

ADVISORY OPINIONS, THE RULE OF LAW, AND THE SEPARATION OF POWERS

HELEN IRVING*

I INTRODUCTION

In 1921, the High Court was asked to rule on the validity of Part XII of the *Judiciary Act 1903* (Cth) which purported to vest advisory opinion jurisdiction in the Court.¹ Section 76 of the Constitution, the Court held, confined its jurisdiction to ‘matters’; there could be no ‘matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court’.² While an advisory opinion constituted an exercise of the judicial power (and therefore no attempt had been made to confer a non-judicial function on the Court), it was not a ‘matter’. The provision was, thus, invalid.

Although questions regarding the nature of a ‘matter’ have come before the Court from time to time since then,³ there has been no serious attempt to persuade the Court to re-think this conclusion. It is thus well settled that the High Court of Australia cannot give advisory opinions regarding the constitutionality of legislation (prospective or otherwise) in the absence of a controversy between parties or ‘matter’.⁴ None the less, the idea that it should be empowered to do so has continued to generate enthusiasm as well as opposition both within and outside the courts.

* Associate Professor, Faculty of Law, University of Sydney.

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

² *Ibid* 265.

³ See, eg, *Commonwealth v Queensland* (1975) 134 CLR 298; *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289; *Croome v Tasmania* (1997) 191 CLR 119; *Abebe v Commonwealth* (1999) 197 CLR 510; *Wong v The Queen* (2002) 207 CLR 344.

⁴ For the sake of simplicity, the expression ‘advisory opinions’ is used in this paper to mean High Court opinions about the constitutional validity of Acts or Bills. Other types of opinion exist, of course, and from time to time the High Court has considered whether there is a ‘matter’ in cases concerning, for example, the power of a State court to decide questions of law arising from a case following an acquittal: *Saffron v The Queen* (1953) 88 CLR 523; and the power of a State court to give guideline sentences: *Wong v The Queen* (2002) 207 CLR 344, among others.

This paper traces the history of advocacy for and against advisory opinion jurisdiction in Australia. In doing so, it traverses the range of approaches to be found in the Australian debates regarding both the desirability of advisory opinions and the form these should take. It discusses the most recent claim, that advisory opinion jurisdiction would serve to promote the rule of law by increasing certainty and enhancing knowledge of the law. It evaluates this view, and concludes that advisory opinions are likely in practice to have little benefit as a means of advancing the rule of law. No greater certainty would arise from an advisory opinion than from the present situation. Indeed, a further layer of uncertainty would be the result: uncertainty surrounding whether the opinion should be accepted by the executive government, followed by uncertainty as to whether the High Court, faced with a concrete controversy arising out of operating legislation (which had earlier been 'ticked off' by the same Court) would follow its own advice.

This illusion of certainty, I argue, would represent a worse outcome for the rule of law than the current situation. While uncertainty is a feature of any constitutional system where judicial review may render an operating Act invalid, the level of uncertainty under the current situation is in practice less than proponents of advisory opinions tend to suggest. This arises partly because invalidation of legislation is relatively uncommon and, secondly, because there are many 'saving' devices, both formal and informal, which render the effect of invalidation considerably less drastic than is sometimes suggested.

Only advisory opinions that are both binding on governments and non-discretionary (that is, where the High Court was unable to decline to give advice) would be capable of offering any degree of certainty (and even this is doubtful). However, were advisory opinion jurisdiction to have this character (as Part XII of the *Judiciary Act 1903* envisaged) its conferral would be likely to amount to a breach of the separation of powers, notwithstanding the Court's view in 1921 that advisory opinions fell within the judicial power. In particular, the 'incompatibility doctrine', as it was developed in *Grollo v Palmer*⁵ and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,⁶ is now likely to be an obstacle to the conferral of advisory opinion jurisdiction – even if the Court were prepared to re-consider the scope of a 'matter' (as Kirby J, for example, has suggested on more than one occasion that it should⁷).

The paper moves on to argue that the desirability of advisory opinion jurisdiction cannot, in any case, merely be considered as a legal question. The political context also needs to be considered in evaluating the merits. Even if advice may be given without a breach of the separation of powers (which is doubtful), any merits are outweighed by political disadvantages inherent in the exercise of a power for which effective alternatives already exist. These disadvantages include the potential for

⁵ (1995) 184 CLR 348.

⁶ (1996) 189 CLR 1.

⁷ *North Ganalanga Aboriginal Corporation v Queensland* (1996) CLR 595 ('*North Ganalanga*'); see also *Thorpe v Commonwealth (No 3)* (1997) 144 CLR 677.

‘killing at birth’ adventurous or progressive legislation, and with it the reduction of opportunities for testing the limits of Commonwealth power.

II THE FRAMING

Virtually the whole range of arguments for and against advisory opinions was rehearsed at the Australasian Federal Convention, 1897-98, during the framing of what are now ss 75 and 76 of the Constitution. Section 75 describes the original jurisdiction of the High Court in a range of five ‘matters’. Section 76 sets out the original jurisdiction that may be conferred by the Parliament on the Court in a further four classes of ‘matter’.

In debate in the Federal Convention, some of the members considered the term ‘matter’ to be too wide. Victorian delegate (and future High Court Justice) Isaac Isaacs was concerned that it might be taken to ‘include matters partaking of a political nature’.⁸ Unless ‘matters’ were qualified, he said, there would be nothing ‘to prevent the Federal Government from going to the Supreme [sic] Court *ex parte* and asking for an interpretation of the Constitution’.⁹ In response, South Australian delegate (and future Commonwealth Attorney-General) Josiah Symon, assured him that the word

merely indicates the scope within which the judicial power is to be exercised, but no matter can be dealt with until it comes before the authorities in the form of a case or some judicial process which will be regulated by the Judiciary Acts.¹⁰

While this appeared to rule out advisory opinions from the category of ‘matter’, earlier debate revealed some ambivalence. In the Convention’s first session in Adelaide, South Australian delegate Patrick Glynn proposed an addition to ss 75 and 76, extending the judicial power of the High Court to ‘[a]ny matters that the Parliament may prescribe’.¹¹ By this, it became clear, he meant references to the Court for advisory opinions. As the draft Constitution then stood, Glynn noted:

We propose abolishing the right of appeal to the Privy Council, and if we succeed in that, another amendment will be necessary. We will have to invest our High Court with the power which is vested in the Privy Council to decide certain matters which are not matters of contentious litigation at the time.¹²

⁸ *Official Record of the Debates of the Australasian Federal Convention* (reprint, 1986) Melbourne 1898, 319 (‘*Melbourne Debates*’).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 962 (Patrick Glynn) (‘*Adelaide Debates*’).

¹² *Ibid.* Section 4 of the *Judicial Committee Act* 1833 (UK) empowered the King on the advice of his Ministers to refer any matter to the Judicial Committee of the Privy Council for hearing or consideration. The principal historical application appears to have been in respect of legal matters arising in British colonies, with some more recent uses concerning parliamentary privileges and eligibility of Members of Parliament to sit. The draft provision of the Australian

Glynn also advanced a 'rule of law' argument.¹³ Quoting from the Convention's 'Bible',¹⁴ James Bryce's *The American Commonwealth*,¹⁵ he asked:

How is a man to know whether he has really acquired a right under a statute? How is he to learn whether to conform his conduct to it or not? How is an investor to judge if he may safely lend money which a statute has empowered a community to borrow, when the statute may be itself subsequently overthrown?¹⁶

The reception was overwhelmingly negative. Edmund Barton (NSW delegate, future Prime Minister and Justice of the High Court) considered the formula 'all matters' to be far too wide, and the examples drawn from other jurisdictions irrelevant.¹⁷ Symon followed, speaking of the 'great charm of the judiciary in the Supreme Court of the United States' which, he said, 'consists in the fact that they do not mix themselves up with the questions of legislation or constitutional law or the question of executive control until their attention is directed to it in some suit between parties'.¹⁸ He also cautioned against provoking

the resistance of a State which has its law brought by the intervention of the Commonwealth before the judiciary to have its validity tested. Immediately you do that you arouse a debate which may never otherwise arise, and you bring about a mongrel suit to determine some matter which may otherwise never be brought before the court.¹⁹

Constitution (now s 74) to which Glynn referred was later amended at the insistence of the British authorities, leaving largely unrestricted right of appeal to the Privy Council.

¹³ Ibid 693.

¹⁴ J A La Nauze, *The Making of the Australian Constitution* (1972) 273.

¹⁵ James Bryce, *The American Commonwealth* (1888) 448.

¹⁶ *Adelaide Debates*, above n 11, 963 (Patrick Glynn).

¹⁷ *Adelaide Debates*, above n 11, 964 (Edmund Barton). The application of the Privy Council's power to give opinions, in a federal system with a written Constitution, Barton suggested, was limited. Among other examples, the Canadian Supreme Court is able to receive references for advisory opinions, and the Canadian case is routinely cited by Australian advocates of advisory opinions. It is worth noting a couple of relevant differences between Australia and Canada. To begin with, unlike in Australia, the *British North America Act* (1867) provided for the disallowance of Acts of the Provincial Parliaments by the Governor-General in Council, on the grounds of *ultra vires*. The 'reference' power in regard to Acts of Parliament was first provided for in s 52 of the *Supreme Court of Canada Act* 1875. Prior to disallowance, the Dominion Government commonly referred the matter to the Supreme Court for advice. The disallowance provision has long fallen into disuse, and 'the reference procedure is now the principal method for the Federal Government to challenge Provincial legislation' (K Swinton, *The Supreme Court and Canadian Federalism* (1990) 15). Canada also has a much weaker notion of separation of powers than either the United States or Australia. See Mark Leeming, 'Courts, Tribunals and the Separation of Powers in Australia and Canada' (1997) 8 *Public Law Review* 143. This, combined with the particular historical origins of the reference provision, suggests that caution should be used in employing the Canadian example in Australian debates on advisory jurisdiction.

¹⁸ *Adelaide Debates*, above n 11, 965 (Josiah Symon).

¹⁹ Ibid 966.

Henry Higgins (Victorian delegate, later Justice of the High Court) was adamant that it was ‘most inexpedient to break in on the established practice of the English law, and secure decisions on facts which have not arisen yet’.²⁰ He recognised that the alternative often meant ‘having important questions of constitutional law decided out of [an individual’s] own pockets’, but believed that a measure (such as reimbursement by parliament) could be adopted to overcome this. Greater disadvantages lay in advisory opinions, he said, since a judge

cannot give that same attention, to a supposititious [sic] case as when he feels the pressure of the consequences to a litigant before him. If he feels that the effect of his decision will be ruin to this man or that man he will take the utmost pains in considering his decision.²¹

South Australia Premier, Charles Kingston, alone spoke in support: ‘I do trust’, he said

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 in the realm.²²

Later, during discussion on the framing of s 75, South Australian delegate John Gordon moved the insertion of a provision designed to limit any claim against the *vires* of an Act to an action either by or on behalf of a State or the Commonwealth; in other words, to prevent such claims being raised by private persons. Questioned as to how a suit would arise, Gordon responded: ‘by the intervention of the [S]tate Attorney-General’.²³ There are, he added, ‘no scientific reason in law why an abstract proposition of law should not be submitted to the courts’.²⁴ Like Glynn, however, Gordon was met with concerted opposition.

The word ‘matter’, Quick and Garran wrote in a summary of the Convention’s position, was chosen ‘as the widest word to embrace every possible kind of judicial procedure that could arise within the ambit of [these] section[s]’.²⁵ Advisory opinions were of a non-judicial character, and the Federal Convention did not intend the federal courts to exercise advisory jurisdiction. Drawing on American opinion, they then advanced a strong policy argument against such jurisdiction:

Ex parte interpretations of the law, without the thorough examination of interested parties and their counsel, are apt to be unsatisfactory and unauthoritative ... [and] the practice would be, at least, open to serious abuse. The one advantage it would have – that of obtaining a prompt decision upon questions which are in doubt, but which no

²⁰ *Adelaide Debates*, above n 11, 966 (Henry Higgins).

²¹ *Ibid* (Charles Kingston).

²² *Ibid* 967.

²³ *Melbourne Debates*, above n 8, 1 March 1898, 1680 (John Gordon).

²⁴ *Ibid* 1682. Gordon illustrated his point with a United States example – the ‘Treasury Notes Case’, which he said, had allowed a single individual ‘to paralyse for a time the whole nation, by raising the question of the legality of the notes’.

²⁵ *The Annotated Constitution of the Australian Commonwealth* (1901) 765.

one is ready to litigate – is more than balanced by other considerations. The Judges would be liable to be hindered in the discharge of their appropriate duties by being employed, in this manner, as the law advisers of the crown – a position which might lead to the undesirable entanglement of the Bench in political matters.²⁶

Within little more than a decade, however, the Commonwealth Parliament was to disregard their conclusion about the intentions of the Constitution's framers; and a further decade later, the High Court was to depart from their second conclusion about the non-judicial character of advisory opinions.

III A JUDICIAL POWER?

Part XII of the *Judiciary Act 1903* (Cth), as inserted in 1910, was entitled 'Reference of Constitutional Questions'. Section 88 purported to confer power on the High Court 'to hear and determine' 'any question of law as to the validity of any Act or enactment of the Parliament' that had been referred to the Court by the Governor-General. Section 89 provided that any matter so referred should be heard and determined by a Full Court consisting of all the available Justices. Section 93 provided for the Court's determination to be 'final and conclusive and not subject to any appeal'.

On the first occasion the power was exercised, amendments to the *Navigation Act 1912-1920* (Cth) (which were to come into force on a date to be proclaimed) were referred to the High Court by the Governor-General. Owen Dixon (later Dixon CJ), for the Attorney-General of Victoria, immediately objected that a reference of constitutional questions was beyond the powers of the Commonwealth Parliament. The Court then proceeded to consider the validity of Part XII of the *Judiciary Act*.

The first question it faced was whether advisory opinions fell within the judicial power. If they did not, the conferral of a non-judicial function on the High Court would likely have been found unconstitutional. As Gavan Duffy, Powers, Rich and Starke JJ stated: '[A] function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth'. Their conclusion at this point was positive. Through the enactment of Part XII, they stated, 'Parliament desired to obtain not merely an opinion but an authoritative declaration of the law. To make such a declaration is clearly a judicial function'.²⁷

What, they then asked, 'are the limits of the judicial power of the Commonwealth?' The

express statement [in ss 75 and 76] of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may

²⁶ Ibid 767.

²⁷ *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 264.

be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction.²⁸

Notwithstanding the judicial character of advisory opinions, this statement of limits, as we see below, was to lead the Court to the conclusion that advisory opinion jurisdiction was unconstitutional.

In a much later case, the Court was asked to reflect upon, *inter alia*, both the nature of a ‘matter’ and the exercise of judicial power. Surveying previous authority, Gleeson CJ stated:

[T]he Court does not pronounce, in the abstract, upon the validity or meaning of Commonwealth or State statutes. To do so would not be an exercise of judicial power conferred by or under Ch III. Such pronouncements are made in an adversarial context, where there is an issue concerning some right, duty or liability. ... It is the relationship, or absence of relationship, between the question of law sought to be raised for the Court's decision in the present case, and any attempt to administer that law, that, in my view, is decisive.²⁹

The invalidity of advisory opinion jurisdiction lies thus in the fact that it does not fall within the ‘judicial power conferred by or under’ Chapter III of the Constitution, notwithstanding that it is a judicial function (as the Court found in 1921). While it seems, therefore, that there are forms of ‘judicial power’ that fall outside the ‘judicial power conferred by or under’ Chapter III of the Constitution (which is confined to the matters listed in ss 73 to 78), the High Court is unable to exercise them.

The Court has consistently suggested, further, that the judicial power of the Commonwealth is characterised not only by its application to a ‘matter’, but also by its power of enforcement. In *Brandy v Human Rights and Equal Opportunity Commission*,³⁰ the High Court traversed the range of definitions of judicial power in cases beginning in 1909 with *Huddart, Parker and Co Pty Ltd v Moorehead*.³¹ From the variety of approaches, Deane, Dawson, Gaudron and McHugh JJ settled upon ‘one aspect of judicial power which may serve to characterise a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power’.³²

This raises a significant point. If the judicial power has, as its core, the making not only of authoritative, but ‘enforceable’ decisions, then advisory opinions are only exercises of the judicial power if they are ‘binding’, at least to the extent of a normal High Court judgment. The expression ‘advisory’ in such a case may be inappropriate. Effectively, the advisory opinion, if enforceable, determines the

²⁸ Ibid 265.

²⁹ *McBain; Ex parte Australian Catholic Bishops Conference* (2002) 188 ALR 1, 4.

³⁰ (1995) 183 CLR 245, 267 (‘*Brandy*’).

³¹ (1909) 8 CLR 330.

³² (1995) 183 CLR 245, 268.

constitutional validity of a Bill or an Act that has not yet come into operation, as if it were a regular High Court decision, absent a concrete dispute between parties. If advice is 'enforceable', what follows from the Executive's or Parliament's failure to adhere to the advice? Presumably, what follows is the High Court's finding that the Act that was subject, pre-enactment, to an adverse opinion is invalid when a concrete dispute arises. This is no more a test of enforceability, however, than a regular exercise of judicial review which reaches the same conclusion. And, what follows if the Court, notwithstanding earlier adverse advice, upholds the constitutional validity of the impugned Act, either because of a change of mind (or of the composition of the Court) or because the concrete facts of a particular dispute led to a different conclusion? These issues are raised again below.

IV ADVISORY OPINIONS ARE NOT 'MATTERS'

Section 76(i) of the Constitution – the section which in the Commonwealth's view in 1921 supported the conferral of advisory opinion jurisdiction – refers to 'any matter' 'arising under this Constitution, or involving its interpretation'. A 'matter', Owen Dixon submitted, 'means a claim of right in litigation between parties, and an abstract question of law is not a "matter"'.³³ The Parliament had no power to enlarge the scope of jurisdiction beyond that which was contemplated by the Constitution.

The Court agreed. Part XII, it held, was invalid. An advisory opinion may involve a legal proceeding, but for the purposes of s 76, said Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ, a matter was not 'a legal proceeding, but rather the subject matter of determination in a legal proceeding'.³⁴ An advisory opinion was no such thing. '[W]e can find nothing in Chapter III of the Constitution', they concluded

to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.³⁵

Higgins J (in a change of heart since the Federal Convention) dissented. Like the majority, he held that an advisory opinion fell within the judicial power. The conferral of such jurisdiction was, he stated, supported by the express incidental power, s 51(xxxix), with respect to the Federal Judicature. The determination of an opinion 'is not judicial in the sense of settling a specific litigation between parties but in the sense of pronouncing the law authoritatively'.³⁶ However, he rejected the view that the Constitution ruled out the High Court's exercise of non-judicial power, stating that there was nothing in the Constitution's separation of powers 'that necessarily involves that the High Court cannot be employed to aid the

³³ *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 258.

³⁴ *Ibid* 264-5.

³⁵ *Ibid* 267.

³⁶ *Ibid* 271.

Executive – judicially, at all events’.³⁷ He also disagreed on the scope of a ‘matter’, holding that it was not confined to ‘a contest between parties’.³⁸ Advisory opinions, Higgins concluded, were not just constitutionally valid, but would be an aid to government. His, however, was a lone voice.

Following this defeat, the Commonwealth never again attempted to confer advisory opinion jurisdiction on the Court. The Court, therefore, has never had to revisit the issue, although the question of what a ‘matter’ amounted to has subsequently been considered several times. On each occasion, the majority view in *In re Judiciary and Navigation Acts* was affirmed.³⁹ In *Mellifont v Attorney-General (Queensland)* ‘two critical concepts’ arising from this view were set out: there could be no ‘matter’ within the meaning of s 76, where the issue concerned ‘an abstract question of law not involving the right or duty of any body or person’, and where it sought ‘a declaration of law divorced or dissociated from any attempt to administer it’.⁴⁰

It has been accepted, thus, since 1921 that advisory opinion jurisdiction cannot be conferred on federal courts by legislation, but only by constitutional alteration pursuant to s 128 of the Constitution. Assuming this conclusion to be correct (this paper is not concerned with how ‘a matter’ might be (re-)construed to embrace advisory opinions), would such an alteration be desirable? Over the years, many different answers have been given, in various forums, to this question.

V SUPPORT FOR ADVISORY OPINIONS: THE 1927-29 ROYAL COMMISSION

Six years after the defeat of Part XII of the *Judiciary Act 1990* (Cth), the question of constitutional alteration was raised by the Royal Commission on the Constitution, appointed by the Nationalist government of Stanley Melbourne Bruce, ‘to enquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation’.⁴¹

In his submission to the Commission, Owen Dixon KC (for the Victorian Bar) set out the policy reasons behind the case he had made in 1921. Advisory opinions, he submitted, were ‘inadvisable’: abstract questions could be framed in a deliberately misleading manner for political purposes, and an opinion based on abstract questions may be defective and incomplete ‘when you come to apply it to the concrete’ in particular if the advice resulted in the severance of parts of an Act.⁴² Finally, he pointed out, if advisory opinions were non-binding they ‘merely give you an advance copy of the judge’s view, which is likely to change and which ought to change if further argument suggests to him that there are good reasons for

³⁷ Ibid 276.

³⁸ Ibid 272.

³⁹ See above n 3.

⁴⁰ *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289, 303.

⁴¹ Commonwealth of Australia, Royal Commission on the Constitution, *Report of the Royal Commission on the Constitution* (1929) 23.

⁴² Commonwealth of Australia, Royal Commission on the Constitution, *Minutes of Evidence*, Part 3, 791.

taking another view'. Where advisory opinions are conclusive, 'they constitute new law in a changed form' with the likelihood of difficulties in interpretation.⁴³

As he had done in 1921, Higgins J (who appeared before the Commission, as one of the surviving framers of the Constitution) supported non-binding advisory opinions on the grounds of convenience and efficiency in the allocation of time. Advice should not be binding, he said, 'because a problem is not worked out before the High Court so thoroughly when there are no opposing sides present'; it would, however, in most cases prove to have been right when tested by a later, concrete case. The High Court, Higgins added, should have 'the same power as the British Parliament has given to the Judicial Committee of the Privy Council ... to give an advisory opinion'.⁴⁴

The Commission's report, handed down in 1929, favoured the Higgins perspective. Among its recommendations, it proposed a new provision, to be inserted in the Constitution: 'Notwithstanding any other provision of this Constitution the Parliament may make laws authorizing the High Court to advise as to the validity of any enactment of the Commonwealth or of any State.'⁴⁵ Such opinions, the Commission proposed, should be at the Court's discretion, and should be given on Acts alone (not Bills or proposed Bills). The recommendation was never tested in a referendum, however, and (like the Commission's other recommendations) nothing further came of it.

VI SUPPORT AFFIRMED: THE CONSTITUTIONAL CONVENTION 1973-1985

For several decades thereafter, little interest was shown in advisory opinion jurisdiction, although the increasing use of the declaratory judgment⁴⁶ (discussed below) over this time should be noted. Neither the 1942 Constitutional Convention, established by Attorney-General H V Evatt under the Curtin Labor government, nor the 1958 Joint Committee on Constitutional Review under the Menzies Liberal government, discussed advisory opinions.

As with so many constitutional 'sleepers', the issue had to wait for the election of the Whitlam Labor government in 1972 for an opportunity to be reconsidered. In 1973 Whitlam established a Constitutional Convention which was to run, every couple of years (for the most part, in altered form and circumstances) until 1985. The Convention's 1978 session considered a proposal for a new section of the Constitution to be inserted (to follow s 77) to read:

The Governor-General in Council may refer to the High Court for its opinion any question of law as to the validity of an enactment of the Parliament of the

⁴³ Ibid.

⁴⁴ Ibid 437-8.

⁴⁵ *Report of the Royal Commission on the Constitution*, above n 41, 255.

⁴⁶ Maxwell E Foster, 'The Declaratory Judgment in Australia and the United States' (1957) 1 *Melbourne University Law Review* 207, 347.

Commonwealth, or as to the validity, if enacted, of a proposed enactment of that Parliament.⁴⁷

Advisory opinion jurisdiction, the proposal spelled out, should also be conferred in respect of alternative legislative procedures and manner and form provisions in both Commonwealth and State Constitutions. The Court should hear argument in a public hearing prior to giving its advice; all opinions should be given by a full bench, and each Justice should be required to make public the reasons for his or her opinion.

The merits of advisory opinions, it was said, included a 'more responsive' government, the saving of time and resources, and the avoidance of hardship due to delays in confirming the validity or invalidity of an Act. In addition, 'planned development' by governments required legislators to be able 'to look ahead in terms of the likely consequences which would flow'.⁴⁸ Supporters of the motion spoke warmly of the immense benefit for trading and commercial life arising from the opportunity to gain an opinion on a Bill 'before steps are taken in reliance on its validity'.⁴⁹

The motion did not go unopposed. There were predictions that States would seek advisory opinions against one another's legislation in a 'propaganda war'.⁵⁰ In addition, it was observed, many current laws in Australia may be found invalid if they were tested in the Court, but 'the objectives of that particular legislation are tolerated by the community generally': the legislature should not have to seek a High Court reference before acting, and the country 'should not be run by lawyers'.⁵¹

A similar motion (with the addition that questions of law under treaties should be specifically listed as subjects for advisory references) was put at the Convention's sitting in 1983. Opponents advanced new arguments. With an advisory reference, it was said, the Court might be asked in the abstract to undertake an unfocused examination of between 200 and 300 provisions in an Act, whereas 'facts and issues normally focus these questions'.⁵² In addition, advisory opinions may deprive interested litigants of the right to appear in a case; 'parties may be only made aware of their rights' once an advisory opinion had been given.⁵³

⁴⁷ *Minutes and Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Perth, 26 July 1978, 28. Agenda Item No W 3 (Senator Button) ('*Perth Debates*').

⁴⁸ *Ibid* 30.

⁴⁹ *Ibid* 32.

⁵⁰ *Ibid* 33.

⁵¹ *Ibid* 34.

⁵² *Ibid* 54.

⁵³ *Ibid* 56.

The supporters, however, won. The result appears to have been encouraged by the *Report on Advisory Opinions by the High Court*, produced by the Senate Standing Committee on Constitutional and Legal Affairs in 1977.⁵⁴

VII FURTHER SUPPORT: THE 1977 SENATE COMMITTEE REPORT

The Senate Standing Committee on Constitutional and Legal Affairs concluded its Report with support for advisory jurisdiction, although restricting advisory opinions to the validity of Bills passed by Parliament but prior to their receiving the royal assent. References to the Court, it was proposed, were to be made by State or Commonwealth Attorneys-General (or by a person issued with a fiat). Advice, once given, should be binding.

The merits of advisory jurisdiction, the Committee held, were greater speed, cost-saving, greater certainty in government administration, and prompt review of legislation in cases of urgency, including emergency measures in time of war or cases where vital private rights were involved (custody of children, for example). In addition, advisory jurisdiction, the Committee stated, would reduce the friction and tension between States and the Commonwealth engendered by litigation in constitutional matters.⁵⁵ A rule of law case was also advanced. Individuals were 'entitled to live under laws which are constitutionally valid' and should not be required to undertake expensive litigation or risk their liberties in order to know how the law stood.⁵⁶

The Committee took note of the objections that advisory opinions, being a legislative function, would infringe the separation of powers, undermine public confidence, and lead to the politicisation of the High Court. It rejected these arguments (although acknowledging that binding advisory opinions might create such problems), among other things, finding no evidence that advisory opinions tended towards politicisation or weakening of judicial independence in other common law jurisdictions.⁵⁷ Against the view that, in the absence of parties, 'the court would not have the benefit of a balanced argument, which could lead the court to give an opinion upon an inadequate and possible misleading presentation of facts and argument,' it noted that it is quite possible to have cases (for example, *ex parte*) where only one party gives, or is competent to give, argument.⁵⁸

⁵⁴ Commonwealth, *Senate Standing Committee on Constitutional and Legal Affairs: Advisory Opinions by the High Court*, Parliamentary Paper No 222 (1977).

⁵⁵ Ibid 19.

⁵⁶ Ibid. Very similar arguments were later put by, among others, Gareth Evans, in John McMillan, Gareth Evans, and Howard Storey, *Australia's Constitution: Time for a Change?* (1983) 283.

⁵⁷ Parliamentary Paper, above n 54, 23. An alternative view, however, has been advanced regarding the politicising effect of the 'reference' power in the Canadian case: Barry Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (1983).

⁵⁸ Parliamentary Paper, above n 54, 23.

On the argument that advisory opinions would be uncertain in later disputes, and that the courts might be left in confusion as to the weight to give them, the Committee observed that this difficulty did not appear to arise in the common law jurisdictions where advisory jurisdiction was permitted. It advanced a similar objection against the argument that the High Court's workload would substantially increase, and observed simply: 'When the High Court becomes genuinely overloaded due to an excessive increase in work, the proper action would be to consider increasing the size of the High Court.'⁵⁹

The Committee concluded that, provided advisory opinions were confined to constitutional issues and to Acts of Parliament or Bills awaiting assent, 'the practical arguments in favour ... outweigh the arguments against'. It also favoured extending advisory jurisdiction to questions of the extraterritorial effect of Australian laws and the effect of foreign laws in Australian jurisdictions, as well as treaties or legislation purporting to give them effect. Appeals, it stated, should be available to the High Court from advisory opinions given by State Supreme Courts, regardless of the subject matter.

VIII CHANGE OF HEART: THE CONSTITUTIONAL COMMISSION

The most recent body set up to review the whole Constitution, the 1986-1988 Constitutional Commission worked with several Advisory Committees, including one on the judicial system. Unlike previous review bodies, but consistent with its strong defence of the separation of powers doctrine and its recommendation that there be 'constitutional provisions which reinforce and make secure [judicial] independence',⁶⁰ this Committee concluded that (with one exception⁶¹) the High Court should *not* have advisory jurisdiction conferred upon it.

The Committee considered it

undesirable to draw the federal judiciary too closely into the legislative process ...
Even if an advisory opinion might be sought only after the passage of a [B]ill through

⁵⁹ Ibid 24.

⁶⁰ Australian Judicial System Advisory Committee, Parliament of Australia, *Report of the Advisory Committee on the Australian Judicial System* (1987) 65.

⁶¹ Ibid 59. See Advisory Committee on Executive Government, Report of the Advisory Committee to the Constitutional Commission (1987) 46. The Advisory Committee recommended an exception, what it called 'section 57 stipulations', that is, stipulations for a double dissolution election, and for a joint sitting of both Houses of Parliament following such an election. The High Court, it noted, had already ruled on questions of whether procedures set out in s 57 had been followed, in *Victoria v Cth (PMA Case)* (1975) 134 CLR 81, and *Western Australia v Cth (First Territory Senators Case)* (1975) 134 CLR 201. Furthermore, questions 'which would arise at the advisory opinion stage raise exactly the same issues as those which arise when litigation resulting from the section 57 legislative process is challenged'. The High Court, it concluded, 'should be required to make a decision at a time when a dissolution of the two Houses can still be avoided if there is no true legal justification for the double dissolution to be granted'.

both Houses [of Parliament], the objection to involving the High Court as adviser to the government of the day would remain.⁶²

Advisory opinions were, its report observed, effectively unnecessary, since ‘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’.⁶³

IX THE RULE OF LAW ARGUMENT

Most recently, advisory opinions have been defended as a means of promoting the rule of law. Kirby J observed in 1996 in *North Ganalanga Aboriginal Corporation v Queensland* that the

current rather narrow state of authority on the High 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.⁶⁴

The Court, he added, ‘should remain alert to developments in judicial procedures which further ... the defence of the rule of law.’⁶⁵

This *obiter dictum* attracted some support, with John Williams agreeing that the rule of law includes, among other things, the principle that the law must be ‘open and clear’ if it is to be ‘capable of guiding the behaviour of its subjects’.⁶⁶ Williams concluded that ‘a refusal to hear and clarify what *is* the law in a situation where a citizen is unsure which of two competing laws he or she must obey would appear to undermine the principle’.⁶⁷

What does the rule of law require? A V Dicey, famously, set out three different principles that can be summarised as

- (i) supremacy of regular as opposed to arbitrary power;
- (ii) equality before the law; and
- (iii) the derivation of the law from individual rights, and not vice versa.⁶⁸

These principles serve as an important point of departure for any discussion of the rule of law.

⁶² Australian Judicial System Advisory Committee, *ibid* 59-60.

⁶³ *Ibid* 59.

⁶⁴ *North Ganalanga* (1996) CLR 595, 666.

⁶⁵ *Ibid*. In *Thorpe v Commonwealth (No 3)* rejecting the application for a declaration that he found to be ‘entirely theoretical’, Kirby J noted that ‘[t]his Court from its earliest days has indicated that it will not act in that way’. He added that at ‘some future time the detail of this jurisprudence may warrant reconsideration by the Court’ (1997) 144 CLR 677, 689.

⁶⁶ John Williams, ‘Re-thinking Advisory Opinions’ (1996) 7 *Public Law Review* 205, 206-7 (Williams quotes Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *LQR* 195, 198).

⁶⁷ *Ibid* 207.

⁶⁸ A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915) 120-121.

Kirby and Williams assume that certainty about the laws under which we live is a core element of the rule of law, and indeed it might be considered an important characteristic of the first principle, non-arbitrary power. Would advisory opinion jurisdiction contribute to certainty? There are at least two reasons why it does not. The first concerns retrospective legislation. The second concerns the illusion of certainty.

X RETROSPECTIVE LAWS

Among other things, the rule of law requires that laws should regulate conduct prospectively. Persons must be able to shape their (future) conduct with knowledge of, and in anticipation of, its conformity to the law. Retrospective laws militate against this. They render the character of the law both uncertain and possibly arbitrary.

Ivor Jennings, indeed, concluded that the rule of law ‘may mean that penal laws should never have retrospective effect’.⁶⁹ This view has also been promoted in Australia.⁷⁰ However, while Article 1, s 9 of the United States Constitution (among other examples) forbids Congress to pass any ‘ex post facto Law’, [notwithstanding recent public declarations on the part of political leaders in Australia⁷¹] there is no constitutional impediment to retrospectivity in Australia – it has been argued that an implied prohibition against retrospective legislation arises from Chapter III of the Constitution and extends to State laws,⁷² but this view has not been adopted by the Court. Any constitutional limitations lie only in the limits of Commonwealth power. The Commonwealth has no head of power over ‘crime’, but where the creation of a criminal offence is incidental to the exercise of a Commonwealth power, its retrospective nature is not an obstacle as such.⁷³ This was held in *R v Kidman*,⁷⁴ and re-affirmed (albeit indirectly) in respect of the *War Crimes Amendment Act 1988* (Cth) in *Polyukhovich v The Queen*.⁷⁵

The rule of law requirement of prospectivity is, thus, missing in Australia. Certainty about the law is in peril so long as retrospective laws are constitutionally permitted. If a High Court empowered with advisory opinion jurisdiction were to give advice to the effect that a proposed Act or a Bill were constitutionally valid, nothing would

⁶⁹ Ivor Jennings, *The Law and the Constitution* (5th ed, 1959) 51.

⁷⁰ Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988).

⁷¹ ‘Backdating terror laws ruled out’ *The Age* (Melbourne) 23 February 2004.

⁷² See Mirko Bagaric and Tanya Lalic, ‘Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation after *Kable*’ (1999) 23 *Criminal Law Journal* 145.

⁷³ See D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) 180. While there is a presumption in statutory interpretation that legislation is not retrospective, this does not apply where retrospectivity is clearly intended.

⁷⁴ (1915) 20 CLR 425, 442. In *obiter*, Isaacs J comments went beyond the technical questions surrounding the incidental power, stating that ‘[n]o act that is a breach of the law at the time it is done, is innocent. It may be that the law has not then affixed penal consequences to it; but that does not affect the quality of the act itself’.

⁷⁵ (1991) 172 CLR 501.

prevent a future Parliament from passing new legislation operating retrospectively to create an offence of conduct previously 'authorised' by the Court's opinion. The retrospective legislation would not be invalid for retrospectivity.

Retrospectivity, indeed, creates a greater prospect of uncertainty than the prospect of constitutional invalidation of a law. This is because a range of measures (discussed below) exists to prevent the invalidation of a law having the impact anticipated by proponents of advisory opinions. In contrast, the very idea of retrospective legislation is to create an offence of conduct that, at the time it was performed, *did* conform to the law.⁷⁶ This is not necessarily to say that all retrospective laws are 'bad', merely that they create a wider scope for uncertainty than the spectre of constitutional invalidation.

XI THE ILLUSION OF CERTAINTY

Nothing, of course, prevents the advocates of advisory opinions from also advocating the end of retrospective laws. But there is a second obstacle. Advisory opinions may well create only the illusion of certainty. The purpose of an advisory opinion given under a reference to the High Court is to prevent an unconstitutional law from coming to life and to protect persons from relying upon it in shaping their conduct. However, even if the Court were vested with advisory opinion jurisdiction, there could be no guarantee that constitutional questions concerning an operating law would never again arise.

First, it would be inconceivable for *every* Bill to be referred to the High Court for an opinion. Considerations of priorities, time and resources must rule this out. The Executive may decide not to refer a particular Bill, the enactment of which subsequently raises constitutional questions in a concrete controversy. The controversy may indeed lead to the Act's invalidation. If it is certainty we seek, none could lie in respect of Acts that had not been subject to a positive advisory opinion. Even if advisory opinions did create certainty in the case of Bills that had been submitted for advice (that is, if we could be certain that the High Court would never invalidate an Act that the Court's opinion had earlier approved) persons would need to shape their conduct in two different ways: first, with confidence in the state of the law, and second, with the prospect of invalidation always in mind. This would require knowledge of the difference between those Acts that had been subject to an advisory opinion and those that had not. This scenario is unlikely to advance the experience of the law as non-arbitrary. However, even laws that had benefited from an affirmative opinion prior to their coming into operation would be susceptible to invalidation at a later stage.

A Bill 'ticked off' by the Court and subsequently proclaimed may later be subject to constitutional doubts, as the Court's jurisprudence (and the composition of the

⁷⁶ See Andrew Palmer and Charles Sampford, 'Retrospective Legislation in Australia: Looking Back at the 1980s' (1994) 22 *Federal Law Review* 217. With due recognition to the fact that retrospective laws come in various forms, and that far from all are criminal laws.

bench) evolves. As Higgins J set out in his defence of advisory opinion jurisdiction in 1921, a ‘determination’ by the Court

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 ... [I]t is open to [other parties] to satisfy this Court that the law of the decision was wrong.⁷⁷

‘Great weight’ is, of course, not insignificant. However, unless the High Court’s opinion were binding on all future governments (raising the question whether a binding opinion constitutes, in fact, a genuine ‘opinion’ or, rather, a judicial order – and with it the spectre of judicial involvement in a legislative function) an executive decision may be taken to reintroduce and enact a law, once the Court’s composition or disposition had changed. Nothing then would either guarantee or prevent the raising of a ‘matter’ regarding this subsequent enactment.

The argument that advisory opinions contribute to the rule of law by creating greater certainty is thus flawed. But does it matter if advisory opinions fail to deliver on this promise? Are they merely toothless tigers? They may contribute little to *certainty*, but do they do any harm? There are two responses to this question, both of which tell against advisory opinions. One is (as we see below) that, while the pursuit of certainty through advisory opinions leads to a dead-end, other, undesirable consequences follow. Secondly, the illusion of certainty may be more damaging than actual uncertainty. If there is a false expectation that advice, once given, can never be altered and that the outcome of both an advisory reference and an actual dispute (or judgment where there is a ‘matter’) is always likely to be the same, the effect – paradoxically – may be greater confusion about the state of the law than otherwise. This would not matter in cases where the Court advised the executive government against a proposed law and the government then chose not to proceed with its enactment (or with an Act’s proclamation). However, where the Court had advised favourably, and a subsequent ‘matter’ then gave rise to an adverse judgment (that is, to a finding that the originally ‘approved’ law was actually unconstitutional), the very opposite of certainty would be produced, and along with this, the likely sense of arbitrariness and injustice would be enhanced.

The only manner of avoiding the problem of uncertainty that must always exist while any prospect of the invalidation of an operating Act exists, would be to turn the Court into a *purely* advisory body, confining it to giving advice and with no subsequent opportunity for it (or a later Bench) to depart from this advice. The advice given would also have to be binding on the executive government and Parliament. Judicial review of operating legislation would be entirely terminated. As judicial review (or, at least, jurisdiction over matters ‘arising under this Constitution, or involving its interpretation’) is conferred on the Court by the Parliament under s 76(i), and not by the Constitution itself, it would therefore be technically possible to withdraw this from the Court’s jurisdiction. This would,

⁷⁷ *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 270.

however, create a significant crisis in Australia's legal culture, not to mention in relations between the legislature and the judiciary. The attempt to make advice 'enforceable' is incoherent; the best proponents could hope for is that advisory opinions would be 'authoritative'.

None of this is to say that certainty is not desirable. There are, however, a range of ways in which the effect of invalidation is minimised in practice. If, as I suggest, advisory opinions of themselves would not contribute substantially or unproblematically to the maintenance of the rule of law, all is not lost. The legal questions must be placed within a political context. The baby need not be thrown out with the bathwater. We see this below.

We turn now to the separation of powers. Even if advisory opinions *could* be made a source of certainty and thus contribute to the maintenance of the rule of law, there are strong policy considerations against such a jurisdiction.

XII THE SEPARATION OF POWERS

Historically, several 'distinct arguments' have been advanced on behalf of the separation of powers, ranging from greater governmental efficiency through greater accountability in both law making and administration, to maintenance of a balance in governmental powers.⁷⁸ The overriding principle is captured in James Madison's distillation of Montesquieu's theory, from *The Spirit of the Laws* (1748): 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny'.⁷⁹

In its application to the Australian Constitution, Sir Anthony Mason states, the principal objects of the separation of powers were 'to provide for a system of representative and responsible government and the maintenance of the rule of law by an independent judiciary'.⁸⁰ Montesquieu, Mason points out, did not intend a rigid separation of institutions; rather, his theory required a 'diffusion' of power, and was not intended to rule out any functional overlap at all between the levels of government.⁸¹ According to John Williams, the history of the separation of powers

suggests that as long as power is restrained and liberty protected there is a degree of flexibility in its application. To this end it is possible that advisory opinions could, with the requisite safeguards, promote liberty and the principle of the rule of law without compromising the objective of restraining power.⁸²

Kirby J's *obiter dicta* in *North Ganalanga* suggest that the Court should be prepared to respond to 'developments in judicial procedures' and to re-think the

⁷⁸ W B Brown, *The Meaning of the Separation of Powers* (1965) 127-8.

⁷⁹ James Madison, *The Federalist*, No 47 (1992) 247.

⁸⁰ Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) *Canberra Bulletin of Public Administration* 1, 2.

⁸¹ *Ibid.*

⁸² Williams, above n 66, 207.

1921 judgment on the constitutionality of advisory opinions.⁸³ However, recent developments would tend to suggest, if anything, a greater emphasis on judicial independence, and the prospect that, were an identical fact situation to that of 1921 to come before the High Court in 2004, advisory opinion jurisdiction would be ruled unconstitutional, not merely on the technical ground that it did not constitute a ‘matter’, but on the grounds of infringement of the separation of powers.

The separation and independence of the judiciary from executive or legislative interference have received significant emphasis in recent years. While exceptions to the second ‘*Boilermakers* principle’⁸⁴ (that Chapter III courts cannot exercise non-judicial powers) have been carved out, allowing judges to exercise non-judicial functions *persona designata*,⁸⁵ these have more recently been qualified by the ‘incompatibility’ doctrine, which prioritises the principle of judicial independence and limits what can be done by a Chapter III judge, even if the requisite *persona designata* safeguards⁸⁶ are in place.

In *Grollo v Palmer*⁸⁷ the Court set down several tests for incompatibility: the non-judicial function is incompatible, if its performance requires ‘so permanent and complete a commitment ... by a judge that the further performance of substantial judicial functions by that judge is not practicable’; or is ‘of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired’; or ‘of such a nature that public confidence in the integrity of the judiciary ... is diminished’.⁸⁸ These principles were extended in *Wilson*⁸⁹ and *Kable*,⁹⁰ where the freedom and independence of the judiciary from interference, or indeed merely the perception of interference, were stressed. In the words of McHugh J, in *Kable*:

Public confidence in the impartial exercise of federal judicial power would soon be lost if ... courts exercising federal jurisdiction were not, or were not perceived to be, independent of the legislature or the executive government.⁹¹

⁸³ *North Ganalanga* (1996) CLR 595, 666.

⁸⁴ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (‘*Boilermakers case*’).

⁸⁵ See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 CLR 409; *Harris v Caladine* (1991) 172 CLR 84; *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348 (‘*Grollo*’).

⁸⁶ The function must be conferred on the judge as a person, not *qua* member of the Court; the judge’s consent must be obtained. *Hilton v Wells* (1985) 157 CLR 57; *Grollo* (1995) 184 CLR 348.

⁸⁷ (1995) 184 CLR 348.

⁸⁸ *Ibid* 365.

⁸⁹ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (‘*Wilson*’).

⁹⁰ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (‘*Kable*’).

⁹¹ *Ibid* 114.

In *Wilson*, the majority indeed stated that the ‘giving to the executive of advisory opinions on questions of law is quite alien to the exercise of the judicial power of the Commonwealth’.⁹²

If giving an advisory opinion – as the Court held in 1921 – is an exercise of judicial power, the issue the Court faced in these later cases does not directly apply. Vesting advisory opinion jurisdiction in the High Court would not amount to an attempt to confer non-judicial functions on the Court (although the question remains: does the problem lie in conferring only non-judicial functions, or in attempting to confer judicial functions that fall outside the ‘judicial power of the Commonwealth’ the exercise of which is limited to those ‘matters’ listed in ss 73 to 78?).

Even if it were a non-judicial function, however, advisory opinion jurisdiction might pass the first *Grollo* test, so long as its exercise was discretionary. However, if the Court were unable to waive a reference for an opinion, in the event that an extra-cautious government wished to subject all policy-based proposed or unproclaimed Acts to a test of validity before implementing them, the performance of regular judicial tasks might well be compromised. The second test would depend upon the nature of the reference; assuming that it was confined to questions of law only, and was not binding, advisory opinions need not necessarily impair the integrity of the judicial function, although Gummow J’s view in *Grollo* that ‘[t]he association of serving judges with advisory opinions has the potential to deplete the capital of the judicial branch of government’⁹³ should be noted.

Public confidence, however, may well be the hurdle upon which the advisory opinion (even as an exercise of the judicial power) would stumble.⁹⁴ It is here that the details of a scheme for advisory opinion jurisdiction become critical. It will make a difference whether the opinion is given to the Executive or to the Parliament; whether it is compulsory or discretionary; whether it is made in respect of an Act or a Bill or confined to non-justiciable questions; whether it may be initiated by the Governor-General, or by the Governor-General in Council only, or by members of the Executive such as the Attorney-General in their own right. An open, discretionary exercise of advice is more likely to be acceptable to the public than confidential advice tendered directly to the Executive prior to the passage of a Bill or prior to the adoption of a course of action. Advice proffered *in camera* is likely to raise concerns that the Court may be embroiled in political matters. The example of Chief Justice Barwick’s giving advice to the Governor-General on a non-justiciable question prior to the dismissal of the Whitlam government in 1975

⁹² (1996) 189 CLR 1, 19-20.

⁹³ *Grollo* (1995) 184 CLR 348, 391.

⁹⁴ Elizabeth Handsley, ‘Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power’ (1998) 20 *Sydney Law Review* 183 argues that public confidence should not be a concern of the judiciary. Her argument conflates, I suggest, the desirability of public confidence in the *judiciary* with the test of public confidence in individual judgments.

was later defended by Barwick as constitutionally proper,⁹⁵ but cannot be said to have commanded public confidence.

Once public confidence becomes a significant test of incompatibility, it is, I suggest, difficult to confine it to the exercise of non-judicial functions (as the somewhat tortured attempt to distinguish the Royal Commissioner from the ‘reporter’ in *Wilson*⁹⁶ would appear to show). The Privy Council effectively said as much in its review on appeal of the judgment in *In Re Judiciary*: it upheld the view that advisory opinions were an exercise of the judicial power, but raised the objection that ‘it is their own executive act which they may be invited to judicially examine’.⁹⁷

This view would create a potential hurdle for advisory opinion jurisdiction. Public perceptions of the Court as an ‘adviser’ to government could not be ruled out, and would represent a serious ‘incompatibility’. Advisory opinions may be an exercise of judicial power but, as was held in *In re Judiciary and Navigation Acts*, not all judicial functions may be conferred on the Court. Even if the Court could be persuaded to overrule *In re Judiciary and Navigation Acts* on the scope of a ‘matter’, the conferral of advisory opinion jurisdiction may still be invalid, amounting to a breach of the separation of powers, a view that has long been held, federally, in the United States.⁹⁸

XIII OTHER WAYS OF OBTAINING ADVICE

To suggest that advisory opinions constitute a problem for judicial independence is not to deprive the government of advice. Routine ways exist in which an ‘opinion’ on the constitutional validity of an Act may be gained prior to its implementation without the involvement of the High Court and in the absence of a ‘matter’ or a controversy between parties. Ministers of State have access to the Crown law officers, whose duties include giving expert advice on the validity of proposed enactments. These officers draw upon the body of authority. While they serve the government, it is their duty to give non-tendentious or partisan advice. They are obliged, at any rate, to consider legal opinion, judgments in similar fact situations, and even dissenting opinions and *obiter dicta* as routine guides to the future disposition of the Court.

If, despite the best advice, constitutional doubts arise after an Act has begun operating, mechanisms exist which have the effect of testing validity early in the life of the legislation, thus reducing its impact in the event of invalidation. Section 78B of the *Judiciary Act 1903* (Cth) requires notice to be given to Attorneys-General ‘[w]here a cause pending in a federal court including the High Court or in a

⁹⁵ Garfield Barwick, *Sir John Did His Duty* (1983) 84-91.

⁹⁶ See *R v Kidman* (1915) 20 CLR 425.

⁹⁷ Leslie Zines, *The High Court and the Constitution* (1987) 159.

⁹⁸ Stephen Crawshaw, ‘The High Court of Australia and Advisory Opinions’ (1977) 51 *Australian Law Journal* 112.

court of a State or Territory involves a matter arising under the Constitution or involving its interpretation'. The Court may not proceed until the Attorneys-General (who have standing in all constitutional cases⁹⁹) have had a 'reasonable time' to consider intervening in the proceedings or the removal of the cause to the High Court. While a cause pending already has the character of 'matter', this provision allows the identification and consideration of constitutional questions prior to a full curial hearing. The Commonwealth Attorney-General is also permitted to seek a declaration of the validity of a Commonwealth Act in a relator action, and this as Leslie Zines points out may mean (in the words of Jacobs J in *Attorney-General (NSW): ex rel McKellar v Cth*¹⁰⁰), that the judgment in *In re Judiciary and Navigation Acts* 'does no more than affect the manner of bringing constitutional questions before the Court'.¹⁰¹

The operation of the declaratory judgment and the liberalisation of rules of standing in recent times have in particular contributed to this effect. Indeed, in the view of the Judiciary Committee of the Constitutional Commission (cited above), standing is now so broad as to obviate any need for advisory opinions.¹⁰²

XIV STANDING AND DECLARATORY JUDGMENTS

A relaxation in applying the rules of standing in constitutional cases emerged in *Onus v Alcoa of Australia Ltd*,¹⁰³ and was confirmed in *Croome v Tasmania*.¹⁰⁴ In *Truth About Motorways*,¹⁰⁵ the Court held, further, that to establish the existence of a 'matter' did not require a particular test for standing: so long as there is a remedy 'appropriate to the asserted wrong',¹⁰⁶ there is a matter for the purposes of Chapter III of the Constitution. In the view of Elizabeth Fisher and Jeremy Kirk, this liberalisation of standing in the post-War decades reflects a growing concern for increased participation in governmental processes.¹⁰⁷ The adoption of a more flexible approach to permitting the appearance of non-party interveners and *amici curiae*¹⁰⁸ may also be part of this trend.

⁹⁹ Cf Cheryl Saunders and Paul Rabbat, 'Relator actions: practice in Australia and New Zealand' (2002) 13 *Public Law Review* 292, who cast some doubt on this principle by the High Court's refusal in 2002 to grant standing to the Catholic Bishops' Conference to which the Commonwealth Attorney-General had issued a fiat, in *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 188 ALR 1.

¹⁰⁰ (1977) 139 CLR 527, 567.

¹⁰¹ Sir Zelman Cowen, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 18.

¹⁰² Australian Judicial System Advisory Committee, above n 61.

¹⁰³ (1981) 149 CLR 27.

¹⁰⁴ (1997) 191 CLR 119.

¹⁰⁵ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

¹⁰⁶ *Ibid* 612 (Gaudron J).

¹⁰⁷ Elizabeth Fisher and Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* 370. See also ALRC Report No 78 (1996).

¹⁰⁸ *Superclinics Australia Pty Ltd v CES* (unreported, 1996); *Levy v Victoria* (1997) 189 CLR 579; *Lange v ABC* (1997) 189 CLR 520.

Section 86 of the *Judiciary Act 1903* and ss 32-34 of the *High Court Procedure Act 1903*, authorise the High Court to make declaratory judgments. This function has been exercised from as early as 1908, and is assumed to be within the judicial power.¹⁰⁹ While the declaration is different from the advisory opinion, in that it requires justiciability and a concrete controversy, the dissimilarity is attenuated in practice by the High Court's tendency to adopt a relatively relaxed approach to the requirements of justiciability in declaratory judgment actions.¹¹⁰

While most controversies for which a declaration is sought are 'sufficiently mature' to have provided the grounds for traditional relief, a small, but significant number of declaratory actions has been successfully pursued, where 'the prematurity and breadth of the challenge, and the abstract manner in which the legal issues were presented, made the suit resemble a proceeding for an advisory opinion'.¹¹¹ Declaratory judgments have indeed been made by the Court before an Act has been proclaimed.¹¹² Where a demurrer is introduced, it 'takes the declaratory judgment closer to an advisory opinion.'¹¹³

In *Croome v Tasmania*,¹¹⁴ questions of standing, of the existence of a 'matter' and the role of the declaratory judgment were all at issue. The impugned law (ss 122 and 123 of the *Criminal Code* (Tas)) had not been invoked for many years. The plaintiffs sought a declaration of the law's invalidity (for inconsistency with a Commonwealth law, under s 109 of the Constitution), rather than a determination of their own immediate rights and liberties. The initial claim by the defendant Tasmania that the plaintiffs lacked standing was withdrawn, and the defendant proceeded (unsuccessfully) on the alternative ground that there was a lack of a 'matter' within the meaning of s 76. The Court, however, found the two grounds to be related; in the words of Brennan CJ, Dawson and Toohey JJ:

It is a long-standing doctrine that a 'matter' may consist of a controversy between a person who has a sufficient interest in the subject and who asserts that a purported law is invalid and the polity whose law it purports to be.¹¹⁵

Gaudron, McHugh and Gummow JJ, found the question of standing to be 'subsumed' within the issue of whether there is or is not a matter.¹¹⁶

¹⁰⁹ *Attorney-General (NSW) v Brewery Employees Union* (1908) 6 CLR 469.

¹¹⁰ Crawshaw, above n 98, 367.

¹¹¹ *Ibid* 373.

¹¹² *Attorney-General (Vic); Ex rel Dale v Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 CLR 237.

¹¹³ Crawshaw, above n 98.

¹¹⁴ (1997) 191 CLR 119.

¹¹⁵ *Ibid* 125. The celebrated *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 provides a further striking example of the Court's declaration of an Act's invalidity.

¹¹⁶ *Croome v Tasmania* (1997) 191 CLR 119, 133.

The significance of this (and comparable) examples lies not merely in the usefulness of the declaratory judgment, for it may well be objected that, had an advisory opinion been available, the Acts might never have been proclaimed in the first place (although this is very unlikely in the case of the Tasmanian *Criminal Code*, the impugned sections of which were introduced in 1924, well prior to the Commonwealth law¹¹⁷ with which it was likely to be found inconsistent). The wider significance, however, lies in the *political* value of the debate over rights, the reach of the Commonwealth's powers, and the relationship between the individual and the state. An advisory opinion would lack this character, removing the legal issue from the political controversy.

The declaratory judgment may in some respects resemble the advisory opinion, but the two differ importantly, in that the issues in the former are shaped by the actual or potential impact of the law upon the lives of individuals, whose interest in the issues is defined and constrained (albeit very broadly) by the rules of standing. A declaration concerns a concrete, rather than an abstract, question. To put the difference simply, in the case of *Croome*, the Court (and the world) was able to appreciate and reflect upon the real experience of a homosexual man living under a legal regime in which homosexual conduct was a crime, rather than the hypothetical experience of such a man.

XV SAVING LEGISLATION

Advocates of advisory opinion jurisdiction refer commonly to the advantages of cost and time saving in avoiding the need to dismantle expensive, complex administrative machinery established to implement an Act which is subsequently held to be invalid. However, they cite relatively few examples of Acts where, in the absence of advisory opinion jurisdiction, this has in fact occurred. The reason, I suggest, is because a number of avenues, both judicial and political, exist, through which legislation can be 'saved'. These include: the presumption of validity in statutory interpretation, and mechanisms adopted to neutralise the deleterious effect of the invalidation of a similar Act.

The argument put to the Constitutional Convention (above) that many laws operate in Australia which may be found invalid if challenged in the Court, but which are tolerated by the community and therefore remain untested should also be noted as a further, albeit indirect, means by which legislation is 'saved'.

XVI PRESUMPTION OF VALIDITY

While the 'presumption of constitutionality', long exercised by the United States Supreme Court,¹¹⁸ has not been conclusively adopted in Australia, 'assertions of presumption of validity ... are numerous' supported by, among other things, the

¹¹⁷ *Human Rights (Sexual Conduct) Act 1994* (Cth).

¹¹⁸ Henry Burmester, 'The Presumption of Constitutionality' (1983) 13 *Federal Law Review* 277.

refusal of the courts to entertain a constitutional issue unless it is essential to the decision ... [and] by another common ploy of constitutional argument – that of adducing other laws which would be invalid if the one under attack is invalid.¹¹⁹

In a challenge, courts generally ‘will endeavour where more than one interpretation is possible to adopt that interpretation which will ensure the validity of the Act’.¹²⁰ The rule of construction that instruments are to be construed *ut res valeat magis quam pereat*, that is, to give effect to an Act as far as possible, is supported by s15A of the *Acts Interpretation Act 1901* (Cth):

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the extent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

This provision is interpreted, among other things, as a legislative direction to apply the devices of severance and reading down (provided for in the *Judiciary Act*) as a means of saving legislation where a part, or parts of an Act may be held invalid.¹²¹

Further, where invalidation may have the impact of defeating ‘expectations and beliefs’ upon which people have acted, the Court has shown some reluctance to overrule an earlier judgment upholding the validity of an Act.¹²² In *Alexander’s* case, Isaacs and Rich JJ spoke of the ‘cogency’ of the rule that instruments are to be construed *ut res valeat magis quam pereat*, in particular when ‘many thousands of men and women are today pursuing their occupations on the faith of [the work of Parliament], and industries all over the Commonwealth ... are carrying on in reliance’ of it.¹²³ In *Philip Morris v Commissioner of Business Franchises (Vic)*¹²⁴ the Court refused to overrule *Dennis Hotels*¹²⁵ and *Dickenson’s Arcade*,¹²⁶ with Mason CJ and Deane J invoking ‘powerful considerations’ against overruling: ‘[f]inancial arrangements which are of great importance to the governments of the States and perhaps to the economy of the nation have been made for a long time past on the faith of these decisions’.¹²⁷

¹¹⁹ Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 119.

¹²⁰ Pearce and Geddes, above n 73, 27.

¹²¹ Colin Howard, *Australian Federal Constitutional Law* (3rd ed, 1985) 32.

¹²² *Queensland v Commonwealth (Second Territory Senators Case)* (1977) 139 CLR 585, 600 (Gibbs J).

¹²³ *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 466.

¹²⁴ *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 (‘*Philip Morris*’).

¹²⁵ *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529.

¹²⁶ *Dickenson’s Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177.

¹²⁷ *Philip Morris* (1989) 167 CLR 399, 438.

XVII POLITICAL SOLUTIONS

From time to time, for all this, legislation is held by the High Court to be invalid. Does the invalidation of an Act have the devastating consequences painted by the advocates of advisory opinions? There is evidence that a combination of legal and political devices are available to minimise the impact of invalidation. Following the *Boilermakers' Case*,¹²⁸ (invalid) judicial orders made by the Court of Conciliation and Arbitration over the thirty year period between its creation and its invalidation were 'saved' by s 49(2) of the *Conciliation and Arbitration Act 1956* (Cth) by which they were 'deemed to be orders of the [newly created] Commonwealth Industrial Court'.¹²⁹

More recently, the judgment in *Ngo Ngo Ha v New South Wales*¹³⁰ brought to an end a long-standing source of States' revenue (the so-called 'business franchise fee') amounting to an estimated \$5 billion per annum. Against a background of growing vertical fiscal imbalance, the political reaction from the States was dramatic. Although the Court, in declining to overrule the earlier 'business franchise fee' cases,¹³¹ effectively avoided a disastrous fiscal and political scenario (demands for refunds of fees unlawfully collected over a period of more than thirty years), it did refuse an alternative avenue for mitigating the impact of invalidation. When asked by the States for a prospective overruling, in the event that the franchise fees were found invalid, the Court declined, stating that it was 'a perversion of judicial power to maintain in force that which is acknowledged not to be the law'.¹³² The judicial power, it was said, involved 'the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct'.¹³³

In the absence of prospective overruling, and faced with a dramatic reversal in the states' fiscal fortunes, a political solution was adopted: the Commonwealth increased sales tax on alcohol and excise duties on tobacco and petrol (collected validly under s 90 of the Constitution), and reimbursed the States, pending the adoption of long-term arrangements. Any moneys liable to be refunded by the States, having been unlawfully collected as 'franchise fees', were made subject to a Commonwealth 'franchise fees windfall tax' of one hundred per cent. The Commonwealth case for introducing the GST, as a source of revenue to be returned

¹²⁸ *Boilermakers case* (1956) 94 CLR 254.

¹²⁹ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (2nd ed, 1998) 527.

¹³⁰ (1997) 189 CLR 465 ('*Ngo Ngo*').

¹³¹ See above n 123 and 124.

¹³² *Ngo Ngo* (1997) 189 CLR 465.

¹³³ *Ibid* 515. See also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188. It should be noted here that the Court has been prepared to 'modify' the doctrine that unconstitutional acts are void *ab initio* (through adapting solutions from the general law of remedies) in some cases where action has been taken in reliance on a subsequently invalidated law, and where 'retroactive invalidation of unconstitutional acts would produce a state of disorder' (Enid Campbell, 'Unconstitutionality and its Consequences' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 120-1).

directly to the States, was given a fillip. Under the *New Tax System (Goods and Services Tax) Act 1999* (Cth) which came into effect in July 2000, the temporary Commonwealth measures were brought smoothly to an end.

The response to the invalidation¹³⁴ of the ‘cross-vesting’ schemes provides a further example of the avoidance of disastrous consequences arising from invalidation. Political cooperation, supported by a constitutional provision (the reference power, s 51(xxxvii)), restored the cooperative framework under which the scheme had operated (at least, in respect of corporations law). An earlier judgment¹³⁵ had given ‘advance warning’ of the likelihood of the scheme’s invalidation, and recourse to the reference power was already under consideration at the time it occurred. By 2001, uniform corporations law had been (re)created under Commonwealth legislation. This process, presumably, would have been followed had an adverse advisory opinion been available prior to the scheme’s coming into operation, with in practice little difference in effect or impact.

Proponents of advisory opinion jurisdiction tend to paint a picture in which invalidation of an Act is not only disastrous, but also common (or at least always imminent). In promoting advisory jurisdiction, the Senate Standing Committee on Constitutional and Legal Affairs in 1977 collected a list of cases where, in its view, advisory opinions prior to the commencement of legislation would have been of value. The first was *Strickland v Rocla Concrete Pipes*¹³⁶ where the High Court’s favourable decision concerning the scope of the corporations power, s 51(xx), had not been anticipated. This uncertainty, the Committee argued, had forced the *Trade Practices Act 1974* (Cth) to be drafted in a more limiting manner than turned out to have been necessary. Second, *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*¹³⁷ resulted in a stay of the Trade Practices Tribunal’s proceedings for the better part of a year while the *Trade Practices Act 1974* (Cth) was under challenge (ultimately unsuccessful) in the High Court. *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)*¹³⁸ followed a two-year period of uncertainty over the status of the relevant Act, subsequently found to be valid. Two family law cases,¹³⁹ where ‘the scope of the Commonwealth’s power to legislate could have been clarified’, and two cases concerning the exercise of jurisdiction by Court officers¹⁴⁰ were also offered as examples; in the latter cases, decrees made invalidly by Court officers were subsequently validated by the

¹³⁴ See, eg, *Re Wakim; Ex parte McNally* (1999) CLR 511; *R v Hughes* (2000) 202 CLR 535.

¹³⁵ *Gould v Brown* (1998) 193 CLR 346.

¹³⁶ (1971) 124 CLR 468.

¹³⁷ (1971) 123 CLR 361.

¹³⁸ (1975) 135 CLR 337. The Report notes that the High Court drew upon an advisory opinion of the Canadian Supreme Court concerning a similar Canadian Bill in reaching its conclusion of validity for the Australian Act. The usefulness of this example in supporting advisory opinion jurisdiction in Australia is, however, dubious; had such an opinion been available in Australia (unless binding), the Act would still have had to wait, in a state of some degree of uncertainty, until a case such as *NSW v Commonwealth* arose.

¹³⁹ *Russell v Russell; Farrelly v Farrelly* (1976) ALJR 594.

¹⁴⁰ *Kotsis v Kotsis* (1971) 122 CLR 114; *Knight v Knight* (1971) 122 CLR 114.

Matrimonial Causes Act 1971 (Cth). Proposals for the *National Companies Act* and a *Corporations and Securities Act* were also cited as proposed legislation which had lapsed with the defeat of the Whitlam Government, but the validity of which, had the Acts been passed, 'would have been in question until pronounced upon by the High Court'.¹⁴¹

This, it must be said, is slim pickings. The absence of advisory opinions in the cases cited resulted, effectively, in no greater inconvenience than would have occurred had the passage of the legislation in question originally been delayed in the Senate (a not uncommon event). In the one clear case of invalidation, a political solution was adopted to render the invalid orders in question retrospectively valid. Uncertainty and distress suffered by the individuals involved in the latter cases should not be overlooked, but this is unlikely to be any greater than the uncertainty suffered where an advisory opinion had been obtained upholding the validity of a law or an action and the Act (and opinion) was subsequently challenged in the Court.

Admittedly, the Senate Committee Report is now more than twenty five years old, but later advocates of advisory opinions have not added greatly to its list. The principal claim, supported by Kirby J's observation in *North Galangana*¹⁴² has revolved around the likely consequences of invalidation of legislation conferring native title. Invalidation by the High Court, Williams has suggested, would have far-reaching and drastic consequences for Aboriginal people who had enjoyed what they believed to be their legal title to land.¹⁴³ This still remains to be seen.

XVIII DISADVANTAGES

The political disadvantages of advisory opinions need also to be considered. These have been anticipated in the range of opposing opinions summarised above in the historical overview. Most persuasive of these is the view that the risk of killing a law at birth might engender timidity in governments. Progressive legislation in Australia has often proceeded by constitutional 'adventures' undertaken by governments who are prepared to test the established constitutional limits and to make new constitutional arguments in support of their legislative programs. Persuasive new arguments, made in concrete cases concerning new legislative initiatives, advance the law. It is precisely this sort of legislation that is most likely to be subject to a negative opinion from the Court. Those (including Kirby J himself) who promote the view that the Constitution should adapt to current needs and values, should particularly value the opportunity to advance fresh perspectives in constitutional interpretation. Of their very nature, advisory opinions are likely to be conservative (as well as sterile) since the rules of construction (discussed above) which are designed to 'protect' legislation by constraining the Court in its dealings with 'live' Acts, are less likely to be a constraint on the Court in the formulating of

¹⁴¹ *Parliamentary Paper*, above n 54, 39.

¹⁴² (1996) 185 CLR 595.

¹⁴³ Williams, above n 66.

an opinion. Furthermore, the Justices are unlikely to anticipate the type of novel argument that a concrete case might throw up, and even less so to confirm constitutional validity where this would depend upon subsequent overruling of an earlier judgment.

XVIX CONCLUSION

Most arguments for advisory opinion jurisdiction have focused on the practical advantages.¹⁴⁴ A lesser number have emphasised the right of people to be ‘governed by valid laws, certain in their scope’ and the right not to be

faced with the difficult choice between arranging their affairs on the assumption the law is valid, disregarding it and possibly facing prosecution, or challenging the validity of the law at private expense.¹⁴⁵

Little evidence, however, is advanced that such an outcome occurs with significant frequency.

While dismantling expensive administrative machinery set up to implement an Act subsequently found to be invalid is undesirable from the point of view of efficiency, it should not be forgotten that this occurs in the normal course of politics, most commonly following a change of government at a general election. Mere cost-saving and efficiency cannot be prioritised in a democratic system where many costly functions are performed (constitutional alteration in accordance with the requirements of s 128, for example) although alternative, cheaper methods may have been available. The invalidation of an Act rarely has a devastating impact, both because mechanisms have evolved for ‘saving’ legislation, and because reversals of policy are a normal incident of a democratic polity, and the democratic framework is designed to accommodate those that come routinely with changes of government.

The compatibility of advisory jurisdiction with the judicial function, indeed whether it is a judicial function, will depend upon a number of variables. A compulsory jurisdiction is much more likely to raise both the potential of interference in the judicial function than is a discretionary jurisdiction. It is, furthermore, much more likely to be perceived as having potential to compromise the independence of the judiciary. Advice following an enactment may be less of a threat to the separation of powers than advice on a proposed enactment, but it is likely nevertheless to create problems in light of the ‘incompatibility’ doctrine. In any case, its real utility is questionable. Past judgments also stand as ‘advice’, but the adventurous, or reforming government may wish to disregard their message, in the hope that a new interpretation of the Constitution, combined with a more mature community tolerance, may allow the departure to go either unchallenged or to survive a challenge.

¹⁴⁴ Crawshaw, above n 98.

¹⁴⁵ McMillan, Evans and Storey, above n 56, 283.

Finally, there is an artificiality in the view that advisory opinions would avoid later disruption. This view rests upon the idea that constitutional validity or invalidity is fixed and eternal and need only be authoritatively declared. Even the strictest proponents of legalism would not go so far as to suggest that a judgment, once made, should never be overturned or distinguished.¹⁴⁶ The certainty sought by rule of law proponents cannot be guaranteed. While certainty is of central importance to the rule of law, an illusion of certainty has little value. The thin prospect that the advisory opinion would increase the level of certainty in the law would be a poor exchange for a potential breach of the separation of powers, and a likely stifling of constitutional adventurousness.

¹⁴⁶*Report of the Royal Commission on the Constitution*, above n 41, as submitted by Dixon.