



Australian Law Reform Agencies Conference (ALRAC)

What's the Value of a Full Time Standing Law Reform Commission?
(You mean besides independence, quality scholarship, extensive public consultation,
corporate memory, cost effectiveness ... ?)

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ABSTRACT

Law reform is now a crowded field in Australia, with law reform commissions competing – with government departments, other statutory authorities, parliamentary committees, interdepartmental committees, royal commissions, eminent persons' groups, NGOs, university-based law reform institutes, private consultants, and other standing and ad hoc bodies – to inquire into important areas of law and social policy. Many of the "other" bodies now utilise well-established law reform techniques, so that law reform commissions no longer are unique in the way they handle inquiries.

The proliferation of alternatives is not a bad thing, affording governments an opportunity to tailor the law reform process to meet the particular circumstances and priorities in each case (eg expertise; speed; cost; openness or confidentiality). However, in this paper, I argue that standing law reform commissions have a number of key attributes that make them especially valuable contributors to public policy development.

These features include – or at least properly *should* include – their:

- ◆ permanence;
 - ◆ independence;
 - ◆ authoritativeness;
 - ◆ community education role;
 - ◆ emphasis on public consultation;
 - ◆ interdisciplinarity;
 - ◆ ability to tap specialist expertise; and
 - ◆ attention to implementation.
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A crowded field

The context of law reform in Australia has changed markedly in the nearly 30 years since the establishment of the Australian Law Reform Commission (ALRC) under the founding Chair, Justice Michael Kirby.¹ Certainly the field has become very much more crowded.

The system of active and well-supported committees in both Houses of Federal Parliament – but especially in the Senate – is now well-entrenched, with these committees increasingly prepared to range over many of the same sorts of complex socio-legal problems that were once largely the preserve of the Commission: how to assure privacy in the computer age; how to regulate the rapid advances in bio-medical technology; how to provide procedural fairness for persons in the armed services charged with offences; how to deal with the costs of justice; how to deal with issues of bio-prospecting and bio-diversity, and so on.²

Similarly, departmental and interdepartmental committees,³ task forces⁴ and working parties now routinely engage in law reform activities, and most adopt at least some of the techniques pioneered by the ALRC to stimulate public debate, canvass opinions and elicit submissions.

Within the Commonwealth Attorney-General's portfolio alone, there are a number of bodies besides the Department providing specialist advice – among them the Administrative Review Council; the Family Law Council; the Human Rights and Equal Opportunity Commission (HREOC); the office of the Federal Privacy Commissioner; the National Alternative Dispute Resolution Advisory Committee (NADRAC); the International Legal Services Advisory Committee (ILSAC) and the Copyright Law Review Committee.

Over the past decade or so, much of criminal law reform at the national level – with the aim of achieving some harmonisation of the various federal, state and territory regimes – has been driven by the Model Criminal Code Officers Committee (MCCOC). This has involved both a progressive codification of existing criminal laws, as well as developing such new areas of regulation as internet/e-commerce crime and DNA profiling.

The Corporations Law Economic Reform Project (CLERP),⁵ the tax law simplification project and the Review of Business Taxation – all of which now operate out of Treasury, to which 'business law' matters were transferred from Attorney-General's some years ago – also are, in effect, specialised law reform bodies.

1 See the *Law Reform Commission Act 1973* (Cth); the Commission actually commenced operations in 1975.

2 Although it is not uncommon for a committee report to conclude that further research and consultation by the ALRC would be a good idea.

3 For example, the Special Interdepartmental Committee on Protection Against Violence (SIDC-PAV).

4 For example, the Attorney-General's National Pro Bono Task Force.

5 CLERP 6, for example, led to the recent Financial Services Reform. In September 2001, the government announced it would proceed to implement CLERP 7, which aims to streamline lodgement and improve corporate compliance. Details are available at www.treasury.gov.au.

Treasury also has established a specially constituted committee (sometimes called an 'eminent persons' group) headed by former High Court Justice Daryl Dawson,⁶ to conduct a major review of the *Trade Practices Act 1974*.⁷

Royal Commissions and other ad hoc inquiries are also used to investigate particular matters of public concern – and to make recommendations for law reform. At this moment, for example, there are federal royal commissions inquiring into the collapse of HIH Insurance⁸ and into aspects of the building and construction industry.⁹ However, consistent with the more pragmatic sensibilities of the time and of the political leadership, royal commissions are now seen as extra-judicial bodies, able to use coercive powers and forensic techniques to get to the bottom of a corporate disaster, a miscarriage of justice, or systemic malpractice in a particular field.

We are unlucky to royal commissions charged, in the near future, with setting the broad socio-political agenda, as happened in the 1970s (under both the Whitlam and Fraser governments), with the royal commissions in inquiry into poverty; land rights; human relationships; multicultural broadcasting; uranium mining and export; veterans affairs; and mineral exploration on the Great Barrier Reef.¹⁰

It is telling that one of the most important socio-economic and legal projects of current times – developing a coherent approach to the consequences attendant upon Australia's aging population – is being conducted within Treasury, through Intergenerational Reports which form part of the Budget process.¹¹

In recent years, with the blurring of the public-private distinction, it is increasingly common for public authorities to commission private consultants to review operations and report on means for improvement.¹² Similarly, there is a strong push to encourage more applied academic research, especially projects which can secure private sector or governmental partners. It is notoriously difficult to win competitive research funding through the Australian Research Council (ARC), with success rates running at about 20% of applications – and legal academics have an especially poor record as compared with colleagues in other disciplines. The success rate for 'Linkage grant' applications is considerably better in general,¹³ and the critical need for empirical work on the legal system coupled with a wide array of likely willing partners should suit legal academics seeking to conduct collaborative research with a applied, reformist orientation.¹⁴

6 And including former Deputy Chair of the Australian Securities and Investments Commission (ASIC), Ms Jillian Segal.

7 See <<http://www.smh.com.au/articles/2002/05/09/1020914032769.html>>.

8 See <<http://www.hihroyalcom.gov.au/>>.

9 See <<http://www.royalcombcgi.gov.au/>>.

10 See D Weisbrot, *Australian Lawyers* (1990) 41–43.

11 See 2002–03 *Budget Paper No 5: Intergenerational Report 2002–03*, which may be found at <http://www.budget.gov.au/2002-03/bp5/html/01_bp5prelim.html>.

12 For example, Corrs Chambers Westgarth is currently examining the accreditation system for pathology labs, having won a tender to provide this review.

13 For more information on Linkage grants, see <<http://www.arc.gov.au/ncgp/linkage/default.htm>>.

14 One good recent example is the successful Linkage grant application of Associate Professor Kathy Mack and Dr Sharon Roach Anleu of Flinders University, looking at the operation of magistrates' courts.

Attributes of a 'traditional' law reform commission

Writing at the dawn of the law reform era in 1970, Professor Geoffrey Sawer¹⁵ noted that the "new principle" of law reform involved a body with four attributes:

- ◆ permanent;
- ◆ full-time;
- ◆ independent; and
- ◆ authoritative.

Permanent

"Permanence" may be somewhat less assured than it might have appeared to Sawer in 1970, when new commissions were being established, budgets were flush, and lists of exciting topics for inquiry were long.

For example, in the 1990s, the Victorian Law Reform Commission was abolished and replaced by Parliamentary Committee; the Canadian Law Reform Commission was abolished; and other commissions struggled to maintain viability with limited staff and financial resources.¹⁶ I believe that the *Fightback!* platform document, upon which John Hewson and the Liberal Party unsuccessfully contested the 1993 federal election, contained a recommendation that savings be made by abolishing the ALRC, as well as a number of other federal agencies.¹⁷

The ALRC was subject to a major review by a House of Representatives Committee in 1993–94,¹⁸ and its functions and powers were again the subject of a review by a Senate Committee in 1999.¹⁹

What is clear is that law reform commissions are no longer seen as compelling support simply by reason of their existence – they must compete for support (public, governmental, professional) within the crowded reform field I have described above, and in competition with other under-funded service providers (eg, legal aid commissions), to demonstrate that they are special, and essential, for proper public policy formation.

Happily, law reform commissions also seem difficult to kill – whether the phoenix or lantana provides the better metaphor, I leave to others to decide. The Law Commission of Canada is now in business²⁰ – with equally impressive ambitions, but a more modest budget.²¹ The Victorian Law Reform Commission is also now back amongst us,²² with a strong staff and an ample work program.

15 G Sawer, "The Legal Theory of Law Reform" (1970) 20 *University of Toronto Law Review* 183, at 183.

16 See the NSWLRC Annual Report 1989, entitled, *A Difficult Year*

17 Unfortunately, *'Fightback!'* was published in pre-WWW days; although there are many passing references to it, I cannot find a full copy of the document on the web, including the Liberal Party's website.

18 This led to the *Australian Law Reform Commission Act 1996*, repealing and replacing the 1973 legislation.

19 The Committee has not yet completed its report.

20 Under the *Law Commission of Canada Act 1996w* (Canada).

21 In 1992, the CLRC had a staff of 60 and a budget of C\$30M; it now stands at roughly 12 and C\$3M.

The move to 'Law Institutes'

In recent times, there has been an interesting movement towards the establishment of university and profession-linked "Law Reform Institutes" in jurisdictions lacking formally constituted law reform bodies.

The Law Reform Commission of British Columbia was established in 1969 under provincial legislation, but ceased operations at the end of March 1997, following a decision by the Provincial Government to discontinue funding. The British Columbia Law Institute (BCLI) was created shortly thereafter, with general operational funding from the BC Law Foundation, and project funding from government for specific inquiries. The BCLI includes membership from the two BC universities, the Law Society and Bar Association, and selected appointees.²³

In Tasmania, a law reform commission operated from 1974 until 1987,²⁴ followed in 1988 by the office of the Tasmanian Law Reform Commissioner – which was abolished in 1997. In July 2001, the Tasmania Law Reform Institute was established, following a partnership agreement signed by the University and the State government. Under the agreement, the Director of the Institute is appointed by the University Council, after formal advice from the State's Chief Justice, the Attorney-General, and the Law Society. The Institute's Board has similar representation, as well as up to two co-opted members.²⁵ One of the first tasks to be undertaken by the Institute is a general review of the *Commissions of Inquiry Act 1995* (Tas).

I understand that there also are moves in South Australia – which has never had a formal law reform commission – to establish a law reform institute, involving Flinders University law school and the local profession. This is an initiative that has my strong support.

Authoritative

A critical factor in winning and maintaining respect for a law reform commission involves ensuring that its scholarship is absolutely first class. Reform work should always proceed from a meticulous treatment of black letter law and a clear understanding of the surrounding process – only after which it is possible to consider intelligently the possibilities for reform, and to make recommendations which are realistic and achievable.

Even if a law reform commission's recommendations are not acted upon quickly by government, a commission report should have independent and enduring value as an authoritative text on a given topic.

For example, the ALRC's reports on admiralty,²⁶ evidence,²⁷ recognition of Aboriginal customary laws,²⁸ sentencing,²⁹ children in the legal process,³⁰ serve as definitive texts

22 See the *Victorian Law Reform Commission Act 2000* (Vic).

23 British Columbia Law Institute, *Annual Report 2001*, p3.

24 Under the *Law Reform Commission Act 1974* (Tas).

25 Among other things, each partner contributed \$130,000 towards the costs of running the Institute. Prof Kate Warner has been appointed foundation Director.

26 ALRC 33 and 48, 1986 and 1990, respectively.

in an area – sometimes the definitive text – and have proved to be of lasting value to courts, lawyers, scholars and students in Australia and overseas, irrespective of the degree of implementation. I expect that our recent reports on marine insurance³¹ and the judicial power of the Commonwealth³² also will achieve this status.

It also was pleasing to see that our Discussion Paper on *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*,³³ was cited positively by Justice Kim Santow of the NSW Supreme Court (almost immediately upon release) in his judgment about the penalties and banning orders to be applied to Rodney Adler and others for breaches of directors' duties.³⁴

The Commission has embarked on a project to post its entire collection of reports online. Until recently, only 24 of the Commission's 90 reports (those produced after 1994) were available on its website and many older reports are out of print, and available only in libraries. All ALRC reports (and many other recent publications) are now available on the Commission's website,³⁵ and may be consulted or downloaded at no cost. Our monitoring of the requests for information provides insights into which Commission work remains of most interest.

The ALRC's latest website usage statistics for the three-month period to November 2001³⁶ show nearly 33,000 'hits' downloading material from the 1986 report on Recognition of Aboriginal Customary Laws (ALRC 31). Notwithstanding the age of this report, it is the ALRC's most requested document by very long way – outstripping by a factor of four or five each of the next most-requested documents: the interim report on evidence law (ALRC 26); the recent review of the Judiciary Act (ALRC 92); women and equality before the law (ALRC 69, 1994); and the *Managing Justice* report (ALRC 89, 2000). Tellingly, the recent Issues Paper on the Protection of Genetic Information³⁷ made the top ten, despite being available for only the last two weeks of the survey period. The papers and reports on Marine Insurance, and a number of recent annual reports, fell just outside the top ten, but nevertheless received several thousand hits each.

Full time

There are many different models that have emerged about how to manage the operations of standing law reform commissions in Australia – driven mainly by considerations of funding, rather than optimal performance.

27 ALRC 26 and 38, 1985 and 1987, respectively.

28 ALRC 31, 1986.

29 ALRC 44, 1988.

30 ALRC 84, 1997.

31 ALRC 91, 2001.

32 ALRC 92, 2001.

33 DP 65, 2002; especially Ch 18.

34 *ASIC v Adler & Ors* [2002] NSWSC 268.

35 All ALRC reports are now online in PDF format. It is recognized that this format is not suitable for all Internet users, such as visually impaired persons, so the ALRC is also working to provide a plain text version of these reports, which should soon be available online.

36 Compiled in April 2002. The full figures are available at <<http://www.austlii.edu.au/~philip/alrc/stats/20011131.html>>.

37 IP 26, 2001. This is a joint inquiry with the Australian Health Ethics Committee of the NH&MRC.

The ALRC currently has a full-time President and three other full-time Commissioners, plus four part-time Commissioners, and a sizable, permanent research staff. The New South Wales Law Reform Commission has operated for some time now using the model of part-time Chair; one full-time Commissioner; a large number of part-time Commissioners assigned to particular references, and a permanent research staff. As recently re-established, the Victorian Law Reform Commission has a full-time Chair, complemented by a number of part-time Commissioners and a permanent research staff.

By way of contrast, the Law Reform Commission of Western Australia (LRCWA) is comprised only of part-time Commissioners – including the Chair – and it outsources most of its research and writing to external consultants. The LRCWA has produced some excellent work in recent years, most notably its review of the State civil and criminal justice systems, the recommendations of which the Western Australian government has undertaken to implement.

In my view, however, a standing law reform commission needs at least *some* full-time (and engaged) Commissioners and a critical mass of strong research staff in order to achieve a high quality product. This is what provides the intellectual energy; the commitment (indeed, the preoccupation); the internal consistency; and the time for contemplation, consultation and empirical study, which are necessary to design and complete major research projects.

It is also necessary to provide some consistency and corporate memory (including records and files) over time. As noted above, the value of a law reform commission's work should be enduring, and this in turn requires some mechanism for the preservation of reports and other publications and materials in a highly accessible form (increasingly, these days, a well-maintained website). Preservation of the expertise is also important, given the time it takes to implement recommendations even where the government is disposed to do so, and the frequent need to make submissions to other bodies (usually parliamentary committees) considering similar issues.

These qualities are also what separate law reform commissions from the myriad part-time committees and interest groups established by professional associations and other bodies, which may make valuable contributions to the reform process but are rarely able to drive major research projects.

Independent

It is absolutely fundamental that a law reform commission maintain its independence. This refers to its *intellectual* independence – the ability to make research findings and offer recommendations without fear or favour. Without this essential quality, a commission is no different from a ministerial office, government department, or management consultancy.

Whether or not there is public confidence in the genuine independence of a law reform commission determines whether members of the public, the legal profession, peak professional and industry associations and others will take the time and trouble to provide evidence, make submissions, comment on drafts, respond to discussion papers, and otherwise engage and co-operate fully in the law reform process.

One of the major benefits of a law reform commission is that it is able to generate and harness an extraordinary *volunteer* effort in the course of its work, to supplement its in-house research and expertise.

My recent experience as Chair of the Attorney-General's National Pro Bono Task Force has heightened my appreciation of the generosity of lawyers and others in providing their time and expertise without charge for the benefit of the community. The Task Force noted that there is 'an important role for government in encouraging and supporting – but not controlling – pro bono initiatives', such as through the provision of resources to improve coordination of such services.³⁸

In the same way, the direct expenses involved in operating a law reform commission may be seen as a form of 'pump priming', providing the focus and coordination that enables much greater public participation as well as a vast volunteer effort in the public interest.

It is now standard operating procedure for the ALRC to establish a broad-based, expert Advisory Committee to assist with the development of all of its inquiries. These bodies have particular value in helping the inquiry to maintain a clear focus and arrange its priorities, as well as in providing quality assurance in the research and consultation effort, and commenting upon the practicability of reform proposals.

Where there are diverse issues and fields involved in a reference, the Commission also may establish a number of specialist Working Groups. For example, in the major inquiry into the federal civil justice system, which culminated in the *Managing Justice* report, the Commission utilised working groups on tribunals; technology; costs; family proceedings; civil litigation; legal education and training; and ADR, complementing the over-arching Advisory Committee.

By definition, we seek to involve the acknowledged leaders in their fields – people who must already be extremely busy. When welcoming new ALRC Advisory Committee members, I inevitably feel the need to point out that we could not possibly afford to pay them what they are worth or could easily command as consultants on the private market. Instead, we can only offer our deep appreciation (and some good hospitality) and the opportunity to help shape important areas of law and policy in areas in which they have had a long-term interest (indeed, usually, a passion).

For example, the Advisory Committee for the recently completed review of the federal Judiciary Act (and related legislation) featured a former Chief Justice of the High Court of Australia; a number of state and federal court judges; a state Solicitor-General; constitutional law professors; and senior private practitioners and government lawyers.

It has been particularly gratifying, therefore, that almost all invitations to serve on our committees are accepted, and the rare knock-backs generally come with a good excuse. There is not the slightest doubt that the high participation rate of eminent people is

38 *Report of the National Pro Bono Task Force to the Commonwealth Attorney-General* (14 June 2001) p 13. The Report also may be found in a number of different formats on the AG's website, at: <http://www.ag.gov.au/aghome/commaff/flld/legal_aid/finalreport/finalreport.html>.

attributable to the real and perceived independence of the Commission. Sitting and former judges, and leading practitioners and scholars, would never volunteer their services to an agency under the control of the executive.

While that intellectual independence must be fiercely guarded, it is also true that, as public agencies, law reform commissions must remain accountable. Commissions do not have plenary powers, but rather must operate within boundaries defined by their constitutive legislation. Further, most commissions do not have complete administrative autonomy, generally having to report through the Attorney-General's portfolio (or something similar), and having to comply with the increasing raft of public sector budget and management reporting requirements.

And while commissions must engage in a number of important ancillary activities — such as community education, conference organisation, publishing, and making submissions to other inquiries based upon previous or current research — they must, of course, keep their eyes focussed squarely upon their main function: to provide high quality legal policy advice on matters referred to them by the Attorney-General.

Attributes of a 'modern' law reform commission

To Sawyer's 1970 list, I would now add four more essential characteristics for a contemporary law reform commission. It must be:

- ◆ generalist;
- ◆ interdisciplinary;
- ◆ consultative; and
- ◆ implementation-minded.

Generalist

I have indicated above the great proliferation and dispersal of law reform activity in Australia, most of it in the hands of ad hoc committees or specialist bodies.

Thus, one of the most important contributions a standing law reform commission can now make is to remain a *generalist* body, endeavouring to work in *any* area of law or procedure, when asked, and making a virtue of this virtuosity — indeed, the most exciting references are those which take you outside your comfort zone.

Standing law reform commissions are also well placed to:

- ◆ monitor all of the dispersed activity (and perhaps play a coordinating, or at least a clearinghouse, role);
- ◆ provide some coherence to the general project of law reform;
- ◆ promote harmonisation or complementarity of laws and processes, which is especially necessary in Australia's fragmented (and sometimes fractious) federal system; and

- ◆ transcend categories which may be narrowed by specialist bodies – to recognise that, say, 'family violence' cuts across criminal law, family law, housing law, social security law, and administrative law (*inter alia*), and involves questions of State and Federal law, and court and tribunal processes.

I have noticed that in developing ideas for potential new references, it is invariably said about some of the broad, multi-portfolio projects that 'if the ALRC doesn't do this one, no one else will'.

Interdisciplinary

The systemic complexity implied by all of this means that law reform commissions also have to see their research as having an important interdisciplinary dimension.³⁹

It may be that some references will be devoted primarily to technical legal matters (or 'lawyer's law') that do not go much beyond the cases, statutes and related procedures. However, most inquiries – and certainly the most interesting ones – will involve complex issues at the intersection of law and social policy. Many will involve novel issues thrown up by changing social organisation or understandings, or by new scientific/medical or information technologies, or by the need to adapt to changing economic realities.

For example, the multidisciplinary nature of the current joint inquiry into the Protection of Human Genetic Information means that it has been critical to include leaders in the areas of: bioethics; genetic and molecular biological research; medicine, clinical genetics and genetic counselling; community health and medicine; indigenous health; health administration and community education; health consumer issues; genetic support groups; insurance and actuarial practice; and privacy and anti-discrimination law. A separate Working Group on Law Enforcement and Evidence also has been established, with experts on forensic medicine, DNA profiling, policing and trial practice.

The ability (and flexibility) to assemble and manage a strong multi-disciplinary research team is another quality that can distinguish a law reform commission from ad hoc committees or other agencies. Law reform commissions will not always be able to maintain all of the necessary expertise in-house, of course, and specialist expertise can be contracted where appropriate. (Knowing when this is appropriate is itself an important skill.)

However, a good law reform commission should contain at least some staff members who are comfortable working with social science materials and methodologies – and certainly some who have strong empirical research skills. Perhaps it is an aspect of common law culture, or legal training, or other factors, but policy-making in law has relied far too much on anecdote or notorious cases, and far too little on detailed and comprehensive empirical research. When such research is undertaken, it is very interesting to note how often the received wisdom is challenged.

39 Different inquiries may benefit from expertise in (inter alia): statistics; economics; management; public administration; psychology; anthropology; sociology; political science; moral philosophy; natural sciences; and information technology.

Consultative

Another of the key defining characteristics of a law reform commission is that it operates fully in the public domain. A commitment to undertaking extensive community consultation as an essential part of its research program is ultimately what distinguishes a law reform commission from most other bodies which have a law reform aspect to their work.

My colleague Brian Opeskin has noted that:

The desirability of engaging the public in the process of law reform may be explained in many ways. For convenience, these can be divided into three groups: benefits for those consulted, benefits for the process of law reform, and benefits in terms of enhanced effectiveness of the law once reformed.⁴⁰

The nature and extent of this engagement normally is determined by the subject matter of the reference. Areas that are (or are seen to be) narrow and technical tend to be of interest mainly to expert legal practitioners, industry associations and government agencies. Recent ALRC reviews of the *Marine Insurance Act 1909* (Cth) and the *Judiciary Act 1903* (Cth) may fall into this category.

Other ALRC references, however – such as those relating to children and the law, Aboriginal customary law, multiculturalism and the law, equality before the law, and especially the present inquiry into the protection of human genetic information – have involved a much greater level of interest and involvement from the general public and the mass media.

As discussed above, the real and perceived independence of a law reform commission is critical to providing the level of confidence needed for successful community consultation. Members of the public, community groups, academics, professional associations and other relevant parties must feel comfortable in coming forward with sensitive information or views critical of established authority. Confidential submissions regularly are made to law reform commissions, containing sensitive personal information and stories that are valuable to the policy-making process, but which never would be revealed to 'the government'.

At least as important, people also must feel that the time and effort involved in their participation in the law reform process is worthwhile – that is, that there is some reasonable prospect for achieving positive change.

As noted at the outset of this paper, law reform is now a crowded field, and 'submission fatigue' is often a very real phenomenon. Thus, in most cases, it will no longer be enough to publish an issues paper or discussion paper, perhaps schedule a few public hearings, and then sit back and wait for the raft of considered, comprehensive, beautifully crafted submissions to flow in.

Sometimes the very existence of an open inquiry is enough to stimulate introspection, internal review and reform by the institutions under scrutiny. Writing about royal

40 B Opeskin, 'Engaging the Public – community participation in the genetic information inquiry' in *Reform* (Issue 80, Autumn 2002) 53, at 54.

commissions of inquiry, Benson and Rothschild have noted that the fact that an inquiry has commenced:

creates a climate of opinion which can often be effective in bringing about changes of thought and attitude ... which would not have happened if the [review] had not been appointed. Some hold the view that this is the major benefit ... and is of more practical value than the subsequent decisions which may or may not be taken.⁴¹

This phenomenon has been apparent to the ALRC in recent inquiries. For example, the ALRC review of the federal civil justice system promoted a great deal of internal review activity among the various federal courts and tribunals. Although the leadership of the Family Court was stridently and publicly resistant to the findings and recommendations of the Commission, the Court's own 'Future Directions Committee' ultimately produced recommendations that closely match those of the ALRC in most respects. The present genetics inquiry has spurred the peak insurance and financial investments body, IFSA, to conduct and commission research, to review some of its policies and practices, and to produce educational literature for consumers and salespeople.

Another challenge for law reform commissions is to develop public consultation programs that are well tailored to the particular nature and circumstances of each inquiry. In some cases, this may mean dealing mainly with a small group of specialists or special interest groups – by scheduling meetings and actively seeking out their views, without expecting too much in the way of written submissions.

With respect to the genetics inquiry, the ALRC and AHEC have adopted the approach that this is not an area to be left exclusively to experts and well-organised industry, professional or interest groups. Rather, we have taken steps to raise community interest, public debate, education and promote public participation, by conducting open public meetings which give the general public an opportunity to have direct input in the formulation of recommendations tabled by the inquiry. Such public meetings have been held in every capital city and many regional centres, including Newcastle, Wollongong, Byron Bay, Townsville, Cairns and Alice Springs.

In the event, public and media interest in this inquiry has been extremely high, with significant attendance at the public forums, a substantial volume of requests for the Issues Paper and other related materials, heavy use of the ALRC's website, many requests for targeted meetings with expert and community groups, and over 165 written submissions.

In other inquiries in which public participation is less naturally forthcoming, some greater creativity will be required in fashioning a consultation program that proceeds from extensive use of the mass media (even talkback radio) and might include, among other things, the use of:

- ◆ surveys of particular memberships or participants;
- ◆ telephone 'hotlines';

41 Benson and Rothschild, 'Royal Commissions: A Memorial' (1982) 60 *Public Administration* 339, at 341.

- ◆ public opinion polling; and
- ◆ market research techniques, including focus groups.

Although I have seen little use of yet in the law reform context, it may be expected that commissions will begin to harness the potential of the internet, developing more interactive websites, including on-line questionnaires, discussion groups and chatrooms.

Planned carefully and managed sensibly, such efforts can promote community debate and education, elicit views and information which assist in fashioning policy recommendations, and provide the law reform commission with a public profile which encourages further interaction in future.

A further benefit of open and extensive public consultation is that the process clearly identifies competing arguments, interests and groups – and their relative support in the general community – well in advance of any governmental action. The public ventilation of issues, including the opportunity for education, debate and participation, sometimes may be enough to defuse lingering tensions.

Sometimes a broad consensus may be achieved through the law reform process; more often, a commission has to make hard decisions and identify a preferred approach. However, a law reform commission's final report is not an advocate's brief – rather, it should set out for government consideration a thorough analysis of the law and policy concerned; identify the various models and options considered; document the range and strength of opinions offered (through meetings, submissions and a review of the literature); and then provide sound reasons for its recommendations.

Whether or not a government ultimately agrees with the approach taken by a law reform commission, the fact of a commission inquiry should guarantee that the government should never be taken by surprise when it engages in lawmaking in the area concerned. This is not always the case, however, when reform initiatives are kept wholly within government departments.

I can think of examples in recent times when the federal government was surprised by the extent and vehemence of the opposition to proposed legislation at the Bill stage. One example was the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000, prepared in anticipation of the Sydney Olympics, which probably did little more than codify the existing common law and practice in this area. Nevertheless, when reduced to writing, the Bill drew fire from community groups, human rights NGOs, civil libertarians, trade unions, the States, and others.

Had there been the opportunity for an ALRC inquiry (notwithstanding the time constraints imposed by the impending Olympics), the law reform process would have made more clear to the public the existing legal position, and would have flushed out the main concerns with the proposed Bill (eg, the definition of 'domestic violence' for these purposes; safeguards protecting against use for peaceful protest and industrial action; federal-state notification/consultation mechanisms, etc) well in advance of formal government consideration of these matters. I suspect that the current disquiet about the proposed anti-terrorist legislation also might have been alleviated somewhat if put through a law reform process.

Implementation-minded

Finally, it is important to note that a final report is not to be a self-executing document — the Commission only may provide advice and recommendations about the best way to proceed, but implementation is a matter for others. The extent to which a law reform commission can influence policy, and maintain public confidence and the respect of government, will depend substantially upon its ability to craft recommendations that are practical and susceptible to ready implementation.

This requires a clear sense of both the possibilities and the limitations of law reform. If it were ever the case, the old conundrum of 'do you recommend the ideal solution or the pragmatic one?' has little resonance at the moment. The current political era is one in which public sector funding is highly contested (if not in actual decline), and deregulation (usually accompanied by industry codes) and privatisations have dispersed power and responsibility.

In an earlier era, the centrepiece of any significant law reform effort was the recommendation of a major new piece of legislation. However, in a more complex environment in which authority is much more diffused, modern law reform efforts are likely to involve a mix of strategies and approaches, including legislation and subordinate regulations; new dispute resolution options; official standards and codes of practices; voluntary industry codes; education and training programs; better coordination of governmental (and intergovernmental) programs, and so on.

In the ALRC's *Managing Justice* report,⁴² for example, only a small portion of the 138 recommendations were addressed to the Attorney-General and called for legislative action of some kind; the remainder were addressed to the federal courts and tribunals (eg, calling for improvement of case management practices, and changes to procedures and court rules); federal Parliament (calling for the development of a protocol on handling complaints against judges); educational institutions responsible for legal and judicial education; legal professional associations (calling for better, and national, rules of ethics and professional practice); and a number of other bodies which potentially could influence the costs of, and access to, justice.

Similarly, at the conclusion of the present inquiry into the protection of human genetic information, it may be expected that some significant legislative change will be recommended to the Attorney-General and the Minister for Health and Aged Care; however, it is also likely that some (or many) of the recommendations will be directed to government departments and agencies; the National Health and Medical Research Council; the Australian Health Ministers' Conference; the Standing Committee of Attorneys-General; industry associations (such as the peak insurance and financial services body, IFSA); hospital and public health authorities; individual health practitioners; educational authorities; employer organisations and trade unions; and statutory authorities with responsibility for privacy and discrimination matters, among others.

42 ALRC, *Managing Justice: A review of the federal civil justice system* (ALRC 89, 2000); the summary of recommendations appears at pp 23-43.

These days, a law reform commission also must think very carefully about any recommendation that entails increased public expenditure – and far more than was the case some years ago, it must spell out very clearly the precise amounts, offsets and cost-benefit analyses involved.

Similarly, there is now a greater reluctance to recommend the establishment of additional governmental authorities. This represents something of a change in approach, as in the past there often seemed to have been a simple reform equation: if there's a problem, recommend a specialised agency to deal with it.

In the *Managing Justice* report and recommendations, the ALRC was very careful to utilise or build upon existing institutions wherever possible, and to be very conscious of not requiring the creation of new – and especially new and expensive – institutions, unless there was no plausible alternative. For example, in considering whether or not to establish a new 'Federal Legal Services Forum', as floated in the preceding Discussion Paper, the Commission concluded that it was reluctant to recommend the establishment of a new body if the functions envisaged for the Forum could be as efficiently and effectively carried out by existing agencies.⁴³

Nevertheless, there are occasions when the establishment of a new institution is called for, such where:

- ◆ the funding required is not huge, or at least will be efficiently utilised;
- ◆ the federal government has or wants to have a stake in the area and wants to do something positive; and
- ◆ there are no obvious alternatives.

For example, following recent recommendations, the Government has embraced – and allocated funding for – the establishment of an Australian Judicial College (for continuing judicial education),⁴⁴ and a National Pro Bono Resources Centre (to facilitate more pro bono practice by lawyers).⁴⁵ Issues Paper 26 on the Protection of Human Genetic Information raises the possibility of establishing a national Human Genetics Commission in Australia⁴⁶ – a matter still under active consideration as the inquiry is proceeding.

Monitoring implementation rates

The ALRC actively measures the quality of its output in part by evaluating the degree to which our reports ultimately are accepted and implemented by government.

However, implementation by government is not the sole barometer of the quality or success of a report. There is no requirement in the ALRC Act, as is there for example in the equivalent Canadian legislation, for the government to respond formally to every report. Some outstanding reports have been consigned to the 'too hard' basket by successive governments – most notably, the report on the recognition of Aboriginal customary laws. As discussed above, it is also increasingly the case that the ALRC's

43 ALRC 89, at para 4.78.

44 ALRC 89, Recommendation 8.

45 This was the central recommendation of the National Pro Bono Task Force.

46 IP 26, at 98–99.

recommendations are aimed at other stakeholders and parties, inside and outside of the legal system.

Nevertheless, in an age of 'benchmarking', implementation rates have both internal and external importance to law reform commissions. The ALRC carefully maintains a register of major developments in relation to issues covered in its past reports, and assesses the level of implementation achieved in each case. In many cases, implementation occurs years after the completion of a report. This data is analysed and published in the ALRC's Annual Report, and is thus publicly available. Reports are categorised as having achieved 'substantial implementation', 'partial implementation', 'nil implementation', or where appropriate in the case of relatively recent reports, as being 'under consideration'.

As at 30 June 2001, the Commission had completed 65 reference related reports, with the following characterisation:⁴⁷

Substantial implementation	55 %
Partial implementation	25 %
Nil implementation	15 %
Under consideration	5 %

Other indicators of a successful report include the degree to which community awareness has been raised as a result of the inquiry process and the resulting report, stimulation of debate on related issues, influence on reform in other jurisdictions, and the extent of citation in further reports, judgments and journal articles. As noted above, in some case ALRC reports are regarded as leading treatises in an area of law, and as such are frequently utilised by judges, practitioners, academics and students.

Conclusion

So then, how does a law reform commission differ from a government department or other agencies in its handling of issues? As described above, the short answer is that a law reform commission: (a) operates almost entirely in the public domain, (b) with a high premium placed upon public consultation, (c) in areas that require a substantial research effort, and (d) where the government of the day has not already determined the policy outcomes, and may be persuaded to implement the commission's considered recommendations.

47 *Annual Report 2000-2001* (ALRC 93), Graph 1, p 22.