

# Negating the proposition that that law reform agencies are the best vehicle for law reform\*

Ladies and gentleman

Surely, it is a self evident truth that the proposition that ...

No perhaps I won't begin that way.

"The time has come," the Walrus said,  
"To talk of many things:  
Of shoes—and ships—and sealing-wax—  
Of cabbages—and kings—  
And why the sea is boiling hot—  
And whether pigs have wings."<sup>1</sup>

As our host described it to me earlier today, I have been left with the graveyard shift ... or, to put it more positively, I get to have the last word and, as an advocate, that makes me very happy.

We've heard a lot about law reform over the last couple of days and so much of it has supported our side in this debate. So much of the law reform, including the fundamental reforms of legal systems in the form of constitutional reform, is being done by other than law reform bodies or agencies.

The phrase, 'the best vehicle for law reform', suggests that these bodies are sufficient in themselves to achieve the completed outcome of law reform. But we know that is not the case. While they may form the chasis, or the seats, or maybe even the wheels of the vehicle for law reform they are only a part of the process that results in the law actually being reformed.

So let's look for a minute at what are the various other vehicles or component parts of vehicles that may lay claim to a role in the law reform process; some of which would claim to have the same or similar role as law reform agencies in the vehicle getting to its destination, others would claim a greater or more central role (nudging law reform agencies out of chasis position). Or should that be pole position?

I have come up with a list—the A list I like to call it—not because they are the best, A-class and all that, but because all but one of them start with the letter 'A'. (I tried so

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\* Case presented by second speaker for the negative team, Robin Banks, Chief Executive Officer, Public Interest Advocacy Centre, in the Australasian Law Reform Agencies Conference 2008, 12 September 2008, Port Vila, Vanuatu.

<sup>1</sup> Lewis Carroll, 'The Walrus and the Carpenter' from *Through the Looking-Glass and What Alice Found There* (1872).

hard to get all of them conforming to the rule, but ... if anyone can help me out with the last one, I will be forever grateful.)

So, we have all of the following 8 As who could claim some status as vehicles for law reform (and one other).

Starting with the topic of this debate we have Agencies.

Then there's Adjudicators, their role in law reform so very clearly articulated by Sir Anthony Mason in of *The Promise of Law Reform*.<sup>2</sup> Although I note it was somewhat poo-pooed by our keynote speaker of yesterday, Bernard Narakobi, when he said 'judges have failed to develop the law'. I think my colleagues from Australia would acknowledge the important role of adjudicators in the development of the law, with the decision of the High Court in *Mabo*<sup>3</sup> being a prime example.

And perhaps while we're on adjudicators, we should add in the adversaries in the matters being adjudicated, without whom the issues would not be before the courts.

Then advocates and activists, out there at the coal face as we say, the grass roots of law reform, perhaps we can lay claim to being the tyres or even the fuel of the law reform vehicle.

And let's not forget, as Brian Hourigan reminded us yesterday, the academics. They, quite properly, contribute substantially to law reform through their research into legal systems and development of new thinking around old areas of law.

Then, I mustn't skip over the role, so ably outlined by Laurie Glanfield in his chapter of *The Promise of Law Reform*, of administrators.<sup>4</sup>

That leaves me with just two more. The first, apocalyptic events ..., perhaps less a vehicle and more like a car crash, their role in the achievement of reform of laws is not to be underestimated

And finally, the only one I couldn't squeeze into an A-frame: the legislators, without whom so much of the reform of law would not eventuate.

So, how do we decide which (if any) can claim the mantle of 'best', whether it be the best vehicle or the best component part of the vehicle.

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<sup>2</sup> Sir Anthony Mason, 'Law Reform and the Courts' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2006) 314-328.

<sup>3</sup> *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).

<sup>4</sup> Laurie Glanfield, 'Law Reform through the Executive' in Opeskin and Weisbrot, above n2, 288-301.

Best connotes an absolute supremacy (even if, as my colleague for the affirmative seems to assert, it is supremacy among a range of options). When it comes to vehicles, there are lots of tests of best:

- Fastest
- Best acceleration from a standing start
- Grooviest look
- Most fuel-efficient
- Greenest
- Most comfortable

Well, I don't think many would disagree with me that law reform agencies cannot claim the mantle of fastest, or even best acceleration. These I think would go to apocalyptic events—who can forget the speed of reform of gun laws after the Port Arthur shootings or of the framework of national security laws after 9/11—and maybe activists: just think about how quickly GetUp! can mobilise the numbers to influence change to the law.

Grooviest look, well I think I'll leave that one to you. At this end of the table we have our two colleagues representing law reform agencies ... and at the other end, my colleague Simon Rice and I representing (as he so ably put it) the rest of the world. I think it's a tough call on which team has the grooviest look. Perhaps we'll have to wait to see just what sartorial splendour is donned for this evening's reception.

Most fuel-efficient; well I think I would have to claim that mantle for the NGO sector: activists and advocates. Their achievement of such significant changes to our legal landscape as domestic violence law reform and equality rights were achieved on the smell of an oil rag (such a small and insignificant part of the overall vehicle, yet vital at times).

Greenest ... Mmmm not sure who can rightfully claim that mantle these days, it is a pretty crowded field, so I'll move on.

Most comfortable, well I might give you—the law reform agencies that is—that one, this is certainly one of the most comfortable venues for discussing law reform, a venue that I know many of the others on the A-list couldn't offer.

So that's one out of five to the law reform agencies so far.

So, what are some of the other tests of best:

The best actors are those who are most skilled or talented (or perhaps the most beautiful). Or maybe we're talking about cleverest. Or the most sustained.

When thinking about a holiday, it might be most exciting, or most relaxing or most adventurous. Or if we're thinking in terms of soldiers: the best might be the bravest and/or the most obedient.

When dealing with policy issues however, we are probably keen to examine who is the most relevant, or the most responsive, or the most politically palatable or acceptable, even, perhaps, the most rational or the best at encouraging debate.

From the point of view of a former Victorian government it appears that best was a matter of the cheapest and the most independent.

On each of these measures, different members of the A-list would claim priority over law reform agencies or bodies.

The adjudicators and academics would give the agencies a run for their money on cleverest. Cheapest and most independent would see a few others climbing into the driver's seat: advocates and activists, and maybe even administrators. Bravest: well I think you have to look to the champions of law reform: the late Justice Lionel Murphy and Vincent Lingiari, Justice Michael Kirby, Kate Shephard of New Zealand, and Nelson Mandela. These are people whom some would call mavericks or worse, but who have been the driving force behind extraordinary law reform.

I don't think anyone wants the title of most obedient, so I'll speed over that road hump.

Most exciting, well, given the recent launch of the privacy report, I think most would agree that it would be a big call to give that one to the agencies. Sorry David!

In terms of which are best at engendering debate, I think I would give it to the legislators and another group from outside the A-list, the media. The measure of most responsive probably depends on the model of the agency. Alberta's Law Reform Institute certainly has serious scope to be responsive to current community priorities, but this is not the case with many other agencies, which must wait in the pits—maybe spinning its wheels a little—hoping for a reference from government.

I turn again to our host, Brian Opeskin, who captured perfectly the complexity of determining who is best when he yesterday was introducing our keynote speaker, Bernard Narakobi. Brian spoke of the time when Mr Narakobi 'took law reform to a different plan' as he entered parliament.

So, at the end of the day, it all comes down to context and, after all, we are all part of the process of achieving law reform. None of us can do it alone (well, perhaps the outliers—the legislators—would claim they can do it without the rest of us, but we know better, even they depend on the administrators.

So there is no 'best vehicle'. No-one tops the A-list. We are all different—and differently effective—vehicles or vital components of vehicles at different times and in different circumstances in the meeting and responding to the challenge and promise of law reform.

Thank you.