Bond Law Review

Volume 22 | Issue 3 Article 13

2010

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Abstract
An advisory opinion jurisdiction for the High Court of Australia has since the drafting of the Constitution in the 1890s been a recurring, though intermittent, suggestion. Notwithstanding the High Court's decision in 1921 that effectively ended the jurisdiction the prospect of its revival has remained a perennial reform option. This article traces the history of the attempts to implement this measure. It will focus upon the arguments that have been advanced for its initial establishment and reintroduction into the constitutional landscape after 1921. It argues that the reasons for the inclusion today are as relevant as they were when they were first consideration in the 1890s.

Keywords
Access To Constitutional Justice, Advisory Opinions, History of Advisory Opinions, 1927 Royal Commission, 1973-1985 Constitutional Conventions, 1977 Senate Committee, 1988 Constitutional Commission

This article is available in Bond Law Review: http://epublications.bond.edu.au/blr/vol22/iss3/13

ADVISORY OPINIONS: 'A WELL-COVERED HARBOUR'

JOHN M WILLIAMS*

Introduction

An advisory opinion jurisdiction for the High Court of Australia has since the drafting of the Constitution in the 1890s been a recurring, though intermittent, suggestion. Notwithstanding the High Court's decision in 1921 that effectively ended the jurisdiction the prospect of its revival has remained a perennial reform option.[1] This article traces the history of the attempts to implement this measure. It will focus upon the arguments that have been advanced for its initial establishment and reintroduction into the constitutional landscape after 1921. It argues that the reasons for the inclusion today are as relevant as they were when they were first consideration in the 1890s.

Advisory Opinions Revisited

In 1996 in *North Ganalanja Aboriginal Corporation v Queensland* the High Court considered issues related to the determination of the native title on a parcel of land in north-west Queensland.[2] In framing an appeal against the Full Court of the Federal Court the applicants advanced a number of procedural as well as substantive points. The procedural issue related to a perceived misdirection on the part of the Registrar and President of the Native Title Tribunal in rejecting an application to consider the existence of native title on the claimed land. The two substantive issues raised by the applicants invited the High Court to make findings as to the history of the extinguishment of native title on the claimed land and a ruling as to the power of Queensland parliament to extinguish native title. By majority the Court accepted the first argument, thus allowing the appeal against the Federal Court and ordered that the application be accepted by the Registrar for determination. On the two substantive issues the majority of the Court refused to consider them in the abstract. The joint judgment (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) reasoned that:

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1 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

2 (1996) 185 CLR 595.

> If this Court were to proceed to determine the second and third points, it would be delivering an advisory opinion. That is beyond the constitutional empowerment of this Court in its appellate as in its original jurisdiction. However helpful it may be for the respondents and interveners to have the opinion of this Court upon the effect of pastoral leases on native title, the question can be answered judicially only in the determination of justiciable issues in properly constituted proceedings. The law is not judicially administered by judicial declarations of its content 'divorced from any attempt to administer that law'.[3]

For his part Justice Kirby was willing to consider the substantial points raised by the applicants. In doing so he questioned the existing jurisprudence relating the prohibition on granting advisory opinions. He stated that:

> The current rather narrow state of authority on the Court's original jurisdiction to provide advisory opinions may one day require reconsideration as the Court adapts its process to a modern understanding of its constitutional and judicial functions. Since *In re Judiciary and Navigation Acts* was decided in 1921 there has been a substantial development in the understanding of what the judiciary in Australia may properly do in discharging its proper functions. For example, the scope of the availability of the beneficial remedy of a declaration, to deal with an apprehended threat of invasion of rights, has expanded greatly, overcoming in the process some of the same resistance as lay behind the refusal to provide advisory opinions. The judicial function is not frozen in time. This Court should remain alert to developments in judicial procedures which further, in proper ways, the defence of the rule of law. So far as is compatible with the judicial function, courts should endeavour to be constructive and useful to parties in dispute. If courts do not adopt this attitude, those parties will look to other means, rely on their power or be left unrequited by their expensive visits to the courts.[4]

My initial reflections to Justice Kirby's invitation to revisit the issue of advisory opinions were published as a comment in the *Public Law Review* in 1996.[5] That article attempted to side step the technical questions of whether 'matter mattered' and the limits of federal judicial power to ask whether the rule of law – and the overarching aspiration of clarity in the law – provided a justification for reconsidering advisory opinions.

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3 Ibid 612 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ). McHugh J came to the same conclusion noting that the 'issue that was not yet ripe for determination' and thus any determination of the Court would amount to an advisory opinion: at 642.

4 Ibid 666 (footnotes omitted).

5 John M Williams, 'Re-thinking Advisory Opinions' (1996) 7 *Public Law Review* 205.

The argument proposed was that when assessed from the prospective of policy it was time to reconsider the current state of law as it related to advisory opinions. In part it drew support from the reasoning of Professor Joseph Raz and Justice Deane about the fundamental importance of the rule of law. For Raz the rule of law rests upon a number of footings. The first related to the openness and clarity of the law. He famously stated that:

> The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.[6]

In similar terms, though writing in another context, Justice Deane noted that s 109 of the Australian Constitution was more than a mechanical provision that determined the operation of inconsistent State and Federal laws. It, according to Justice Deane, 'serves the equally important function of protecting the individual from the injustice of being subjected to the requirements of valid and inconsistent laws'.[7] So too, I argued, advisory opinions could bring a certain degree of clarity and thus advanced the concept of the rule of law.[8] These arguments continue to inform my thinking on the question.

The challenge for this article is the fact that I am in furious agreement with the arguments of Professor Leslie Zines. His overall conclusion that there is 'no good reasons based on principle, policy or textual provisions for the decision in *Re Judiciary and Navigation Acts*', is undoubtedly correct.[9] Professor Zines has deliberately left untouched the history of the attempts, and an assessment of the arguments, that were developed in the various conventions and commissions as to the preference for and against an advisory opinion jurisdiction. It is this area that is the focus of this article.

A History of Australia's Flirtation with Advisory Opinions

An account of the attempts to include in the Constitution a mechanism has been outlined by Professor Helen Irving in her 2004 article.[10] In the context of a larger argument it traces the prominent arguments raised in Constitutional Conventions of the 1890s, the 1927-1929 Royal Commission, the Constitutional Conventions 1973-

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6 Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 198.

7 *University of Wollongong v Metwally* (1984) 158 CLR 447, 477 (Deane J).

8 I should note that the clarity argument has been challenged by Helen Irving, 'Advisory Opinions, The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie University Law Journal* 105.

9 Leslie Zines, in this volume.

10 Irving, above n 8.

1985, the 1977 Senate Committee and finally the Constitutional Commission 1986-1988. In this article I will draw out a number of points discussed during the various conventions and reports to argue the continuing advantages of adopting an advisory jurisdiction for the High Court. Where this article differs from Professor Irving is the interpretation of the history and a focus on the arguments advanced during these reviews.

As Professor Zines noted, the first attempt to include a power was moved by the South Australian Patrick Glynn in 1897.[11] He proposed that the judicial power of the High Court be extended to include: 'Any matter that the Parliament may prescribe'.[12]

Having proposed this addition, the subsequent debate that took place was remarkably short when compared to other aspects of the judicial clauses. For his part, Glynn attempted to persuade colleagues that this was not 'a dangerous question of policy' but had precedents in both the United Kingdom and the United States.[13] In particular the Privy Council was empowered by the *Judicial Committee Act 1833* to hear matters referred by the Crown. Section 4 stated that:

> It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.

Glynn informed the delegates that eight State constitutions in America allowed for advisory opinions to be sought from the judiciary. In putting his argument he cited no higher authority than James Bryce to conclude this approach as sound.[14] Bryce had concluded that 'this expedient seems a good one, for it procures a judicial and non-partisan interpretation, and procures it at once before rights or interests have been created'.[15] Glynn would have known that in the context of the Convention few would have lightly contradicted a positive assessment by Bryce.[16]

Despite Glynn's confidence in the correctness of the amendment there was little support for his proposal. Only five other framers spoke to the proposal before it was defeated. All were attracted to the principle that the proposal embodied, yet all could

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11 Leslie Zines, in this volume.

12 *Official Record of the Debates of the Australasian Federal Convention Adelaide 1897* (Adelaide, 1897) 962.

13 Ibid 963.

14 *Official Record of the Debates of the Australasian Federal Convention Adelaide 1897* (Adelaide, 1897) 963.

15 James Bryce, *The American Commonwealth* (Macmillan, 1888) 448; cited by Glynn, ibid, 963.

16 John A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 18-9.

find fault in its inclusion. For his part Edmund Barton, the leader of the Convention, was concerned not to allow the Parliament to expand the jurisdiction of the High Court in ways that may conflict with the jurisdiction granted by the Constitution itself.[17] He said:

> I think we will have to be rather careful before adopting a sub-section of this kind, because it is framed in such a wide way as to include any matter that the Parliament may prescribed. We shall have in the first case to determine – and we shall have to invoke the power of the Supreme Court to determine it – whether a matter prescribed by Parliament is a matter within their power to so deal with under the Constitution. We should there find some fruitful sources of litigation if a proposal of this kind were carried.[18]

Josiah Symon, who generally was supportive of Barton's arguments, made the additional point that the 'great charm' of the United States Supreme Court was that it was not involved in question of constitutional authority 'until their attention is directed to it in some suit between parties'.[19] Henry Bournes Higgins, likewise, was not convinced that abstract questions made for good law. 'If there is one thing more than another', he told delegates, 'which is recognised in British jurisprudence it is that a judge never gives a decision until the facts necessary for that decision have arisen'.[20]

Unlike his fellow liberal-minded colleague, Charles Cameron Kingston was happy to entertain the concept of advisory opinions. He told delegates:

> I thoroughly agree with the object of Mr. Glynn with regard to the propriety of providing some facile, expeditious, and inexpensive means whereby the highest judicial pronouncements on matters of great public concern can be obtained. I do trust we will not attach too much weight to the suggestion that we should go through the old routine of having to find some unfortunate people to make it a personal quarrel before we can obtain the decision of the highest court of the realm.[21]

Ever the political reformer, Kingston had since the 1880s attempted to bring about reform of the legal procedures in South Australia. In 1895 he introduced his Law Reform Bill into the State Parliament. In it he attempted to break the hold of the established legal profession by seeking to facilitate legal training by taking it away from the University of Adelaide and allow a system of articles to fully flourish. The

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17 Ibid 965.

18 Ibid 963-4.

19 Ibid 965.

20 Ibid 967.

21 Ibid 966.

Bill outlawed any requirement for a candidate for admission 'to pass any examination, take any degree or attend lectures at any university'.[22] Not satisfied with effectively closing the law school, Kingston's Bill excluded examination in any 'dead or foreign language', a provision aimed squarely at the Latin requirement. During the second reading Kingston satirically quoted from a question from a law school examination paper that required candidates to 'translate and comment' on various Latin passages. Kingston told the chamber that 'he could not *translate* it, but could *comment* on it, and say it was *rubbish*'.[23]

However, while Kingston supported the direction of Glynn's proposal he concluded that in its current terms he would oppose it. Kingston reasoned (not unlike Barton) that if it was included then the Federal Parliament could arrogate to itself 'all the judicial power it may wish, even to the extent of ousting State legislation'.[24] His was an objection based on the over inclusiveness of the Glynn proposal rather than the principle he was seek to achieve.

For his part Alfred Deakin was yet to be convinced of the necessity of the proposal. He told delegates that '[w]hile recognising the end in view to be eminently desirable, I feel great diffidence in lending any sanction to a proposal of this kind until it has been better digested.[25] After some soothing reflections directed toward Glynn and in praise of his efforts, the proposal was rejected on the voices.[26]

This then was the extent of consideration of the issue during the Convention. The general question remerged with the specific issue of what was a 'matter' in the context of Ch III of the Constitution.[27] The tenor of the debate indicates that Barton's initial rejection of the proposal was a fatal blow to Glynn's cause. What emerged from the Convention debates is a general reluctance to increase the jurisdiction of the High Court. This would appear to be the overriding consideration. In addition to this argument, based upon the convenience of a limited jurisdiction for the Court, concerns about unforeseen consequences also told against the proposal. It should be remembered that the judicial clauses were under close scrutiny as a substantial group

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22 Parliamentary Debates, Legislative Assembly, 6 November 1895, 2090. See John C Bannon, *The Kingston Government of South Australia, 1893-1899: A Study in Immediate pre-Federation Colonial Politics* (PhD Thesis, 2006).

23 Parliamentary Debates, 2090 (my emphasis).

24 *Official Record of the Debates of the Australasian Federal Convention Adelaide 1897* (Adelaide, 1897), 967.

25 Ibid 967.

26 Ibid.

27 See John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 765-8.

of the Framers remained sceptical about the need for a High Court given the continuing role of the Supreme Courts and the Privy Council. In this context an argument for additional jurisdiction was a difficult one to advance.

1927 Royal Commission

The Royal Commission into the Constitution in 1927 was the next opportunity to reconsider the question of advisory opinions. This occurred six years after the High Court's decision in *In Re Judiciary and Navigation Acts*.[28] The Commission was established by the Bruce government and had the general terms of reference to 'inquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation'.[29] Beyond this the Commission was give ten specific areas of inquiry including '(vi) judicial power'.

Ultimately the Commission recommended the inclusion of a new section 80A at the end of Ch III of the Constitution. It stated that:

> Notwithstanding any other provision of this Constitution the Parliament may make laws authorising the High Court to advise as to the validity of any enactment of the Commonwealth or any State.[30]

Evidence was given to the Commission by prominent lawyers of the period including Mr Owen Dixon KC (for the Victorian Bar), Sir Robert Garran and Justice HB Higgins. This evidence makes for fascinating reading in light of what was to come. For instance, Justice Andrew Inglis Clark (the son of the Tasmanian framer) did not support an amendment of the Constitution to include advisory opinions. Notwithstanding his 'hostility' to the idea, when prompted by the Commissioners he conceded that some abstract questions might be usefully answered for the parliament before the passage or enactment of legislation. 'Has the Commonwealth Parliament the right to make a law with regard to the incorporation of a company?' was one such question.[31] The answer to that question would come 37 year after Inglis Clark's death, when in 1990 when the High Court handed down the *Incorporation Case*.[32]

However, it was the evidence of Owen Dixon and Justice Higgins that best states the case for and against the amendment of the Constitution. Dixon commenced his

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28 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

29 *Report of the Royal Commission on the Constitution* (Government Printer, 1929) v.

30 Ibid 255.

31 *Royal Commission on the Constitution of the Commonwealth, Evidence* (Government Printer, 1927), 932.

32 *New South Wales v Commonwealth* (1990) 169 CLR 482.

evidence on the issue by cautioning Commissioners that advisory opinions were 'inadvisable'.[33] He then proceeded to set out a series of objections.

First, any question put to the High Court by the Government could be framed in such a way as to 'mislead' or worse 'propounded in such a way as to produce the right answer'.[34]

Secondly, 'an abstract question will only permit of an abstract answer' and that without the benefit of concrete facts the answer may be defective.[35] To illustrate the point he argued that questions about whether a particular section of an Act is valid and/or severable cannot be understood in isolation of the facts. The example he offered was the *James Case* and the interrelation between the quota provision of the Act and the section dealing with compulsory acquisition.[36] The true operation of the sections, he concluded, relied upon the facts.

Thirdly, Owen Dixon raised the issue of whether the answer to the abstract question was to be 'made conclusive on everybody throughout Australia, or whether you are going to leave them so that they are mere advice.' If they were advisory then he concluded they 'scarcely help a very great deal'. On the same point, if the answers constituted 'new law in a changed form' then the issue of interpretation of the answers given by the Court remained.[37]

Sir Robert Garran, the then Solicitor-General of the Commonwealth, was generally supportive of the proposals. Explaining the operation of the 1921 *Judiciary Act* amendments he noted that an opinion would only be sought after a Bill had been passed 'and therefore there were citizens who had an interest in the question of whether the Act was really an Act of Parliament or a piece of waste paper'.[38] His overall support was based upon a balance of convenience argument: 'one is to save the litigant the uncertainty and expense of testing a point, and the other is really to advise the Parliament as to the scope of its powers'.[39]

For his part Justice Higgins was in favour of the amendment of the Constitution. Echoing some of his reasons in *In re Judiciary and Navigation Acts* he concluded that

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33 *Royal Commission on the Constitution of the Commonwealth, Evidence* (Government Printer, 1927), 791.

34 Ibid.

35 Ibid.

36 *James v South Australia* (1927) 40 CLR 1.

37 *Royal Commission on the Constitution of the Commonwealth, Evidence* (Government Printer, 1927), 792.

38 Ibid 58.

39 Ibid 60.

the Australian Parliament should be given the same powers as the British Parliament to seek the opinion of the Privy Council.[40] Notwithstanding his otherwise low regard for the Privy Council he told his audience that 'If it is a fit thing to put that duty upon the Privy Council surely it is a fit thing to put it on the High Court'.[41] He continued:

> It will only give the High Court more trouble, of course, but from the point of view the public, in nine cases out of ten it will be a big relief to Parliament to know that the High Court states that a law of such-and-such a character will be valid.[42]

Unlike his views at the 1897 Adelaide Convention, Justice Higgins now believed that the High Court could deal with abstract questions. He did concede that any ruling on an abstract question should not be absolutely binding on the High Court. This was 'because a problem is not worked out before the High Court so thoroughly when there are no opposing sides present; but, at the same time, in nine cases out of ten, I should say that the result would be the right one'.[43] In coming to this conclusion he was consistent with his prevision discussion of the point in *In re Judiciary and Navigation Acts* where he opined that:

> It would not be a judgment binding all the world, as has been suggested, or binding as *res judicata* between parties who have not been heard; but it would be an authority of great weight—a decision which, unless overruled, the Courts would follow in actions between parties.[44]

Arguably reflecting on his time as a member of the Executive, or alarmed by his colleague's treatment of his beloved Commonwealth *Conciliation and Arbitration Act 1904*, he concluded that the referral jurisdiction would be:

> a tremendous help to Parliament, because Ministers would not then be faced with the position of being told, 'You may pass that law but it will not be valid,' and they would be entering into a well-covered harbour by the High Court having given an advisory opinion.[45]

Notwithstanding the concerns raised by Owen Dixon and others, the Commission concluded that the advantages of having 'the advice of the High Court upon the

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40 (1921) 29 CLR 257, 274.

41 *Royal Commission on the Constitution of the Commonwealth, Evidence* (Government Printer, 1927), 438.

42 Ibid.

43 Ibid.

44 (1921) 29 CLR 257, 270.

45 *Royal Commission on the Constitution of the Commonwealth, Evidence* (Government Printer, 1927), 438 (my emphasis).

validity of legislation before the community incurs the trouble and expense of acting of upon legislation which may or may not be valid outweighs the objections to any judicial pronouncement being made as to the validity of legislation except in regard to a concrete case in litigation instituted between the parties'.[46]

The 1929 Commission was the first to comprehensive review of the Constitution since its drafting nearly three decades before. The role of the High Court in that time had been critical in shaping the nature of Australian federation. Experience had shown that many of the legislative initiatives of the Parliament lay beyond the constitutional boundary and that the striking down of these had caused inconvenience to industry and citizens alike. It is against this background that the Commission opted for an amendment to the Constitution to facilitate the introduction of an advisory opinion jurisdiction.

The Constitutional Conventions 1973-1985 and 1977 Senate Committee

The election of the Whitlam government in 1972 signalled a commitment to constitutional amendment on a grand scale.[47] For Gough Whitlam and the Labor Party, the Australian Constitution had traditionally been viewed as an obstacle to the implementation of the Party's platform. Delivering the Chifley Memorial lecture in 1957, Whitlam characterised the situation as 'The Constitution versus Labor'. He said:

> The way of the reform is hard in Australia. Our parliaments work within the constitutional framework which enshrines Liberal policy and bans Labor policy. Labor has to persuade the electorate to take two steps before it can implement its reforms: first to elect a Labor government, then to alter the Constitution.[48]

Two year later in 1959 Whitlam would join the Joint Committee on Constitutional Review that would report on the possible amendments to the Constitution.[49] The issue of advisory opinions would not be considered by the Committee which had as its main focus the legislative powers of the Parliament. Ultimately, it would make recommendations regarding navigation and shipping, aviation, nuclear energy, industrial relations and a range of changes to give to the Commonwealth greater

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46 *Report of the Royal Commission on the Constitution* (Government Printer, 1929), 255.

47 For an account of the reformist tendencies of the incoming Whitlam government: see Edward Gough Whitlam, *The Whitlam Government 1972-1975* (Penguin Books, 1985) 1-24.

48 Edward Gough Whitlam, 'The Constitution *versus* Labor' in E G Whitlam, *Labor and the Constitution* (Fabian Society, 1965), 32.

49 *Report from the Joint Committee on Constitution Review, 1959* (Commonwealth Government Printer, 1959).

power over the economy. As with many reviews of the Constitution no action was taken.

The zeal for constitutional reform by the Labor government was put into action with the establishment of the long running Constitutional Conventions that were held between 1973 and 1985. The Conventions provided the first opportunity since 1927 to reconsider the issue of advisory opinions. At the Perth Convention in 1978, a proposed amendment was debated by delegates. Senator John Button moved that the Constitution should be amended to add a new section after the current s 77. He proposed the following amendment:

> 77A.(A) the Governor General in Council may refer to the High Court for its opinion-
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> a) any question of law as to the validity of an enactment of the Parliament of the Commonwealth, or as to the validity, if enacted, of a proposed enactment of the Parliament; or
>
> b) any question of law as to the interpretation or application of section fifty-seven or section one hundred and twenty-eight of the Constitution, being a question that, by reason of the circumstances existing at the time of the reference, the Governor General in Council is of opinion has arisen or is reasonably likely to arise.[50]

Also included in the proposed amendment was the ability for the State Governors, acting on the advice of the Executive Council of the State, to also refer a matter to the High Court for an advisory opinion. According to the proposal once a matter was referred to the High Court it would hear argument in public on the question and publish its reasons for the decision.[51] The provision further stipulated that the Bench hearing a referred question should consist of not less than five justices.

When introducing the motion Senator Button outlined many of the previous arguments for the inclusion of this new section in the Constitution. In particular he used the examples of the *Seas and Submerged Lands Act*,[52] amendments to the *Family Law Act*,[53] and the national compensation legislation to illustrate examples where the expenditure of time and resources had been made prior to the High Court's

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50 *Proceedings of the Australian Constitutional Convention and Standing Committee Reports*, Perth 26-28 July 1978 (Government Printer, 1978), 28.

51 Ibid 29.

52 *Seas and Submerged Lands Act 1973* (Cth). See *New South Wales v Commonwealth* (1975) 135 CLR 337.

53 *Family Law Act 1975* (Cth). See *Russell v Russell* (1976) 134 CLR 495.

consideration of a constitutional challenge. If the amendment was adopted, he told the Convention, it would do:

> a great deal towards expediting and making more responsive the system of Government we have in a Australia at both the State and Federal levels, and, indeed, the relationships between the various arms of Government in this country.[54]

Senator Tate, who seconded the motion, focused upon the advantages of clarity that an advisory opinion would provide particularly in relation to ss 57 and 128 of the Constitution. Undoubtedly seared by the experience of the Whitlam government, he told the delegates there would be grave consequences if the current uncertain constitutional approach remained. Speaking in dramatic terms, he told the delegates that:

> I have in mind that machinery ought to be created at every stage to avoid the possibility of violence in the social and political transformation of Australia. When you have questions of great political moment, such as to do with double dissolution, joint sittings, and the referenda is proceeding from only one chamber it leads to possible situations of shock and hysteria if sudden announcements are made on the basis of correspondence between one justice of the High Court and one of the parties concerned, albeit the Chief Justice.[55]

The Button-Tate proposal was not accepted without challenge. Senator Knox argued that such a proposal would undermine the nature of representative government by leading to the judicialisation of politics. He informed delegates that:

> This country should not be run by lawyers, and I do believe that by putting into the system, a process of getting advisory opinions in the High Court will tend to lead it to be run by lawyers, and the High Court will be placed between the people and the legislatures.[56]

Mr Guy Green, the future Chief Justice and Governor of Tasmania, attempted to answer the objections of Senator Knox and others by pointing out how unremarkable the proposal was in fact. He commenced by indicating his support for the motion and professing to be surprised at the amount of opposition it had drawn. He proceeded to enlighten delegates to the fact that since 1833 the Privy Council had been empowered to give advisory opinions that the Canadian Supreme Court had done so since 1912.

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54 *Proceeding of the Australian Constitutional Convention* (Government Printer, 1979), 31.

55 Ibid 32.

56 Ibid 35.

He further indicated that the New South Wales Court of Criminal Appeal had also provided them since 1934.[57] He concluded by informing delegates that:

> It is only sensible to allow the High Court to determine these matters before the law is put into effect. It saves time, expense, and inconvenience, and it does not all then that; as the Privy Council said, there is no reason suggest that this ease in any way at all subversive of the functions of the High Court.[58]

As was the case with many of the Convention's proposals they would not put to the people. Again the key arguments advanced in relation to the inclusion of an advisory opinion related to the convenience of the parliamentary processes and ultimately the certainty that it provided the community. The events of 1975, and the implications related to the validity of the 1974 Joint Sitting,[59] added a degree of urgency to the remarks of both Senator Button and Senator Tate.

A year before the Perth Convention the Senate Constitutional and Legal Affairs Committee brought down its own report on advisory opinions and the High Court. The Committee's terms of reference were to investigate '[w]hether the Constitution should be amended to enable the High Court to give advisory opinions on important questions of law or fact arising out of legislation or other matters'.[60]

The Committee had before it submissions from the Attorney General's Department, the Law Council of Australia and its constituent bodies, and legal academics. As well as reviewing the 1927 Royal Commission and the constitutional conventions of 1973-1976 the Committee considered the position in a number of other jurisdictions including Canada, the United States and America, England, and India.

The committee set out what it described as the 'yes' and 'no' case for the adoption of an advisory opinion jurisdiction. In terms of the yes case the Committee concluded that:

> The principal argument in favour of an advisory opinion procedure is that it allows an early judicial review of constitutionally doubtful laws. While under the present system judicial review may be possible ultimately through

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57 Ibid 46.

58 Ibid.

59 See the High Court's decisions resulting from the operation of the s 57: *Cormack v Cope* (1974) 131 CLR 432; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81; and *Western Australia v Commonwealth* (1975) 134 CLR 201.

60 Senate Standing Committee on Constitutional and Legal Affairs, Report on the Reference, *Advisory Opinions by the High Court* (1977) 1.

> litigation, evidence before the Committee indicates that it may often be desirable to hasten the process.[61]

In support of this conclusion the committee noted the flexibility this would provide to State and Commonwealth governments in relation to intergovernmental matters, the current difficulty of individuals bringing constitutional challenges and the existence of such a jurisdiction within the New South Wales *Criminal Appeals Act 1975*.[62]

The Committee was emphatic in its rejection of the arguments put forward in the no case. So, for instance, the Committee said there was no evidence that the jurisdiction breached the separation of powers and involves the High Court in the undertaking of a legislative function. Moreover they disagreed with the proposition that advisory opinions would tend to politicise or weaken the judicial branch of government. The Committee was fortified in this conclusion by the Privy Council's opinion in *Ontario v Canada*[63] where their Lordships stated that:

> Upon the whole, it does seem strange that a court, such in effect this is, should have been for three-quarters of a century liable to answer questions put to the Crown and should have done it without the least suggestion of inconvenience or impropriety if the same thing when attempted in Canada deserves to be stigmatised as subversive of the judicial function.[64]

However, the Committee did note some of the practical difficulties of the jurisdiction. It acknowledged the lack of concrete facts, the essential uncertainty of the status of advisory opinion and the potential for overloading the Court. Notwithstanding these concerns the Committee held to its view that this was an amendment worth pursuing. In particular the Committee endorsed the use of the jurisdiction in three areas.

First, upon the request of the Attorney-General of the Commonwealth or the States, the High Court would hear a referred issue. This would be limited to questions of law affecting the constitutionality of any law prior to it receiving Royal Assent.

Secondly, on questions of law arising out of a conflict of laws between the States and where appropriate the Commonwealth Territories. This would include the validity of laws that purported to have an extra-territorial effect.

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61 Ibid 18.

62 Ibid18-20.

63 [1912] 1 AC 571, 585.

64 Senate Standing Committee on Constitutional and Legal Affairs, Report on the Reference, *Advisory Opinions by the High Court* (1977) 21.

Thirdly, 'on questions arising out of treaty entered into by the Commonwealth and the validity of any legislation which purports to give effect to it.'[65]

Undoubtedly, the 1977 Report was informed by the debates that were being considered within the Constitutional Convention. The Report was a clear account of the alternatives and provided a relatively modest version of the advisory opinion options. This period ended with a general agreement as to the value of this amendment. In the sweep of history to this point there had been two significant opponents to an advisory opinion jurisdiction: the Framers and the High Court in 1921. The latest consideration in 1988 witnessed a significant shift in attitude towards advisory opinions.

1988 Constitutional Commission

The 1988 Constitutional Commission marked a break with the generally consistent calls for the amendment to Constitution to allow an advisory opinion jurisdiction. As the Commissioners acknowledged in their Final Report, the previous inquires demonstrated 'wide support' for the inclusion of a referral power.[66] It is significant that the Report characterised this support for the change as 'political'. 'This support', continued the Constitutional Commission, 'was of course principally motivated by a desire to make the governmental and legislative process more smoothly, efficiently and speedily'.[67] This conclusion would be consistent with the direction of the 1977 and 1979 reports which were undertaken either by the political branch of government, or informed by submissions from politicians. However, the fact that the support for the change is based upon an argument about greater efficiency in government is not itself a reason to reject the change.

The Commission's deliberations were informed by a series of Advisory Committees established to address particular subjects. The Australian Judiciary Advisory Committee would initially consider the issue of advisory opinions and prepare a report from the Commission. The issue was, in the context of the entirety of their Report, a relatively minor question. Ultimately, the Advisory Committee recommended against conferring the jurisdiction on the High Court.[68] The Committee gave the following reasons:

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65 Ibid 30.

66 *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988), 417.

67 Ibid.

68 Constitutional Commission, *Australian Judicial System Advisory Committee Report* (Australian Government Publishing Service, 1987), 59.

> First, the rules as to standing in Australia are now sufficiently relaxed as not to shut out any plaintiff with a substantial interest or concern in testing constitutional questions. Secondly it is undesirable to draw the referral judiciary too closely into the legislative process by having it express views upon bills or proposed bills before they have been tested by passage through both Houses of Parliament. Even if an advisory opinion might be sought only after the passage of a bill through both Houses, the objection to involving the High Court as adviser to the government of the day would remain. It may be observed that submission to the Committee on the topic were overwhelmingly against the existence of such a jurisdiction.[69]

The Advisory Committee was chaired by Justice Jackson (Federal Court) and included Professor James Crawford, Justice Gummow (Federal Court), Mr RC Jennings QC (former Solicitor-General of Tasmania), Justice Kennedy (Supreme Court of WA) and Justice McGarvie (Supreme Court of Victoria). The Committee consulted widely taking oral evidence from 62 persons in all State and Territory capitals. Further the Committee had discussions with the High Court, the Federal and Family Courts as well as the Supreme Courts of the States and Territories.[70]

In its Final Report the Commission acknowledged the main reasons for conferring the jurisdiction was to establish a means of removing the 'cloud of doubt' that may hang over legislation, and to prevent the cost of establishing, for instance, statutory bodies only to have declared invalid at some later period. They acknowledged the difficult position that private citizens and corporation faced in having legislation declared invalid. This was particularly the case is the area of marital status or custody of children or when it prevented certainty in commercial planning.[71]

The Report further acknowledged that its final recommendation required balancing the conflicting interests on the question. Ultimately they concluded that the 'proponents of advisory jurisdiction sometimes overstate its advantages so far as the achievement of certainty is concerned'. In the end the Commission agreed with the Advisory Committee 'that the High Court should not be invested with advisory jurisdiction, either generally or in respect to matters of constitutional validity'.[72]

Notwithstanding the rejection of the general advisory opinions jurisdiction the Committee recommend that:

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69 Ibid 59-60.

70 Ibid 2-3.

71 *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988), 415.

72 Ibid 417.

> The Constitution be altered to invest the High Court with jurisdiction to make a declaration on any question of law referred to it:
>
> (i) by the Governor General in Council relating to the manner and form of enacting any proposed law of the Commonwealth, including any proposed alteration to the Constitution;
>
> (ii) by the Governor of a State or the Administrator in Council of a Territory relating to the manner and form of enacting any proposed law of that State or Territory.[73]

The Commission highlighted the 'manner and form' controversies related to the uncertainty involving ss 57 and 122 of the Constitution. In the case of the States the entrenched constitutional provisions could, they concluded, create doubt and inconvenience as to when an Act was required to comply with the entrenchment provisions.

How do we explain this break with the otherwise consistent acceptance of an advisory jurisdiction for the High Court? Irving suggests that the 'change of heart' may have been the results of an intensified defence of the separation of powers.[74] This may, in part, provide an explanation for what had been until 1987 a consistent supportive message by reviews evaluating the question. The Commission was correct that the liberalisation of standing and the use of declaratory judgments had gone a long way to answer one of the chief arguments for the use of advisory opinions. Yet, this liberalisation had been noted by both the 1927 Commission and the 1977 Senate Committee. Notwithstanding these developments both these inquiries plumped for an advisory jurisdiction for the High Court.

Undoubtedly the arguments against advisory opinions should not be quickly dismissed. However, the 'change of heart' is not explained to any great extend in the 1988 Report. One contrast that can be made between 1897/8 inquiry and the previous reports is the representation of judicial officers on the review committee. Clearly the courts may have a different perspective on the desirability of this additional jurisdiction. However, a review of the arguments since the 1890s does not indicate any seriously contention that it is a jurisdiction in conflict with the exercise of judicial power. It would be a reasonable conclusion to draw that the resistance by the judiciary was a key factor for the 'change of heart' after 1987.

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73 Ibid 414.

74 Irving, above n 8, 117.

Conclusion

What then do the various reports tell us about arguments relating to the adoption of advisory opinions? Generally it is the combination of certainty for the people and the parliament that have been the attraction for the various reporters. As such there is much to commend the conclusion of Stephen Crawshaw on the issue: 'the arguments presented in favour of advisory opinions have usually been practical, in contrast to the more theoretical arguments advanced against them'.[75]

[75] *Report on Advisory Opinions by the High Court* (Government Printer, 1977), 26.