australia in the place of uncompensated confiscation of property of the past; and the need for particular changes, including to address the shockingly high and persisting Indigenous incarceration rates under our present laws and policies.⁵⁹

Technology, which has been another recurring theme in the *Review*,⁶⁰ will also continue to attract insightful contributions. Amongst these will surely be the analysis of the growing impact of artificial intelligence upon substantive law and the processes of legal decision-making.⁶¹ Hopefully, this technology may help lawyers to address the fundamental flaw in the common law system for the delivery of justice: its prohibitive expense which has grown even greater in the 60 years since the first volume of the *Review*.⁶²

Of clear importance for the future of humanity is the legal response to the development, deployment, delivery and use of nuclear weapons. This has many implications

⁵⁶ MD Kirby and R LaForgia, ‘Fact-Finding and Report Writing by UN Human Rights Mandate Holders’ (2017) 38(2) *Adelaide Law Review* 463.

⁵⁷ See generally n 27.

⁵⁸ Anne Twomey, ‘Why an Indigenous Voice Would Not Be “Third Chamber” of Parliament’, *Sydney Morning Herald*, (online, 28 May 2019).

⁵⁹ Australian Law Reform Commission, *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, 28 March 2017).

⁶⁰ See generally n 25.

⁶¹ F Pasquale, ‘A Rule of Persons, Not Machines: The Limits of Legal Automation’ (2019) 87(1) *George Washington Law Review* 1; F Pasquale and G Cashwell, ‘Four Futures of Legal Automation’ (2015) 63 *UCLA Law Review Discourse* (2015), 26.

⁶² W Zeidler, ‘Court Practice and Procedure Under Strain: A Comparison’ (19823) 8(2) *Adelaide Law Review* 150 (comparing common law and civil law approaches).

affecting consequential issues.⁶³ But it also has broad importance in international law, exemplified in the Advisory Opinion of the International Court of Justice on the legality of nuclear weapons,⁶⁴ and the decision of the non-nuclear weapons states in the United Nations General Assembly to negotiate a treaty to prohibit nuclear weapons.⁶⁵ Clearly these topics are of existential significance. The fact that they have attracted little attention in Australian law reviews is perhaps further evidence of the inclination of lawyers to address immediate but relatively minor problems whilst ignoring great dangers that seriously threaten continued human existence.

Another topic likely to attract continued attention in the *Review* is climate change and environmental regulation⁶⁶ and the associated challenge of guaranteed water availability both in Australia and internationally.⁶⁷ There are many interesting and novel Australian legal developments affecting our global posture on these topics.⁶⁸ These will surely attract many contributions to the *Review* in the future.

Although formal changes to Australia's *Constitution* are notoriously difficult to secure, constitutional law has long been a special strength of the *Review*.⁶⁹ What has already been written will suggest certain topics for future articles that deserve continuing attention. These include constitutional recognition of our Indigenous peoples; better protection of universal rights; the relationship of municipal and international law; and the need to address growing public disillusionment about the capacity of our present political system to respond to large challenges as distinct from small, insignificant targets that attract votes in a limited number of marginal electorates. Can or should Australia turn its attention to such big issues, including that of a Republic;⁷⁰ interstate rivalry over access to water;⁷¹ and improvements in

⁶³ AJ Brown, 'When Does Property Become Territory? Nuclear Waste, Federal Land Acquisition and Constitutional Requirements for State Consent' (2007) 28(1–2) *Adelaide Law Review* 113.

⁶⁴ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

⁶⁵ J Camilleri, M Hamel-Green, and Fumihiko Yoshida (eds), *The 2017 Nuclear Ban Treaty — A New Path to Nuclear Disarmament*, (Oxford, 2019).

⁶⁶ Jeffery and He (n 26).

⁶⁷ A Webster, 'A Colonial History of the River Murray Dispute' (2017) 38(1) *Adelaide Law Review* 13.

⁶⁸ MD Kirby, 'Environmental and Planning Law in the Age of Human Rights and Climate Change' (2019) 36(3) *Environmental and Planning Law Journal* 181.

⁶⁹ See generally (n 17).

⁷⁰ D Wiseman, 'A Just Republic of Just Words? Constitutional Rights and Progressive Social Justice' (1998) 20 *Adelaide Law Review* 199; see also MD Kirby, 'The Australian Referendum on a Republic — Ten Lessons' (2000) 46 (December) *Australian Journal of Politics and History* 510.

⁷¹ Sandford D Clark, 'The River Murray Waters Agreement: Peace in Our Time?' (1983) 9(1) *Adelaide Law Review* 108.

the processing of law reform.⁷² Viewed as an efficiency mechanism for a legal system with many challenges, critical scrutiny of our legal system and its practitioners is needed more urgently today than ever it has been in the past 60 years.

If humanity survives the triple challenges of nuclear weapons, climate change and the complex issues of terror and security, the *Review* will still be published in 60 years time. It will remain an ongoing stimulus to lawyers in Adelaide, and their colleagues, to analyse and provoke, stimulate the legal discipline and to enhance its contribution to the good governance of the Australian people and in the world.

My small list of likely topics for possible attention in the second 60 years of the *Review* will doubtless seem as inadequate and unperceptive as it would have been had I ventured upon that task at the end of my legal studies in 1961. Efforts of lawyers in futurology are usually doomed to fail because the nature of the legal discipline often tends to trap their minds in the past. Commonly, it requires the advances and challenges of other disciplines, and especially of new technology, to force awareness of unwelcome change upon lawyers.

Some aspects of our law that are desirable and even admirable have been generally preserved over the past 60 years. Most notably these have included fidelity to incorruptibility on the part of judges and legal practitioners⁷³ and the abiding concern of many practitioners with the attainment of the elusive goal of justice that gives nobility to the law as a profession. Yet none of us 60 years ago foresaw the advent of the internet, search engines and mobile devices.⁷⁴ And I doubt that many of us, even the great Roma Mitchell and John Bray, dreamed about the developments of *Mabo*;⁷⁵ of the huge growth in women's engagement with the law; and of the advent of gay rights that, with other changes, have marked the last 60 years.

For the contribution that the *Adelaide Law Review* has made to the legal discipline in Adelaide, South Australia and our country generally, I express grateful thanks. For the contribution that the *Review* will make in the coming decades, I express eager anticipation.

⁷² AC Castles, 'Reform the Law, Essays on the Renewal of the Australian Legal System (Book Review)' (1983) 9(2) *Adelaide Law Review* 309.

⁷³ Gabrielle Appleby and Grant Hoole, 'Integrity of Purpose: A Legal Process Approach to Designing a Federal Anti-Corruption Commission' (2017) 38(2) *Adelaide Law Review* 397.

⁷⁴ Seb Tonkin, *Google Inc v Australian Competition and Consumer Commission* (2013) 34(1) *Adelaide Law Review* 203.

⁷⁵ *Mabo* (n 43).