

Parliament of the Commonwealth of Australia

Law Reform – the Challenge Continues

**A report of the inquiry into the role and function
of the Law Reform Commission of Australia**

House of Representatives
Standing Committee on Legal and Constitutional Affairs

May 1994

Canberra

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Foreword

This report is the first comprehensive parliamentary review of the Law Reform Commission of Australia in its almost 20 years of existence. The Commission was established to review laws with a view to the systematic development and reform of the law. This it has done through more than 60 reports and numerous discussion papers.

In addition to reviewing federal laws, a national law reform body has the potential to provide leadership in national approaches to law reform.

The Commission began its work with great enthusiasm. Many factors produced this enthusiasm including the long standing need for a body capable of taking a long-term view of law reform.

The environment in which the Commission now operates contrasts strongly with that of the mid 1970s. Law reform commissions share the function of proposing law reforms with a plethora of specialist review and reform bodies which were less numerous twenty years ago. The years since the Commission was established have seen a great deal of work completed but the challenge continues. The need for law reform has not diminished.

The role of law reform has been challenged as never before. The Victorian Law Reform Commission and the Law Reform Commission of Canada were abolished in 1993. The Law Reform Committee of South Australia no longer exists.

In this context the Committee has attempted to analyse the activities and operations of the Commission and to consider if the organisation needs a fundamental realignment of its objectives. At the same time the inquiry has encouraged the Commission itself and the organisations and individuals with an interest in its operations, to consider its past achievements and future aims. The result is a number of recommendations aimed at correcting impediments to the smooth operations of the Commission and facilitating its value to the Australian community.

Daryl Melham MP
Chair
House of Representatives Standing Committee
on Legal and Constitutional Affairs

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Terms of reference

Inquiry into the role and function of the Law Reform Commission of Australia

The Committee shall consider and report on:

- (a) the optimum role and function of the Law Reform Commission of Australia ('the Commission') as a separate and permanent law reform agency;
- (b) the relationship between the Commission and other relevant bodies including, but not limited, to the Family Law Council, the Administrative Review Council, the Companies and Securities Advisory Committee, the Copyright Law Review Committee, the Office of Parliamentary Counsel, the Office of Legislative Drafting and the Attorney-General's Department.

In conducting its inquiry the Committee may examine:

- (i) the benefit of a permanent and separate law reform commission;
- (ii) the membership structure of the Commission;
- (iii) the principles by which subjects should be assessed as suitable for reference to the Commission;
- (iv) the effectiveness of the Commission in performing its functions and any obstacles to that effectiveness; and
- (v) the need for any amendment to the *Law Reform Commission Act 1973*.

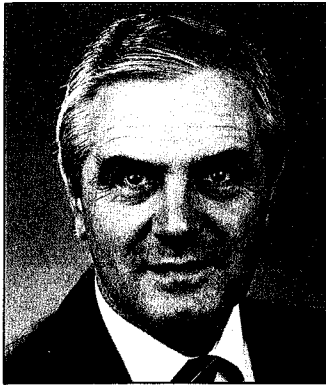
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Legal and Constitutional Affairs

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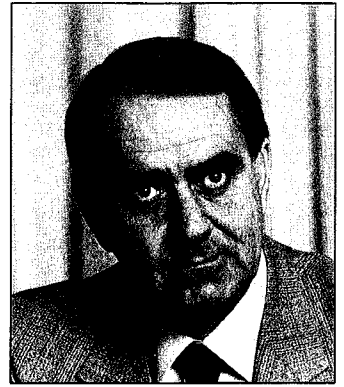
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	Mr Christopher Pyne MP (from 10 May 1994)
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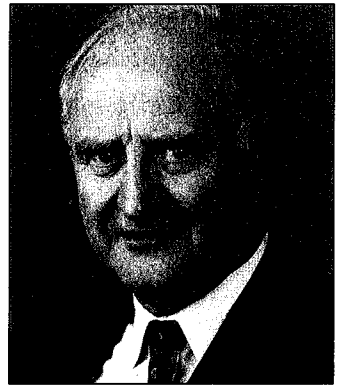
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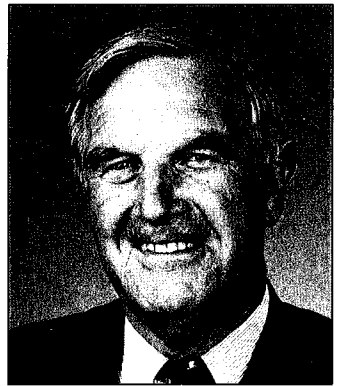
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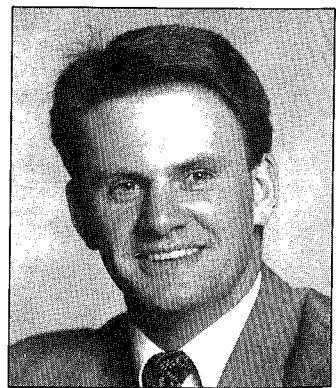
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Abbreviations and acronyms

ACS	Australian Customs Service
ALRAC	Australasian Law Reform Agencies Conference
the Act	<i>Law Reform Commission Act 1973</i>
the ACT Committee	The ACT Community Law Reform Committee
ARC	Administrative Review Council
BCA	Business Council of Australia
CASAC	Companies and Securities Advisory Committee
the Commission	Law Reform Commission of Australia
CLRC	Copyright Law Review Committee
FLC	Family Law Council
the Law Council	Law Council of Australia
NSWLRC	New South Wales Law Reform Commission
NTLRC	Northern Territory Law Reform Commission
OLD	Office of Legislative Drafting
OPC	Office of the Parliamentary Counsel
QLRC	Queensland Law Reform Commission
SCAG	Standing Committee of Attorneys-General
TLRC	The Office of the Law Reform Commissioner of Tasmania
VLRC	Victorian Law Reform Commission
WALRC	Law Reform Commission of Western Australia

Summary and recommendations

The inquiry

1. A review of the Law Reform Commission of Australia (the Commission) is timely because of its continuous existence since 1975 without a comprehensive parliamentary review. Having established the Commission, Parliament has a responsibility to ask if it is operating effectively and if its functions are the most appropriate for the future. The fact that a new president is being appointed to the Commission also provides a good opportunity to reflect on its structure.

Scope and structure of the report

2. The report begins with an introduction which describes the inquiry process and surveys the structure of the report. This is followed by a brief history of the Commission. The report then sets out the current operations and activities of the Commission and asks how effective it has been in performing its functions. From here the report moves to an analysis of the appropriate role and function of the Commission as a separate and permanent body and considers its membership structure. The matter of providing the Commission with references is then taken up. While several of the recommendations throughout the report require amendments to the *Law Reform Commission Act 1973*, (the Act), there is a separate chapter which focuses on the need for secondary amendments to the Act and related legislation. The report concludes with a review of the relationships between the Commission and other commonwealth law advisory bodies and, state and territory law reform bodies.

History of the Commission (Chapter 2)

3. The Act to establish the Commission was passed in 1973 (to commence on 1 January 1975) with the unanimous support of all parties and both Houses of Parliament. The second reading debate made it clear that the Australian Parliament intended the new body to give a national lead to law reform and uniformity of law – as well as focussing on reforming laws subject to federal jurisdiction.

4. The Act gives the Commission power to perform its functions independently of direction from the Attorney-General, although the latter has the sole right to give references to the Commission. The head of the Commission (originally 'the Chairman', but since 1985 'the President') has wide powers in relation to the operations of the Commission. The first chairman, Justice Michael Kirby, remained in the position from January 1975 until September 1984. He encouraged the participation of the wider community in the work of the Commission. The 14 reports produced during his chairmanship reflected a broad social policy focus.

5. Justice Murray Wilcox presided over the Commission in an interim arrangement for 9 months until the appointment of the Hon Xavier

Connor in May 1985. He presided over the Commission until December 1987. During the 3 years in which Justice Wilcox and Hon Xavier Connor headed the Commission, 14 more reports were completed. The Commission was given only two new references when Hon Xavier Connor was president, as at the time, the Commission had a backlog of references caused by the Commission's lack of adequate resources to service its workload.

6. Justice Elizabeth Evatt was appointed president in January 1988 and completed her term in November 1993. Under Justice Evatt the Commission has broadened its focus, and has undertaken joint projects with other law reform and law advisory bodies.

7. The Attorney-General announced on 11 May 1994 that he would recommend to the Governor-General that Mr Alan Rose be appointed as the new president of the Commission from 23 May 1994. The most senior member of the Commission in the period between presidents has been Ms Sue Tongue, the deputy president.

Operations and effectiveness (Chapter 3)

8. This chapter commences with a review of the types of persons and methods used by the Commission in fulfilling its functions. It then provides an examination of the effectiveness of those operations.

9. The evaluation of the Commission's work is approached via three paths: the implementation of the Commission's recommendations; the reputation of the Commission in the eyes of those outside government; and the record of the Commission in completing references by set dates. The Committee briefly reviews the resources of the Commission in the light of these views.

10. Although the Commission receives honorary advice from consultants, the Committee found no evidence that this has led to a compromise in either the quality of the advice to the Commission or in its independence. The Committee considers that the influence of the work of the Commission over almost 20 years has been very significant.

11. The Committee accepts the implementation rate of the Commission's recommendations of approximately 60 per cent as adequate and recognises that the processing of reports has been affected by political, resource and time constraints that may have nothing to do with the merits of the recommendations. As the Federal Government is usually responsible for the processing of the Commission's reports, the Commission considers that it is necessary for the Federal Government to restate its recognition of the need for a commission to carry out law reform functions.

Recommendation 1

The Committee recommends that the government recognise that there is a continuing need for a commission to carry out law reform functions.

12. The Commission is usually referred to as the 'Australian Law Reform Commission'. The Committee considers it would be appropriate for the name of the Commission to be formally changed as it distinguishes the Commission from other law reform bodies, both domestic and overseas, and imparts the national character of the Commission.

Recommendation 2

The Committee recommends that the name of the Commission be changed to the 'Australian Law Reform Commission', and that the *Law Reform Commission Act 1973* be amended as necessary to give effect to the change.

Recommendation 3

The Committee further recommends that the Commission should continue to do high quality, well researched and well documented reports.

13. The Committee considers it is necessary for the Commission and the government to have an effective working relationship not only during the term of inquiries but also during the processing or implementation of reports.

Recommendation 4

The Committee recommends that departments having responsibility for administering the law which is the subject of a Commission report, consult with the Commission in the first instance within six months of the tabling of that report and later as necessary – with a view to preparing a response to that report.

Recommendation 5

The Committee recommends that where possible, officers of the appropriate departments be included among consultants to the Commission for the life of the projects.

Recommendation 6

The Committee further recommends that all government departments should make provision by appropriate means for the processing of Commission recommendations.

Recommendation 7

The Committee further recommends that each administering department include in its annual report a statement of the status of the consideration process, and where recommendations are accepted, the implementation process.

14. These measures will enable the Commission to continue to monitor the processing of its reports.

Recommendation 8

The Committee recommends the Commission should continue to include in its annual report details about the extent to which recommendations have been processed or implemented.

15. The large majority of evidence contained praise for the Commission's work in general and by reference to specific inquiries. Several persons and organisations made criticisms about three of the Commission's inquiries.

16. The Committee acknowledges that there will usually be criticisms when proposals for significant policy changes are made. Recommendations may prescribe a course of action which will at times offend certain interest groups. The point is, that procedures should ensure each person is given a fair hearing and, the reasoning in the report should objectively reflect the better approach.

17. The Committee considers that in the product liability and the personal property securities inquiries, some of those consulted and those making submissions developed the impression that there was no prospect their views would be given appropriate weight. This may lead to a view that the Commission is not objective and this is a view that should be avoided at all costs.

18. The Committee considers that the Commission's authority and processes would benefit from making available to persons who are neither members nor staff, but who are nevertheless interested or

involved in the work of the Commission, guidelines on the processes that may be undertaken during the course of a reference.

Recommendation 9

The Committee recommends that the *Law Reform Commission Act 1973* be amended to authorise the Commission to provide guidelines on the processes of the Commission that may be undertaken during the course of a reference.

19. Some evidence suggested that the inclusion of draft legislation in the Commission's reports is inefficient because it is rarely enacted. Evidence also suggested that the Commission's effectiveness is adversely affected because it has been distracted from its policy development role by drafting legislation which delayed the completion of reports.

20. The majority of evidence presented arguments in favour of the Commission preparing draft legislation once the broad policy has been settled. Not only does the drafting process help to focus the development of the details of the policy, but the draft legislation provides a clear image of how the policy might be effected.

Recommendation 10

The Committee recommends that the Attorney-General should be able to request draft legislation in the terms of reference to the Commission.

Recommendation 11

The Committee recommends that the Commission should be able to provide draft legislation in its reports, even when the terms of reference do not expressly request it, if the Commission determines there is a need for it or that it will enhance the report.

Recommendation 12

The Committee recommends that the Commission should also be able to prepare draft legislation in the course of considering proposals for reform as a tool in the reform process.

21. The Committee considers that a failure to deliver reports on time is an impediment to effectiveness. Furthermore, a delay in reporting is

undesirable and detracts from the overall quality of the report. The Committee believes that regular consultation between the Commission and the Attorney-General is the most important way to ensure the successful completion of an inquiry in terms of both setting an acceptable deadline and meeting it once it is set.

Recommendation 13

The Committee recommends that the Commission should not be burdened with more work than it can possibly do. The Attorney-General should ensure that the Commission should not be given a reference unless the Commission has the resources necessary to commence work promptly and continue.

22. The Committee also considers it necessary to impose a greater time discipline on the Commission.

Recommendation 14

The Committee recommends that the Commission keep the Attorney-General informed about the progress of its inquiries.

Recommendation 15

The Committee further recommends that the Commission must formally request an extension of time when it will not be able to meet an agreed reporting deadline.

23. The Committee also concludes that for the Commission to maintain the quality of its output it must maintain resources at the current relative base level.

Appropriate role and function (Chapter 4)

24. Its national character, is the distinguishing feature of the Commission. While the Committee considers that the current role and functions of the Commission are still appropriate it recommends two changes that will expand the functions of the Commission.

25. In the federal context, the application of complementary laws of each Australian jurisdiction is an important development that should be given recognition in the statutory functions of the Commission.

Recommendation 16

The Committee recommends that the *Law Reform Commission Act 1973* be amended to provide the Commission with a function to consider proposals for the complementarity of laws of the Commonwealth on the one hand, and of the territories and the states on the other.

26. The Committee considers that in addition to the existing requirement under section 7 of the Act to ensure that laws the Commission reviews and proposals it considers are consistent with the Articles of the International Covenant on Civil and Political Rights, it is essential that the Commission also critically considers other relevant international treaty obligations.

Recommendation 17

The Committee recommends that the *Law Reform Commission Act 1973* be amended to require the Commission in its review of current laws and consideration of proposals for law reform, to examine and to evaluate critically such of Australia's international treaty obligations as are relevant.

27. The Committee examined the permanent and separate nature of the Commission and considered the alternatives to a permanent and separate law reform commission. The Committee concludes that the distinctive contribution that a permanent and separate law reform commission can make to the reform of the legal system lies in its capacity for detailed research, extensive consultation and critical analysis.

28. The independence and objectivity of the Commission is founded in part in its statutory nature, and in part in the independent management and operations of the Commission. There is no power for the Attorney-General to be involved in the formulation of reports and recommendations. Nor is there a power for the Attorney-General to direct the Commission in connection with the performance of its functions or exercise of its powers.

29. The Committee regards the Commission as an important source of independent advice for the government because of its capacity for accessing expert and representative opinion. Its direct relationship with the Attorney-General means it fulfils a need for advice to the Attorney-General independent from that of the department and others. The objectivity of the Commission also derives from the wide consultation that the Commission undertakes in each reference, as there is a democratic imperative in such open processes.

30. Together, the national character and the independence of the Commission encourage a more systematic development of the law in Australia.

Membership and organisation structures of the Commission (Chapter 5)

31. The full-time and part-time members of the Commission are the decision makers. The Committee examined the membership structure of the Commission and considered the desirable backgrounds and qualifications of full-time and part-time members.

32. As the members provide leadership and intellectual input to the Commission, the composition of the membership of the Commission will determine how it fulfils its role.

33. The Committee was concerned about two aspects of the Commission's current structure. The first is that the Act does not distinguish between the full-time and part-time members. The second is the current organisational structure.

34. The Committee recognises that all commissioners provide leadership and intellectual input to an inquiry. The Committee considers that the role of full-time commissioners will almost always be dominant, because of the practical limitations imposed by part-time work.

35. As the Act does not distinguish between the responsibilities of full-time and part-time members, it therefore imposes responsibility for financial and administrative matters on part-time members. The Act should restrict this obligation to full-time members. The Committee considers that there should be relief for part-time members from responsibility for financial and administrative matters.

36. The Committee does not wish to detract from the Commission's flexibility to allocate its resources to achieve the best outcome for each reference. However it considers that the Act should be amended to distinguish between full-time and part-time members.

Recommendation 18

The Committee recommends that the *Law Reform Commission Act 1973* impose responsibility for financial and administrative management and policy on full-time members only.

37. The Committee recognises that there is a wide variation in the involvement of part-time members in the work of the Commission. In view of this, the Committee believes it is appropriate for the president to continue to be able to select any member of the Commission as the manager of the overall policy direction of a reference. The Committee considers that a part-time member should only be selected when that

member has indicated that he or she will be available to provide the necessary level of involvement and direction in the reference. An agreed commitment from part-time members is a matter of resource planning and management and is vital to the effective operation of the Commission.

38. The Committee concludes that the task of overall responsibility for an inquiry should usually be the role of full-time members as this recognises the reality that the day to day direction of a reference is left to them.

Recommendation 19

The Committee recommends that as a general rule full-time members should be in charge of the overall policy direction of a reference. If part-time members have both the expertise and the time necessary for the intense involvement required to give overall policy direction to an inquiry, they should not be excluded.

39. The Committee concludes that the current organisational structure of the Commission is unwieldy as the president must deal with four senior staff members of the Commission. It would be more practical if there were one, chief executive officer of the Commission. The Committee notes that until recently the Commission had a senior staff position that was both the Secretary and Director of Research, and strongly favours the reinstatement of that position.

40. The Committee considers that the composition of the Commission with members of various backgrounds and training, both legal and otherwise, provides a balance of opinion. The Committee supports the appointment of non-lawyer experts as part-time members of the Commission and considers that it is important that the Commission continue to be able to appoint part-time members to specific references on the basis of relevant expertise.

41. Most members have been lawyers whether as practitioners, academics, or judges. Generally appointees have first reached a distinguished position in their careers. The reputation and background of a member affects the prestige of an inquiry and a report.

42. In general the Committee agrees with the view that there should be a mix of practising and academic lawyers appointed to the Commission and considers that government lawyers with relevant expertise should be considered along with other practitioners. However, the need to balance Commission membership should not be subsidiary to the greater principle of the importance of the individual appointee's qualities, reputation and expert knowledge.

43. There is currently a preponderance of academic commissioners at the Commission. While consultants provide an intellectual input and access to professional expertise, they are not involved in the decision making processes. The Committee considers there is a need to retain a direct avenue to practical knowledge about the subjects under review through experienced legal practitioners having a role as members.

Recommendation 20

The Committee recommends that the Commission seeks to ensure that experienced legal practitioners whether government or private are represented in the membership of the Commission.

Making a reference to the Commission (Chapter 6)

44. The two issues that arise when considering making references to the Commission are who should be able to make references and which matters should be referred.

45. The Commission already has the power under section 6 of the Act to make suggestions for references to the Attorney-General. The Committee concludes that while others, including the Commission, may suggest references to the Attorney-General, the Attorney-General alone should have the power to refer matters to the Commission.

Recommendation 21

The Committee recommends that the Attorney-General continue to have the sole power to make references to the Commission, and that the Commission's statutory right to make suggestions about references should continue.

46. The Committee considers that the references should reflect the role of the Commission as a national law reform body and should not be limited in any way to or by exclusion from, specific subject areas. While the Commission has demonstrated an ability and a capacity not enjoyed by other bodies to undertake difficult and long term projects, the Commission should have a mix of medium and long term projects. The Committee believes that there should not be a definitive set of criteria to determine what references should be made to the Commission.

Recommendation 22

The Committee recommends that there should be no restriction on the scope of references given to the Commission.

47. The Committee believes that the Commission should undertake broad consultation to identify subjects suitable for future reference and that these consultations be used in the preparation of an annual work plan, which will enhance the management and flow of the Commission's work.

Recommendation 23

The Committee recommends that the Commission should prepare an annual work plan.

Legislative amendments to the *Law Reform Commission Act 1973* and other legislation (Chapter 7)

48. The Committee considered 10 proposals made by the Commission for amendments to the Act and related legislation. The proposals were the subject of round table discussions in public hearing among the Commission, the Attorney-General's Department, the Office of Parliamentary Counsel and the Committee. They relate to administrative and machinery provisions as well as to drafting considerations.

49. The Committee supports modernisation of the Act and considers that the appropriate time for the Commission to discuss its proposed changes with the drafters is when instructions are given for substantive amendments to the Act.

Recommendation 24

The Committee recommends that the *Law Reform Commission Act 1973* be redrafted in accordance with modern drafting styles. The Commission should discuss modernisation proposals with the drafters when instructions are prepared for substantive amendments to the Act.

50. Some provisions of the Act relating to the deputy president need to be clarified. There have been only two deputy presidents both of whom have been appointed in a situation where the president's term of office was about to expire, but who had not been replaced. The Committee considers that because of the significance of the position, if there is to be a deputy president, he or she should be a full-time member.

Recommendation 25

The Committee recommends that the Act be amended:

- to make it clear the deputy president is a member of the Commission;
- to enable persons who are not already member of the Commission to be appointed as deputy president and member, without first having to be appointed as a member;
- by replacing the provision that the deputy president can be removed at the discretion of the Governor-General, with standard conditions concerning the appointment and removal of statutory office holders;
- to make it clear that the deputy president is eligible for re-appointment;
- to enable the deputy president, or person otherwise exercising the powers of president, to act in the position of president; and
- to provide for the appointment of a member of the Commission as acting president when the president and deputy president are unavailable to act.

Recommendation 26

The Committee further recommends that if there is a deputy president, then he or she should be a full-time member.

51. Giving the Commission power to appoint staff under either the Act or the *Public Service Act 1922* protects the Commission's flexibility to appoint staff. Staff appointed under the *Public Service Act* would have increased mobility in their jobs, which would enhance staff morale and would not affect the independence of the Commission.

Recommendation 27

The Committee recommends that the *Law Reform Commission Act 1973* be amended to enable the president to appoint staff under either the *Public Service Act 1922* or the *Law Reform Commission Act 1973*.

Recommendation 28

The Committee further recommends that appointments under the *Law Reform Commission Act 1973* be made on terms and conditions determined by the Commission in consultation with the Public Service Commission.

52. The Commission proposed that members of the Commission be required under statute to disclose their interests where they may conflict with the performance of their duties. It is not considered to be a significant problem, having regard to the work done by the Commission. The Committee does not think it is necessary for such disclosure to be required in legislation.

53. The Attorney-General has delegated the power to appoint consultants to the Commission, to the Attorney-General's Department. The Commission, rather than the Attorney-General or the Department should be able to appoint consultants. This does not represent a diminishing of the importance of the role of the consultant.

Recommendation 29

The Committee recommends that the *Law Reform Commission Act 1973* be amended to enable the Commission to appoint consultants.

54. There are limited powers of delegation in the Act for the president or the Commission, which is in part a reflection of the age of the Act. The powers necessary for the operations of the Commission should be vested in the president or the Commission. There should also be power to delegate such powers to the Commission members or the most senior staff member, as this would promote flexibility and continuity in the operations of the Commission especially when the president is not available.

Recommendation 30

The Committee recommends that the *Law Reform Commission Act 1973* be amended to confer chief officer powers on the president, or any person acting in that position, and to enable such powers to be delegated to members of the Commission, or to the most senior staff member. The Committee further recommends that the president's other powers should be conferred on the Commission and that the Act be amended to make provision for a member of the Commission to exercise those powers as delegate of the Commission.

55. The members and staff of other statutory authorities have an immunity from civil action, the cause of which arises in the ordinary course of their duties. It would be reasonable for the members and staff of the Commission to have such immunity under the Act.

Recommendation 31

The Committee recommends that the *Law Reform Commission Act 1973* be amended to give members and staff of the Commission immunity from civil action, the cause of which necessarily or reasonably arises in the ordinary course of duties being honestly undertaken for the Commission.

56. The Commission's expenditure limit without the Attorney-General's approval is currently \$100,000. The Committee considers it would be reasonable to extend this limit to a level such as that of the Federal Court, which is \$250,000.

Recommendation 32

The Committee recommends that the *Law Reform Commission Act 1973* be amended to increase the Commission's expenditure limit without the Attorney-General's approval to \$250,000.

57. The Commission has always made an annual report although it is not obliged to do so under the Act. The Commission should continue to provide an annual report and this should be a statutory requirement.

Recommendation 33

The Committee recommends that the Commission be required by statute to submit an annual report to parliament.

Relationships between the Commission and other federal bodies (Chapter 8)

58. The Committee examines the roles of some of the statutory and non-statutory bodies which advise the federal government and considers the relationship each has with the Commission. The Administrative Review Council (ARC), the Companies and Securities Advisory Committee (CASAC), the Family Law Council (FLC) and the Copyright Law Review Committee (CLRC) each has its own reporting relationship with the Attorney-General or the Minister of Justice.

59. The Commission has undertaken projects jointly with the ARC, the CASAC and the FLC, although there has not been an occasion to date on which the Commission has worked with the CLRC.

60. There is value in providing a range and diversity of advice to the government. The specialist bodies can perform the law reform aspects of

their operations well because of their specialisation and the support they receive from experts in their fields.

61. The Committee recognises the importance of current mechanisms in promoting cooperation and reducing wasteful duplication, and considers that the Commission should develop and maintain mechanisms to foster cooperation including, where relevant, joint projects with these other federal bodies.

Recommendation 34

The Committee recommends that the Commission should develop and maintain mechanisms to avoid wasteful duplication of effort and to foster cooperative work with the Administrative Review Council, the Companies and Securities Advisory Committee, the Copyright Law Review Committee and the Family Law Council.

Recommendation 35

The Committee recommends that there should be joint projects between the Commission and any of the Administrative Review Council, the Companies and Securities Advisory Committee, the Family Law Council and the Copyright Law Review Committee where it is likely that cooperation will result in better recommendations due to the study being jointly conducted. The relationship between the Commission and the other participating bodies should be defined at the time the reference is given.

62. The Committee considers it undesirable that the relationship between the ARC and the Commission should be disturbed because the Commission's office of president is vacant or the president is not available.

Recommendation 36

The Committee recommends that the *Law Reform Commission Act 1973* and/or the *Administrative Appeals Tribunal Act 1975* be amended to allow a person otherwise exercising the powers of the president of the Commission to act as ex officio member of the Administrative Review Council when the office of the president is vacant or when the president is not available.

63. The situation with the Copyright Law Review Committee must be distinguished from that of the other bodies. The CLRC is suffering from

a severe shortage of resources and the Committee considers that this should not go on as this creates a great deal of uncertainty about its role.

64. Copyright and intellectual property are important and complex areas of the law that are of increasing importance. The Committee concludes that the CLRC should be adequately resourced as a matter of urgency, and that consideration should be given to expanding its area of interest.

Recommendation 37

The Committee recommends that the Copyright Law Review Committee be adequately resourced in order to fulfil its functions. The most suitable level of resourcing should be determined by a working group, established by the Attorney-General. The working group should include at least one member of the CLRC, and the scope of its inquiry should include an examination of the possible expansion of the role of the CLRC to include other areas of intellectual property.

65. Although evidence about the relationship between the Attorney-General's Department and the Commission is scant, it appears that the relationship is sound and that the intention of the Commission's founders to empower it with reasonable operational independence has been honoured. The Committee considers that a regular formal meeting between the Attorney-General and the Commission, held, say quarterly, would ensure that the lines of communication are well maintained.

66. While the specialised nature of legislative drafting was emphasised during the inquiry, the Committee was confronted with a majority of evidence which argued that the process of drafting legislation helped focus the policy and ensure the detail was developed in a way that resulted in a more complete report.

67. The Commission is firmly in favour of having a role in the drafting of legislation for its references. The Committee believes that a compromise is needed. The Commission should continue to include draft legislation where appropriate, but the specialist drafters of OPC should provide the service of drafting wherever possible.

Recommendation 38

The Committee recommends that where draft legislation is either requested in the terms of reference, or is required by the Commission for whatever purpose, the Commission should, at an early stage in the inquiry process and in the first instance, have discussions with the Office of Parliamentary Counsel to determine resource availability. Where OPC indicates that it will not be able to meet the Commission's drafting needs in a timely manner, the Commission should be at liberty to make whatever drafting arrangements that it thinks suitable.

This practice should also be followed for subordinate legislation, in which case the Office of Legislative Drafting should provide the drafting resources necessary.

Relationships between the Commission and state and territory law reform bodies (Chapter 9)

68. The Committee examined the joint projects and the working relationships between the Commission and the state and territory law reform bodies and considered proposals for the further development of cooperation between them.

69. The state and territory attitudes to and expectations of joint projects and cooperation with the Commission were quite mixed. The Commission considers there should be greater emphasis on promoting joint projects between the Commission and state and territory law reform bodies.

70. The Committee believes that part of the role of a national law reform commission is to assist in the systematic development of the law. The Committee supports the activities of the Commission in carrying out its function of promoting uniformity and reducing duplication.

71. Formal coordinating structures will not necessarily assist in furthering cooperative relationships between the Commission and the state and territory law reform bodies. The Committee acknowledges the constitutional and jurisdictional nature of problems that may affect the selection of joint projects. Nevertheless the Committee feels the Commission should continue to promote harmonisation of federal and state and territory law.

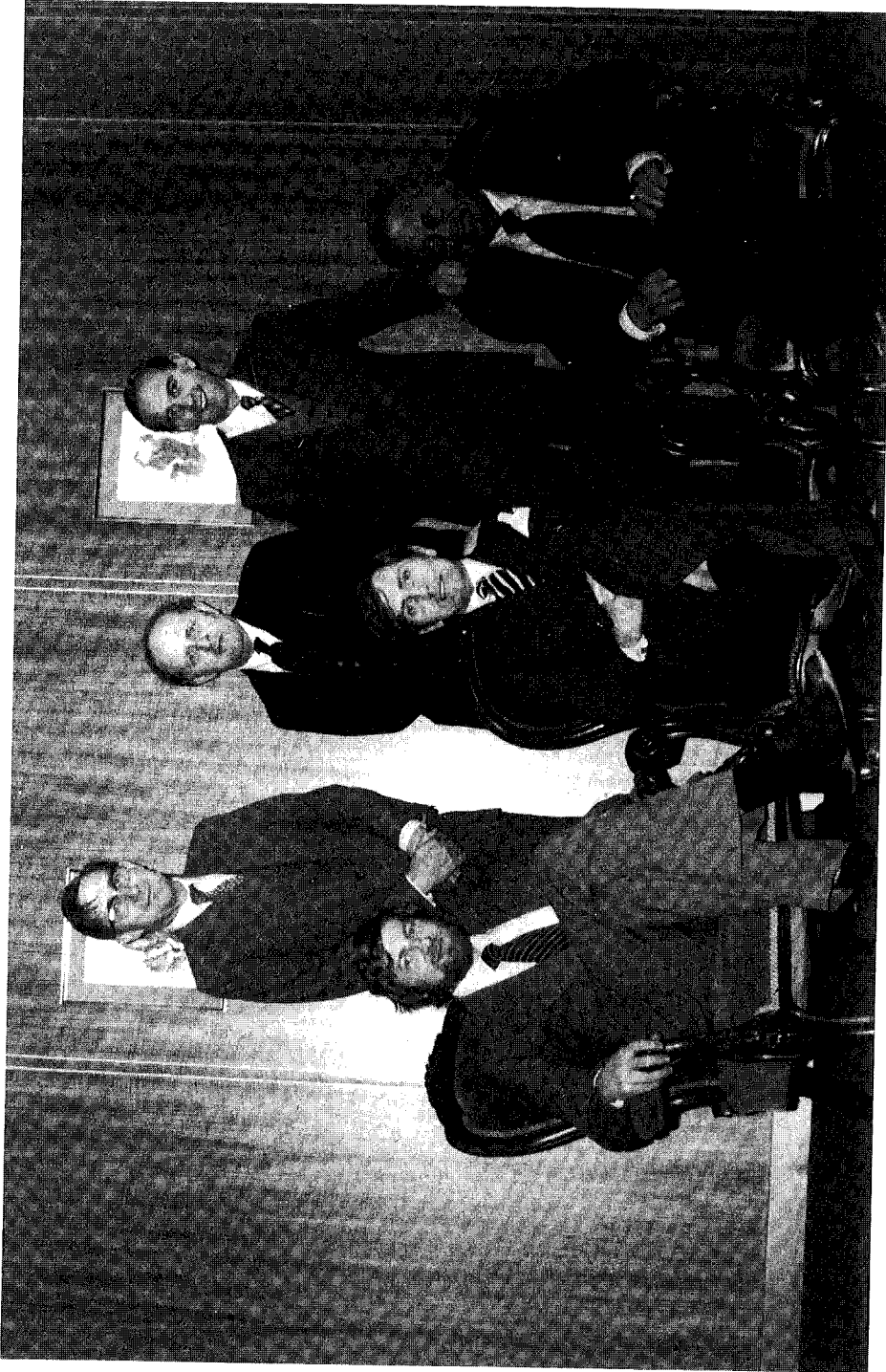
Recommendation 39

The Committee recommends that the Commission continue to suggest and that the Attorney-General continue to make references that promote uniformity of law throughout Australia and reduce duplication of law reform effort.

Recommendation 40

The Committee further recommends that the Commission continue its role of promoting uniformity of law and reducing duplication of law reform effort through its activities with the states and territories including: undertaking joint projects with them, consulting them, and developing comprehensive laws as models for them.

72. The Committee also considers that there would be advantages in the Commission maintaining links with its law reform counterpart in New Zealand, the Law Commission.



The foundation members of the Law Reform Commission in 1975
back row: Gerard Brennan, Alex Castles and John Cain; front row: Gareth Evans, Michael Kirby and Gordon Hawkins

Chapter 1

Introduction

The inquiry was referred to the Committee by the Attorney-General on 31 August 1993. Sixty-one submissions were received and oral evidence was taken from more than 30 persons.

The main impetus for the inquiry was the fact that the Law Reform Commission of Australia had been operating for almost 20 years without being subject to a wide-ranging parliamentary review. A review was also timely because the appointment of a new President was due.

This report encompasses the role and function of the Law Reform Commission of Australia as well as its relationships with other relevant bodies. A survey of the contents of the report follows. The role of the Law Reform Commission as described in the Law Reform Commission Act 1973 and its non-statutory functions are outlined. The introduction ends with a brief review of the Law Reform Commission's resources.

1.1 The inquiry process

1.1.1 The House of Representatives Standing Committee on Legal and Constitutional Affairs commenced its inquiry into the role and function of the Law Reform Commission of Australia (the Commission) on 31 August 1993 at the request of the Attorney-General, the Hon Michael Lavarch, MP.

1.1.2 The terms of reference were advertised in September 1993 in the national press. Invitations to prepare submissions were sent to judges of federal courts, law schools, professional associations, business associations, government agencies, state premiers, state and territory law reform agencies and other interested persons. Most interest in the inquiry was displayed by legal practitioners and those persons and organisations who had been or were involved in work at the Commission.

1.1.3 The Committee made available to interested parties the submissions authorised for publication and the transcripts of evidence from the public hearings. The Committee in turn, requested comments on the proposals contained in the submissions and transcripts.

1.1.4 Sixty-one submissions were received from individuals and organisations including judges, legal practitioners, industry groups, law associations and legal firms, academics and federal government agencies.¹ Oral evidence was taken from more than 30 persons during public hearings in Canberra, Melbourne and Sydney.²

1.2 Background to the inquiry

1.2.1 The inquiry was undertaken for two main reasons. First, a review is timely. The role and function of the Commission and its relationships with other federal bodies engaged in law reform, have not previously been the subject of review by the parliament.³ The Commission is now in its 20th year of operations.

1.2.2 The Commission was established in 1975 under an Act of the Australian Parliament.⁴ Since its inception, the Commission has undertaken references on a wide range of subjects. Many of its reports and recommendations have been implemented in whole or in part. In this time too, other federal bodies with a law reform function have been established.

1 A list of persons and organisations who made submissions is at Appendix A, and a list of exhibits is at Appendix B.

2 A list of witnesses who appeared at public hearings is at Appendix C.

3 The Senate Standing Committee on Constitutional and Legal Affairs – as it then was – tabled a report *Reforming the Law* in 1979 on the processing of law reform proposals in Australia (Parliamentary Paper No. 90/1979). This report focussed on how law reform proposals from the Commission and elsewhere might be effected. There have also been other reviews undertaken by the Attorney-General's Department.

4 *Law Reform Commission Act 1973*.

1.2.3 The second reason for conducting an inquiry was that the term of the existing president of the Commission was due to expire in November 1993. The immediate past president, Justice Elizabeth Evatt, retired at the end of her appointment, after a term lasting from 5 January 1988 until 10 November 1993. The Committee hopes that its review will provide useful background information at the time of the appointment of the next president.⁵

1.2.4 The appointment of a new president is a convenient opportunity for the government to reflect on the structure and role of the Commission – to consider its past outcomes and its future potential. It has been noted that the review could set the direction for the Commission for years to come.⁶

1.3 Scope of the inquiry

1.3.1 There are two main aspects of the inquiry:

- the role and function of the Commission as a separate and permanent law reform agency; and
- the relationships between the Commission and other bodies with a law reform or related function.

1.3.2 While these two aspects are interrelated they have been addressed in separate chapters and in the order suggested by the terms of reference.

5 The Attorney-General, the Hon Michael Lavarch, announced on 11 May 1994 that he would recommend to the Governor-General that Mr Alan Rose be appointed as the new president of the Commission from 23 May 1994. The most senior member of the Commission in the period between presidents has been Ms Sue Tongue, deputy president.

6 S. Skehill, *Transcript*, p. 443.

1.3.3 The report commences with a short history of the Commission (chapter 2) and then provides a review of the methodology of the Commission and an examination of the effectiveness of the Commission in performing its functions (chapter 3). An analysis of the appropriate role and function of the Commission as a separate and permanent law reform agency (chapter 4) follows.

1.3.4 The related issues of the membership structure (chapter 5) and making references (chapter 6) are also examined.

1.3.5 A separate chapter sets out discussion of the need for particular amendments to the *Law Reform Commission Act 1973* and related legislation that are not addressed in relation to other issues (chapter 7).

1.3.6 The report then provides a review of the Commission's relationships with other particular federal advisory bodies (chapter 8) and its relationships with state and territory law reform bodies (chapter 9).

1.4 The role of the Commission

1.4.1 The Commission was established by the Act and commenced operations on 1 January 1975. It is a national body whose role is to provide legal policy advice on law reform to the federal Attorney-General.

1.4.2 The Commission's statutory functions are set out in sections 6 and 7 of the Act⁷. Under section 6 the functions of the Commission are:

7 The Act is reproduced at Appendix D.

- to review laws to which the Act applies⁸ with a view to the systematic development and reform of the law, including, in particular:
 - the modernisation of the law by bringing it into accord with current conditions;
 - the elimination of defects in the law;
 - the simplification of the law; and
 - the adoption of new or more effective methods for the administration of the law and the dispensation of justice;
- to consider proposals for:
 - the making of laws to which the Act applies;
 - the consolidation of laws to which the Act applies;
 - the repeal of laws to which the Act applies that are obsolete or unnecessary; and
 - uniformity between laws of the territories and laws of the states; and
- to make reports to the Attorney-General arising out of any such review or consideration and, in such reports, to make such recommendations as the Commission thinks fit.

1.4.3 Under section 7 of the Act the Commission is required to ensure that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions. It must also ensure that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights.

1.4.4 In addition to these statutory functions, the Commission cites a number of related non-statutory functions it performs:

⁸ The Act applies to Commonwealth and territory laws.

- reducing duplication of law reform effort and promoting uniformity;
- providing draft legislation or drafting instructions for its policy recommendations;
- collecting and publishing information about law reform within Australia and overseas;
- publishing *Reform* – a journal of law reform information and articles on the work of the Commission and others;
- following up the implementation of the Commission's recommendations; and
- otherwise providing information about the Commission's work.⁹

1.5 Resources

1.5.1 Although the Commission is a separate body, it is included within the Attorney-General's portfolio and is funded under the Attorney-General's community affairs program. **Figure 1** illustrates the Attorney-General's portfolio program structure.

1.5.2 The Commission is located in Sydney and all its members and staff are appointed under the Act. The members of the Commission are the president, the deputy president and the full-time and part-time commissioners. The Commission currently has a deputy president, one full-time commissioner and 11 part-time commissioners.¹⁰

1.5.3 The Commission also has 39 staff.¹¹ Some are law reform officers and others provide administrative support. As well as these members and staff of the Commission, consultants are appointed to work on particular references.

9 ALRC, *Submissions*, pp. S23–24.

10 ALRC, *Submissions*, p. S347.

11 ALRC, *Submissions*, p. S29.

1.5.4 The Commission's budget appropriation for 1993-94 is \$4 million.

Appendix 2 – Attorney-General's Portfolio program structure

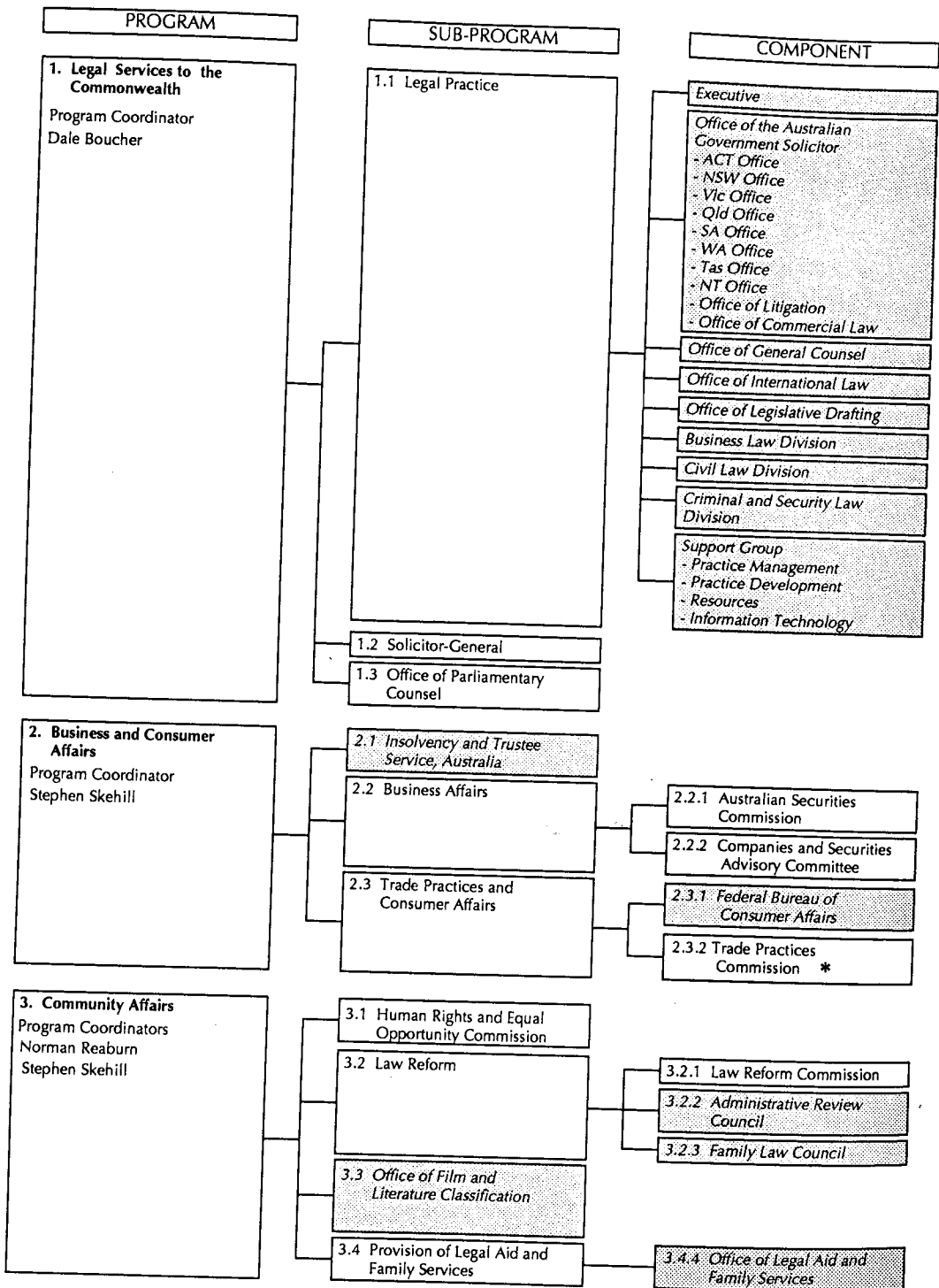


Figure 1. Extracted from the Attorney-General's Department Annual Report 1992-93, vol. 2.

Chapter 2

A history of the Commission

This chapter sets the scene for the evaluation of the Commission by considering the organisation's history and the aspirations of those members of parliament who championed its formation.

The Act to establish the Commission was passed in 1973 (to commence on 1 January 1975) with the unanimous support of all parties and both Houses of Parliament. The second reading debate made it clear that parliament intended the new body to give a national lead to law reform and uniformity of law in Australia – as well as focussing on reforming laws having federal jurisdiction.

The Act gives the Commission power to perform its functions independently of direction from the Attorney-General, although the latter has the sole right to give references to the Commission. The head of the Commission (originally 'the chairman', but since 1985 'the president') has wide powers in relation to the operations of the Commission. The first chairman, Justice Michael Kirby, remained in the position from January 1975 until September 1984. He encouraged an inclusive philosophy and methodology which enabled the wider community to participate in the work of the Commission. The 14 reports produced during his chairmanship reflect a broad social policy focus.

Justice Murray Wilcox presided over the Commission under an interim arrangement for nine months until the appointment of the Hon Xavier Connor in May 1985. Hon Xavier Connor presided over the Commission until December 1987. During the three years in which Justice Wilcox and Hon Xavier Connor headed the Commission, 14 more reports were completed on references which were given to the Commission before Hon Xavier Connor arrived. The Commission received only two new references during this period, with Hon Xavier Connor noting that the backlog of references he inherited was caused by the Commission's lack of adequate resources to service its workload.

Justice Elizabeth Evatt was appointed president in January 1988 and completed her term in November 1993. Under Justice Evatt the Commission has extended its mode of operations by undertaking joint projects with other federal advisory bodies.

2.1 Prior to Federation

2.1.1 Calls for reform of the law applicable in Australia pre-date federation and there were several unsuccessful attempts at systematic law reform prior to federation.

2.1.2 The first New South Wales Law Reform Commission was established by Letters Patent in 1870.¹² This commission of part-time lawyers produced very little and was abandoned within a short time. Another reform attempt sought to codify the substantive law of Victoria in the 1870s and 1880s and was similarly unsuccessful.¹³

2.2 Post Federation

2.2.1 The next attempt at institutional law reform saw the appointment of a Commissioner of Law Reform in New South Wales from 1920 to 1931.¹⁴ The proposals from this office come to nothing, and after the position was discontinued, ad hoc committees of practitioners undertook law reform which has been characterised as not being well organised or thoroughly investigated.¹⁵

2.2.2 In the 1960s and the 1970s government or parliamentary law reform bodies were established in each of the states and territories as well as at the federal level.

12 Law Reform Commission, *Annual Report 1975* (ALRC 3 1975), p. 3.

13 *ibid.*, p. 3.

14 *ibid.*, p. 4.

15 *ibid.*, p. 5.

2.3 Permanent Australia wide law reform body

2.3.1 By the time the Commission was established only the Northern Territory¹⁶, among the states and territories, did not have either a law reform commission or some other law reform body.

2.3.2 There had been proposals for a national approach to law reform in Australia since the 1950s.¹⁷ It was not until December 1973 however that legislation, enabling the establishment of a national law reform body, was enacted. Prior to the establishment of the Commission in 1975, federal law reform was done in the courts, the Attorney-General's Department, the Parliament and ad hoc committees.¹⁸

2.3.3 Parliament's intentions for and expectations of the proposed body were apparent in the second reading debate. Senator the Hon Lionel Murphy, the Labor Attorney-General who introduced the Law Reform Commission Bill into the Senate, stated in his second reading speech that the promotion of law reform on a comprehensive and uniform basis could only be done by:

an expert body, working full-time on the task and removed from the pressures of day to day politics, [is] established for the purpose.¹⁹

Senator Murphy described the Bill as:

an expression of the Government's view that except where local circumstances justify different treatment, people wherever they live in Australia should be subject to the same law. For this reason, many questions of law reform must be dealt with on a national basis.²⁰

2.3.4 The debates indicated that a national law reform commission would promote uniformity in the law throughout Australia, while

16 The Northern Territory followed soon after however in 1976 – see chapter 9.

17 Australia, Senate 1973, *Debates*, vol. S 57, p. 1346.

18 Law Reform Commission, *Annual Report* (ALRC 3 1975) provides an interesting account of law reform in Australia in chapter 1 at pp. 1–24.

19 Australia, Senate 1973, *Debates*, vol. S 57, p. 1347.

20 Australia, Senate 1973, *Debates*, vol. S 57, p. 1347.

recognising the separate jurisdictions of the states. Senator the Hon Ivor Greenwood, the then shadow Attorney-General, considered that such a commission would provide material for public debate and consideration, and that its independence from government might encourage the acceptance of proposals.²¹ He saw the commission taking a leading role in law reform in Australia:

... one national law reform Commission which will co-ordinate the work of the existing law reform commissions and which will possibly, by the quality of its work and the manner in which it operates, tend to reduce the number of existing law reform bodies and to ensure that the work which is done is of such a character that it can be used by both the Commonwealth and the States in appropriate areas of interest. That is, of course, the objective to which many persons who have written in the learned journals on this subject in recent years have looked forward.²²

2.3.5 The Law Reform Commission Bill received the unanimous support of all parties and both Houses of Parliament.²³ The Act commenced on 1 January 1975, 74 years after Federation.

2.4 The Commission

2.4.1 Only the federal Attorney-General has the power to make a reference to the Commission, although as the result of an amendment²⁴ to the Law Reform Commission Bill during its passage through the Senate, the Commission may suggest a reference to the Attorney-General.

2.4.2 The Attorney-General does not have power to direct the Commission with regard to the performance of its functions or the

21 Australia, Senate 1973, *Debates*, vol. S 58, p. 2596.

22 Australia, Senate 1973, *Debates*, vol. S 58, p. 2596.

23 Australia, Senate 1973, *Debates*, vol. S 57, pp. 1345–1348; Australia, Senate 1973, *Debates*, vol. S 58 pp. 2594–2604; Australia, House of Representatives 1973, *Debates*, vol. H of R 87, pp. 4493–4495; Australia, House of Representatives 1973, *Debates*, vol. H of R 87, pp. 4713–4714.

24 Australia, Senate 1973, *Debates*, vol. S 58, p. 2602.

exercise of its powers. The Commission has a broad power under section 8 of the Act to 'do all things' in connection with the performance of its functions.

2.4.3 The head of the Commission is the president²⁵ who is appointed a full-time member of the Commission by the Governor-General.²⁶

2.4.4 Justice Michael Kirby was the foundation chairman of the Commission and remained in that office for almost ten years from 1 January 1975 until September 1984.²⁷ At first only a part-time member, Justice Kirby became full-time²⁸ and was joined by part-time commissioners: Professor AC Castles, Mr GJ Evans, Associate Professor GJ Hawkins,²⁹ and Mr FG Brennan and Mr J Cain³⁰.

2.4.5 The guiding philosophy of the Commission during Justice Kirby's administration was that all Australians should be able to participate in the law reform process. Justice Kirby instituted a variety of research methods designed to ensure that this goal was achieved, including:

- the appointment of honorary expert consultants from a wide range of disciplines;
- publication of discussion papers and summaries of discussion papers written in plain language and widely distributed free of charge;
- public hearings;
- surveys, polls and questionnaires; and
- specialist consultations.³¹

25 Originally the head was the 'Chairman', but an amendment to the Act altered the title to 'President' in 1985.

26 Section 12 of the Act.

27 A table of all office holders of the Commission was included in the submission of the Commission and is reproduced at Appendix F.

28 On 4 February 1975.

29 All appointed on 4 February 1975.

30 Both appointed in June 1975.

31 ALRC, *Submissions*, p. S75.

2.4.6 Justice Kirby considers the extension of consultation into community consultation through the use of the media to have been a novel feature of the Commission's methodology.³² The findings of a comparative analysis of law reform commissions in the United Kingdom, Australia and Canada support this claim.³³

2.4.7 The Commission issued 14 substantive reports during Justice Kirby's term of office.³⁴ The work program during his term reflected a broad social policy focus. Completed reports included: complaints against police, police powers, insolvency and bankruptcy, human tissue transplants, privacy, defamation, insurance contracts and agents, and child welfare.³⁵

2.4.8 Justice Murray Wilcox³⁶ was the acting part-time chairman for nine months after Justice Kirby left in September 1984.³⁷ Justice Wilcox's appointment was a temporary arrangement until a long term replacement could be found.³⁸

2.4.9 Hon Xavier Connor was appointed full-time president in May 1985 and completed his term in December 1987. He described the Commission as being 'in a bad way' when he took office.³⁹ Hon Xavier Connor considered the Commission had been given references far beyond its resources and that because of this many remained unfinished at the time of his appointment.

32 M. Kirby, *Transcript*, p. 169.

33 W. H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* 1986 Edmonton, Juriliber Ltd.

34 ALRC, *Submissions*, p. S76.

35 *ibid.*

36 Justice Wilcox had been appointed to the Federal Court in May 1984.

37 Justice Kirby left the Commission in September in 1984 to become President of the New South Wales Court of Appeal, which position he still holds today.

38 M. Wilcox, *Submissions*, p. S220.

39 X. Connor, *Submissions*, p. S239.

2.4.10 Only two new references were sent to the Commission during Hon Xavier Connor's term. This does not mean that these were years of inactivity however, as the Commission 'was able to complete its unfinished work of long standing' during this time.⁴⁰ Fourteen more reports were finalised and tabled during the years that Justice Wilcox and Hon Xavier Connor were each leading the work of the Commission. Completed reports included: evidence, standing in public interest litigation, contributory negligence, domestic violence, Aboriginal customary laws, admiralty, contempt, insolvency, matrimonial property, and service and execution of process.⁴¹

2.4.11 Justice Elizabeth Evatt was appointed full-time president in January 1988 and she completed her term in November 1993.⁴² During Justice Evatt's term the Commission commenced a new law reform program covering five areas of law: family law, business law, access to justice, government law and the ACT. In performing work under the program the Commission undertook joint projects with specialist federal agencies, the Family Law Council and the Companies and Securities Advisory Committee, to reduce duplication. It also undertook joint projects with state law reform commissions to promote national uniformity.

2.4.12 The Commission considers that it has responded to the more entrepreneurial focus of government that developed in the late 1980s by providing the same quality of advice to the Attorney-General within a much shorter time.⁴³

40 *ibid.*

41 See Appendix E.

42 Justice Evatt is still a part-time commissioner on the equality before the law reference.

43 ALRC, *Submissions*, p. S78.

2.4.13 Recently completed reports include: censorship procedure, multiculturalism and the law, customs and excise, administrative penalties in customs and excise, choice of law, superannuation, personal property securities, and collective investment schemes.⁴⁴

2.4.14 Current references are:

- review of the *Designs Act 1906*;
- review of service delivery legislation administered by the federal Department of Human Services and Health (formerly Health, Housing and Community Services), specifically children's services, aged and community care, health, housing and disability services;
- equality before the law;
- review of compliance and enforcement mechanisms under the *Trade Practices Act 1974*;
- intractable access cases in the Family Court; and
- evidence, stage 3.⁴⁵

2.4.15 Since it commenced operations the Commission has developed and refined its approach to and methodology for its work. The Commission continues to use the methods and the participatory approach that Justice Kirby initiated⁴⁶, and has built on this foundation over the past 20 years.

44 *ibid.*, p. S79.

45 *ibid.*, pp. S55–S64.

46 *ibid.*, p. S75.

Chapter 3

Operations and effectiveness

This chapter reviews the activities and methods used by the Commission in fulfilling its functions. It then considers the effectiveness of those operations.

The evaluation of the Commission's work is approached via three paths: the implementation of the Commission's recommendations; the reputation of the Commission in the eyes of those outside government; and the record of the Commission in completing references by stipulated dates. The Committee briefly reviews the resources of the Commission in the light of these views.

3.1 The people involved in Commission inquiries

A. Divisions

3.1.1 After the Attorney-General makes a reference to the Commission the president establishes a division of at least three members to work on that reference.⁴⁷ Those members may be any of the president, the deputy president, the full-time commissioners and the part-time commissioners. The current practice is for the full-time members to sit on all divisions and for part-time members to participate in one or two references at most.⁴⁸ Full-time members are appointed on the basis of their management expertise as well as their wide experience in legal policy work. Part-time members are generally appointed because of their expertise in the subject area of the reference although they usually also have a broad background in law reform.⁴⁹

3.1.2 The Commission describes the particular value of part-time commissioners in this way:

47 Section 27 of the Act.

48 ALRC, *Submissions*, p. S155.

49 *ibid.*

Apart from providing expertise in the relevant area, the people appointed are highly regarded in the field and can provide entree for the Commission to a range of people and information.⁵⁰

B. Staff

3.1.3 The Commission usually has several references at one time with some three to five law reform officers working on any one reference full-time. A staff project manager is in charge of a reference⁵¹, and like the members, will work part-time on a reference.

C. Consultants

3.1.4 Consultants are appointed because of their particular qualifications and expertise in relation to a particular reference. They are an essential part of the resources the Commission draws on to enable it to fulfil its functions. Consultants may provide services such as research, analysis and writing and are part of the wider community consultations that are so typical of the Commission's methodology. They help to work through issues and proposals with the aim of reconciling conflicting views through negotiation. The Commission regards their contributions as an indicator of the likelihood of the proposals being accepted by government.

3.1.5 Most of the consultants assisting on references do so on an honorary basis, although where a particular specialist issue arises the Commission will contract someone to provide advice on that. The value of the work performed by consultants is far greater than the amount paid as fees, and the Commission depends on the goodwill of the professional community to maintain the high quality of its work. For example, in the collective investments inquiry 32 people provided consultancy services but the total amount of consultancy fees paid in 1992–93 was only some \$9,000.⁵²

50 *ibid.*

51 Prior to 1991 a full-time commissioner was the person in charge: *ibid.*

52 ALRC, *Submissions*, p. S37.

3.1.6 While the Commission values the input of the community and those appointed as consultants, it is not bound to accept advice:

The Commission considers the findings of consultants very closely but it is not and should not be, obliged to adopt their views.⁵³

Comments

3.1.7 The Committee notes that the Commission receives honorary services from consultants. The Committee found no evidence that as a result of the services being honorary there has been a compromise in either the quality of the advice the Commission receives or in the Commission's independence.

3.2 Methodology of the Commission

3.2.1 Evaluating the performance of the Commission requires an examination of how the Commission is performing its functions. Work at the Commission is undertaken according to a process of research, consultation, decision making and report writing.

A. Research

3.2.2 The initial research phase of a reference might consist, typically, of a comparative assessment of the law under review with the law of other jurisdictions, and a consideration of the political context. The Commission states what the law is with an assessment of any defects and remedies.

B. Consultation

3.2.3 The Commission does not confine its consultations to the legal area. It looks broadly at all those groups within the community who have an interest in the reference. It may confer with and seek written

53 ALRC, *Submissions*, p. S369.

submissions from government departments and other statutory authorities, the private sector, academics, community organisations and private individuals who may be interested in, or affected, by possible recommendations.⁵⁴

3.2.4 The nature and extent of the consultation process varies with each reference with a focus on those community sectors for which the reference is most relevant. In addition to appointing part-time commissioners and consultants who are expert in the relevant field of law or practice, methods of consultation include:

- issuing media releases;
- holding press conferences;
- conducting surveys and opinion polls;
- inviting written submissions;
- participating in radio and television programs;
- holding discussions with interested persons and organisations including industry groups, government departments and peak community organisations;
- holding discussions with parliamentary committees and individual members of parliament;
- conducting public hearings and seminars; and
- addressing professional bodies, universities, community organisations and conferences.⁵⁵

3.2.5 There is often a distribution of consultative documents including issues papers and discussion papers which outline the subject matter and offer proposals for change. Consultants and other interested persons are invited to respond to the papers prepared by the Commission.

54 ALRC, *Submissions*, p. S24.

55 *ibid.*, p. S25.

C. Decision making and report writing

3.2.6 The Commission believes that effective consultation leads to an increase in the quality of the resulting proposals as well as an increase in the acceptance of the proposals by government. Controversial issues can be discussed and negotiated before the proposals are made.⁵⁶

3.2.7 Commissioners consider and assess all opinions and responses advanced during the consultation process before finalising their views on a reference and framing recommendations. The division as a whole approves the final report of the inquiry.

3.2.8 The final reports of the Commission have included draft legislation when required to do so by the terms of reference.

3.3 Evaluating the Commission's work

3.3.1 Evaluation requires not only a review of its activities but a qualitative assessment of its work which is not a simple task. The advice offered to the Committee on how it could evaluate the Commission's performance reflected the philosophies of the advice-givers on law reform, amongst other things.

3.3.2 The Attorney-General's Department suggested that the Commission's performance should be considered with regard to:

- the record of the Commission in completing references within the stipulated period;
- the regard with which the Commission is viewed by external commentators and subject matter experts;
- the extent to which the Government accepts recommendations made by the Commission; and

56 ALRC, *Submissions*, p. S369.

- the use made by the Commission of the financial resources made available to it.⁵⁷

3.3.3 The Business Council of Australia (BCA) considered that the Commission's effectiveness should be judged by its ability to influence reform of legislation, its contribution to the development of national laws within Australia and its contribution to the efficiency of legislation.⁵⁸

3.4 Taking stock of the Commission

3.4.1 The Commission has been in existence for 19 years and in that time has had about 50 references. The work of the Commission is reflected in a substantial amount of written material: approximately 50 substantive reports, 60 discussion papers and 10 issues papers have been published. In addition, the Commission has published a large number of research papers.

3.4.2 Some 30 reports have been implemented by legislation in whole or in part, and a majority of the remainder are still under consideration.⁵⁹

Comments

3.4.3 The Committee considers that the record of the Commission in terms of measurable output has been impressive. The Committee notes that the work of the Commission seems to be characterised by a painstaking accumulation of information. As consultation is a part of every reference⁶⁰, the Commission has conducted many programs of consultation, the nature and extent of each consultation process

57 Attorney-General's Department, *Submissions*, p. S309.

58 BCA, *Submissions*, p. S195.

59 A detailed table of information about references was included in the first volume of the ALRC's submission: *Submissions*, pp. S40–S54, and is reproduced at Appendix E.

60 ALRC, *Submissions*, p. S24.

depending on the reference.⁶¹ Many dedicated, distinguished and professional members, consultants and staff have been involved in the work of the Commission. Significantly, many consultants are deserving of special recognition as they have largely provided their services to the Commission on an honorary basis or at significantly discounted rates.

3.5 Implementation of Commission reports

3.5.1 The rate of implementation of the reports and recommendations of the Commission is one measure of its effectiveness. Although the Commission does not accept that implementation rates are the best means of evaluating performance, it acknowledges that others do and claims that by December 1993, 62 per cent of its reports have been fully or partially implemented.⁶² In Australia, only the NSWLRC has a higher implementation rate, at 74 per cent. Of all Commonwealth law reform agencies, the Commission's rate compares favourably with those of a majority of agencies – the lowest being the New Zealand Law Commission, with 39 per cent, and the highest being the Manitoba Law Reform Commission and the Scottish Law Commission, each with 81 per cent. The Commission points out that it undertakes comparatively more references about controversial social issues than other agencies and that recommendations about such issues are more difficult to implement.⁶³

3.5.2 Although neither referred to implementation rates, the Law Council of Australia considers both the range of work undertaken by the Commission and its implementation record to be impressive⁶⁴, and the Attorney-General's Department believes the record of government

61 *ibid.*, p. S25.

62 ALRC, *Submissions*, p. S466.

63 *ibid.*, p. S429.

64 The Law Council of Australia, *Submissions*, p. S200.

acceptance of Commission recommendations is high⁶⁵. The Attorney-General's Department states that the work of the Commission that is not adopted is not without value. This is so for two reasons. The first reason is that the existence of a report and its recommendations as a catalyst for change may be more important than the detail of the recommendations. The second reason is that reports on which there has been no action 'may simply reflect competing or changed priorities within government; in other cases, a report may have been overtaken by other events.'⁶⁶

Comments

3.5.3 The Committee considers that the influence of the work of the Commission over almost 20 years has been very significant, but to measure its effectiveness solely through implementation rates is not satisfactory. The Committee accepts that the implementation rate is one indicator of performance and considers that if the Commission's advice were rarely accepted it would be ineffective. The Committee considers the implementation rate of the Commission's reports and recommendations to be adequate. The Committee considers that a comparison of the implementation rates of the various law reform agencies should however, only be a guide to the relative performance of the Commission. The implementation rates are not susceptible of direct comparison because the work of the law reform agencies is not directly comparable.

3.5.4 The Committee agrees with the Attorney-General's Department assessment that there are factors influencing the implementation of reports that do not reflect on the performance of the Commission. Furthermore, the rate of implementation is affected because there may be a considerable lapse of time between the tabling of a report and the

65 Attorney-General's Department, *Submissions*, p. S310.

66 *ibid.*, p. S310.

government's response, and yet a further period before the implementation of accepted recommendations.

3.5.5 The Commission's reports seem to have a 'long "shelf life" ', as one submission puts it.⁶⁷ The evidence to support this view is available in the Government's current legislative program. The Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1993 which was passed by the Parliament in May 1994, is to implement the recommendations of the Gibbs Committee⁶⁸ which relied extensively upon the Commission's criminal investigation report⁶⁹ which was tabled in November 1975, the first year of the Commission's operation.

3.5.6 The Committee notes that there has been a continuing flow of references to the Commission. The Committee considers that the Commission has responded with reports that in the main have been accepted and well received.

Recommendation 1

The Committee recommends that the government recognise that there is a continuing need for a commission to carry out law reform functions.

3.5.7 Section 5 of the Act provides for the Commission to be named the 'Law Reform Commission'. During the course of its inquiry, the Committee noted that the Commission was usually referred to as the 'Australian Law Reform Commission', not least of all by the Commission itself. The name, 'Australian Law Reform Commission', distinguishes the

67 M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S215.

68 *Review of Commonwealth Criminal Law*, Final Report, December 1991, AGPS Canberra. The review committee was chaired by the Rt Hon Sir Harry Gibbs.

69 *ALRC 2 Criminal Investigation*, 1975.

Commission from other law reform bodies, both domestic and overseas, and imparts the national character of the Commission. The Committee considers it would be appropriate for the name of the Commission to be formally changed to the 'Australian Law Reform Commission'.

Recommendation 2

The Committee recommends that the name of the Commission be changed to the 'Australian Law Reform Commission', and that the *Law Reform Commission Act 1973* be amended as necessary to give effect to the change.

Recommendation 3

The Committee further recommends that the Commission should continue to do high quality, well researched and well documented reports.

3.6 Government responsibility for implementation

3.6.1 As indicated above, one of the qualifications on using a rate of implementation test of effectiveness is that the implementation of Commission reports is usually the responsibility of the federal government. This makes the processing of Commission reports subject to political, resource and time constraints that may have nothing to do with the value of the recommendations.

3.6.2 A department having responsibility for administering the law which is the subject of a Commission report will usually prepare a response to that report. This may mean going through a consultation process which is similar to that undertaken by the Commission.⁷⁰

70 D. Weisbrot, *Transcript*, p. 354.

3.6.3 Some submissions⁷¹ stated that Commission recommendations are not properly followed through by Government. Justice Wilcox notes the ramifications of a Commission report being ignored:

Each time a report is ignored there is a detrimental effect on the Commission's standing in the community and its ability to obtain high quality people; as commissioners, Legal Officers and consultants.⁷²

3.6.4 Mr Ron Harmer pointed out that the implementation of the insolvency report he worked on had been delayed.⁷³ Although the report on the general insolvency inquiry was tabled in 1988, the corporate law insolvency recommendations were implemented in the *Corporate Law Reform Act 1992* and the recommendations about personal insolvency are currently under consideration in the Attorney-General's Department. Mr Harmer felt that not only was implementation delayed but that two different areas within the Attorney-General's Department worked on the recommendations without any apparent consultation between the two. This was difficult to understand when the report expressly highlighted the need for as much uniformity as possible between personal and corporate insolvency because of the common basis of both.

3.6.5 Hon Xavier Connor commented that advice by the Attorney-General's Department on Commission reports has not been available to the Commission, denying it the opportunity to reply.⁷⁴

3.6.6 Justice Wilcox argued that there should be a process to ensure Commission reports are promptly and carefully considered on their merits and not politically or bureaucratically smothered. In the absence of such a mechanism, implementation:

71 Bureau of Ethnic Affairs, *Submissions*, p. S5 and M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S215.

72 M. Wilcox, *Submissions*, p. S221.

73 R. Harmer, *Transcript*, pp. 109-110.

74 X. Connor, *Submissions*, p. S241.

... depends entirely upon the initiative of the Government of the day and is substantially governed by bureaucratic factors and attitudes.⁷⁵

3.6.7 Mr Sturt Glacken suggested the processing might be enhanced if the Attorney-General was obliged to table a statement in Parliament, within a specified time of tabling of the report, setting out the government's response to each report.⁷⁶

3.6.8 Mr John Greenwell, a former deputy president of the Commission, attributed the length of time which elapses before recommendations are dealt with by governments to the perceived lack of urgency surrounding a reference.⁷⁷ He suggested that the Commission be available as a consultant to the Office of Parliamentary Counsel (OPC) and the department administering the legislation under review. He argued that the Act should be amended to make it clear that the Commission was to be a consultant in the implementation process.⁷⁸

3.6.9 Professors Chesterman, Graycar and Zdenkowski also argued in favour of Commission involvement in the implementation process.⁷⁹ This would enable the Commission to use the knowledge acquired during the inquiry in the implementation process, and be a cost-effective contribution.

3.6.10 Mr Wayne Berry, then acting Chief Minister of the Australian Capital Territory, commented that it is not only possible but necessary to have an effective working relationship between a government and an independent law reform agency.⁸⁰

75 M. Wilcox, *Submissions*, p. S221.

76 S. Glacken, *Submissions*, pp. S254–S255.

77 J. Greenwell, *Submissions*, p. S245.

78 *ibid.*, p. S247.

79 M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S215.

80 Acting Chief Minister, Australian Capital Territory, *Submissions*, p. S256.

3.6.11 The Commission regards the lack of formal procedures for considering, processing or implementing Commission recommendations as a considerable frustration for those who work on Commission references and expect a government response.⁸¹ The Commission made a number of proposals as a means of enhancing the implementation of its reports.

3.6.12 The Commission would like a formal role in the processing of its reports, to be defined at the time matters are referred to it and to be provided for by an amendment to the Act.⁸² It proposes four options for a formal procedure to assist the processing of its recommendations:

- the Commission should continue to include in its Annual Report details about the extent to which recommendations have been implemented;
- the corporate plans of all government departments should make provisions for the processing of Commission recommendations;
- establishment of a departmental committee (or inter-departmental committee where interests are from more than one portfolio) including Commission representatives, after each report has been tabled to consider how the recommendations should be dealt with; and
- establishment of a joint sub-committee of the House of Representatives and the Senate Standing Committee on Legal and Constitutional Affairs to oversee the implementation of Commission reports.⁸³

3.6.13 The Attorney-General's Department agrees with these proposals except for the proposal to establish a joint parliamentary sub-

81 ALRC, *Submissions*, p. S152.

82 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S514.

83 *ibid.*, p. S510.

committee.⁸⁴ It considers that there would be little gain in such a sub-committee overseeing the government consideration of a Commission report.

Comments

3.6.14 The Committee is not convinced of the merits of the Commission's suggestion that the creation of a joint sub-committee of the House of Representatives and the Senate Standing Committees on Legal and Constitutional Affairs would significantly enhance the speedy processing of the Commission's reports. Indeed, involvement of the parliamentary committees would necessarily add another stage to the consideration of Commission reports without any increase in the likelihood of prompt government acceptance and implementation.

3.6.15 The Committee considers that the processing of Commission reports would be improved by increased interaction between the Commission and the departments having responsibility for administering the law which is the subject of a Commission report.

Recommendation 4

The Committee recommends that departments having responsibility for administering the law which is the subject of a Commission report, consult with the Commission in the first instance within six months of the tabling of that report and later as necessary – with a view to preparing a response to that report.

3.6.16 The Committee also sees merit in an official of the administering department working closely on each reference as a consultant. This would enable the Commission to be better informed about the

84 *ibid.*

bureaucratic influences relating to a project. It would in turn enable the administering department to gain a greater understanding of the processes of the inquiry and also enable it to handle the consideration more efficiently.

Recommendation 5

The Committee recommends that where possible officers of the appropriate departments be included among consultants to the Commission for the life of the projects.

Recommendation 6

The Committee further recommends that all government departments should make provision by appropriate means for the processing of Commission recommendations.

Recommendation 7

The Committee further recommends that each administering department include in its annual report a statement of the status of the consideration process and, where recommendations are accepted, the implementation process.

Recommendation 8

The Committee recommends the Commission should continue to include in its annual report details about the extent to which recommendations have been processed or implemented.

3.7 Reputation as to effectiveness

3.7.1 Mr David Kelly thought that judging the effectiveness of a commission by reference solely to its implementation rate reflected a 'peculiarly narrow view of the process of social and legal change'.⁸⁵ He argues that the functions of the Commission include:

. . . the development of community understanding of legal issues, involvement of people with conflicting viewpoints in extensive dialogue, the development of consensus and rational compromises, and the encouragement of bureaucracies to develop better administrative procedures to help meet accepted social and legal objectives.⁸⁶

3.7.2 As the QLRC argues, much of the standing of a law reform agency is achieved through the dissemination of its discussion papers, working papers and reports because they are comprehensive, well-argued and contain authoritative statements of law:

Commission publications are often used by courts, universities, practitioners and members of the public to provide an analysis of the existing law and of the problems sought to be remedied.⁸⁷

3.7.3 The Attorney-General's Department believes that in general terms, the Commission is highly regarded by those outside government.⁸⁸ It regards the ability of the Commission to engage honorary consultants as a measure of this high regard.

3.7.4 Mr Harmer considered that the Commission's high status was established in the early years by Justice Kirby and others presenting 'a picture of the commission hard at work on a number of references which were important to the community'.⁸⁹ However, he did not think the same status was there at present.

85 D. Kelly, *Submissions*, p. S277. Mr Kelly has experience in the work of law reform bodies most recently as the chairman of the VLRC prior to its abolition. He has also been a commissioner with the Commission.

86 *ibid.*, p. S278.

87 QLRC, *Submissions*, p. S127.

88 Attorney-General's Department, *Submissions*, p. S310.

89 R. Harmer, *Transcript*, p. 107.

3.7.5 Professor John Goldring argued similarly that he did not consider that the Commission's reports were now as scholarly as they once were.⁹⁰

A. Praise

3.7.6 The evidence contains much praise of the Commission's work.⁹¹ It refers to the Commission's work generally and its effect on shaping public opinion in many areas of the law⁹², the influence on people in the financial markets⁹³, the contribution to a democratic society⁹⁴ and raising the level of debate in Australia about the law and related policy.⁹⁵ Other comments have focussed on the Commission's papers and reports being of a high standard⁹⁶, and of the Commission's work making a contribution to legal thought and development⁹⁷.

3.7.7 Some evidence refers to specific inquiries. Senator Nick Bolkus, the Minister for Immigration and Ethnic Affairs, commented favourably on the standard of the report on multiculturalism and the law and the appropriateness of the consultation processes.⁹⁸ Mr J. Drury, of the Australian Customs Service (ACS), argued that the Commission reports

90 J. Goldring, 'Processes and problems of law reform', paper presented to the Australasian Law Reform Agencies' Conferences, Hobart, September 1993, *Exhibit 1*.

91 For example, J. Wade, *Submissions*, p. S2; Bureau of Ethnic Affairs, *Submissions*, p. S5; R. Simmonds, *Submissions*, p. S10; Law Society of New South Wales, *Submissions*, p. S13; J. Faulks, *Transcrip*, p. 55; Law Council of Australia, *Submissions*, p. S199; M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S102; X. Connor, *Submissions*, p. S241 and Minister for Immigration and Ethnic Affairs, *Submissions*, p. S261.

92 R. Harmer, *Transcript*, p. 116.

93 D. Blyth, *Transcript*, p. 129.

94 J. Wade, *Submissions*, p. S3.

95 G. James, *Transcript*, p. 302; NSWLRC, *Submissions*, p. S96.

96 X. Connor, *Submissions*, p. S241; ACS, *Submissions*, p. S232; CLRC, *Submissions*, p. S83; J. Wade, *Submissions*, pp. S2-S3.

97 CLRC, *Submissions*, p. S84.

98 Minister for Immigration and Ethnic Affairs, *Submissions*, p. S261.

on customs and excise are 'a comprehensive basis' for the reform of customs and excise legislation.⁹⁹

3.7.8 In relation to the current reference on the Designs Act, the Intellectual Property Committee of the Law Council of Australia praised the Commission's work as competent and professional.¹⁰⁰ In particular the Law Council mentioned the conduct of the inquiry, including the research and office support available, its mode of public consultations and the use the Commission makes of its outside consultants. The Law Council qualified its praise because it will still be some time before the work is completed and it feels that the Commission should have taken a more positive role in identifying the priority of the various issues at the outset. It concluded however, that the discussion paper 'provided a solid foundation for further inquiry and discussion'.¹⁰¹ These comments were endorsed by the Australian Copyright Council.¹⁰²

B. Criticism

3.7.9 Considerably less evidence contains criticisms of the Commission. The criticisms have focussed on three references: product liability, personal property securities and collective investments. A common feature of these references is that they are in areas of business and commercial law. It should be noted that they are only three of 22 reports identified by the Commission as having a direct commercial impact.¹⁰³

3.7.10 The most ardent critic was the Business Council of Australia (BCA), which called for the abolition of the Commission. Its fall back position was for a considerably modified membership structure with

99 ACS, *Submissions*, p. S227.

100 Law Council of Australia, *Submissions*, p. S208.

101 *ibid.*, p. S208.

102 Australian Copyright Council, *Submissions*, p. S499.

103 S. Tongue, *Transcript*, p. 278.

greater emphasis on economic expertise.¹⁰⁴ It based its proposals largely on its experiences with the Commission in the product liability inquiry¹⁰⁵, although it also criticised the Commission for taking too long to produce a discussion paper for the current trade practices inquiry¹⁰⁶.

Product liability

3.7.11 With regard to the product liability inquiry Mr Robert Gardini said the Commission did not consult effectively¹⁰⁷, and Mr Clive Speed said the Commission failed to consider the cost implications of its proposals and did not take account of international developments¹⁰⁸. Mr Speed also felt the Commission had made up its mind that it wanted a more radical approach to the law.¹⁰⁹

3.7.12 The Commission responded to this criticism by providing details of its 'exhaustive public consultation process' and of an independent economic analysis of the proposals.¹¹⁰ Professor John Goldring, the former commissioner who was in charge of the reference, also rejected the criticisms.¹¹¹ He felt the criticisms were made because the Commission did not accept entirely the BCA's views, and considered that the Commission had 'bent over backwards to obtain and to consider properly the views of businesses on its proposals'.¹¹²

104 The membership structure including the BCA's suggestions is discussed in chapter 5.

105 BCA, *Submissions*, p. S195.

106 C. Speed, *Transcript*, p. 93.

107 R. Gardini, *Transcript*, pp. 82-83.

108 C. Speed, *Transcript*, p. 75.

109 *ibid.*, p. 81.

110 ALRC, *Submissions*, pp. S37-S39.

111 J. Goldring, *Submissions*, p. S259.

112 *ibid.*

Personal property securities

3.7.13 Two former consultants to the Commission on the personal property securities reference, Professor Anthony Duggan and Mr Simon Begg, referred to problems in that reference.¹¹³ The problems were:

- premature formulation of proposals;
- the urge to be innovative;
- lack of skill in policy development and analysis; and
- unwillingness to engage outside assistance.

3.7.14 Professor Duggan felt that the Commission had failed to explain why the approach adopted in Canada, and advocated by Canadian consultants would not work in Australia.¹¹⁴ He made some suggestions about what the Commission might have done differently:

- appoint a commissioner in charge with expertise in the area;
- visit Canada to study its new system; and
- bring overseas experts to Australia for brainstorming.¹¹⁵

3.7.15 The Queensland Law Reform Commission expressly endorsed the comments of Professor Duggan and Mr Begg. It considered that the options for placement of the legislative provisions in legislation other than the Corporations Law should have been more fully explored.¹¹⁶

3.7.16 Mr Stephen Mason, a former commissioner, commented that the policy recommended in the Commission report is essentially the same as that given effect to in the United States Uniform Commercial Code.

3.7.17 Professor Ralph Simmonds argued¹¹⁷ that in his experience with this inquiry, the Commission appeared to be an effective body for

113 A. Duggan, *Submissions*, pp. S94–S95 and S. Begg, *Submissions*, pp. S171–S173.

114 A. Duggan, *Transcript*, p. 150.

115 *ibid.*, pp. 151–152.

116 QLRC, *Submissions*, p. S497.

117 R. Simmonds, *Submissions*, p. S10–S11.

activating consultative mechanisms. He thought that the Commission might be able to make better use of external expertise, however, by subcontracting outside consultants, such as the Companies and Securities Advisory Committee (CASAC). The resulting report could then be used in the consultative process.

3.7.18 The Commission defended these criticisms by saying that it was not able to resource the reference adequately thereby causing it to report late. It agreed that more consultation could have taken place in the early stages, although it points out that the later stages of work on the reference saw significant achievements.¹¹⁸ It felt that many of Professor Duggan's and Mr Begg's concerns were incorporated into the Commission's recommendations. The Commission confirms that the form of its solution was different from the approach adopted in Canada and advocated by them. However, it argued that the differences resulted because of the importance the Commission placed on domestic circumstances including the national Corporations Law and the complexity of the project, as an exercise to achieve uniformity throughout all Australian States and Territories.¹¹⁹

Collective investments

3.7.19 Mr Don Blyth argued that the final collective investments report 'lacked detailed analysis and made many general unsubstantiated statements'.¹²⁰ He also argued that the inquiry did not take sufficient account of the views of business and market forces, and that the Commission formed a view early in the process in favour of radical new ideas and did not listen sufficiently to the views of consultants and that the report was unduly influenced by the project manager.

118 ALRC, *Submissions*, p. S373.

119 ALRC, *Submissions*, pp. S373-S374.

120 Trustees Companies Association of Australia, *Submissions*, p. S177.

3.7.20 The Commission responded to these criticisms by saying that the views and options for reform were fully considered by those working on the inquiry. It felt that both reports from that inquiry 'have been extremely well received in many quarters'.¹²¹ It argued that the final views were formed only after extensive debate with the trustee and finance industries, consumer groups, the public and others. It acknowledged that the disappointment underlying Mr Blyth's comments was understandable because one of the major recommendations was to abolish the requirement that a trustee be appointed.¹²²

3.7.21 Mr Robert Ferguson, a consultant to the inquiry, was in agreement with these arguments of the Commission.¹²³ Mr Ferguson stated that he did not perceive the Commission as favouring radical ideas from an early stage and thought that the enthusiasm for a 'clean sheet of paper mentality' had been tempered by the consultative process.¹²⁴

3.7.22 In summary, the Commission agreed there were some difficulties in the conduct of the product liability and the personal property securities inquiries which represent just two of its 47 substantive references.¹²⁵ It acknowledges the importance of extensive consultation to its work and argues that differences of opinion do not justify claims of lack of consultation or of not listening. The Commission states that as a direct result of these identified problems, it is attempting to enhance its consultation process, including consulting more widely prior to the release of discussion papers.

121 ALRC, *Submissions*, p. S374.

122 *ibid.*

123 R. Ferguson, *Submissions*, pp. S287–288.

124 *ibid.*

125 ALRC, *Submissions*, pp. S374–S375.

C. Comments

3.7.23 The Committee acknowledges that there will usually be criticisms when proposals for significant policy changes are made. Recommendations may prescribe a course of action which will at times offend certain interest groups. The point is, that procedures should ensure each person is given a fair hearing and, the report should objectively reflect the better approach.

3.7.24 The Committee considers that in the product liability and the personal property securities inquiries, some of those consulted and those making submissions developed the impression that there was no prospect their views would be given appropriate weight. This may lead to a view that the Commission is not completely objective and this is a view that should be avoided at all costs.

3.7.25 The Committee accepts the importance of expert consultants to the Commission and notes the need for the Commission to have a flexible approach to consultants and the need to enhance its processes.

3.7.26 The Committee considers that the Commission's processes would benefit from making available to persons who are neither members nor staff, but who are nevertheless interested or involved in the work of the Commission, guidelines on the processes that may be undertaken in the course of a reference.

3.7.27 The Commission proposed, and the Attorney-General's Department agreed, that the Act be amended to include provisions relating to the conduct of inquiries.¹²⁶ The Commission relied on provisions contained in the enabling legislation of other statutory

¹²⁶ ALRC and Attorney-General's Department joint submission, *Submissions*, p. S513.

authorities as a model for its proposal.¹²⁷ Justice Evatt stated the inclusion of such provisions in the Act would give the Commission more authority in conducting its proceedings.¹²⁸

3.7.28 Although the Commission has proposed it should have a statutory model of the way it conducts its inquiries, the Committee considers that this might detract from the flexibility of the Commission's operations. The Committee favours instead the provision of authority in the Act for the Commission to provide guidelines in relation to the conduct of inquiries as it sees fit.

3.7.29 The Committee considers these guidelines might be useful for several purposes. They would provide information to those interested in how the Commission conducts its inquiries and would be helpful in identifying the issues of an inquiry. The Committee also considers that they may be relied upon to set the tone of authority during the course of public proceedings.

Recommendation 9

The Committee recommends that the *Law Reform Commission Act 1973* be amended to authorise the Commission to provide guidelines on the processes of the Commission that may be undertaken during the course of a reference.

127 ALRC, *Submissions*, pp. S165–167.

128 E. Evatt, *Transcript*, pp. 483–484.

3.8 Draft legislation

3.8.1 Until recently the terms of reference given to the Commission have usually required draft legislation to be included in the final report.¹²⁹ There is evidence that suggests that not only is such draft legislation inefficient because it was rarely enacted, but that the Commission's effectiveness was adversely affected because the Commission was distracted from the policy by drafting legislation that delayed the completion of reports.

3.8.2 The Committee found there were two basic questions to answer in relation to draft legislation:

- whether draft legislation should be able to be prepared during the term of a Commission inquiry; and
- when Bills are drafted for the Commission, who should draft them.

3.8.3 Although these two questions are interrelated, the first will be considered in this chapter and the second will be considered in chapter 8 because it is also an important issue when examining the relationship between the Commission and the Office of Parliamentary Counsel (OPC).

3.8.4 The OPC has stated that the Commission has been distracted from determining policy by focussing on the form of the draft legislation.¹³⁰ Similar statements were made in other submissions. Mr J. Drury considered that in the review of customs and excise legislation some issues were not explained in the report but were included in the draft

129 ALRC, *Submissions*, p. S155.

130 OPC, *Submissions*, p. S133. The other reasons the OPC raises against draft legislation in Commission reports are considered in chapter 8 below.

Bill, the drafting of which delayed the report.¹³¹ Professor Duggan argued that in the personal property securities inquiry the Commission became locked into the position presented in its draft Bill and was unreceptive to possible changes.¹³²

3.8.5 Against this evidence the CASAC commented that it did not find that the Commission had been distracted from settling the policy in the collective investments inquiry by becoming too focussed on drafting. In that inquiry, drafting commenced at a late stage in the process 'after the general policy principles had been determined'.¹³³

3.8.6 Many more witnesses and submissions presented arguments that the Commission should continue to include draft legislation with its reports because the discipline of drafting helps to work out the detail of proposals in a way no other process does.¹³⁴

3.8.7 Hon Xavier Connor expressed the case for including draft legislation in this way:

... it has occurred over and over again that the reduction of law reform proposals to a legislative format has demonstrated inadequacies in the proposals.¹³⁵

3.8.8 Others argued similarly, including Justice Kirby. Drafting legislation was an important way of focussing attention, getting one's thoughts clear, especially about the difficult issues. If draft legislation were not included he considered that:

131 ACS, *Submissions*, p. S233.

132 A. Duggan, *Submissions*, p. S94.

133 CASAC, *Submissions*, p. S271.

134 X. Connor, *Submissions*, p. S240; S. Mason, *Submissions*, p. S299; Attorney-General's Department, *Submissions*, p. S313; R. Sackville, *Transcript*, p. 287; T. Robertson, *Submissions*, pp. S292–S293.

135 X. Connor, *Submissions*, p. S240.

. . . the notion of just coming up with generalities would be another step backwards from the discipline that may ensure that proposals pass into law.¹³⁶

3.8.9 Other witnesses told the Committee that the quality of the Commission's reports is enhanced by having draft legislation included.¹³⁷ Justice Evatt spoke in favour of including draft legislation:

I say that for a law reform commission to deliver high quality advice on law reform policy and implementation, it must have draft legislation attached to it, because the thing that distinguishes a law reform commission from any other agency, permanent or ad hoc, which gives advice on legal policy, is the ability of the law reform commission to show how its recommendations will convert into implementable legislation.¹³⁸

3.8.10 Others witnesses also told the Committee that legislation is important because in the delivery of government policy that is what will be read and used. Mr Harmer spoke to the Committee of the benefit of having draft legislation in the insolvency report. He said that he had not heard any criticism about what was intended:

I was assiduous to make certain as to why they had that view. They said that it was because they were able to look at the legislative form of it.¹³⁹

Comments

3.8.11 Draft legislation might accompany Commission reports when either requested by the Attorney-General or the Commission has determined there is a need for it. In chapter 6, the Committee concludes that while others may suggest references to the Attorney-General, the Attorney-General alone should have the power to refer matters to the Commission. As discussed in that chapter, the Committee does not think it is appropriate to limit in any way the terms of reference an Attorney-General can give to the Commission.

136 M. Kirby, *Transcript*, pp. 187-188.

137 R. Harmer, *Transcript*, pp. 112-113.

138 *Transcript*, p. 246.

139 *Transcript*, p. 112.

3.8.12 The Committee feels compelled to accept the weight of evidence which argued that the process of drafting legislation helps to focus the policy and ensure its development in a way that results in more complete proposals. However, by the time the drafting takes place, the main policy should be decided. The details may then be developed when the policy is translated into draft legislation. The Committee also accepts that draft legislation is an important practical tool of law reform because it reveals the form of proposed policy changes.

3.8.13 Accordingly, the Committee considers that draft legislation should be able to be prepared during the term of a Commission inquiry.

Recommendation 10

The Committee recommends that the Attorney-General should be able to request draft legislation in the terms of reference to the Commission.

Recommendation 11

The Committee recommends that the Commission should be able to provide draft legislation in its reports, even when the terms of reference do not expressly request it, if the Commission determines there is a need for it or that it will enhance the report.

Recommendation 12

The Committee further recommends that the Commission should also be able to prepare draft legislation in the course of considering proposals for reform as a tool in the reform process.

3.9 Completing references on time

3.9.1 The ability of the Commission to complete its work on time affects its effectiveness. Although the issue of timeliness was raised in relation to draft legislation it is a more general issue that is also affected by the Commission's ability to estimate how long it needs to complete references.

3.9.2 Professor Goldring has commented that the Commission once held the view that 'it was better to be absolutely right than to meet deadlines'.¹⁴⁰

3.9.3 When the Commission has said it has not met a reporting date the reasons advanced for this have been limited resources as well as a poor estimate of how long the inquiry processes will take.¹⁴¹

3.9.4 The Attorney-General's Department believes that the record of the Commission in completing references on time 'has been a matter of concern to successive Attorneys-General'.¹⁴² The Attorney-General's Department believes this problem has been addressed by discussions

140 J. Goldring, 'Processes and problems of law reform', paper presented to the Australasian Law Reform Agencies' Conferences, Hobart, September 1993, *Exhibit 1*, p. 4.

141 ALRC, *Submissions*, p. S156.

142 Attorney-General's Department, *Submissions*, p. S309.

with the Commission. The Commission has undertaken to pay greater attention to the initial advice provided to the Attorney-General about the time it will require to complete that reference, having regard to other outstanding work. It will also keep the Attorney-General informed of the causes for any delay which may require the extension of time or the re-allocation of priorities amongst references.

3.9.5 The Commission has agreed that in a number of cases 'the completion of drafting was delayed and the report was not completed within the time required'.¹⁴³

3.9.6 Delay was also considered in the context of drafting. One former full-time commissioner, Mr Stephen Mason, has stated that '[d]rafting need not delay reports', and cited the recent collective investments project as a supporting example.¹⁴⁴ He further stated that the customs and excise inquiry was delayed not because of drafting but rather 'because the LRC consistently misestimated when both the report and the draft legislation would be ready'.

3.9.7 As referred above, the Commission has accepted that it has not estimated accurately. To help overcome this problem, the Commission proposed that Mr Greenwell's proposal¹⁴⁵ that a feasibility study be undertaken on some references be adopted. This proposal was agreed to by the Attorney-General's Department.¹⁴⁶

3.9.8 The Commission's proposal is that where a reference is likely to be long and involved, a feasibility study should be carried out jointly by the agency responsible for administering the legislation and the Commission. The study should:

143 ALRC, *Submissions*, p. S155.

144 S. Mason, *Submissions*, p. S300.

145 J. Greenwell, *Submissions*, pp. S243–S244.

146 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S510.

- identify the primary issues;
- determine the allocation of resources;
- estimate the amount of time needed to complete the reference;
- settle the terms of reference;
- develop a protocol regulating the relationship between the Commission and the administering agency; and
- discuss the Commission's role in the implementation process.

The reference should be provisional until the Attorney-General accepts the study and approves the reference.¹⁴⁷

Comments

3.9.9 The Committee notes Mr Skehill's satisfaction with discussions he has recently had with the Commission about its ability to complete references by set dates. The Committee considers that a delay in reporting is undesirable as it detracts from the overall quality of the affected report. Furthermore, the failure to deliver reports on time adversely affects the reputation of the Commission is an impediment to its effectiveness. The Committee also considers that a lack of explanation about delays is unacceptable.

3.9.10 The Committee acknowledges that estimating the time required to complete a reference is not a simple issue. It sees little merit in recommending that feasibility studies, such as those contemplated by the joint proposal of the Commission and the Attorney-General's Department, be carried out. They will add a new delay to the Commission's processes. The Committee believes that regular consultation between the Commission and the Attorney-General is the most important way to ensure the successful completion of an inquiry in

¹⁴⁷ ALRC, *Submissions*, p. S368.

terms of both setting an acceptable deadline and meeting it once it is set.¹⁴⁸

Recommendation 13

The Committee recommends that the Commission should not be burdened with more work than it can possibly do. The Attorney-General should ensure that the Commission should not be given a reference unless the Commission has the resources necessary to commence work promptly and continue.

3.9.11 The Committee also considers it is necessary to impose a greater time discipline on the Commission.

Recommendation 14

The Committee recommends that the Commission keep the Attorney-General informed about the progress of its inquiries.

Recommendation 15

The Committee further recommends that the Commission must formally request an extension of time when it will not be able to meet an agreed reporting deadline.

3.10 Resources of the Commission

3.10.1 The Commission argues that its resource level also affects its ability to meet deadlines. It describes the number of staff and the size of its budget as small, and claims it must juggle resources, continually

¹⁴⁸ The issue of consultation between the Commission and the Attorney-General is discussed more fully in chapter 8.

reassign staff and transfer resources from one project to the next to meet deadlines.¹⁴⁹ It further claims that:

[i]n many cases the Commission is able to complete its references within the designated time only because its staff are prepared to work long hours to achieve the necessary results. However, this has undesirable consequences. It is an unfair imposition on them and can result in staff fatigue, low morale and inefficiencies.¹⁵⁰

3.10.2 Mr Skehill considers the Commission to be well resourced by comparison to other similar bodies.¹⁵¹ He stated that resource needs are always discussed with the Commission before recommending to the Attorney-General that a particular reference be given to the Commission. Alternatively, where the Commission has sought references itself or references have been initiated within government, the resource needs of the Commission have been addressed prior to the reference being given.

Comments

3.10.3 The Committee notes that the Commission's output will depend on the resources provided to it. The Committee considers that in order for the Commission to maintain the quality and quantity of its output, the government should ensure that the Commission has the resources necessary to support the current relative base level of work. This fact underscores the importance of having regular consultation between the Commission and the Attorney-General.¹⁵²

3.10.4 The Committee notes that the Commission's budget is comparable with the budgets of other Commonwealth Law Reform Agencies.¹⁵³

149 ALRC, *Submissions*, pp. S153–S154.

150 ALRC, *Submissions*, p. S154.

151 Attorney-General's Department, *Submissions*, p. S310.

152 The issue of consultation between the Commission and the Attorney-General is discussed in chapter 8.

153 ALRC, *Submissions*, p. S462.

Chapter 4

The role and function of the Commission

In this chapter the Committee examines the permanent and separate nature of the Commission and the alternatives to a permanent and separate law reform commission. The Committee considers that the current role and functions of the Commission are appropriate. The independent nature of the Commission is founded in the independent management and operations of the Commission in performing its work. Without a national law reform commission there would be a fragmented approach to law reform which the Committee feels would create the impression of an unsystematic development of the law in Australia.

4.1 Appropriate role and function of the national law reform commission

4.1.1 The Commission is in the first instance a national body, whose role is to provide legal policy advice on law reform to the federal Attorney-General. The evidence indicates that there is a continuing need for a national law reform commission.

4.1.2 Mr Stephen Mason, a former full-time commissioner, argued that the government should expect from the Commission 'more than just vague proposals, an account of public input, a rehearsing of previous work or a text book on the law in the relevant area'.¹⁵⁴ He argued that the Commission should provide 'detailed and substantive analysis and solutions to real problems', and that it should 'build a consensus for those solutions'.

4.1.3 The FLC argued that the Commission should have a public profile and be the focus of public debate on major legal issues.¹⁵⁵

154 S. Mason, *Submissions*, p. S298.

155 FLC, *Submissions*, p. S104.

4.1.4 The Commission argues that it should continue to operate as a comprehensive and general law reform agency. It should not be amalgamated with other specialised or ad hoc agencies, and argues that amalgamation is a limitation on the sources of law reform advice.¹⁵⁶

4.1.5 Mr Don Blyth spoke about the frustrations, of the trustee industry, because of the lack of uniformity in state laws.¹⁵⁷ He felt the Commission might be able to do work in those areas of the law because it could help to overcome some of the individual state interests.

4.1.6 Professor David Weisbrot thought the Commission was uniquely capable of dealing with uniformity or model legislation.¹⁵⁸ He recognised a need for greater uniformity based on his knowledge of some companies, in the context of privatisation, that have paid millions of dollars in legal expenses to find out what the laws are in every state and territory.

Comments

4.1.7 One important feature of the Commission is that it has a statutory responsibility to undertake its functions with a view to the 'systematic development of the law'. Each reference the Commission receives should be approached as a review of a specific area of law in the context of the broader Australian body of law. It is not limited to only working within the established structure.

4.1.8 There were few suggestions for changes to the Commission's role or functions contained in sections 6 and 7 of the Act. The Committee accepts the current role and functions of the Commission and considers they are still relevant in Australia today.

¹⁵⁶ ALRC, *Submissions*, pp. S341-342.

¹⁵⁷ D. Blyth, *Transcript*, pp. 126-127.

¹⁵⁸ *Transcript*, pp. 356-357.

4.1.9 There are two amendments that the Committee considers should be made to the statutory functions of the Commission, and these relate to the Commission's character as a national law reform commission.

A. Complementary laws of the Commonwealth, Territories and States

4.1.10 One of the functions of the Commission that section 6 sets out is:

- (d) to consider proposals for uniformity between laws of the Territories and laws of the States.

4.1.11 The Committee considers that it would be appropriate to amend the Act to also provide the Commission with a function to consider proposals for the complementarity of laws of the Commonwealth on the one hand and of the territories and states on the other.

4.1.12 In recent years complementary laws have commenced in each Australian jurisdiction. The Committee feels that it is an important development that should be given recognition in the statutory functions of the Commission. As a national law reform commission it would be appropriate for the Commission to have the power to be given a reference relating to such laws or proposed laws.

Recommendation 16

The Committee recommends that the *Law Reform Commission Act 1973* be amended to provide the Commission with a function to consider proposals for the complementarity of laws of the Commonwealth on the one hand, and of the territories and states on the other.

B. Australia's international treaty obligations

4.1.13 Under section 7 of the Act the Commission is required to ensure that the laws it reviews and the proposals it considers do not trespass unduly on personal rights and liberties and do not unduly make the

rights and liberties of citizens dependent upon administrative rather than judicial decisions. It must also ensure that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights.

4.1.14 The Commission proposed, and the Attorney-General's Department agreed, that section 7 be amended so that the Commission is required to ensure that its reports and recommendations are consistent with all of Australia's international treaty obligations.¹⁵⁹

4.1.15 The Commission's proposal recognised that Australia is now party to a number of other international human rights instruments including the International Covenant on Economic, Social and Cultural Rights. It is also party to many trade and environment related treaties.¹⁶⁰

Comments

4.1.16 The Committee notes that this is a more complex issue than either the Commission or the Attorney-General's Department acknowledged in their proposals. It is essential that the Commission consider all Australia's international treaty obligations in the performance of its functions. Furthermore, the consideration should be evaluative and critical, rather than merely ensuring that existing laws and law reform proposals are consistent with international obligations. Such a consideration might reveal inconsistencies. The Commission should also be able to make recommendations about Australia's status in relation to current treaty obligations.

159 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S514.

160 ALRC, *Submissions*, p. S170.

Recommendation 17

The Committee recommends that the *Law Reform Commission Act 1973* be amended to require the Commission, in its review of current laws and consideration of proposals for law reform, to examine and to evaluate critically such of Australia's international treaty obligations as are relevant.

4.2 A separate and permanent law reform agency

4.2.1 The Commission is part of the executive arm of government even though it is not part of the Attorney-General's Department or any other department of government. As a statutory authority it is a separate and permanent agency.

4.2.2 The statutory nature of a law reform agency does not of course preclude it being abolished. An Act of Parliament can be amended by a subsequent Act of Parliament. The Committee notes that in 1993 both the Canadian Law Reform Commission and the Victorian Law Reform Commission were dissolved.¹⁶¹

4.2.3 The independence and objectivity of the Commission derives partly from its statutory nature and partly because its operations are not subject to formal external direction. Although the Attorney-General gives the Commission its terms of reference, neither the Attorney-General nor the Attorney-General's Department directs the Commission's operations or the Commission's findings in its reports.

¹⁶¹ J. Goldring, 'Processes and problems of law reform', paper presented to the Australasian Law Reform Agencies' Conferences, Hobart, September 1993, *Exhibit 1*, p. 1.

4.2.4 The evidence revealed a general community perception that the Commission was independent and that this independence was important to the operations of the Commission. Mr Blyth commented that the commercial community considers the Commission to be independent.¹⁶² The Australian Customs Service (ACS) argued that the permanent and independent character of the Commission was important to the way in which the customs and excise review was perceived within the ACS and industry.¹⁶³

4.2.5 Only three submissions have called for the Commission's abolition or have strongly challenged whether it should continue.¹⁶⁴ The BCA claimed that bodies like CASAC and the CLRC 'substantially reduced the public benefit of a permanent and separate law reform commission'.¹⁶⁵ Mr John Coombs considered the Commission to be an expensive luxury whose continuation might be difficult to justify.¹⁶⁶ Mr Matthews considered that the Commission's functions could be carried out by a parliamentary committee¹⁶⁷. These submissions represent a small proportion of the overall evidence provided to the Committee which was resoundingly in favour of the continued operation of the Commission as a separate and permanent national law reform commission.

Comments

4.2.6 The Committee considers that the separate and permanent nature of the Commission as a statutory authority supports its independent character.

162 *Transcript*, p. 124.

163 ACS, *Submissions*, p. S230.

164 L. Matthews, *Submissions*, p. S90; BCA, *Submissions* p. S194 and New South Wales Bar Association, *Submissions*, p. S216.

165 *Submissions*, p. S194

166 New South Wales Bar Association, *Submissions*, p. S216. It should be noted however, that several witnesses told the Committee that this submission did not have the support of members: for example, T. Robertson, *Transcript*, p. 343.

167 L. Matthews, *Submissions*, p. S90.

4.3 Alternatives to a permanent and separate law reform agency

4.3.1 Other possible sources of advice on law reform are:

- subject specialist advisory bodies;
- special purpose ad hoc committees and Royal Commissions;
- government departments;
- parliamentary committees; and
- contracted consultants.

4.3.2 Evidence before the Committee highlighted the limitations of these other sources of advice on law reform.

4.3.3 Specialist bodies such as the Family Law Council (FLC), the Administrative Review Council (ARC) and the Companies and Securities Advisory Committee (CASAC) are limited to a relatively narrow subject area. These bodies are experts in their field and are therefore a valuable source of advice for government. This single subject focus was at the same time limiting and meant that specialist bodies were not well suited to undertake comparative assessments or broader based inquiries.¹⁶⁸

While relatively narrow terms of reference may be an appropriate approach for solving problems within a subject area, they are not necessarily conducive to a systematic development of the law.¹⁶⁹

4.3.4 Ad hoc committees operating before the Commission was established were criticised for lacking resources for research and for the examination of submissions from interest groups.¹⁷⁰ The Commission says that in relation to ad hoc committees generally, they are temporary in nature and lack comprehensive methods of wide consultation.¹⁷¹ Professor Weisbrot said that despite having good people on such

168 FLC, *Submissions*, p. S106.

169 ALRC, *Submissions*, p. S341.

170 Australia, Senate 1973, *Debates*, vol. S 57 p. 1347.

171 ALRC, *Submissions*, p. S341.

committees, the part-time nature of members means it is difficult to give the inquiry strong direction.¹⁷²

4.3.5 Government departments are subject to the pressures of program delivery and immediate day to day policy development.¹⁷³

4.3.6 The Committee does not agree that parliamentary committees are better suited to undertake law reform than a specialist independent commission. There are several reasons for this.

4.3.7 One feature of parliamentary committees is that they are by their nature more closely tied to the political process and their reports will reflect those more direct political concerns. This may lead to piecemeal changes to legislation when what is required often is an overhaul.

4.3.8 Because of the pressure of time, lack of resources and lack of direct access to expertise, parliamentary committees cannot undertake the type of work the Commission undertakes. Furthermore, projects will at times be adversely affected by the calling of elections. As one witness observed, the benefit of a permanent and separate law reform commission over other forms of review bodies, is that the Commission has the comparative luxury of a number of years of looking ahead.¹⁷⁴

4.3.9 Some evidence proposed contracting out as a means of undertaking law reform projects.¹⁷⁵ While contracting out may be appropriate for obtaining an expert opinion, it is not appropriate for conducting a complex review requiring wide consultation with the community.

172 D. Weisbrot, *Transcript*, p. 347.

173 R. Simmonds, *Submissions*, p. S9.

174 R. Harmer, *Transcript*, p. 108.

175 For example, R. Simmonds, *Submissions*, p. S11.

4.4 Benefits of a permanent and separate law reform commission

4.4.1 Most submissions commented favourably on the permanent nature and independent status of the Commission. As a permanent body the Commission is able to undertake a project whether short or long term. As an agency dedicated to law reform the Commission has a separate resource base.

4.4.2 This independent status enhanced the integrity of the advice provided. The Commission can provide genuine policy alternatives as the bureaucratic and political perspectives are largely introduced after the advice is given. The Commission is seen as a source of independent information, research and ideas in part because it operates in the public domain and is not bound by the usual public service requirements for secrecy.¹⁷⁶

4.4.3 Professors Chesterman, Graycar and Zdenkowski point out¹⁷⁷ that a permanent commission avoids the start up costs and delays that would be associated with an ad hoc committee.

4.4.4 The Commission is not limited to providing advice on only a particular aspect of the law. It works in a wide range of subject areas including access to justice and legal aspects of social justice, operation of the legal system, science, economic regulations and business and commercial law.¹⁷⁸

4.4.5 The references have required a multidisciplinary approach and wider consultation than would be necessary if only the technical legal rules were at issue. As the Commission is a specialist law reform body

¹⁷⁶ D. Weisbrot, *Transcript*, p. 361.

¹⁷⁷ M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S211.

¹⁷⁸ ALRC, *Submissions*, p. S354.

the legal policy is considered in a context of reform by a body that can take a consistent approach to the development of the law.

4.4.6 One more apparent advantage of a permanent law reform commission is that the people who worked on reports may still be available when its reports are being considered.

4.4.7 A permanent law reform commission has the infrastructure to access specialists and others. It holds and accesses expertise so that it is well placed to represent the views of particular segments.

4.4.8 The QLRC argued compellingly in favour of a permanent and separate law reform commission.¹⁷⁹ It started from the premise that law reform is rarely a simple technical change but involves more complex issues of socio economic policy. As an independent body, a separate law reform commission is not associated with a particular interest group and can present considered recommendations. Its independence enhances its ability to consult with organisations and individuals.

4.4.9 The QLRC also argued that a permanent body can build up expertise to carry out the slow development process of law reform.¹⁸⁰ Others do not have the time required for detailed research, extensive consultation, complex analysis. Others have a piecemeal approach while a permanent body fosters continuity and cohesion in development of proposals.

Comments

4.4.10 The Committee believes the Commission has a number of important features. It is an independent body with a national focus. It has an established methodology and has law reform experts on hand. As

179 QLRC, *Submissions*, p. S125.

180 QLRC, *Submissions*, p. S127.

well, the Commission is aware of competing policy considerations although it is not compelled to inject political considerations and can focus on the systematic development of the law.

4.4.11 A body that is separate from the Attorney-General's Department and other government agencies, is independent. It has the capacity to develop comprehensive policy and is not distracted by routine policy development and the capacity to encourage open consultation. An advantage for the government in having a separate and permanent law reform commission is that it can bring a medium to long term perspective to issues and policies.

4.4.12 As a permanent body with a permanent administrative structure it has a base from which to develop links with clients and other organisations. Commission staff provide the members with research, analysis, writing and administrative services.

4.4.13 The Committee regards the Commission as an important source of independent advice for the government because of its capacity for accessing expert and representative opinion. Its direct relationship with the Attorney-General means it fulfils a need for advice to the Attorney-General independent from that of the department and others.

4.4.14 The Committee believes that there is considerable goodwill in the community towards the Commission. As an independent body the Commission has the capacity to tap broader constituencies than those traditionally accessed by the department or minister.

4.4.15 The Committee considers that the independence and objectivity of the Commission is founded in part in its statutory nature, and in part in the independent management and operations of the Commission. The objectivity of the Commission also derives from the wide consultation that the Commission undertakes in each reference, as its independence

derives in part from the democratic nature of its processes. The Committee considers that together, the national character and the independence of the Commission encourage a more systematic development of the law in Australia.

Chapter 5

Membership and organisation structures of the Commission

The Act provides for full-time and part-time commissioners who are appointed by the Governor-General by means of an instrument of appointment which specifies terms and conditions. The Committee considers the ability and stature of commissioners to be of the utmost importance.

The full-time and part-time members of the Commission are the decision makers on a reference. The Committee examined the membership structure of the Commission and considered the desirable functions, backgrounds and qualifications of full-time and part-time members. As the members provide leadership and intellectual input to the Commission, the membership of the Commission will determine how it fulfils its role. The Committee considers that the current membership structure is appropriate to the Commission's role and functions. It also agrees that within that structure the Commission should be able to determine the most appropriate internal management arrangements for references including the continuation of the practice that part-time members be appointed to specific references on the basis of relevant expertise. The Act does not distinguish between full-time and part-time commissioners except for the special powers of the president. The Committee believes the Act should be amended to reflect more accurately the practicalities of part-time work.

The Act requires the Commission to include members who satisfy certain requirements. While the pool from which Commissioners are to be appointed includes persons who have been enrolled as legal practitioners of the High Court or a Supreme Court for at least five years, there is no requirement that the Commission include an experienced legal practitioner. The Committee found that there is a need for the Commission to seek to ensure that experienced legal practitioners are represented in the membership of the Commission.

5.1 The decision makers – full-time and part-time members

5.1.1 The ability, stature and expertise of the members, both full-time and part-time, are the vital elements in the success or otherwise of the Commission. This has been recognised throughout the evidence. Even though it may appear to be stating the obvious, the Committee wishes to

place on the record its view that the most able from both the legal profession and the wider community should be appointed as commissioners and that all such appointees should be widely accepted as objective contributors to the processes of law reform.

5.1.2 Full-time members in particular give the organisation a culture. They are the repository of knowledge on legal matters as well as of the corporate experience of the Commission. If they are collegiate, cooperative and erudite, the results will be evident in the high quality reports of the Commission.

5.1.3 Professor Simmonds commented on the importance of commissioners' interests and experience. He considered that the Commission must have members who have expertise and interests in development of the legal system, though not all members need be lawyers or even legally trained.¹⁸¹ Justice Murray Wilcox argued that the quality of the Commission's reports is attributable to its success in harnessing the 'public spirit of outstanding people'.¹⁸²

5.1.4 The membership structure of the Commission is determined in accordance with the Act, in particular, sections 12 and 15. The Commission is to consist of a full-time president, and four or more other members, each of whom is either full-time or part-time. One member may be a deputy president, who can be either full-time or part-time. All members are appointed by the Governor-General and the instrument of appointment specifies the terms and conditions of each member including the term of the appointment (up to seven years).

181 R. Simmonds, *Submissions*, p. S9.

0182 M. Wilcox, *Submissions*, p. S220.

A. President and deputy president

5.1.5 A president who is also the holder of a judicial office may perform the duties of that office, and indeed the four previous chairmen and presidents have been judges or retired judges.¹⁸³

5.1.6 The president's statutory powers include:

- the power to appoint employees with the approval of the Attorney-General, and to determine their terms and conditions¹⁸⁴;
- the power to engage consultants with the approval of the Attorney-General, and to determine their terms and conditions¹⁸⁵;
- the power to constitute divisions of the Commission¹⁸⁶; and
- the power to convene meetings of the Commission as necessary for the efficient conduct of its work.¹⁸⁷

5.1.7 The deputy president may exercise the powers of the president during a vacancy in the office of president or when the president is not available.¹⁸⁸

B. Other members

5.1.8 The Act does not distinguish between the role and functions of the other full-time and part-time members. Under the Act, all members have equal status in the decision-making process. The Commission presently has two full-time members, the deputy president and a commissioner, and 11 part-time commissioners. **Figure 2** illustrates the Commission's current organisation structure.

183 ALRC, *Submissions*, p. S68.

184 Section 22 of the Act.

185 Section 23 of the Act.

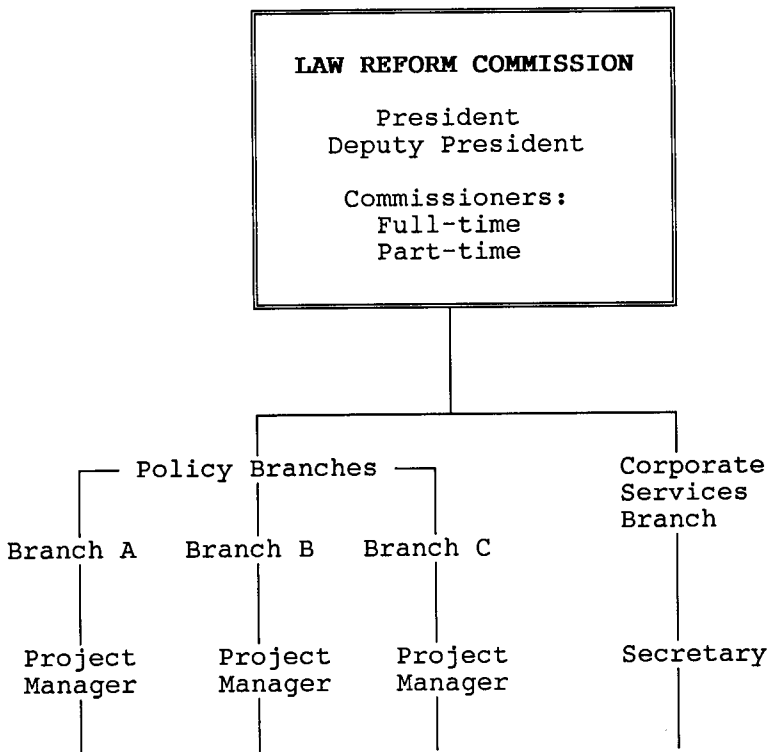
186 Section 27 of the Act.

187 Section 20 of the Act.

188 Section 15 of the Act.

Figure 2.

Current organisation chart of the Law Reform Commission



5.1.9 Justice Williams stated some general principles that the QLRC saw as important to the membership structure of the Commission. Successful law reform requires full-time commitment from some members. There is value in part-time membership because their diversity of qualifications and experience means they bring different perspectives to the work of the Commission.¹⁸⁹

5.2 Managing the work

5.2.1 Prior to 1991, a reference was managed by an individual commissioner, either full-time or part-time. This person was the commissioner in charge and took primary responsibility for the management and carriage of a reference. The former Secretary and Director of Research, had responsibility for corporate services as well as a significant policy role.¹⁹⁰

5.2.2 Since 1991 references have been managed by project managers.¹⁹¹ Full-time members sit on all divisions and part-time members participate in one or two references.¹⁹² The Commission argues that this structure promotes efficiency as it permits the full-time and part-time commissioners to give strategic direction and policy overview to references rather than being involved with administrative management.¹⁹³

5.2.3 The policy reform work of the Commission is divided administratively into three branches. Each of these branches works on 2 different projects and is headed by a project manager, who is a Senior

189 QLRC, *Submissions*, p. S128.

190 ALRC, *Submissions*, p. S347.

191 ALRC, *Submissions*, p. S155.

192 ALRC, *Submissions*, p. S347.

193 ALRC, *Submissions*, pp. S347–S352.

Executive Service Band 1.¹⁹⁴ A project manager has responsibility for day-to-day management of references and project staff.¹⁹⁵

5.2.4 Branch A is responsible for the equality before the law¹⁹⁶, and the trade practices¹⁹⁷ references. Branch B is responsible for the reference concerning the review of all service delivery legislation administered by the federal Department of Human Services and Health¹⁹⁸. Branch C is responsible for the *Designs Act 1906*¹⁹⁹, and intractable access cases in the Family Court²⁰⁰ references.

5.2.5 Support services are provided by a fourth branch, Corporate Services Branch, which is headed by the Secretary who is also a Senior Executive Band 1.²⁰¹ As the name of the branch suggests this branch provides finance services, personnel and office services, information technology services, library services, and information and media liaison.

Comments

5.2.6 The Committee is concerned about two aspects of the Commission's current structure that are both related to the management of references. The first is that the Act does not distinguish between the full-time and part-time members. The second is the current organisational structure.

194 ALRC, *Submissions*, pp. S30–S31.

195 ALRC, *Submissions*, p. S347.

196 ALRC, *Submissions*, p. S61.

197 *ibid.*, p. S64.

198 *ibid.*, pp. S62–S63.

199 *ibid.*, p. S60.

200 FLC, *Submissions*, p. S122–S123.

201 ALRC, *Submissions*, p. S31.

5.3 A revised management structure

5.3.1 A group of three professors from the University of New South Wales Law School all of whom have had experience as commissioners, distinguished between the overall responsibility for a reference on the one hand and financial and administrative management on the other.²⁰² Professors Chesterman, Graycar and Zdenkowski suggested that either a full-time commissioner or the staff project manager should be responsible for the financial and administrative management of a reference.²⁰³ They argued that part-time commissioners should not assume either of these functions. The Commission and the Attorney-General's Department agreed with the thrust of this proposal to the extent that part-time commissioners should not assume financial and administrative management.²⁰⁴

5.3.2 In relation to the overall direction of a reference Professor Chesterman et al suggested that only full-time, and not part-time, commissioners should have this responsibility. In rejecting this suggested limitation on the role of part-time commissioners, the Commission felt that it might adversely affect part-time commissioners' proprietorial commitment to a project.²⁰⁵ The Commission proposed, and the Attorney-General's Department agreed, that the Commission should be able to determine the most appropriate internal management arrangements for references.²⁰⁶

5.3.3 Professor Goldring, a former commissioner, has written that part-time members with outside commitments to practice or an academic

202 M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S213–S214.

203 *ibid.*, *Submissions*, p. S214.

204 ALRC and Attorney-General's Department joint submission, *Submissions*, pp. S507–S508.

205 ALRC, *Submissions*, p. S352.

206 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S501.

career would lack the time necessary to reflect thoroughly upon the existing law and the possibilities for changes in law, policy or both.²⁰⁷ Similarly, Professor Weisbrot felt that where only part-time members are involved,

. . . those references are almost inevitably consigned to the backburner because there is not anyone who has got that ongoing commitment to drive it forward.²⁰⁸

5.3.4 Mr Blyth surmised that the 'real' role for part-time commissioners is on specific references where they have a degree of expertise in the particular field.²⁰⁹ Professor Duggan said that in the personal property securities inquiry, the Commission made a mistake in not appointing a commissioner with appropriate expertise to run the reference.²¹⁰

Comments

5.3.5 The Committee recognises that all commissioners provide leadership and intellectual input to an inquiry. However, the role of full-time commissioners will almost always be dominant, because of the practical limitations imposed by part-time work.

5.3.6 As the Act does not distinguish between the responsibilities of full-time and part-time members, it therefore imposes responsibility for financial and administrative matters on part-time members. The Act should restrict this obligation to full-time members. The Committee considers that there should be relief for part-time members from responsibility for financial and administrative matters.

5.3.7 The Committee does not wish to detract from the Commission's flexibility to allocate its resources to achieve the best outcome for each

207 J. Goldring, 'Processes and problems of law reform', paper presented to the Australasian Law Reform Agencies' Conferences, Hobart, September 1993, *Exhibit 1*, p. 7.

208 D. Weisbrot, *Transcript*, p. 348.

209 Trustee Companies Association of Australia, *Transcript*, p. 125.

210 A. Duggan, *Transcript*, p. 151.

reference. However it considers that the Act should be amended to distinguish between full-time and part-time members.

Recommendation 18

The Committee recommends that the *Law Reform Commission Act 1973* impose responsibility for financial and administrative management and policy on full-time members only.

5.3.8 The Committee recognises that there is a wide variation in the involvement of part-time members in the work of the Commission. In view of this, the Committee believes it is appropriate for the president to continue to be able to select any member of the Commission as the manager of the overall policy direction of a reference. The Committee considers that a part-time member should only be selected when that member has indicated that he or she will be available to provide the necessary level of involvement and direction in the reference. An agreed commitment from part-time members is a matter of resource planning and management and is vital to the effective operation of the Commission.

5.3.9 The task of overall responsibility for an inquiry should usually be the role of full-time commissioners. This recognises the reality that day to day direction of a reference is left to them.

Recommendation 19

The Committee recommends that as a general rule full-time members should be in charge of the overall policy direction of a reference. If part-time members have both the expertise and the time necessary for the intense involvement required to give overall policy direction to an inquiry, they should not be excluded.

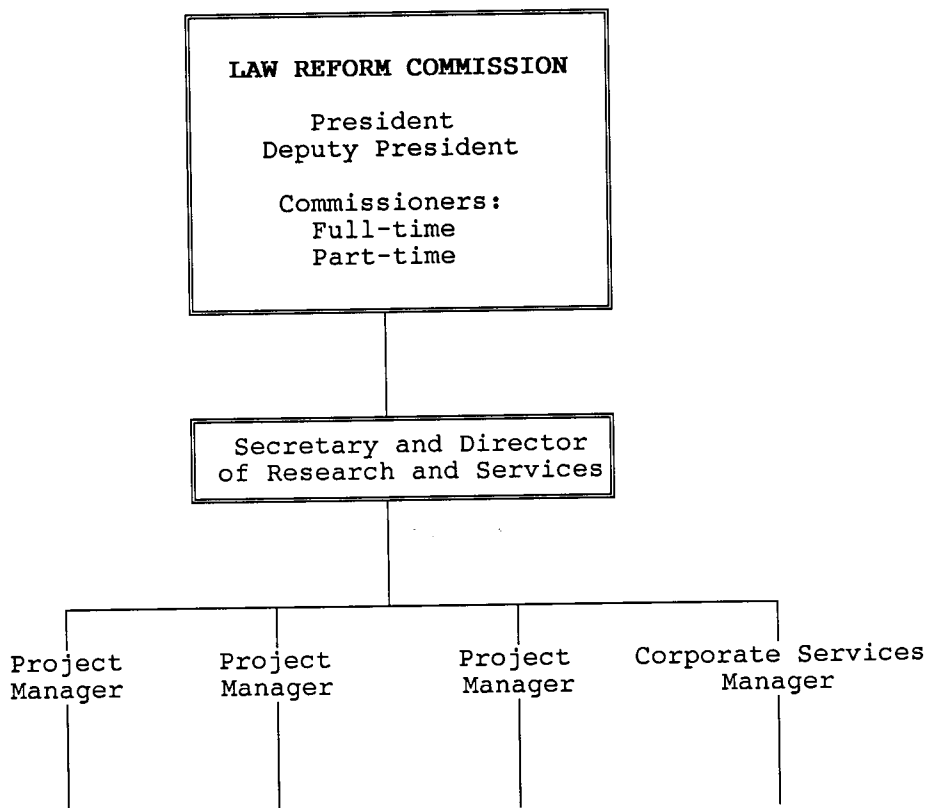
5.3.10 The Committee considers it is important for the Commission to have firm control and direction over a reference. The current organisational structure of the Commission seems unwieldy as the president must deal with four senior executive service officers. The Committee considers it would be more practical if there were one senior executive service officer as the central coordinator and supervisor of both the policy reform work and corporate services. The president would have less need to spend time on administrative work and project managers would be able to concentrate on policy and legal research.

5.3.11 The Committee recognises that in any field of endeavour particular individuals may achieve differently and have different personalities and talents. It appears to the Committee that the organisational structure has evolved because of the interests and talents of people who have worked in particular positions. The Committee feels that this has not led to an efficient structure.

5.3.12 The Committee notes that there is currently no chief executive officer position, formerly the Secretary and Director of Research. The Committee considers this to be a weakness in the current structure and strongly favours the reinstatement of the position of Secretary and Director of Research. **Figure 3** illustrates a possible revised organisation structure for the Commission.

Figure 3.

Revised organisation structure for the Law Reform Commission



5.4 Backgrounds and qualifications of members

A. Not only lawyers

5.4.1 The Act stipulates four groups of people from whom commissioners are to be selected.²¹¹ Three of the four have legally based descriptions. They include judges, legal practitioners with at least five years experience and those with legal tertiary qualifications who have been on the academic staff of a tertiary institution. All these groups are referred to in this report as 'lawyers' or people having 'legal qualifications'. The fourth group must be suitable in the opinion of the Governor-General. At present only two of the 13 members have qualifications other than law.²¹² The Commission acknowledges the need for the participation of non-lawyers, although it argues that full-time members must be lawyers, presumably in all three categories, and proposes that it should continue to include part-time members who are not legally qualified.²¹³

5.4.2 The evidence contained many references to the value of a wider community representation on the Commission. The Business Council of Australia (BCA) argued that there was excessive legal representation and that the current membership structure was not 'conducive to the development of law reform that has broad community support'.²¹⁴ It suggested there should be only three members of the Commission, all full-time. The president should have extensive experience in private practice and the others should be an economist and a person with extensive policy development experience. Part-time commissioners should be replaced by external consultants.

211 Section 12 of the Act.

212 Professor Bettina Cass and Professor Peter Baume.

213 ALRC, *Submissions*, p. S350.

214 BCA, *Submissions*, pp. S195-S196.

5.4.3 Professor Goldring agreed that the economic evaluation of the impact of existing laws and proposals for law reform is an important factor.²¹⁵ He argued however that the policy process must be multi-faceted.

5.4.4 The Commission rejects the BCA's suggestion that part-time commissioners be replaced by external consultants.²¹⁶ The Commission argues that part-time commissioners are more impartial than consultants and have responsibilities that consultants do not have such as the ability to conduct public hearings. Their roles are complementary:

Part-time Commissioners perform an important statutory function and, at the same time, offer a level of expertise at least equal to that provided by consultants. Consultants have more freedom to express their personal views without being constrained by the need to maintain their independence or to be part of the collective decision making process.²¹⁷

5.4.5 The FLC suggested²¹⁸ that some members of the Commission should be non-lawyers and be more representative of the wider community. The Queensland Bureau of Ethnic Affairs also proposed that members should be drawn from all sectors in the community and include non-legal areas concerned with human, social, welfare and educational considerations.

5.4.6 The Queensland Bureau of Ethnic Affairs also argued that members should come from different states and territories.²¹⁹

215 J. Goldring, *Submissions*, p. S260.

216 ALRC, *Submissions*, pp. S350–S351.

217 ALRC, *Submissions*, p. S351.

218 FLC, *Submissions*, pp. S103–S104.

219 Bureau of Ethnic Affairs, *Submissions*, p. S4.

5.4.7 Hon Wayne Goss, the Premier of Queensland, and Mr Sturt Glacken each suggested that there should be representatives of the state and territory law reform agencies on the Commission.²²⁰

5.4.8 The Commission responded that such ex officio membership may make the size of the Commission 'unwieldy' and feels that part-time members should continue to be appointed on the basis of their expertise in a discipline relevant to a particular reference.²²¹ The Commission agrees there should be federal-state cooperation however, and suggests this be done by establishing a law reform advisory committee whose members should include, among other, heads of law reform agencies.

Comments

5.4.9 The Committee considers that the composition of the Commission with members of various backgrounds and training, both legal and otherwise provides a balance of opinion.

5.4.10 The Committee notes that in the early years of the Commission it had a broad spread of members from across Australia. The Committee considers that it is desirable that members come from as wide a geographical spread as possible although it accepts that there should be no formal requirement of membership based on state or territory representation.

5.4.11 The Committee considers that the Commission should continue to be able to appoint part-time members to specific references on the basis of relevant expertise. It notes with approval that there are at the time of this inquiry two part-time members who are not legally qualified and that they have been appointed because their expertise is related to

220 Premier of Queensland, *Submissions*, p. S249 and S. Glacken, *Submissions*, p.S253.

221 ALRC, *Submissions*, p. S352.

specific law reform projects. The Committee supports the appointment of non-lawyer experts as part-time members of the Commission.

B. What sort of lawyers

5.4.12 Justice Murray Wilcox proposed that the Commission's lawyer membership be approximately half academics and half practitioners, noting the different perspectives each group has to contribute.²²² This mix should be reflected in each division and reference. Likewise Hon Xavier Connor supported the need to have a mix of lawyers as members²²³, and the New South Wales Law Society expressed support for the increased appointment of solicitor members because they could bring knowledge and practical experience to the Commission²²⁴.

5.4.13 Mr Harmer said that over the years the status of the Commission had declined, and that this made it harder to attract the right people. One reason he advanced for this was that to work for the Commission was financially unattractive, a particular problem in recent years because of the economic recession.²²⁵

5.4.14 Professor Goldring has commented that the Commission used to attract leading solicitors, barristers and academics as members, and that this is no longer the case.²²⁶ He considers that such a shift in the composition of members diminishes the Commission's legitimacy and effectiveness. He attributes the change, in part, to salaries that are inadequate to attract the right people.

222 M. Wilcox, *Submissions*, p. S220.

223 X. Connor, *Submissions*, p. S240.

224 Law Society of New South Wales, *Submissions*, p. S12.

225 *Transcript*, p. 106.

226 Exhibit

5.4.15 Other witnesses commented favourably on the Commission's access to the specialist experience and knowledge of part-time commissioners. This often involved sacrifices by both the person and that person's employer or firm.

Comments

5.4.16 The Committee notes that most members have been lawyers, whether as practitioners, academics, or judges. Generally appointees to the Commission have first reached a distinguished position in their careers. The Committee considers that the reputation and background of a commissioner affects the prestige of an inquiry and a report.

5.4.17 In general the Committee agrees with the view that there should be a mix of practising and academic lawyers appointed to the Commission and considers that government lawyers with relevant expertise should be considered along with other practitioners. However, the need to balance Commission membership should not be subsidiary to the greater principle of the importance of the individual appointee's qualities, reputation and expert knowledge. The Committee notes that although the numbers of members are small, there is an imbalance in representation from the professions. There is currently a preponderance of academic commissioners at the Commission. There is a need to retain a direct avenue to practical knowledge about the subjects under review through experienced legal practitioners having a role as members.

5.4.18 While consultants provide an intellectual input and access to expertise of the professions, the need for access to practical knowledge is not fully addressed through consultants because they are not directly involved in the decision making processes.

Recommendation 20

The Committee recommends that the Commission seeks to ensure that experienced legal practitioners whether government or private are represented in the membership of the Commission.

5.4.19 The Committee acknowledges that the initiative is up to an individual to make himself or herself available to work at the Commission. It considers that the success of the Commission depends on its ability to harness the talents of those persons with a capacity for objective reasoning and consideration of views in the community. The Committee also considers that the prestige of the Commission must be sufficient to attract the lawyers and other members it needs to successfully perform its functions.

Chapter 6

Making a reference to the Commission

The two issues that arise when considering making references to the Commission are who should be able to make references and which matters should be referred. The Committee concludes that while others, including the Commission, may suggest references to the Attorney-General, the Attorney-General alone should have the power to refer matters to the Commission. With regard to the second issue, the Committee considers that the references should reflect the role of the Commission as a national law reform body and should not be limited in any way to, or by exclusion from, specific subject areas. The Committee believes that there should not be a definitive set of criteria to determine what references should be made to the Commission. The Committee also believes that an annual work plan will enhance the management and flow of the Commission's work.

6.0.1 Sections 6 and 7 of the Act regulate the provision of references to the Commission.²²⁷ The work of the Commission is undertaken pursuant to references 'made by the Attorney-General, whether at the suggestion of the Commission or otherwise'.²²⁸ The subject matter of references is not defined by the Act. In practice, references are the result of a collaborative effort between the Attorney-General's Department and the Commission. A senior officer of the department discusses reference proposals with members of the Commission.²²⁹ There is fairly constant ongoing discussions between the two organisations. They discuss whether emerging issues are appropriate for reference and the Commission's resource capability to deal with a proposed project.

227 See 1.4.2 to 1.4.4 above.

228 Section 6 of the Act.

229 Attorney-General's Department, *Submissions*, p. S310-S311.

6.1 The power to refer

6.1.1 At present only the Attorney-General has the power to make references to the Commission and most submissions support this position.²³⁰

6.1.2 In the past there have been proposals to enable others to refer matters to the Commission.

6.1.3 In 1990 the National Legal Aid Advisory Committee recommended that the Act be amended to enable the Commission to initiate or pursue law reform references other than those nominated by the Attorney-General.²³¹ In its response to the report, the government stated that it saw no need so to amend the Act, as it considered the Commission was already able to suggest appropriate references to the Attorney-General. The response argued that the final approval of the Attorney-General for references was desirable to ensure the coordination of activities of the Commission and other law review bodies, such as the FLC and the ARC.²³²

6.1.4 In 1991 the Commission suggested to the Attorney-General that the Act be amended:²³³

- to permit parliamentary committees to refer certain matters to it;
- to make it clear that the Commission should take into account changes to administrative law and the principles on which they are based; and

230 For example X. Connor, *Submissions*, p. S241.

231 National Legal Aid Advisory Committee, *Legal Aid for the Australian Community*, AGPS, Canberra, 1990, p. 322.

232 National Legal Aid Advisory Committee, *Annual Report 1990–91*, p. 18.

233 Law Reform Commission, *Annual Report 1991*, (ALRC 1991) p. 11.

- to include references to other international conventions and agreements that deal with human rights such as the United Nations Convention on the Rights of the Child.²³⁴

6.1.5 Those suggestions were not taken up.

6.1.6 Several submissions contained suggestions that the Commission be given a stronger measure of self referencing power.²³⁵ The Trustee Companies Association believed this would overcome the possible inefficiencies that might result if the Commission were to pursue an unstructured approach to law reform.²³⁶

6.1.7 The Commission is not in favour of having a statutory power to initiate its own references.²³⁷ In practice, the Commission can seek references in the course of formal or informal consultations with the Attorney-General or Attorney-General's Department. It argues that to be effective, it must take into account that resources are best directed to produce recommendations which address the government's agenda for reform.

6.1.8 The Commission proposed that section 6(1) of the Act be amended to expressly state that the Commission may make recommendations to the Attorney-General concerning new possible references.²³⁸

234 The Commission is required under section 7 of the Act to ensure that, as far as practicable, its proposals are consistent with the Articles of the International Covenant on Civil and Political Rights.

235 J. Goldring, *Submissions*, p. S7; R. Simmonds, *Submissions*, p. S10; FLC, *Submissions*, p. S103; Trustee Companies Association of Australia, *Submissions*, p. S175; Law Society of South Australia, *Submissions*, p. S181; and S. Glacken, *Submissions*, p. S252.

236 Trustee Companies Association of Australia, *Submissions*, p. S175.

237 ALRC, *Submissions*, p. S360.

238 ALRC and Attorney-General's Department joint submission, *Submissions*, p.S514.

6.1.9 Mr David Kelly (one time chairman of the now defunct Victorian Law Reform Commission) also argued that the Commission's work should reflect the priorities in a government's legal policy.²³⁹ Mr Stephen Mason also argued that the Commission should not establish its own reform program because it might be wasteful.²⁴⁰

Comments

6.1.10 The Commission already has the power under the Act to make suggestions for references to the Attorney-General. Section 6(1) states that the

... functions of the Commission are, in pursuance of references to the Commission made by the Attorney-General, whether at the suggestion of the Commission or otherwise: ...

The Committee does not consider that a more explicit statutory restatement of that power will have a substantive effect on the current practices. What the Attorney-General does with those proposals depends on how persuasively the Commission argues the case and on the Commission's working relationships with the Attorney-General and the department.

6.1.11 The Committee understands that arguments against other people or bodies making law reform references include, that another body's work may affect the matter, or that the impetus for law reform is removed from the government of the day, which may have consequent effects on consideration and implementation.

Recommendation 21

The Committee recommends that the Attorney-General continue to have the sole power to make references to the Commission, and that the Commission's statutory right to make suggestions about references should continue.

239 D. Kelly, *Submissions*, p. S277.

240 S. Mason, *Submissions*, p. S301.

6.2 Whether a reference should be made

6.2.1 The Attorney-General's Department believes that the suitability of references for the Commission is subjective and that it is 'difficult to identify any clear criteria which will necessarily identify a subject as suitable or unsuitable for reference'.²⁴¹ The guiding criteria for identifying references have generally been:

- whether the issue in question raises serious questions of law and/or legal policy, or whether it is more properly classified as a policy issue better addressed by some other body;
- whether there is any more appropriate specialist body to which the issue should be committed - eg, the Administrative Review Council;
- whether the issue is one likely to benefit from the application of the Commission's broadly-based consultative methodologies;
- whether the Commission would be able to deal with the issue within time constraints that may be required, having regard to other existing references and their competing priorities;
- whether other bodies, such as Departments of State, have the capacity to attract and retain qualified staff able to undertake detailed law reform exercises which may only be called for periodically; and
- whether the issue is one which the government believes should be dealt with within the Executive rather than by an independent body - for example, because commitment has already been given to broad policy parameters.²⁴²

6.2.2 Mr David Kelly proposes one overriding principle to assess the suitability of references to the Commission:

References should be given on the basis of the value to the government and the community of the likely outcome of work on those references.²⁴³

241 Attorney-General's Department, *Submissions*, p. S311.

242 *ibid.*

243 D. Kelly, *Submissions*, p. S277.

6.2.3 The BCA suggests that references should only be made to the Commission where there is a clear case for law reform and there are 'demonstrable economic and social benefits to be gained' from law reform.²⁴⁴

6.2.4 In particular, Professor Simmonds suggested that in order to assess the suitability of references the Commission should address Australia's federal structure and the need to develop new cooperative arrangements with the states.²⁴⁵

6.2.5 Professors Chesterman, Graycar and Zdenkowski suggested three features that would make a project suitable for reference to the Commission:

- it needs lengthy, in-depth examination of some branch or branches of the law;
- it requires extended consultation with the community at large or with a significant range of interest-groups; and
- change, if any, is likely in one or more of the following:
 - the way in which major justice or policy issues are dealt with under the law;
 - the law's response to a new social or economic challenge;
 - the total 'package' of rules, regulations and administrative practices which governs a major activity within the private or public sector.²⁴⁶

6.2.6 Mr Sturt Glacken suggested the Commission's work should be directed to 'those matters which have the greatest need for long term reform'.²⁴⁷ Hon Xavier Connor also suggested that suitable subjects

244 BCA, *Submissions*, p. S196.

245 R. Simmonds, *Submissions*, p. S10.

246 M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S214.

247 S. Glacken, *Submissions*, p. S250.

should be of long or medium term interest and not 'hot' or short term issues.²⁴⁸

6.3 Suitable matters for reference to the Commission

6.3.1 Some evidence focussed on the subject areas for possible references. Certain submissions stated that the Commission is particularly suited to work on issues of social justice and should continue to work in this area.²⁴⁹

6.3.2 Some submissions argued that the Commission should continue to work in the administrative law area, both where there are large scale reforms to administrative rules, regulations and practices²⁵⁰, and in matters determining the merits of review by administrative bodies and judicial review by courts²⁵¹.

6.3.3 The NSW Law Society argued that the Commission should continue to review broad policy issues.²⁵² The then president, Mr John Nelson suggested the Commission might have a role in the government's 'Reclaiming Justice' project.

6.3.4 Some evidence contained arguments that the Commission should play a greater role in business and commercial law reform²⁵³ and in developing economic regulation.²⁵⁴

248 X. Connor, *Submissions*, p. S241.

249 Humanist Society of Victoria, *Submissions*, p.S15-S16; M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S214; Minister for Foreign Affairs, *Submissions*, p. S218; J. Crawford, *Submissions*, p. S258; and Minister for Immigration and Ethnic Affairs, *Submissions*, p. S261.

250 M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S215.

251 ACS, *Submissions*, p. S230.

252 Law Society of New South Wales, *Submissions*, p. S12.

253 Trustee Companies Association, *Submissions*, p. S175.

254 M. Chesterman, R. Graycar and G. Zdenkowski, *Submissions*, p. S214.

6.3.5 The Commission proposes, and the Attorney-General's Department agrees that the Commission should continue to be given references in any aspect of the law and include joint references where appropriate.²⁵⁵ They also suggest that the criteria they identified in their earlier submissions be used to assess the suitability of references.

6.3.6 The Commission argued that it should undertake references which require the development of detailed legal policy on issues from all sectors of the community.²⁵⁶ It also felt the Commission benefits from a mix of references and acknowledged the need to develop and maintain close relationships with other specialist law reform bodies. The Commission proposes references in the following areas:

- social equity and access to justice
- economic regulation and business and commercial law
- operation of the legal system
- international law
- family law
- environmental law
- criminal law
- intellectual property law.²⁵⁷

6.3.7 The Commission developed this list from issues arising in the course of its work. It suggests that some would be suitable as joint references.

6.3.8 The Department of Environment, Sport and Territories suggested that the Commission undertake work on the legal regimes of the Commonwealth responsibility on Norfolk Island, external territories and the Jervis Bay Territory because they require reform that addresses their individual needs.²⁵⁸

255 ALRC and Attorney-General's Department joint submission, *Submissions*, p.S508.

256 ALRC, *Submissions*, p. S356.

257 ALRC, *Submissions*, pp. S357–S358.

258 Department of Environment, Sport and Territories, *Submissions*, pp. S237–S238.

6.3.9 Hon Wayne Goss, the Premier of Queensland, suggested there might be more joint references to law reform commissions generally.²⁵⁹

Comments

6.3.10 The Committee considers it is not desirable to limit references to the Commission in any way to specific subject areas. What new reference the Commission takes on should undoubtedly be influenced by what references the Commission already has, and the urgency of the reference.

6.3.11 The Committee considers that the Commission should have a mix of medium term and long term projects which increases the possibility of the Commission having capacity to commence important projects as they arise.

6.3.12 The Committee believes that a set of definitive criteria is not appropriate and would be too limiting with the possibility of denying to government the flexibility in undertaking law reform. Systematic development of the law demands a sustained review of the policy. The scope of inquiry into reform should not be too narrowly drawn.

6.3.13 The Commission has demonstrated an ability and a capacity not enjoyed by other bodies to undertake difficult and long term projects.

Recommendation 22

The Committee recommends that there should be no restriction on the scope of references given to the Commission.

259 Premier of Queensland, *Submissions*, p. S249.

6.4 Annual work program

6.4.1 The ACS suggested the Commission should offer a consultancy review service to federal departments and agencies which would share the associated costs with the Commission.²⁶⁰ In effect this would mean that government departments could be identifying areas for review and proposing references.

6.4.2 The Commission suggests that the ACS proposal about consultancy work could be incorporated into an annual work program that it proposes should be included in its annual report.²⁶¹ The Commission and the Attorney-General's Department agree the Commission should prepare a work program to describe progress on current references and new references which the Commission proposes should be undertaken in the year to follow.²⁶² The Attorney-General should continue to make references as necessary and changes to the work program should be agreed between the Attorney-General and the Commission at the time a new reference is given.

6.4.3 A related proposal by the Commission is for the establishment of a law reform advisory committee.²⁶³ It is suggested as ensuring a more regular and orderly consideration of the allocation of law reform projects to the Commission. This proposal builds on a suggestion by Mr Glacken for a committee to help promote a more structured and systematic approach to law reform in a federal system.²⁶⁴

6.4.4 The Commission also suggests that as related measures, law reform should be a standing item on the agenda of the Standing

260 ACS, *Submissions*, p. S231.

261 ALRC, *Submissions*, pp. S360–S361.

262 ALRC and Attorney-General's Department joint submission, *Submissions*, pp. S508–S509.

263 Refer chapter 4 above.

264 S. Glacken, *Submissions*, p. S251.

Committee of Attorneys-General (SCAG), and the Attorney-General should advise the SCAG of that committee's views about how law reform projects should be allocated between federal agencies and the states and territories and how uniformity of laws should be achieved.

6.4.5 The Attorney-General's Department agrees on the underlying concept of broad consultation to identify subjects suitable for reference to the Commission.

Comments

6.4.6 As the Committee discusses in chapter 9, it does not believe a formal structure will assist the processing of law reform proposals. The Committee believes that the Commission should nevertheless undertake broad consultation to identify subjects suitable for future reference. These consultations should be reflected in its work program.

6.4.7 The Committee considers that a consultancy review service should only be included in terms of a formal references to the Commission. The Committee also considers that work plans will enhance the management and flow of the Commission's work.

6.4.8 As the Commission already collects and publishes information about law reform proposals and work in Australia, it should be well placed to prepare annual work plans.

Recommendation 23

The Committee recommends that the Commission should prepare an annual work plan.

Chapter 7

Amendments to the *Law Reform Commission Act 1973* and other legislation

*The Commission made numerous proposals for amendments to the Act and related legislation. In this chapter the Committee considers ten of the proposals that relate to administrative or machinery provisions as well as to drafting considerations. The other four suggestions are considered by the Committee elsewhere in the report.*²⁶⁵

*The proposals which were the subject of round table discussions in public hearing between the Commission, the Attorney-General's Department, the OPC and the Committee are considered below.*²⁶⁶

7.1 Modernisation of the format

7.1.1 The Commission proposed, and the Attorney-General's Department agreed that the Act be redrafted in accordance with modern drafting styles.²⁶⁷ The earlier proposed amendments did not contemplate substantive changes and included reorganising and renumbering provisions.²⁶⁸

Comments

7.1.2 The Committee supports modernisation of the Act and notes that the proposal does not contemplate amendments of a substantive nature. The appropriate time for the Commission to discuss its proposed changes

265 The proposal to include statutory provisions about the conduct of inquiries is considered in chapter 3 above. The two proposals to amend the Commission's statutory functions are considered in Chapter 4 above. The proposal about the president's ex-officio membership of the ARC is considered in Chapter 8 below.

266 *Transcript*, pp. 454–513.

267 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S512.

268 ALRC, *Submissions*, p. S160.

with the drafters is when instructions are given for substantive amendments to the Act.

Recommendation 24

The Committee recommends that the *Law Reform Commission Act 1973* be redrafted in accordance with modern drafting styles. The Commission should discuss modernisation proposals with the drafters when instructions are prepared for substantive amendments to the Act.

7.2 Deputy president

7.2.1 The Commission proposed, and the Attorney-General's Department agreed, that the Act be amended:

- to make it clear the deputy president is a member of the Commission;
- to enable persons who are not already members of the Commission to be appointed as deputy president and member, without first having to be appointed as a member;
- by replacing the provision that the deputy president can be removed at the discretion of the Governor-General, with standard conditions concerning the appointment and removal of statutory office holders;
- to make it clear that the deputy president is eligible for re-appointment;
- to enable the deputy president, or person otherwise exercising the powers of president, to act in the position of president; and

- to provide for the appointment of a member of the Commission as acting president when the president and deputy president are unavailable to act.²⁶⁹

Comments

7.2.2 The Committee accepts these proposals and notes that they concern machinery provisions and that the amendments clarify the position of the deputy president, and streamline the operations of the Commission.²⁷⁰

7.2.3 The Committee notes that there have been only two deputy presidents both of whom have been appointed in a situation where the president's term of office was about to expire, but had not been replaced. The Committee considers that, because of the significance of the position, if there is a deputy president, he or she should be a full-time member.

²⁶⁹ ALRC and Attorney-General's Department joint submission, *Submissions*, p. S512.

²⁷⁰ ALRC, *Submissions*, pp. S161–S162.

Recommendation 25

The Committee recommends that the Act be amended:

- to make it clear the deputy president is a member of the Commission;
- to enable persons who are not already members of the Commission to be appointed as deputy president and member, without first having to be appointed as a member;
- by replacing the provision that the deputy president can be removed at the discretion of the Governor-General, with standard conditions concerning the appointment and removal of statutory office holders;
- to make it clear that the deputy president is eligible for re-appointment;
- to enable the deputy president, or person otherwise exercising the powers of president, to act in the position of president; and
- to provide for the appointment of a member of the Commission as acting president when the president and deputy president are unavailable to act.

Recommendation 26

The Committee further recommends that if there is a deputy president, then he or she should be a full-time member.

7.3 Staff appointments

7.3.1 The Commission proposed, and the Attorney-General's Department agreed, that the Act be amended to allow for staff to be appointed under either the *Public Service Act 1922* or the *Law Reform Commission Act 1973*.²⁷¹ All staff are currently employed under sections 22 of the Act on terms and conditions set by the president with the approval of the Attorney-General. They do not have mobility to move to other federal agencies in the same way as public servants.²⁷²

7.3.2 At the round table discussions Mr Chris Sidoti said that in particular, the Commission's administrative staff would benefit from increased mobility.²⁷³

Comments

7.3.3 The Committee considers that giving the Commission power to appoint staff under either Act would protect the Commission's flexibility to appoint staff. The Committee considers that staff appointed under the Public Service Act would have increased mobility in their jobs, which would enhance staff morale and would not affect the independence of the Commission.

Recommendation 27

The Committee recommends that the *Law Reform Commission Act 1973* be amended to enable the president to appoint staff under either the *Public Service Act 1922* or the *Law Reform Commission Act 1973*.

271 ALRC and Attorney-General's Department, *Submissions*, p. S512.

272 ALRC, *Submissions*, p. S163.

273 *Transcript*, pp. 455–456.

Recommendation 28

The Committee further recommends that appointments under the *Law Reform Commission Act 1973* be made on terms and conditions determined by the Commission in consultation with the Public Service Commission.

7.4 Disclosure of interests

7.4.1 The Commission and the Attorney-General's Department agreed that members of the Commission should be required to disclose all relevant personal interests where they may conflict with the performance of their duties.²⁷⁴ The Commission originally made a proposal to amend the Act to include similar requirements made of the members of other statutory authorities.²⁷⁵

7.4.2 This was not a formal proposal of the Commission and the Attorney-General's Department because they believe proposed amendments to the *Audit Act 1901* might cover some of the same requirements.²⁷⁶

Comments

7.4.3 The Committee notes that this issue was raised by the Commission, and it is not considered by the Committee to be a significant problem, having regard to the nature of work done by the Commission.

274 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S518.

275 ALRC, *Submissions*, p. S163.

276 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S518.

7.4.4 The Committee considers that members of the Commission are at liberty to disclose their pecuniary and non-pecuniary personal interests where those interests may conflict with the performance of their duties. However, the Committee does not think it is necessary for this disclosure to be required in legislation.

7.5 Consultants

7.5.1 The Commission proposed, and the Attorney-General's Department agreed, that the Act should be amended to enable the Commission, rather than the president or the Attorney-General to appoint consultants.²⁷⁷

7.5.2 The Commission acknowledged that the current arrangement worked well but argued that it should have a power similar to that of other statutory authorities.²⁷⁸

Comments

7.5.3 The Committee notes that the Attorney-General has delegated this power to the Attorney-General's Department and considers that the proposal would not represent a diminishing of the importance of the role of the consultant.²⁷⁹

Recommendation 29

The Committee recommends that the *Law Reform Commission Act 1973* be amended to enable the Commission to appoint consultants.

277 ALRC and Attorney-General's Department, *Submissions*, p. S513.

278 ALRC, *Submissions*, p. S164.

279 Attorney-General's Department, *Submissions*, p. S317.

7.6 Delegations

7.6.1 The Commission and the Attorney-General's Department proposed that the Act be amended to confer chief officer powers on the president of the Commission, or any person acting in that position, and to ensure that such powers can be delegated to members of staff of the Commission. The Commission also proposed that other powers such as the establishment of divisions should be conferred on the Commission, and that the Act should make appropriate provision for their exercise by a member or members of the Commission as delegate of the Commission.²⁸⁰

Comments

7.6.2 The Committee notes that the absence of such powers of delegation is in part a reflection of the age of the Act.²⁸¹

7.6.3 The Committee considers that the chief officer powers of the Commission should be conferred on the president. The Committee also considers that the powers presently conferred on the president ought to be conferred on the Commission, and there should be provision for the delegation of powers of the Commission to the members and the most senior staff member.

7.6.4 The Committee considers that these measures would promote flexibility and continuity in the operations of the Commission especially when the president is not available.

280 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S513.

281 *Transcript*, pp. 480–482.

Recommendation 30

The Committee recommends that the *Law Reform Commission Act 1973* be amended to confer chief officer powers on the president, or any person acting in that position, and to enable such powers to be delegated to members of the Commission, or to the most senior staff member. The Committee further recommends that the president's other powers should be conferred on the Commission and that the Act be amended to make provision for a member of the Commission to exercise those powers as delegate of the Commission.

7.7 Immunity from civil action

7.7.1 The Commission proposed, and the Attorney-General's Department agreed, that the Act be amended to give members and staff of the Commission immunity from civil action – similar to that provided in the *Human Rights and Equal Opportunity Commission Act* – the cause of which necessarily or reasonably arises in the ordinary course of duties being undertaken for the Commission.²⁸²

Comments

7.7.2 The Committee notes that the members and staff of other statutory authorities have similar immunity, and considers the proposal should be accepted.²⁸³

282 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S513.

283 ALRC, *Submissions*, p. S167 and *Transcript*, pp. 487–488.

Recommendation 31

The Committee recommends that the *Law Reform Commission Act 1973* be amended to give members and staff of the Commission immunity from civil action the cause of which necessarily or reasonably arises in the ordinary course of duties being honestly undertaken for the Commission.

7.8 Principal officer

7.8.1 The Commission proposed, and the Attorney-General's Department agreed, that the *Freedom of Information (Miscellaneous Provisions) Regulations* Schedule 2, be amended to record the president as the Commission's 'principal officer'.²⁸⁴

7.8.2 This proposal is intended to give effect to the recent corporate restructure in which the position of Secretary and Director of Research was abolished.²⁸⁵

Comments

7.8.3 The Committee considers that in light of its strong preference discussed in chapter 5 to reinstate the position of Secretary and Director of Research, this proposal should not be adopted.

284 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S513.

285 ALRC, *Submissions*, p. S169.

7.9 Monetary value of contracts

7.9.1 The Commission proposed, and the Attorney-General's Department agreed, that the Commission's expenditure limit without the Attorney-General's approval be increased from \$100,000 to \$250,000.²⁸⁶

7.9.2 The Commission originally proposed that the expenditure limit be removed because other statutory authorities did not have such a limit.²⁸⁷ The Attorney-General's Department was not in favour of removing the limit²⁸⁸ and Mr Skehill suggested that an extended limit to \$200-250,000 would be more appropriate.²⁸⁹

Comments

7.9.3 The Committee notes that a similar limit is included in the *Federal Court Act 1976* and considers that the proposed expenditure limit of \$250,000 without the express authority of the Attorney-General is reasonable.

Recommendation 32

The Committee recommends that the *Law Reform Commission Act 1973* be amended to increase the Commission's expenditure limit without the Attorney-General's approval to \$250,000.

286 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S514.

287 ALRC, *Submissions*, p. S169.

288 Attorney-General's Department, *Submissions*, p. S318.

289 *Transcript*, p. 491.

7.10 Annual Report

7.10.1 The Commission and the Attorney-General's Department agreed that the Commission be required by statute to submit an annual report to Parliament, irrespective of whether the requirement is under its own Act, the *Audit Act 1901* or any replacement Act.²⁹⁰

Comments

7.10.2 The Committee notes that the Commission has always made an annual report to the Attorney-General and that it would like to formalise this practice.²⁹¹ The Committee considers that not only do the annual reports of the Commission contain very useful information but that it is appropriate for the Commission to continue to provide an annual report.

Recommendation 33

The Committee recommends that the Commission be required by statute to submit an annual report to parliament.

290 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S518.

291 *Transcripts*, p. 487.

Chapter 8

Relationships between the Commission and other federal bodies

This chapter examines the roles of some of the statutory and non-statutory bodies which advise the federal government. After considering the relationship each has with the Commission, the Committee concludes that the Administrative Review Council, the Companies and Securities Advisory Committee and the Family Law Council have distinctive roles and should continue as separate bodies.

However, the Commission should develop mechanisms to foster cooperation including, where relevant, joint projects. Duplication should be avoided and better communication promoted.

The Copyright Law Review Committee is not resourced sufficiently well to enable it to function effectively as an independent body. Because of the increasing value to Australia of expertise on copyright law, this body should be strengthened and adequately resourced.

The relationship between the Commission and the Attorney-General's Department, while sound, could be put on a better footing by encouraging more regular contact. The Commission should have formal discussions with the Attorney-General on a quarterly basis.

The relationship between the Commission and the Office of Parliamentary Counsel is defined largely by the issue of legislative drafting in Commission reports. The relationship can be improved by formalising the structure of consultation on legislative drafting.

8.0.1 Since the establishment of the Commission in 1975 a number of other statutory and non-statutory bodies which advise the government on law reform have been established. Several submissions noted the range of advisory agencies and commented on the extent of liaison which should exist between them.

8.0.2 The Commission does not specialise in a specific area of law. It describes itself as a generalist law reform body and refers to the list of current references as an indicator of its broad range of operations.²⁹²

8.0.3 By comparison, the names of four bodies mentioned in the terms of reference indicate the narrow focus on specialist subject matters that those bodies deal with: the Administrative Review Council (ARC), the Companies and Securities Advisory Committee (CASAC), the Copyright Law Review Committee (CLRC) and the Family Law Council (FLC).

8.0.4 Many submissions, including those from the advisory bodies, focus on the distinctions between them and the Commission. For example, one distinction between the Commission and some of the other advisory bodies is the role of research in each organisation's operations. The Family Law Council stressed its function as an advisory body rather than a research organisation. It saw the Commission's role as a research body.²⁹³ That is, it was able to conduct research and provide advice of a detailed nature. The advice the FLC provided was described as 'specialist advice at a policy level'.²⁹⁴

8.0.5 While each of these bodies comes within the Attorney-General's portfolio, each has its own separate reporting relationship with the Attorney-General or the Minister for Justice.

8.1 Specialist law advisory bodies

A. Administrative Review Council

8.1.1 The ARC is a statutory authority established by the *Administrative Appeals Tribunal Act 1975*. Its role is to provide policy

292 ALRC, *Submissions*, p. S149.

293 FLC, *Submissions*, p. S106.

294 *ibid*, p. S108.

advice to the Minister for Justice on strategic and operational issues affecting Commonwealth administrative decision-making processes, particularly processes for the review of government decisions.

8.1.2 The ARC is responsible for the broad oversight of Australia's administrative review system – the Administrative Appeals Tribunal, the Ombudsman and the Federal Court's jurisdiction to review administrative action. The ARC further states that:

It is also responsible for the general oversight of a number of specialist tribunals. As part of this role, the ARC seeks to facilitate the work of all administrative review bodies at the Commonwealth level by assisting them to cooperate in a principled, coordinated and cost-effective way.²⁹⁵

8.1.3 The ARC has a separate secretariat based in Canberra which is staffed by officers of the Attorney-General's Department.

B. Companies and Securities Advisory Committee

8.1.4 The CASAC is a statutory authority established by the *Australian Securities Commission Act 1989* (the ASC Act). It was formed in September 1989 and is the newest of this group of advisory bodies. CASAC is comprised of part-time members appointed by the federal Attorney-General and is supported by a separate secretariat based in Sydney.

8.1.5 CASAC's role is to provide advice to the Attorney-General about any matters connected with companies, securities or the futures industry or a national scheme law including law reform in relation to a national scheme law.²⁹⁶ Like the ARC, the CASAC may provide advice as it determines the need. CASAC states that:

In fulfilling these functions, the Advisory Committee seeks to stimulate and lead the debate on the enhancement of the standards for

²⁹⁵ ARC, *Submissions*, p. S184.

²⁹⁶ Section 148 of the ASC Act.

corporations and participants in public markets, and propose suitable regulatory reform where necessary'.²⁹⁷

C. Copyright Law Review Committee

8.1.6 The CLRC was established administratively in 1983 by the Attorney-General and is the only non-statutory body in this group of advisory bodies. Its role is to advise the Minister for Justice on specific copyright matters referred to it from time to time. Unlike the ARC, CASAC and the FLC, but like the Commission, it does not provide short term advice nor does it have an express power to initiate the advice it provides.

8.1.7 The members are all part-time as is the secretariat support, which is provided by the Attorney-General's Department in Canberra 'as required'.²⁹⁸ The members come from Brisbane, Canberra, Melbourne, Perth and Sydney.²⁹⁹

D. Family Law Council

8.1.8 The FLC is a statutory authority established by the *Family Law Act 1975*. Its role is to provide policy advice to the Attorney-General concerning legislation relating to family law, legal aid in relation to family law and any other matter relating to family law.

8.1.9 Like the ARC and CASAC, the FLC's advice and recommendations to the Attorney-General may be either of its own motion or upon request made to it by the Attorney-General.³⁰⁰ It has a separate secretariat based in Canberra and staffed by officers of the Attorney-General's Department co-located within the Family and Administrative Law Branch.

297 CASAC, *Submissions*, p. S274.

298 Attorney-General's Department, *Submissions*, p. S314.

299 CLRC, *Submissions*, p. S80.

300 FLC, *Submissions*, p. S100.

8.2 The Commission's relationships with the specialist law advisory bodies

8.2.1 The Commission's relationships with the specialist bodies may be considered from two points of view. First, the Commission has a real working relationship with some bodies. With others, it has a potential relationship although it has no actual contact.

8.2.2 As there is an overlap of the subjects on which the Commission and each of these specialist law advisory bodies may provide advice, there is scope for wasteful duplication of effort. However, in most cases there are mechanisms in place that are designed to minimise duplication.

8.2.3 There is an ongoing statutory relationship between the ARC and the Commission because the president of the Commission is an ex officio member of the ARC. This supports a working relationship in which the ARC has provided advice to the Commission on administrative law matters arising under law reform references.

8.2.4 The ARC and the Commission are currently working together on the review of programs administered by the Department of Human Services and Health. The ARC is reviewing the administrative law aspects of the funding programs and developing administrative law principles for the Commission to incorporate in its review of the legislation.

8.2.5 The ARC and the Commission defined their respective responsibilities at the beginning and are continuing consultations to ensure a successful working relationship on the project.³⁰¹

301 ARC, *Submissions*, p. S185.

8.2.6 Although there is no statutory provision to underpin a working relationship, the Commission and the CASAC recently completed a joint review of the regulatory framework for collective investment schemes. The joint review published an issues paper, two discussion papers and two reports. The recommendations were settled through negotiation and dissenting views were recorded.³⁰² This inquiry combined the market oriented knowledge of CASAC with the law reform methodology, expertise and resources of the Commission.

8.2.7 CASAC was 'most satisfied with the conduct and outcomes'³⁰³ of the project and the work produced was favourably commented upon by many in the business community.³⁰⁴ The methodology and conduct of the inquiry also were generally commented on favourably, although the inquiry attracted some criticism.³⁰⁵

8.2.8 Although it is not a statutory relationship, the Commission has observer status on the FLC, and consults the FLC in relation to family law aspects of Commission references.³⁰⁶ The Commission and the FLC are engaged in a joint study of intractable access applications in the Family Court, and work on this project is continuing under an agreed protocol for the initiation and conduct of joint projects.³⁰⁷

8.3 Independence of the law advisory bodies

8.3.1 While the terms of reference do not specifically raise the possibility of amalgamation of the law advisory bodies with the Commission, many submissions addressed this prospect. Submissions argued both for and

302 CASAC, *Submissions*, p. S270.

303 CASAC, *Submissions*, p. S269.

304 ALRC, *Submissions*, p. S149.

305 D. Blyth, *Transcript*, p. 128; and A. Duggan, *Transcript*, p. 154.

306 FLC, *Submissions*, p. S107.

307 FLC, *Submissions*, pp. S122-S123.

against some form of amalgamation. There were suggestions made to the Committee that there would be benefits in merging the Commission and some of these bodies³⁰⁸ including the suggestion that their existence 'substantially reduced the public benefit of a permanent and separate Law Reform Commission'.³⁰⁹

8.3.2 The weight of the evidence was against bringing any of the advisory bodies into the Commission. In particular none of the bodies specified in the terms of reference proposed that they be amalgamated and most offered sound reasons why they should continue as separate bodies.

8.3.3 The ARC argued that the roles of the Commission and itself are very different and should be maintained separately.³¹⁰ The Commission reviews the law on a one-off project basis, whereas the ARC has ongoing responsibility for the operation of the administrative law system. The Commission undertakes long term reviews only after matters have been referred by the Attorney-General, whereas the ARC often provides quick advice on current matters which may be self initiated. The ARC believes the capacity to provide such advice may be adversely affected if the two were amalgamated.

8.3.4 The CASAC argued against being absorbed into the Commission because the ability to provide timely advice to the Attorney-General on commercial matters could be seriously compromised and the utility of the CASAC undermined.³¹¹

308 J. Goldring, *Submissions*, p. S6, (in relation to the FLC, CLRC, and CASAC); Law Council of Australia, *Submissions*, p. S200 (in relation to expanding the ALRC's role to give it responsibility for law reform in the intellectual property area) and Australian Customs Service, *Submissions*, p. S236.

309 BCA, *Submissions*, p. S194.

310 ARC, *Submissions*, p. S84.

311 CASAC, *Submissions*, p. S272.

8.3.5 The FLC argued against being amalgamated with the Commission as their roles are distinct and the FLC is already working economically, effectively and efficiently.³¹² It believes the government would lose the capacity to obtain speedy and representative advice on family law because its members have highly specialised knowledge.³¹³ The FLC does not undertake large research projects and considers the Commission to be qualified to undertake substantive research and to provide advice of a more detailed nature.³¹⁴

8.3.6 The FLC further argues that it would not be cost effective to amalgamate it with the Commission because of its current convenient secretariat arrangements. It considers that there are useful and adequate mechanisms both to avoid wasteful duplication of effort and to foster cooperative work between them.

8.3.7 The Attorney-General's Department argued³¹⁵ that each of the ARC and the FLC operates within so discrete and important an area of speciality that it would not be desirable to subsume that role within a wider generalist law reform body. There would not be a significant economy

8.3.8 The evidence from the Commission itself did not support its amalgamation with these agencies.³¹⁶ It considers that each provides a different type of advice to Government. However, it also considered that each of the bodies and the Commission would benefit from improved mechanisms for communication, and, where relevant, closer working relationships.

312 FLC, *Submissions*, pp. S108–S109.

313 FLC, *Submissions*, p. S111.

314 FLC, *Submissions*, p. S106.

315 Attorney-General's Department, *Submissions*, p. S313.

316 ALRC, *Submissions*, p. S342.

8.3.9 The different working methods of the advisory bodies, when compared with the Commission, contribute to the successful fulfilling of their different functions. Mr Stephen Mason considered that these bodies attract professional and community input and respond quickly to government requests because they are not expected to work out the full detail of their proposals.³¹⁷

8.3.10 The CLRC is one of those bodies with a potential rather than a working relationship with the Commission. It considers that there has been a high level of acceptance of its recommendations by both the government and those with interests in copyright.³¹⁸ The CLRC has nevertheless identified two problems, both stemming from a lack of adequate resources with which to fulfil its functions.³¹⁹ The first is its inability to produce research papers because of a lack of continuous research resources. The second is the perceived lack of continuity in the performance of its work because its members and staff are part-time.

8.3.11 These concerns have been echoed in the arguments of the Intellectual Property Committee of the Law Council of Australia.³²⁰ The Law Council argued that the consequences of the resource problem are that the CLRC has taken too long to complete one inquiry and there has been little opportunity to consider wider policy issues in another inquiry. The Law Council of Australia advocates the incorporation of the CLRC within the Commission because of the need for a 'single and coherent means for dealing with intellectual property reform issues'³²¹.

8.3.12 The Australian Copyright Council shares these concerns about the CLRC's lack of resources. It considers that the CLRC would benefit

317 S. Mason, *Submissions*, p. S301.

318 CLRC, *Submissions*, pp. S81–S82.

319 CLRC, *Submissions*, pp. S81–S82.

320 Intellectual Property Committee of the Law Council of Australia, *Submissions*, p. S207.

321 Law Council of Australia, *Submissions*, p. S209.

from increased research and advisory assistance of the kind provided at the Commission.³²²

8.3.13 In more general comments about the development of law in the area of intellectual property, the Law Council expressed concern about the fragmented nature of law reform and the proliferation of bodies and persons involved in the preparation of such law reform proposals.³²³ The result of this has been that reform has been frequently drawn out over a long period of time and proposals have lacked wide general support because of the perceived lack of appropriate consultation.³²⁴

8.3.14 While the Commission expressly addresses and rejects amalgamation with any of the specialist bodies it does consider there would be merit in joint projects.³²⁵

8.3.15 Professor David Weisbrot, a former commissioner with the NSWLRC, considers the Commission is particularly suited to continued involvement in joint projects because of its multi-disciplinary approach.³²⁶

Comments

8.3.16 The Committee believes that there is value in providing a range and diversity of advice to the government. The Commission should not therefore be amalgamated with or assume the functions of the ARC, the CASAC, the FLC or the CLRC. These specialist bodies can perform the law reform aspects of their operations all the better because of their specialisation and the support they receive from experts in their fields.

322 Australian Copyright Council, *Submissions*, p. S499.

323 Law Council of Australia, *Submissions*, p. S206.

324 *ibid.*, p. S207.

325 ALRC, *Submissions*, p. S343.

326 *Transcripts*, p. 347.

Recommendation 34

The Committee recommends that the Commission should develop and maintain mechanisms to avoid wasteful duplication of effort and to foster cooperative work with the Administrative Review Council, the Companies and Securities Advisory Committee, the Family Law Council and the Copyright Law Review Committee.

Recommendation 35

The Committee recommends that there should be joint projects between the Commission and any of the Administrative Review Council, the Companies and Securities Advisory Committee, the Family Law Council and the Copyright Law Review Committee where it is likely that cooperation will result in better recommendations due to the study being jointly conducted. The relationship between the Commission and the other participating bodies should be defined at the time the reference is given.

8.3.17 Minor adjustments are needed to further enhance the relationship between the Commission and particular bodies. For example, the Committee considers it undesirable that the relationship between the ARC and the Commission should be disturbed because the office of president is vacant or the president is not available.

Recommendation 36

The Committee recommends that the *Law Reform Commission Act 1973* and/or the *Administrative Appeals Tribunal Act 1975* be amended to allow a person otherwise exercising the powers of the president of the Commission to act as ex officio member of the Administrative Review Council when the office of the president is vacant or when the president is not available.

8.3.18 The situation with the CLRC must be distinguished from that of the other bodies. Evidence showed that the CLRC is suffering from a severe shortage of resources. The current chairman, Justice Ian Sheppard, carries out his CLRC obligations on a part-time basis, supported by part-time committee members and part-time staff.³²⁷ The Committee believes that the CLRC cannot continue to rely on goodwill.

8.3.19 The Committee recognises the importance of the area of copyright law and considers that the work performed by the CLRC is too important to be delayed by inadequate research and administrative resources. Having regard to both the importance of its work and the increasing demands being made on the CLRC, the Committee gave serious consideration to whether amalgamation of the CLRC with the Commission was the best way to provide the former with the research support it needs.

8.3.20 Having studied the matter, the Committee is convinced that this option would not be in the best interests of the development and reform of copyright law. Instead, the CLRC should be adequately resourced as a matter of urgency.

³²⁷ He is a judge of the Federal Court of Australia.

8.3.21 The Committee considers that copyright law is not the only area of intellectual property law which needs attention. Consideration should be given to not only expanding the resources of the CLRC, but to also expanding its area of interest.

8.3.22 The Committee is not able to describe what resources would be adequate for the support of the CLRC, although a full-time secretariat would seem to be a minimum requirement. The most suitable staffing and financial support for the CLRC should be studied by a working group established for that purpose by the Attorney-General.

Recommendation 37

The Committee recommends that the Copyright Law Review Committee be adequately resourced in order to fulfil its functions. The most suitable level of resourcing should be determined by a working group, established by the Attorney-General. The working group should include at least one member of the CLRC, and the scope of its inquiry should include an examination of the possible expansion of the role of the CLRC to include other areas of intellectual property.

8.4 Relationships of the Commission with the legislative drafters and the Attorney-General's Department

A. Attorney-General's Department

8.4.1 The role of the Attorney-General's Department in relation to the Commission is that the Department assists the Attorney-General in the administration of the Act and provides advice on³²⁸:

- appointments to the Commission;
- references to the Commission;

328 Attorney-General's Department, *Submissions*, p. S308.

- the need for amendment to the Act;
- the effectiveness of the Commission's performance of its role and function; and
- the financial and other resource needs of the Commission.

8.4.2 The Attorney-General's Department also advises the Attorney-General on the recommendations of the Commission which relate to matters of substantive law within the portfolio authority of the Attorney-General.

8.4.3 Senior officers of the Attorney-General's Department discuss proposals for references with the members of the Commission before recommending to the Attorney-General that he make a particular reference to the Commission.³²⁹ It has provided consultants to work on particular references and holds frequent meetings with members and staff of the Commission.

8.4.4 The Attorney-General's Department seeks to build 'an open and effective relationship built on frank communication'.³³⁰

Comments

8.4.5 Although evidence on the relationship between the Attorney-General's Department and the Commission is scant, it appears that the relationship is sound and that the intention of the Commission's founders to empower it with reasonable operational independence has been honoured. Indirect evidence suggests that earlier Presidents may have enjoyed closer day-to-day relationships with past Attorney-Generals, than those in more recent times. While recognising that personalities are always a factor in working relationships, this probably reflects the ever-widening range of responsibilities of the Attorney-

329 An amendment was moved to the original Bill to permit suggestions about references to be made by the Commission.

330 Attorney-General's Department, *Submissions*, p. S308.

General. The Committee considers that a regular formal meeting between the Attorney-General and the Commission, held, say quarterly, would ensure that the lines of communication are well maintained.

B. Drafting legislation³³¹

8.4.6 References to the Commission usually include a request that draft legislation be prepared with the final report. When the Government accepts a Commission report any draft legislation, including drafts that are part of the report, will need to be prepared for introduction into Parliament. Together the Office of Legislative Drafting (OLD) and the Office of Parliamentary Counsel (OPC) provide specialist drafting services for federal legislation.

Office of Legislative Drafting

8.4.7 The Office of Legislative Drafting (OLD) is part of the Attorney-General's Department. It provides drafting services for subordinate legislation such as regulations, the ordinances of Australia's non-self governing territories and the wide variety of other legislative instruments made under federal Acts.

8.4.8 The Commission does not often provide draft regulations, so the OLD has not had much need to work with Commission drafts.

Office of Parliamentary Counsel

8.4.9 The Office of Parliamentary Counsel (OPC) is a statutory authority established by the *Parliamentary Counsel Act 1970* to draft legislation for introduction into Parliament, to draft amendments of proposed laws that are being considered by Parliament and to perform functions incidental to such drafting.

³³¹ The issue of draft legislation arises elsewhere in this report in the context of examining the effectiveness of the Commission in performing its functions – refer chapter 3.

8.4.10 OPC feels the quality of Commission draft Bills it has worked with has varied considerably, and states that it has had to rework draft Bills both to give effect to any policy differences between the Commission's report and the government's decision³³² and to overcome 'drafting infelicities'.³³³

8.4.11 OPC argues³³⁴ that the Commission should not produce draft Bills because:

- a focus on draft legislation distracts the Commission from its major function of determining policy;
- the Commission does not have adequate access to the services of skilled drafters;
- the use of consultant drafters by the Commission is an inefficient use of Commonwealth resources;
- there can be substantial difficulties in preparing Commission Bills for introduction into Parliament.

8.4.12 On a similar line of argument, the Attorney-General's Department argued that even where recommendations have been adopted, Commission draft Bills have not been enacted because of significant differences in drafting style between OPC and the Commission.³³⁵ The Department viewed this checking step as an inefficient duplication in drafting effort.

Draft Bills as a part of reports

8.4.13 OPC argued that if a policy does not have government support, a draft Bill represents a waste of resources.³³⁶ Other relevant issues are the quality of the drafting and the extra time taken in producing a report.

332 OPC, *Submission*, p. S134.

333 OPC, *Submissions*, p. S135.

334 OPC, *Submissions*, p. S131.

335 Attorney-General's Department, *Submissions*, p. S312.

336 OPC, *Submissions*, p. S134.

8.4.14 The Australian Customs Service (ACS) took an interest in this matter because its principal legislation was referred to the Commission in 1987. Reports arising from the reference and including draft legislation, were tabled in 1992. The ACS does not support the inclusion of draft legislation in Commission reports.³³⁷

8.4.15 In a current project involving the legislation administered by the Department of Human Services and Health, the aim of the project is to develop from a considerable number of current pieces of legislation, five main Acts drafted in a plain language style. The terms of reference require the Commission to work with OPC. The Commission is to provide drafting instructions for Bills to OPC who will draft these Bills as a normal part of its workload.³³⁸ The Bills will have the priority assigned to them by the Parliamentary Business Committee.

Who should draft Bills for Commission reports

8.4.16 The Commission is firmly in favour of having a role in the drafting process to ensure the policy developed is 'sound and practical'.³³⁹ The Commission argues that it is significant that OPC has indicated that resource constraints may prevent OPC from being able to allocate resources to drafting for the Commission within the time frame required by the terms of reference.³⁴⁰ The Commission feels that it must have the option of playing an active role in the drafting process because if it were relying on OPC:

This would put the Commission in a situation where none of its reports would be able to append draft legislation. This may jeopardise the chances of Commission's reports being implemented.

337 ACS, *Submissions*, p. S234.

338 OPC, *Submissions*, p. S501.

339 ALRC, *Submissions*, p. S382.

340 H. Penfold, *Transcripts*, p. 471; and OPC, *Submissions*, p. S502.

8.4.17 Consequently the Commission proposed that it should be involved in the drafting process and its role should be determined at the start of a reference.³⁴¹ It thought a mechanism should be developed to enable it to work with OPC to produce the drafts.

8.4.18 The Attorney-General's Department proposes that OPC or a consultant drafter approved by OPC should undertake the legislative drafting³⁴². The Commission accepts, apparently with some reservation, that 'that should occur whenever possible'.³⁴³ If the Commission is less than whole-hearted about this proposal, its reserve is understandable. It may not always be possible or appropriate to engage a consultant drafter approved by OPC. In the Committee's opinion, any requirement to do so might have the potential to undermine the Commission's independence.

Comments

8.4.19 The evidence presented to the Committee during its inquiry into clearer Commonwealth law, suggested that specialisation in drafting is desirable in the interests of better quality drafting and in making the best use of specialist drafting resources.³⁴⁴

8.4.20 Expense is also a consideration if the alternative is a drafting specialist in private practice. OPC noted that consultants might be two to nine times as expensive as federal government drafters.³⁴⁵

8.4.21 While the specialised nature of legislative drafting was emphasised during the inquiry, the Committee was confronted with a

341 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S511.

342 *ibid.*

343 *ibid.*

344 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Clearer Commonwealth Law*, 1993, AGPS Canberra.

345 OPC, *Submissions*, p. S134.

majority of evidence which argued that the process of drafting legislation helped focus the policy and ensure the detail was developed in a way that resulted in a more complete report.

8.4.22 The Hon Xavier Connor put the case in this way:

... it has occurred over and over again that the reduction of law reform proposals to a legislative format has demonstrated inadequacies in the proposals. Consequently the presence of an in-house drafting service is invaluable.³⁴⁶

8.4.23 This is an area where compromise is needed to achieve the best results. The Committee considers that the Commission should continue to include draft legislation where appropriate but that the specialist drafters of OPC should provide the service of drafting wherever possible.

Recommendation 38

The Committee recommends that where draft legislation is either requested in the terms of reference, or is required by the Commission for whatever purpose, the Commission should, at an early stage in the inquiry process and in the first instance, have discussions with the Office of Parliamentary Counsel to determine resource availability. Where OPC indicates that it will not be able to meet the Commission's drafting needs in a timely manner, the Commission should be at liberty to make whatever drafting arrangements that it thinks suitable.

This practice should also be followed for subordinate legislation, in which case the Office of Legislative Drafting should provide the drafting resources necessary.

346 X. Connor, *Submissions*, p. S240.

Chapter 9

Relationships between the Commission and state and territory law reform bodies

The Commission has much to gain by cooperation with the other law reform bodies in Australia, as a learner, a teacher and a partner in joint projects. In considering the optimum role and function of the Commission, the Committee decided to seek evidence on the relationships between the Commission and its state and territory equivalents. This chapter examines the joint projects and the working relationships between the Commission and those bodies. It considers proposals for the further development of cooperation between the Commission and the state and territory law reform bodies.

9.1 Background

9.1.1 When the Commission was established there was a clear intention that the role of the national law reform body would address the commonwealth and state relationships in legal issues.

9.1.2 Since the Commission commenced operations in 1975 there have been changes in the form and status of State and Territory law reform bodies. There have however been regular meetings of Australian law reform bodies since 1974 at the Australasian Law Reform Agencies Conference (ALRAC). At present the conference meets biennially. Proposals discussed at these meetings often result in joint projects being undertaken by the members.

9.1.3 From 1 January 1976 the Standing Committee of Attorneys-General assigned³⁴⁷ a clearing house function to the Commission for the compilation and distribution of an official list of work carried out or

³⁴⁷ Prior to this the law reform body in Western Australia performed this function. See ALRC 3, *Annual Report 1975*, p. 36.

being carried out by all law reform agencies in Australia and New Zealand.³⁴⁸

9.1.4 The Commission considers that one of its non-statutory functions is to promote uniformity of law throughout Australia and to reduce duplication of law reform effort. It does so by:

- undertaking joint projects with state and territory bodies;
- consulting relevant state and territory bodies to ensure wide support for its proposals; and
- developing comprehensive laws which can serve as model laws for the states and territories.³⁴⁹

9.1.5 The Commission considers that there should be greater emphasis on promoting joint projects between the Commission and other Commonwealth bodies and between the Commission and state and territory law reform bodies,

. . . especially where the aim is to harmonise the laws of the Commonwealth, States and Territories and where it is evident that cooperation will result in better recommendations due to involvement by experts with a variety of necessary skills and knowledge.³⁵⁰

9.2 Law reform structures in Australian states and territories³⁵¹

A. Australian Capital Territory

9.2.1 The ACT Community Law Reform Committee is a ministerial committee and was established in March 1990, in the second year of self government in the ACT. The ACT Committee reports to the ACT government on formal references for law reform and identifies areas in

³⁴⁸ ALRC 3, *Annual Report 1975*, p. 37.

³⁴⁹ ALRC, *Submissions*, p. S23.

³⁵⁰ ALRC, *Submissions*, p. S507; See also S. Tongue, *Transcript*, p. 497.

³⁵¹ For more detail than is included in this report refer to: ALRC, *Submissions*, p. S429–S439.

need of review or reform, anticipates emerging social-legal issues and assesses the practical impact of various proposals and laws on the people of the ACT. The ACT government has recently agreed to give statutory recognition to the ACT Committee.

B. New South Wales

9.2.2 The New South Wales Law Reform Commission (NSWLRC) commenced operations on 1 January 1966, and in September 1967 became an independent statutory authority constituted under the (NSW) *Law Reform Commission Act 1967*.

9.2.3 The NSWLRC is the oldest continuing full-time commission in Australia. It receives references from, and reports to, the NSW Attorney-General.

C. Northern Territory

9.2.4 The Northern Territory Law Reform Committee (NTLRC) was established in 1976. It is an independent non-statutory standing committee of honorary members governed by a written constitution which was last revised in November 1992.

9.2.5 The NTLRC receives references from, and reports to, the NT Attorney-General.

D. Queensland

9.2.6 The Law Reform Commission of Queensland (QLRC) is an independent statutory authority constituted under the (Qld) *Law Reform Commission Act 1968*. Amendments to that Act in 1972 provided for the appointment of full-time members.

9.2.7 The QLRC reports to the Queensland Attorney-General. The work of the QLRC is directed to the simplification and modernisation of the law, with a focus on codification.

E. South Australia

9.2.8 There is today no separate government based law reform body in South Australia. The former Law Reform Committee of South Australia established by Proclamation in 1968, made its last report to the South Australian Attorney-General in 1987.

9.2.9 The Law Society of South Australia, law teaching universities in South Australia, the Legal Services Commission of South Australia, community centres and other community based groups make proposals for law reform that are usually focussed narrowly on current practical problems.³⁵² Research papers prepared by the Department of Justice are not often made available for comment before legislation is introduced into parliament.³⁵³

F. Tasmania

9.2.10 The Office of the Law Reform Commissioner of Tasmania (TLRC) was established by the (Tas) *Law Reform Commissioner Act 1988*.

9.2.11 The TLRC reports to the Tasmanian Attorney-General on its standing references on criminal law and procedure and civil procedure as well as ad hoc references from the Tasmanian Attorney-General.

G. Victoria

9.2.12 Several bodies now contribute to law reform in Victoria:

- Law Reform Committee, a joint parliamentary committee established in November 1992;
- Scrutiny of Acts and Regulations Committee;
- Victoria Law Foundation;

³⁵² Law Society of South Australia, *Submissions*, p. S179.

³⁵³ *ibid.*

- experts appointed as temporary law reform commissioners for particular inquiries, and
- Law Reform Advisory Council.

9.2.13 The Chief Justice of Victoria is the chair of both the Law Foundation and the Law Reform Advisory Council. However there are no formal linkages with the Law Reform Committee.

9.2.14 The current structure replaces a statutory authority which was established in 1985 and dissolved by the Victorian Parliament in 1992.

H. Western Australia

9.2.15 The Law Reform Commission of Western Australia (WALRC) was established by the (WA) *Law Reform Commission Act 1972*.

9.2.16 The WALRC receives references from, and reports to, the WA Attorney-General.

9.3 Joint projects and cooperation

9.3.1 The Commission argued that there is 'great merit in joint projects' with state and territory law reform agencies.³⁵⁴ It has been involved in several joint projects with state law reform commissions.

A. Product liability

9.3.2 This project involved the Commission, the NSWLRC and the then Victorian Law Reform Commission (VLRC) and resulted in a joint report. The Commission notes that the recommendations contained in the report are now being followed in the European Community.³⁵⁵

354 ALRC, *Submissions*, p. S345.

355 ALRC, *Submissions*, p. S 343.

9.3.3 This inquiry was criticised by the Business Council of Australia (BCA).³⁵⁶

B. Personal property securities

9.3.4 The personal property securities project – the Commission, the VLRC, the NSWLRC, the QLRC – did not achieve the same degree of accord. The Commission and the NSWLRC published a joint discussion paper and the QLRC and the VLRC issued their own joint discussion paper. The Commission produced an interim report and remains willing to consult with the remaining state bodies with a view to issuing a joint final report.

9.3.5 The NSWLRC considered that further consultation with relevant interest groups was needed as well as detailed analysis of the Commission's proposals.³⁵⁷ It stated that the QLRC and the NSWLRC will reassess the project in 1994.

9.3.6 This project was the target of some criticism in submissions and at public hearings.³⁵⁸ The QLRC expressly endorsed the adverse comments of Professor Anthony Duggan and Mr Simon Begg³⁵⁹. It argued that the Commission's approach to the placement of the legislative provisions in the Corporations Law had the effect that 'the role of the Commission was not as a facilitator of law reform, but as an advocate for an increase in Commonwealth power'³⁶⁰.

9.3.7 This reference illustrates the difficulties for a law reform commission in working on references with a potential to invoke

356 The details of the BCA's criticisms are in chapter 3.

357 NSWLRC, *Submissions*, pp. S493–S494.

358 This criticism is discussed in chapter 3.

359 QLRC, *Submissions*, p. S497.

360 QLRC, *Submissions*, p. S497.

commonwealth/state arguments and sensitivities. The Commission's objectivity will always be tested in such references. The Premier of Western Australia, Hon Richard Court, urges the Commission to be sensitive to the division of powers between the states and the Commonwealth in its work.³⁶¹ Potentially political references highlight the need for commissioners to be people capable of great objectivity. In each case no more can be asked than that they consult widely and argue cases individually.

C. Other cooperative activities

9.3.8 The NSWLRC referred to a joint project on informed consent to medical treatment which led to a joint report by the Commission and the NSWLRC and a discussion paper by the VLRC in 1987.³⁶²

9.3.9 The WALRC referred to cooperation with the Commission in which 'the two Commissions engaged in normal cooperative processes, sharing research material and ideas, and I came to Sydney to attend a consultants meeting.'³⁶³

9.3.10 Hon Daryl Manzie, the Northern Territory Attorney-General, expressed appreciation for the Commission's consultative and cooperative approach in seeking Northern Territory input to references.³⁶⁴

9.4 The future for joint projects and cooperation

9.4.1 The WALRC considered that 'the scope for joint projects between a state law reform body and the Commission is diminishing', because the Commission no longer had an interest in law at the state level now that

361 Premier of Western Australia, *Submissions*, p. S264.

362 NSWLRC, *Submissions*, p. S493.

363 WALRC, *Submissions*, p. S496.

364 Northern Territory Attorney-General, *Submissions*, p. S97.

there was the ACT Consultative Law Reform Committee.³⁶⁵ It also referred to the unwillingness of a former Western Australian Attorney-General to allow the WALRC to be involved in the uniform project on succession law.

9.4.2 Hon Richard Court, the Western Australian Premier, has advocated:

a clear demarcation, in accordance with the constitutional powers and responsibilities in the Australian federation, of the work done by the Australian Law Reform Commission.³⁶⁶

He acknowledged the cooperation between the WALRC and the Commission, and supported improvement of that cooperation and consultation.

9.4.3 The QLRC considered that constitutional and jurisdictional problems will arise in each joint federal and state project.³⁶⁷ It felt that joint projects between states and territories were more likely to be successful as uniform law reform exercises. Unlike the QLRC, Premier Wayne Goss suggested there might be more joint references to law reform commissions, including the Commission.³⁶⁸

9.4.4 Despite these doubts about joint projects, the QLRC noted that the Commission has a valuable role and that its research and publications greatly assisted the QLRC in various projects, and had informed it about law reform in other jurisdictions.³⁶⁹

9.4.5 The NSWLRC considered that joint projects are worthwhile because of efficiencies in resource use, the progression of uniformity and increasing the project's political acceptability.³⁷⁰ The NSWLRC

365 WALRC, *Submissions*, p. S496.

366 Premier of Western Australia, *Submissions*, p. S263.

367 QLRC, *Submissions*, p. S498.

368 Premier of Queensland, *Submissions*, p. S249.

369 QLRC, *Submissions*, p. S498.

370 NSWLRC, *Submissions*, p. S494.

cautioned that there must be a clear allocation of work, an agreed timetable and commitment to the project. It further said that care needs to be given to the allocation of responsibility for consultation because of its crucial importance.

9.4.6 The NSWLRC stated the role to be played by the Commission in joint projects is largely determined by whether there is federal jurisdiction to deal with the subject matter under consideration.³⁷¹ It identified several areas in which the Commission could take a lead role and in which it considered there is both federal and state jurisdiction, and where uniformity is desirable: environmental law, criminal law, the legal profession, and alternative dispute resolution.

9.4.7 The most enthusiastic supporter for joint federal and state law reform work was the TLRC. Professor Don Chalmers, the TLRC, argued that 'collaboration on law reform between the Commission and the relevant state and territory bodies is fundamental to the continued improvement of the law in this country'.³⁷² He referred to one of the early Commission reports, on human tissue transplants, as a 'clear example of the benefits achievable' in terms of consistency of development in the law in different jurisdictions within Australia.³⁷³

9.4.8 Mr Russell Scott, one of the original commissioners and a later consultant to the Commission, also referred to the success of this reference in terms of uniform law reform. He described the human tissue transplants report as the most successful uniform law reform project in Australia so far:

This Report was widely accepted nationally and internationally and the draft statute which accompanied it was soon enacted (with minor variations from State to State) by all Australian States and Territories. . . The Council of Europe displayed early interest in the Commission's

371 *ibid.*

372 TLRC, *Submissions*, p. S320.

373 *ibid.*

Report which, in turn, led to the Council inviting Australia to attend the meetings of its principal Bioethics Committee (CAHBI). This Committee prepared model legislative principles for European nations throughout the 1980s.³⁷⁴

9.4.9 In particular, Professor Chalmers considered laws which directly impact on the private and personal lives of individuals would be improved by joint projects. He argued that these laws are in urgent need of uniformity and considered that the Commission could play an important role as a coordinator for work undertaken at state and territory level in such areas as: wills and succession, aged accommodation, privacy, adoption and surrogacy, the legal profession, real and personal securities, evidence and collective investments.

9.4.10 Professor Chalmers argued that the need for uniformity is a matter of common sense and of human rights.³⁷⁵ There has been much talk about uniformity over the years but he argued there was still repetition of effort and divergence between state laws and the need for collaboration has not changed. The Committee generally supports this view but notes that uniformity may be achieved without the need for a formal mechanism.

9.4.11 Professor Chalmers stated that although the TLRC had not been involved in any joint projects with the Commission, he felt it had provided guidance and avoided divergence between state laws. He considered they were an effective use of limited law reform resources. One example he cited was that Tasmania was considering the federal and New South Wales final drafts of the uniform Evidence Bill.³⁷⁶

374 R. Scott, *Submissions*, p. S265.

375 TLRC, *Submissions*, p. S320.

376 TLRC, *Submissions*, p. S321.

9.4.12 The NTLRC had not been involved in any joint projects, but was supportive of future joint projects in which it saw the Commission in a coordinating role.³⁷⁷

9.4.13 The Commission argues that it is suited to coordinate effort to promote harmonisation of law between the Commonwealth and the states and territories.³⁷⁸ The joint submission from the Attorney-General's Department and the Commission suggests that the relationship between the Commission and other participating organisations should be defined when the references are given.³⁷⁹

9.5 Proposals for a formal coordinating structure

9.5.1 In 1990 the National Legal Aid Advisory Committee recommended that a national and integrated approach to law reform by governments should be coordinated by the Standing Committee of Attorneys-General (SCAG). The Government agreed that SCAG be informed of the need to coordinate a national and integrated approach to law reform,³⁸⁰ and SCAG noted the recommendation.³⁸¹

9.5.2 Mr Sturt Glacken proposes formal structures to encourage the exchange of information and research between various law reform agencies with a view to coordinating the work of such bodies, and to minimise any duplication of effort.³⁸² He proposes the establishment of a 'Commonwealth-State Advisory Council on Law Reform' of

377 NTLRC, *Submissions*, pp. S323–S324.

378 ALRC, *Submissions*, p. S346.

379 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S507.

380 National Legal Aid Advisory Committee, *Annual Report 1990-91*, p. 18.

381 Advice sought from the Civil Law Division, Attorney-General's Department in 1993 by the Committee secretariat.

382 S. Glacken, *Submissions*, p. S253.

representatives of Commonwealth and state and territory agencies or including representatives of state and territory agencies as statutory part-time members.

9.5.3 The Commission also envisages a law reform advisory committee and provides details of the proposed body in its submissions.³⁸³ The committee would include members from other federal law reform agencies as well as SCAG and the Law Council. The function of the committee would be to provide advice to the Attorney-General on areas of the law in need of reform. The views of the committee should be conveyed to SCAG by the Attorney-General.³⁸⁴

9.5.4 Although the Attorney-General's Department falls short of supporting this proposal, it agrees with the concept of broad consultation with interested parties to identify subjects suitable for future references to the Commission.³⁸⁵

9.6 Conclusions

9.6.1 The state and territory attitudes to and expectations of joint projects and cooperation with the Commission were quite mixed. The Committee considers that the formal coordinating structures proposed will not necessarily assist in furthering cooperative relationships.

9.6.2 The Committee commends the members and operation of the ALRC in promoting cooperation between the law reform bodies. The Committee recognises the value of this forum in encouraging an

383 ALRC, *Submissions*, pp. S362–S365 and ALRC and the Attorney-General's Department joint submission, *Submissions*, p. S509; See also S. Tongue, *Transcript*, p. 497.

384 ALRC and Attorney-General's Department joint submission, *Submissions*, p. S509.

385 *ibid.*

exchange of information as well as a more consistent approach to the development of law.

9.6.3 The Committee notes the arguments that the practical effect of the changes in relation to the self-government of some territories is that the federal government no longer has the same direct interest at the state and territory level of law as it used to have. Such an argument denies the possibility of the national law reform commission taking a lead in the development of a systematic development of law within Australia.

9.6.4 The Committee believes that part of the role of a national law reform commission is to assist in the systematic development of the law. The Committee supports the activities of the Commission in carrying out its function of promoting uniformity and reducing duplication.

9.6.5 The Committee notes the constitutional and jurisdictional nature of problems that may affect the selection of joint projects. Nevertheless the Committee feels the Commission should continue to promote the harmonisation of law between the federal jurisdiction and those of the states and territories.

Recommendation 39

The Committee recommends that the Commission continue to suggest and that the Attorney-General continue to make references that promote uniformity of law throughout Australia and reduce duplication of law reform effort.

Recommendation 40

The Committee further recommends that the Commission continue its role of promoting uniformity of law and reducing duplication of law reform effort through its activities with the states and territories including: undertaking joint projects with them, consulting them, and developing comprehensive laws as models for them.

9.6.6 The Committee notes that there are significant advantages in the globalisation of economic activity. The Committee further notes that the platform of Closer Economic Relations with New Zealand is progressing. The Committee considers that there would be advantages in the Commission maintaining links with its law reform counterpart in New Zealand, the Law Commission.

EXPRESSION OF CONCERN

by
Peter Slipper MP

I am most concerned particularly about three issues in this report. They are:

1. the renaming of the Law Reform Commission;
2. whether draft legislation should be prepared by the Commission or provided in its reports; and
3. international treaty obligations which subvert Australia's national sovereignty and independence without reference to Parliament or the Australian people.

1. Renaming the Law Reform Commission

I agree that the name of the Law Reform Commission should be changed, however I believe the name, 'Commonwealth Law Reform Commission', should be adopted given the federal nature of the Australian political system. I agree with comments to this inquiry by Hon Richard Court, MLA the Premier of Western Australia, that there should be a clear demarcation of the work undertaken by the Commission.¹ The designation 'Commonwealth Law Reform Commission' is a more appropriate manner in which to describe the Commonwealth Government body responsible for federal law reform.

2. Draft legislation

It is inefficient to have draft legislation accompanying reports of the Law Reform Commission. This is because the preparation of draft legislation grossly delays the completion of reports, and in any event the legislation is rarely enacted in that form if ever.

¹ Premier of Western Australia, *Submissions*, p. S263.

I believe that draft legislation should only be produced when the Attorney-General insists it is essential, in which case, the Office of Parliamentary Counsel and the Office of Legislative Drafting should provide the necessary drafting resources. Naturally it would still be open to the Law Reform Commission to approach the Attorney-General for a direction that draft legislation be included in those situations where the Law Reform Commission considers draft legislation necessary.

3. International treaty obligations

The hypocrisy of the Labor Government in this area is appalling. On the one hand, it claims to be the champion of a so-called independent Australia when pursuing Keating's republican agenda at public expense. On the other hand, it regularly signs away our national sovereignty and independence by indiscriminately entering into myriad treaties and protocols.

The reality is of course that Australia is already independent. Treaties and protocols purport to subject Australia to international obligations without the consent of parliaments or the Australian people. At the very least treaties and protocols should only be entered into subject to Australia's domestic constitutional arrangements. Unfortunately a wide High Court interpretation of the external affairs power in the Australian Constitution has destroyed the federal balance, enabling the Commonwealth to legislate in Australia to implement international obligations in areas traditionally matters for the States. This has virtually torn up the Constitution and undermined our federal system. The Law Reform Commission should state what the law in Australia ought to be regardless of what international treaties say.

Peter Slipper MP

May 1994

Appendix A

List of submissions

List of Submissions

Submission Number	Individual/Organisation
1	Hon Mr Justice Bryan Beaumont Judges' Chambers Federal Court of Australia
2	Professor John Wade School of Law Bond University
3	Mr Uri Thernal, OAM Director, Bureau of Ethnic Affairs Department of Family Services and Aboriginal and Islander Affairs
4	Professor John Goldring Dean, Faculty of Law University of Wollongong
5	Professor Ralph Simmonds Dean and Foundation Professor of Law School of Law Murdoch University
6	Mr John Nelson President The Law Society of New South Wales
7	Ms Halina Strnad Convenor, Submissions Committee Humanist Society of Victoria Inc
8	Ms Sue Tongue Deputy President Law Reform Commission of Australia (Volume 1)
9	Hon Justice I F Sheppard, AO Chairman Copyright Law Review Committee

Submission Number	Individual/Organisation
10	Mr Leonard Matthews
11	Judge H H Jackson President Children's Court of Western Australia
12	Professor A J Duggan Acting Dean of Law Henry Bournes Higgins Professor of Law Monash University
13	Ms Robyn Henderson Executive Director, National Council Royal Institute of Public Administration Australia
14	The Hon Daryl W Manzie, MLA Attorney-General Northern Territory Government
15	Mr John Faulks Chairman Family Law Council
16	The Hon Justice G N Williams QC Chairman Queensland Law Reform Commission
17	Mr Brian Dargan Director, Law Reform National Crime Authority
18	Ms Hilary Penfold First Parliamentary Counsel Office of Parliamentary Counsel
19	Ms Sue Tongue Deputy President Law Reform Commission of Australia (Volume 2) (Supplementary submission to no. 8)
20	Mr Simon Begg Corrs Chambers Westgarth

Submission Number	Individual/Organisation
21	Mr Don Blyth National Director Trustee Companies Association of Australia
22	Mr Stephen Walsh QC President The Law Society of South Australia
23	Dr Susan Kenny President Administrative Review Council
24	Mr Clive Speed Assistant Director Business Council of Australia
25	Ms Susan Crennan Chairman Victorian Bar Council
26	Mr Peter Levy Secretary-General Law Council of Australia
27	Professor Michael Chesterman, Professor Graycar and Professor Zdenkowski Faculty of Law University of New South Wales
28	Mr John Coombs QC President The New South Wales Bar Association
29	Senator the Hon Gareth Evans Minister for Foreign Affairs
30	Justice Murray Wilcox Judges' Chambers Federal Court of Australia
31	Mr J M Drury Deputy Comptroller-General (Services) Australian Customs Service

Submission Number	Individual/Organisation
32	Mr Andrew McKinlay Acting Assistant Secretary Department of the Environment, Sport and Territories
33	The Hon Xavier Connor, AO QC
34	Mr John Greenwell
35	The Hon Wayne Goss MLA Premier of Queensland
36	Mr Sturt Glacken Owen Dixon Chambers West
37	The Hon Wayne Berry Acting Chief Minister Australian Capital Territory
38	Professor James Crawford Jesus College Cambridge, UK
39	Professor John Goldring Dean, Faculty of Law University of Wollongong (Supplementary submission to no. 4)
40	Senator the Hon Nick Bolkus Minister for Immigration and Ethnic Affairs
41	The Hon Richard Court MLA Premier of Western Australia
42	Russell Scott
43	John Kluver Executive Director Companies & Securities Advisory Committee
44	Mr David St L Kelly Phillips Fox Solicitors
45	Mr Ian Cuncliff Blake Dawson Waldron Solicitors

Submission Number	Individual/Organisation
46	Mr Clive Speed Assitant Director Business Council of Australia (Supplementary submission to no. 24)
47	Mr Robert Ferguson Joint Managing Director Bankers Trust Australia Ltd
48	Mr David Fairlie President The Law Society of New South Wales (Supplementary submission to no. 6)
49	Mr Tim Robertson Secretary New South Wales Society of Labor Lawyers
50	Mr Stephen Mason Special Counsel Blake Dawson Waldron
51	Mr Stephen Skehill Deputy Secretary Attorney-General's Department
52	Professor Don Chalmers Commissioner Law Reform Commission of Tasmania
53	Mr Stephen Herne Executive Officer Northern Territory Law Reform Committee
54	Ms Sue Tongue Deputy President Law Reform Commission of Australia (Volume 3) (Supplementary submission to nos. 8 & 19)
55	Mr Peter Hennessey Executive Director New South Wales Law Reform Commission

Submission Number	Individual/Organisation
56	Dr Peter Handford Executive Officer and Director of Research Law Reform Commission of Western Australia
57	The Hon Justice G N Williams QC Chairman Queensland Law Reform Commission (Supplementary submission to no. 16)
58	Ms Libby Baulch Executive Officer Australian Copyright Council
59	Ms Hilary Penfold First Parliamentary Counsel Office of Parliamentary Counsel (Supplementary submission to no. 18)
60	Ms Kate Waterhouse Acting Director, Law Reform Unit ACT Attorney-General's Department
61	Ms Sue Tongue Deputy President Law Reform Commission of Australia;
	and
	Mr Stephen Skehill Deputy Secretary Attorney-General's Department (Supplementary submission to nos. ALRC: 8, 19, 54 and AG's: 51)

Appendix B

List of exhibits

List of Exhibits

Exhibit Number	Exhibit
1	Goldring, J. 1993, 'Processes and problems of law reform', paper presented to the Australasian Law Reform Agencies' Conference, Hobart, 24-25 Sept.
2 (i)	Pamphlet - The Australian Law Reform Commission.
(ii)	Pamphlet - Women: Equality Before the Law.
(iii)	Pamphlet - Trade Practices Act Enforcement.
(iv)	Pamphlet - Designs.
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(viii)	Australian Law Reform Commission (interim), <i>Personal Property Securities</i> , Report no. 64, ALRC, Sydney.
(ix)	Australian Law Reform Commission 1993, <i>Collective Investments: Other People's Money</i> , Report no. 65, ALRC, Sydney.
(x)	Blair, M., <i>Collective Investments</i> , Research Paper no. 2, ALRC, Sydney.
(xi)	Australian Law Reform Commission 1993, <i>Collective Investments: Other People's Money</i> , Report no. 65, vol. 1, ALRC, Sydney.
(xii)	Australian Law Reform Commission 1993, <i>Collective Investments: Other People's Money</i> , Report no. 65, vol. 2, draft legislation, ALRC, Sydney.
(xiii)	Australian Law Reform Commission, <i>Guide to Child Care</i> , Discussion paper.
(xiv)	Australian Law Reform Commission, <i>Equality Before the Law</i> , Discussion Paper no. 54, ALRC, Sydney.
(xv)	Australian Law Reform Commission 1993, <i>Reform</i> , no. 65, ALRC, Sydney.

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**Exhibit
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Exhibit

- 3 Jackson, H. H. 1987, 'Law reform – from the outside looking back', paper presented to the Annual National Conference of the Australian Society of Labor Lawyers, Perth.
- 4 (i) Duggan, A. J. 1991, 'Some reflections on consumer protection and the law reform process, *Monash University Law Review*, vol. 17, no. 2, pp. 252–284.
- (ii) Duggan, A.J. 1991, 'Commercial law: reform and uniformity – is there a better way?', *Commercial Law Association*, March 1992, pp. 24–26.
- (iii) *Personal Property Security Law Reform*, 1993.
- 5 (i) Family Law Council 1992, *Annual Report 1991–1992*, AGPS, Canberra.
- (ii) Family Law Council 1992, *Patterns of Parenting After Separation*, Report to the Minister for Justice and Consumer Affairs, AGPS, Canberra.
- (iii) Family Law Council 1992, *Family Mediation*, A Report to the Minister for Justice, AGPS, Canberra.
- (iv) Family Law Council 1992, *Power of the Family Court to Require the Provision of Information for the Recovery of Children*, Report to the Minister for Justice, AGPS, Canberra.
- (v) Family Law Council 1993, *Comments on the Report of the Joint Select Committee on the Operation and Interpretation of the Family Law Act*, Report to the Minister for Justice, AGPS, Canberra.
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- (viii) Family Law Council 1993, *News*, no. 4.
- 6 Copy of submission by Intellectual Property Committee of the Law Council of Australia 1992, 'Intellectual property law reform and administration'.
- 7 (i) Law Reform Commission of Victoria 1991, *Annual Report 1990–1991*, no. 44, Melbourne.
- (ii) Law Reform Commission of Victoria 1992, *Annual Report 1991–1992*, no. 51, Melbourne.
- 8 (i) Hudson, R. 1992, 'No will to implement', *New Law Journal*, June 26 1992, p. 899.
- (ii) Confidential

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Number**

Exhibit

- 9 Copy of letter dated 17 November 1992 to Mr S. Mason.
- 10 Copy of letter dated 25 Novemeber 1992 to Mr S. Mason.
- 11 (i) Braddock, R. 1989, *Economic Impact of Revised Proposals*, no. 2A, ALRC, Sydney.
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- (iii) List of reports on references with a direct commerical impact by the Law Reform Commission of Australia.

Appendix C

List of witnesses

List of Witnesses

Canberra, 2 November 1993

Office of the Parliamentary Counsel

Ms Hilary Penfold, First Parliamentary Counsel

Canberra, 3 November 1993

Administrative Review Council

Dr Susan Kenny, President
Mr Stephen Lloyd, Ex-Director of Research

Business Council of Australia

Mr Clive Speed, Assistant Director
Mr David Lieberman, Member
Mr Robert Gardini, Consultant

Family Law Council

Mr John Faulks, Chairman
Dr Nigel Collings, Member
Ms Matina Mottee, Member

Melbourne, 10 December 1993

Professor Anthony Duggan

Blake Dawson Waldron

Mr Ron Harmer, Partner

Trustee Companies Association of Australia

Mr Don Blyth, National Director

Sydney, 20 December 1993

Hon Justice Elizabeth Evatt AO
Hon Justice Michael Kirby AC CMG

Australian Law Reform Commission

Ms Sue Tongue, Deputy President
Mr Chris Sidoti, Commissioner
Mr Andrew Naylor, Law Reform Officer (Legal)

Copyright Law Review Committee

Hon Justice I F Sheppard, Chairman

Law Society of New South Wales

Mr John Nelson, President
Mr Mark Richardson, Secretary

New South Wales Law Reform Commission

Hon Gordon Samuels, Chairman
Mr Peter Hennessy, Executive Director

Sydney, 15 February 1994

Mr Bob Ellicott QC
Professor John Goldring
Mr Greg James QC
Mr Stephen Mason
Mr Ronald Sackville QC

Companies and Securities Advisory Committee

Mr Mark Burrows, Chairman
Mr John Kluver, Director
Mr Leigh Hall, Member

Sydney, 15 February 1994 continued...

*New South Wales Society of Labor
Lawyers*

Mr Tim Robertson, Secretary

University of Sydney

Professor David Weisbrot, Dean, Law
School

Canberra, 24 February 1994

Attorney-General's Department

Mr Stephen Skehill, Deputy Secretary

Australian Law Reform Commission

Ms Sue Tongue, Deputy President

Mr Chris Sidoti, Commissioner

Mr Andrew Naylor, Law Reform
Officer

Office of Parliamentary Counsel

Ms Hilary Penfold, First Parliamentary
Counsel

Mr Tom Reid, Second Parliamentary
Counsel

Mr Paul Lanspeary, Senior Assistant
Parliamentary Counsel

Appendix D

Law Reform Commission Act 1973



LAW REFORM COMMISSION ACT 1973

Reprinted as at 31 March 1990

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3. Interpretation
4. Extension to Territories

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5. Establishment of Commission
6. Functions of Commission
7. Certain matters to be considered
8. Powers of the Commission
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10. Interim reports

PART III—CONSTITUTION OF THE COMMISSION

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LAW REFORM COMMISSION ACT 1973

An Act to Constitute a Law Reform Commission

PART I—PRELIMINARY

Short title

1. This Act may be cited as the *Law Reform Commission Act 1973*.¹

Commencement

2. This Act shall come into operation on a date to be fixed by Proclamation.¹

Interpretation

3. In this Act, unless the contrary intention appears:

“**Commission**” means the Law Reform Commission;

“**Deputy President**” means the Deputy President of the Commission;

“**judicial office**” means:

- (a) an office of judge of a Federal Court or of the Supreme Court of a Territory;
- (b) an office the holder of which has, by virtue of an Act, the same status as a judge of a court referred to in paragraph (a);
or
- (c) the office of President of the Defence Force Discipline Appeal Tribunal;

“**laws**” includes rules of the Common Law or of Equity;

“**laws to which this Act applies**” means:

- (a) laws made by, or by the authority of, the Parliament, including laws of the Territories so made; and

s. 4

(b) any other laws, including laws of the Territories, that the Parliament has power to amend or repeal;

“member” means the President or another member of the Commission;

“President” means the President of the Commission;

“reference” means a reference by the Attorney-General to the Commission under this Act;

Extension to Territories

4. This Act extends to all the external Territories.

PART II—ESTABLISHMENT, FUNCTIONS AND POWERS OF THE COMMISSION

Establishment of Commission

5. There is established by this Act a Commission by the name of the Law Reform Commission.

Functions of Commission

6. (1) The functions of the Commission are, in pursuance of references to the Commission made by the Attorney-General, whether at the suggestion of the Commission or otherwise:

- (a) to review laws to which this Act applies with a view to the systematic development and reform of the law, including, in particular:
 - (i) the modernization of the law by bringing it into accord with current conditions;
 - (ii) the elimination of defects in the law;
 - (iii) the simplification of the law; and
 - (iv) the adoption of new or more effective methods for the administration of the law and the dispensation of justice;
- (b) to consider proposals for the making of laws to which this Act applies;
- (c) to consider proposals relating to:
 - (i) the consolidation of laws to which this Act applies; or
 - (ii) the repeal of laws to which this Act applies that are obsolete or unnecessary; and
- (d) to consider proposals for uniformity between laws of the Territories and laws of the States;

and to make reports to the Attorney-General arising out of any such review or consideration and, in such reports, to make such recommendations as the Commission thinks fit.

- (2) The Attorney-General may:
 - (a) modify the terms of a reference; and
 - (b) give directions to the Commission as to the order in which it is to deal with references.

Certain matters to be considered

7. In the performance of its functions, the Commission shall review laws to which this Act applies, and consider proposals, with a view to ensuring:

- (a) that such laws and proposals do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions; and
- (b) that, as far as practicable, such laws and proposals are consistent with the Articles of the International Covenant on Civil and Political Rights.

Powers of the Commission

8. Subject to this Act, the Commission has power to do all things necessary or convenient to be done for or in connexion with the performance of its functions.

Commission to comply with requirements of Parliament

9. If either House of the Parliament or a Committee of either House, or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information (including information in respect of expenditure or proposed expenditure of the Commission) concerning the performance of the functions, or the exercise of the powers, of the Commission under this Act, the Commission shall comply with the requirement.

Interim reports

10. Where the Attorney-General has referred a matter to the Commission:

- (a) the Commission may, at any time before making its report in pursuance of the reference, make an interim report on its work under the reference; and

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- (b) the Attorney-General may, at any time before the Commission makes its report in pursuance of the reference, direct the Commission to make an interim report on its work under the reference.

PART III—CONSTITUTION OF THE COMMISSION

Commission to be a body corporate

11. (1) The Commission:

- (a) is a body corporate with perpetual succession;
- (b) shall have a common seal;
- (c) may acquire, hold and dispose of real and personal property; and
- (d) may sue and be sued in its corporate name.

(2) The common seal of the Commission shall be kept in such custody as the Commission directs and shall not be used except as authorized by the Commission.

(3) All courts, judges and persons acting judicially shall take judicial notice of the imprint of the common seal of the Commission appearing on a document and shall presume that it was duly sealed.

Constitution of Law Reform Commission

12. (1) The Commission shall consist of:

- (a) a President; and
- (b) 4 or more other members;

each of whom shall be:

- (c) a judge of a Federal Court or of the Supreme Court of a State or Territory;
- (d) a person who has been enrolled as a legal practitioner of the High Court, or of the Supreme Court of a State or Territory, for not less than 5 years;
- (e) a person who is a graduate in law of a university and has had experience as a member of the academic staff of a tertiary educational institution; or
- (f) a person who, in the opinion of the Governor-General, is, by reason of the person's special qualifications, training or experience, suitable for appointment to the Commission.

(2) All members of the Commission shall be appointed by the Governor-General.

(3) The President shall be appointed as a full-time member, but if the President is or becomes the holder of a judicial office the President may perform any of the duties of that office.

(4) Members other than the President shall be appointed either as full-time members or as part-time members.

(5) The holder of a judicial office shall not be appointed as a full-time member (other than the President) unless the President is the holder of a judicial office.

(5A) In subsections (3) and (5), "judicial office" includes a judicial office of a State.

(6) A member shall not be appointed for more than 7 years but is eligible for re-appointment.

(7) The instrument of appointment of each member shall specify the terms and conditions of the member's appointment, including the period for which the appointment is made.

(8) The instrument of appointment of a member, being a legal practitioner of the Supreme Court of a Territory, may designate the member as a member in respect of that Territory, and a member so designated shall take part in the proceedings of the Commission in respect of such references only as the President determines to be of special significance in relation to that Territory.

(9) The exercise or performance of the functions or powers of the Commission is not affected by reason only of there being a vacancy in the office of a member.

Appointment of holder of judicial office as member of Law Reform Commission not to affect tenure etc.

13. The appointment of a person who is the holder of a judicial office as a member of the Commission, or service by a person who is the holder of a judicial office as such a member, whether the appointment was or is made or the service occurred or occurs before or after the commencement of this section, does not affect, and shall be deemed never to have affected, the person's tenure of that judicial office or the person's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of that judicial office and, for all purposes, the person's service, whether before or after the commencement of this section, as a member of the Commission shall be taken to have been, or to be, service as the holder of that judicial office.

Arrangements for appointment of the holder of a judicial office of a State

14. (1) The Governor-General may, for the purpose of appointing to the Commission a person who is the holder of a judicial office of a State, enter into such arrangement with the Governor of that State as is necessary to secure that person's services.

(2) An arrangement under subsection (1) may provide for the Commonwealth to reimburse a State with respect to the services of the person to whom the arrangement relates.

Appointment of Deputy President

15. (1) The Governor-General may appoint a member to be Deputy President of the Commission.

(2) The Deputy President holds office as Deputy President during the pleasure of the Governor-General.

(3) The Deputy President may exercise any power of the President:

(a) during a vacancy in the office of President; or

(b) during any period, or during all periods, when the President is absent from duty or absent from Australia, or for any other reason, unable to perform the duties of the office of President.

Remuneration and allowances of members of Law Reform Commission

16. (1) A member, not being the holder of a judicial office (including a judicial office of a State), shall be paid such remuneration as is determined by the Remuneration Tribunal.

(2) A member shall be paid such allowances as are prescribed.

(3) This section has effect subject to the *Remuneration Tribunals Act 1973*.

Termination of appointments of members of Law Reform Commission

17. (1) The Governor-General may terminate the appointment of a member by reason of misbehaviour or physical or mental incapacity.

(2) If:

(a) a member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with the member's creditors or makes an assignment of the member's remuneration for their benefit; or

(b) a full-time member engages, except with the approval of the Attorney-General, in paid employment outside the duties of the member's office;

the Governor-General shall terminate the appointment of the member concerned.

(3) Subsections (1) and (2) do not apply to a member who is the holder of a judicial office but, if a member who is the holder of a judicial office ceases to hold a judicial office, the Governor-General may terminate the member's appointment.

(4) In this section, "**judicial office**" includes a judicial office of a State.

Resignations

18. A member may resign the office of member by writing signed by the member and delivered to the Governor-General.

Leave of absence for full-time members

19. The Attorney-General may grant leave of absence to a full-time member upon such terms and conditions as to payment of salary or otherwise as the Attorney-General determines.

Meetings of Commission

20. (1) The President shall convene such meetings of the Commission as are, in the President's opinion, necessary for the efficient conduct of its affairs.

(2) The quorum for a meeting shall be 3 members.

(3) A question arising at a meeting of the Commission shall be decided by a majority of the votes of members present and voting.

(4) The President shall preside at all meetings at which the President is present.

(5) In the event of the absence of the President from a meeting, the Deputy President shall preside at that meeting.

(6) In the absence of the President and the Deputy President from a meeting, the members present shall elect one of their number to preside at that meeting and the person so elected shall preside accordingly.

(7) At a meeting, the President or other member who presides has a deliberative vote and, in the event of votes being equal, has a casting vote.

(8) The Commission may regulate and conduct the proceedings at its meetings as it thinks fit and shall keep minutes of those proceedings.

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Meetings of Divisions

21. (1) A meeting of a Division constituted under subsection 27 (1) shall:

- (a) if the President is among the members of the Division, be convened and presided over by the President;
- (b) if the Deputy President but not the President is among the members of the Division, be convened and presided over by the Deputy President; and
- (c) in any other case, be convened and presided over by a member of the Division specified for the purpose by the President.

(2) In the event of the absence from a meeting of a Division of the member who, pursuant to subsection (1), is to preside, those members of the Division who are present may elect one of their number to preside at that meeting.

(3) The quorum for a meeting of a Division shall be 2 members.

(4) The member presiding at a meeting of a Division shall have a deliberative vote.

(5) A question arising at a meeting of a Division shall be decided by a majority of the votes of the members present and voting.

(6) If at a meeting of a Division at which only 2 members are present, those members differ in opinion on a question, the member presiding shall postpone the determination of that question to a meeting of the Division at which all the members of the Division are present.

(7) In the event of an equality of votes on a question before a meeting of the Division at which more than 2 members are present, the member presiding shall have a casting vote.

(8) A Division may regulate the conduct of its proceedings at meetings and shall keep minutes.

Appointment of staff

22. (1) The President may, on behalf of the Commission and with the approval of the Attorney-General, appoint as employees of the Commission such persons as the President thinks necessary for the purposes of this Act.

(2) The terms and conditions of employment of employees of the Commission are such as are from time to time determined by the President with the approval of the Attorney-General.

President may engage consultants

23. (1) The President may, with the approval of the Attorney-General, engage persons having suitable qualifications and experience as consultants to the Commission.

(2) The terms and conditions of the engagement of a person under subsection (1) are, subject to this Act, such as are determined by the President with the approval of the Attorney-General.

Application of Superannuation Act to staff etc.

26. The Commission is an approved authority for the purposes of the *Superannuation Act 1922*.

PART IV—PROCEEDINGS OF THE COMMISSION

President may constitute Divisions

27. (1) The President may constitute a Division consisting of not less than 3 members including, if the President thinks fit, himself or herself, for the purposes of a particular reference.

(2) A Division constituted under subsection (1) shall, for the purposes of the reference in respect of which it is constituted, and for the purpose of making a report and recommendations to the Attorney-General arising out of that reference, be deemed to be the Commission.

Commission to inform itself in any manner

28. For the purposes of a review or consideration of any matter the subject of a reference, the Commission may inform itself in such manner as it thinks fit.

PART V—FINANCE

Moneys payable to Commission, and estimates of expenditure

29. (1) There are payable to the Commission such moneys as are appropriated by the Parliament for the purposes of the Commission.

(2) The Minister for Finance may give directions as to the amounts in which, and the times at which, moneys referred to in subsection (1) are to be paid to the Commission.

(3) The Commission shall prepare estimates, in such form as the Attorney-General directs, of receipts and expenditure of the Commission for each financial year and, if the Attorney-General so directs, for

any other period specified by the Attorney-General and the Commission shall submit estimates so prepared to the Attorney-General not later than such date as the Attorney-General directs.

(4) Moneys of the Commission shall not be expended by the Commission otherwise than in accordance with estimates of expenditure approved by the Attorney-General.

Purchase and disposal of assets

30. The Commission shall not, without the approval of the Attorney-General:

- (a) acquire any property, right or privilege for a consideration exceeding in amount or value \$50,000 or, if a higher amount is prescribed, that higher amount;
- (b) dispose of any property, right or privilege where the amount or value of the consideration for the disposal, or the value of the property, right or privilege, exceeds \$50,000 or, if a higher amount is prescribed, that higher amount;
- (c) enter into a contract for the construction of a building for the Commission, being a contract under which the Commission is to pay an amount exceeding \$50,000 or, if a higher amount is prescribed, that higher amount; or
- (d) enter into a lease of land for a period exceeding 10 years.

Application of moneys of Commission

32. The moneys of the Commission shall be applied only:

- (a) in the discharge of obligations and liabilities of the Commission arising under this Act; and
- (b) in the payment of any salary and allowances payable under this Act.

Application of Division 3 of Part XI of Audit Act

33. It is hereby declared that the Commission is a public authority to which Division 3 of Part XI of the *Audit Act 1901* applies.

Exemption from taxation

36. The Commission is not subject to taxation under any law of the Commonwealth, a State or a Territory.

PART VI—MISCELLANEOUS

Reports to be laid before each House of the Parliament

37. Where the Attorney-General receives a report (including an interim report) on a matter the subject of a reference, the Attorney-General shall lay the report before each House of the Parliament within 15 sitting days of that House after its receipt by the Attorney-General.

Regulations

38. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

NOTE

1. The *Law Reform Commission Act 1973* as shown in this reprint comprises Act No. 221, 1973 amended as indicated in the Tables below.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Law Reform Commission Act 1973</i>	221, 1973	20 Dec 1973	31 Dec 1974 (see <i>Gazette</i> 1975, No. G3, p. 2)	
<i>Remuneration and Allowances Amendment Act 1977</i>	111, 1977	28 Oct 1977	Ss. 1, 2, 5, 9 (2), 13, 16, 18 and 19 (2): Royal Assent Remainder: 1 June 1977	S. 14 (2)
<i>Administrative Changes (Consequential Provisions) Act 1978</i>	36, 1978	12 June 1978	12 June 1978	S. 8
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 1983</i>	91, 1983	22 Nov 1983	S. 3: 20 Dec 1983 (a)	—
<i>Statute Law (Miscellaneous Provisions) Act (No. 1) 1985</i>	65, 1985	5 June 1985	S. 3: 3 July 1985 (b)	S. 11

NOTE—continued
Table of Acts—continued

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 1985</i>	193, 1985	16 Dec 1985	S. 3: Royal Assent (c)	S. 16

- (a) The *Law Reform Commission Act 1973* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1983*, subsection 2 (1) of which provides as follows:
“(1) Subject to this section, this Act shall come into operation on the twenty-eighth day after the day on which it receives the Royal Assent.”
- (b) The *Law Reform Commission Act 1973* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985*, subsection 2 (1) of which provides as follows:
“(1) Subject to this section, this Act shall come into operation on the twenty-eighth day after the day on which it receives the Royal Assent.”
- (c) The *Law Reform Commission Act 1973* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act (No. 2) 1985*, subsection 2 (1) of which provides as follows:
“(1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent.”

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 3	am. No. 111, 1977; Nos. 65 and 193, 1985
S. 4	am. No. 65, 1985
S. 11	am. No. 65, 1985
S. 12	am. No. 111, 1977; No. 91, 1983; No. 65, 1985
S. 13	rs. No. 111, 1977 am. No. 65, 1985
Ss. 14, 15	am. No. 65, 1985
S. 16	rs. No. 111, 1977 am. No. 65, 1985
S. 17	am. No. 111, 1977; No. 65, 1985
S. 18	am. No. 65, 1985
Ss. 20-23	am. No. 65, 1985
Ss. 24, 25	rep. No. 65, 1985
Ss. 26, 27	am. No. 65, 1985
S. 29	am. No. 36, 1978
S. 30	am. No. 65, 1985
S. 31	rep. No. 65, 1985
S. 33	rs. No. 65, 1985
S. 34	rep. No. 65, 1985

NOTE—continued
Table of Amendments—continued

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 35	am. No. 36, 1978 rep. No. 65, 1985
Ss. 36, 37	am. No. 65, 1985

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Appendix E

Information on the Law Reform Commission's references

(reproduced from submission no. 8 – volume one of the Commission's submission)

Information about references

Complaints against police

Reference received 16 May 1975
Preliminary papers Complaints against police
ALRC WP 1, 1975
Report Complaints against police
ALRC 1, 1975
Date tabled 7 August 1975
Legislative action *Complaints (Australian Federal Police) Act 1981* (Cth)
See also *Police (Allegations of Misconduct) Act 1977* (NSW);
Police Administration Act 1979 (NT)

Criminal investigation

Reference received 16 May 1975
Report Criminal investigation
ALRC 2, 1975
Date tabled 8 November 1975
Legislative action *Criminal Investigation Bill 1979* (Cth): introduced; lapsed
Criminal Investigation Bill 1981 (Cth): introduced, lapsed
Defence Force (Discipline) Act 1984 (Cth)
Crimes (Investigation of Commonwealth Offences) Act 1991
(Cth)
See also *Police Administration Act 1978* (NT)
Alexander v R (1981) 145 CLR 395
Williams v R (1986) 161 CLR 278
Carr v R (1988) 165 CLR 314
McKinney v R (1991) 171 CLR 468
Petty & Maiden v R (1991) 173 CLR 95
Collins v R (1980) 31 ALR 257
R v Coleman (1987) 87 FLR 175
Carroll & ors v Mijovich (1991) 25 NSWLR 441
Larsson v Commissioner of Police for NSW (1989) 16 NSWLR
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Selected articles F Bates 'Australian draft legislation on identification parades'
41(161) *Journal of Criminal Law* 61
R Bates 'The right to a lawyer at a police interrogation' 1981)
35(2) *Australian Police Journal* 77

Alcohol, drugs and driving

Reference received 22 January 1976
Preliminary papers Alcohol, drugs and driving
ALRC WP 2, 1976
Report Alcohol, drugs and driving
ALRC 4, 1976
Date tabled 23 September 1976
Legislative action *Motor Traffic (Alcohol and Drugs) Act 1977* (ACT)

Insolvency: the regular payment of debts

Reference received	10 May 1976
Preliminary papers	Consumers in debt ALRC WP 3, 1976
Report	Insolvency: the regular payment of debts ALRC 6, 1977
Date tabled	4 November 1977
Legislative action	
Judicial citations	<i>Water Board v Glambedakis</i> (1992) 28 NSWLR 694
Selected articles	KE Lindgren 'Consumer dealings' 6 <i>Australian Business Law Review</i> 74

Human tissue transplants

Reference received	15 July 1976
Preliminary papers	Human tissue transplants ALRC WP 5, 1977 Does Australia need statutory brain death? ALRC IP 1, 1977
Report	Human tissue transplants ALRC 7, 1977
Date tabled	21 September 1977
Legislative action	<i>Transplantation and Anatomy Act 1978</i> (ACT) legislation based on the report has been enacted in all States and Territories except Tasmania
Selected articles	'British medicos praise Australian report' (1978) (March/April) <i>Law Society Bulletin</i> 10

Complaints against police (supplementary report)

Reference received	16 May 1975
Preliminary papers	Complaints against police (supplementary report) ALRC WP 6, 1977
Report	Complaints against police (supplementary report) ALRC 9, 1978
Date tabled	9 June 1978
Legislative action	As for ALRC 1

Unfair publication: defamation and privacy

Reference received	23 June 1976
Preliminary papers	Defamation ALRC WP 4, 1976 Defamation – options for reform ALRC DP 1, 1977 Defamation and publication privacy – a draft uniform Bill ALRC DP 3, 1977
Report	Unfair publication: defamation and privacy ALRC 11, 1979
Date tabled	7 June 1979
Legislative action	See: <i>Defamation Bill 1992</i> (NSW): introduced 25 February 1992; <i>Defamation Bill 1992</i> (Qld): introduced 10 March 1992; <i>Defamation Bill 1991</i> (Vic): introduced 13 November 1991.

- Judicial citations** *Williams v Spautz* (1992) 174 CLR 509
Mann v Medicine Group Pty Ltd (1992) 38 FCR 400
Cotogno v Lamb (No 3) (1986) 5 NSWLR 559
ABC v Waterhouse (1991) 25 NSWLR 519
Herald & Weekly Times Ltd v Guide Dog Owners [1990] VR 451
- Selected articles** PT George 'Congruency: unravelling the defamation action' (1990) 6 *Australian Bar Review* 124

Privacy and the census

- Reference received** 9 April 1976
- Preliminary papers** Privacy and the census
ALRC DP 8, 1978
- Report** Privacy and the census
ALRC 12, 1979
- Date tabled** 15 November 1979
- Legislative action** *Census and Statistics Amendment Act 1981* (Cth)
- Other action** Administrative implementation of other recommendations

Lands acquisition and compensation

- Reference received** 7 July 1977
- Preliminary papers** Lands acquisition law: reform provisions
ALRC WP 8, 1977
Lands acquisition law: reform proposals
ALRC DP 5, 1978
- Report** Lands acquisition and compensation
ALRC 14, 1980
- Date tabled** 22 April 1980
- Legislative action** *Lands Acquisition Act 1988* (Cth)
See also *Lands Acquisition Act 1978* (NT)
- Judicial citations** *Universal Sands & Minerals Pty Ltd v Commonwealth* (1980) 30 ALR 637
Leppington Pastoral Co Pty Ltd v Department of Administrative Services (1990) 23 FCR 148
Goold v Commonwealth (1993) 114 ALR 135
James v Swan Hill Sewerage Authority [1978] VR 519 (ALRC DP 5)
Kozaris v Roads Corporation [1991] 1 VR 237
Mario Piraino Pty Ltd v Roads Corporation [No 2] [1993] 1 VR 130
- Selected articles** PM Salmon 'Compulsory acquisition and compensation for the taking of land' (1980) (No 16) *New Zealand Law Journal* 354

Sentencing of federal offenders (interim)

- Reference received** 11 August 1978
- Preliminary papers** Sentencing: reform options
ALRC DP 10, 1979
Sentencing of federal offenders
ALRC DP 15, 1980
- Report** Sentencing of federal offenders (interim)
ALRC 15, 1980
- Date tabled** 21 May 1980

- Legislative action** *Crimes Amendment Act 1982* (Cth); publication of prosecution guidelines
Recommendations on criminal compensation for ACT not accepted: *Criminal Injuries Compensation Act 1983* (ACT)
Crimes Compensation Act 1982 (NT)
- Judicial citations**
Neal v R (1982) 149 CLR 305
Morris v East (1988) 83 ACTR 1
Chow v DPP & anor (1992) 28 NSWLR 593
DPP (Cth) v el Karhani (1990) 21 NSWLR 370
Piper v Corrective Services Commission of NSW (1986) 6 NSWLR 352
- Selected articles**
D Challenger 'Payment of fines' (1985) 18 *Australian Journal of Criminology* 95

Insurance agents and brokers

- Reference received** 9 September 1976
- Preliminary papers**
- Report** Insurance agents and brokers
ALRC 16, 1980
- Date tabled** 11 September 1980
- Legislative action** *Insurance (Agents and Brokers) Act 1984* (Cth)
- Judicial citations** *Con-Stan Industries of Australia Pty Ltd v Norwich* (1986) 160 CLR 226
Norwich v Con-Stan Industries [1983] 1 NSWLR 461
Metrot Pty Ltd v Manufacturers' Mutual Insurance Ltd (1990) 21 NSWLR 220

Child welfare

- Reference received** 18 February 1979
- Preliminary papers** Child welfare – children in trouble
ALRC DP 9, 1979
Child welfare: child abuse and day care
ALRC DP 12, 1980
- Report** Child welfare
ALRC 18, 1981
- Date tabled** 12 November 1981
- Legislative action** *Children's Services Act 1988* (ACT)
- Judicial citations** *J v Lieschke* (1987) 162 CLR 447
Shales v Lieschke (1985) 3 NSWLR 65
- Selected articles** G Lombard 'Child welfare in the Australian Capital Territory (1986) 11 *Legal Service Bulletin* 33
C Staniforth 'Advancing the welfare of children or entrenching the welfare bureaucrats?' (1987) 12 *Legal Service Bulletin* 10

Insurance contracts

- Reference received** 9 September 1976
- Preliminary papers** Insurance contracts
ALRC IP 2, 1977
Insurance contracts
ALRC DP 7, 1978
- Report** Insurance contracts
ALRC 20, 1982

Date tabled	16 December 1982
Legislative action	<i>Insurance Contracts Act 1984</i> (Cth)
Judicial citations	<i>Deaves v CML Fire & General Insurance Co.</i> (1979) 143 CLR 24 (ALRC DP 7) <i>Trident General Insurance Co. v McNiece Bros Pty Ltd</i> (1988) 165 107 <i>Advance (NSW) Insurance Agencies Pty Ltd & Anor v Matthews</i> (1989) 166 CLR 606 <i>Ferrcom Pty Ltd v Commercial Union Assurance Company of Australia Ltd</i> (1993) 176 CLR 332 <i>Wasson v Commercial & General Acceptance</i> (1985) 2 NSWLR 206 <i>GRE Insurance Ltd v QBE Insurance Ltd</i> [1985] VR 83 <i>Advance (NSW) Insurance Agencies Pty Ltd v Matthews</i> (1988) 12 NSWLR 250 <i>Commercial Bank of Australia v Baltica General Insurance Co Ltd</i> (1992) 28 NSWLR 579 <i>Lindsay v CIC Insurance Ltd</i> (1985) 16 NSWLR 673 <i>Commercial Union Assurance Company of Australia v Ferrcom</i> (1991) 22 NSWLR 389 <i>Accident Insurance Mutual Ltd v Sullivan</i> (1986) 7 NSWLR 65 <i>Barclay Holdings (Australia) Pty Ltd v British National Insurance Co.</i> (1987) 8 NSWLR 514 <i>Trident General Insurance Co. Ltd v McNiece Bros. Pty Ltd</i> (1987) 8 NSWLR 270
Selected articles	PD Finn 'Good faith and fair dealing. Part 1' (1990) 5 <i>Australian Insurance Law Bulletin</i> 101 D Kelly 'Further thoughts on the Ferrcom case: a re-examination of the principle of "proportionality"' (1993) 8(8) <i>Australian Insurance Law Bulletin</i> 57
Privacy	
Reference received	9 April 1976
Preliminary papers	Privacy and publication – proposals for protection ALRC DP 2, 1977 Privacy and intrusions ALRC DP 13, 1980 Privacy and personal information ALRC DP 14, 1980
Report	Privacy ALRC 22, 1983
Date tabled	14 December 1983
Legislative action	<i>Privacy Act 1988</i> (Cth) <i>Telecommunications Interception Amendment Act 1987</i> (Cth)
Judicial citations	<i>Tullamore Bowling & Citizens Club v Lander</i> [1984] 2 NSWLR 32
Selected articles	K O'Connor 'Privacy problems in the nineties' (1990) 10(2) <i>Communications Law Bulletin</i> 11

Foreign State immunity

Reference received 11 November 1982
Preliminary papers Foreign State immunity
 ALRC DP 19, 1983
Report Foreign State immunity
 ALRC 24, 1984
Date tabled 10 October 1984
Legislative action *Foreign States Immunities Act 1985* (Cth)

Evidence (interim)

Reference received 18 July 1979
Preliminary papers Evidence
 ALRC IP 3, 1980
Report Evidence (interim)
 ALRC 26, 1985 see also ALRC 38
Date tabled 21 August 1985
Legislative action see ALRC 38
Judicial citations *McKinney v R* (1991) 171 CLR 468
Bell v R (1985) 7 FCR 555
Minister for Immigration and Ethnic Affairs v Tavelli (1990) 23 FCR 162
Natta v Canham (1991) 104 ALR 143
Wade v Gilroy (1986) 10 Fam LR 793
Chambers v Joblin (1986) 7 NSWLR 1
Ritz Hotel Ltd v Charles of the Ritz Ltd (1988) 15 NSWLR 158 (Evidence RP 2)
ULV Pty Ltd v Scott (1990) 19 NSWLR 190 (Evidence RP 13)
R v Connors (1990) 20 NSWLR 438
Trawl Industries of Australia v Effem Foods Pty Ltd (1992) 27 NSWLR 326
R v Rosenmeyer [1985] VR 945 (Evidence RP 14)
DPP v Martell [1992] 2 VR 249

Selected articles PM Reynolds 'Optical disc document images: evidentiary aspects in Victoria' (1991) 3 *Bond Law Review* 85

Standing in public interest litigation

Reference received 1 February 1977
Preliminary papers Access to courts – I: Standing: public interest suits
 ALRC WP 7, 1977
 Access to courts – I: Standing: public interest suits
 ALRC DP 4, 1978
Report Standing in public interest litigation
 ALRC 27, 1985
Date tabled 29 November 1985
Legislative action
Other action Consideration being given to Government's response
Judicial citations *Onus v Alcoa of Australia Ltd* (1981) 1981 149 CLR 27 (ALRC DP 4)
Ogle v Strickland (1987) 13 FCR 306
United States Tobacco Co. v Minister of Consumer Affairs (1988) 20 FCR 520

Tectran Corporation Pty Ltd v Legal Aid Commission of NSW
(1986) 7 NSWLR 340

Selected articles

Coles Myer Ltd & Anor v O'Brien (1992) 28 NSWLR 525
KM Mack 'Standing to sue under federal administrative law'
(1987) 16 *Federal Law Review* 319

Contributory negligence**Reference received**

21 February 1984

Preliminary papers

Contributory negligence: consultation paper

ALRC DP 1, 1984

Fatal accidents legislation in the ACT: consultation paper

ACTLR 2, 1984

Report

Community law reform for the Australian Capital Territory: First report – The community law reform program, contributory negligence in fatal accident cases and breach of statutory duty cases and funeral costs in fatal accident cases

ALRC 28, 1985

Date tabled

29 November 1985

Legislative action

Law Reform (Miscellaneous Provisions) (Amendment) Act 1991 (ACT); *Compensation (Fatal Injuries) (Amendment) Act 1991* (ACT)

Domestic violence**Reference received**

29 May 1984

Preliminary papers

Domestic violence in the ACT: Discussion paper

ACTLR 4, 1984

Report

Domestic violence

ALRC 30, 1986

Date tabled

20 March 1986

Legislative action

Domestic Violence Act 1986 (ACT) and associated legislation; see *Domestic Violence Amendment Act 1991* (ACT) for extension (as recommended) to other relationships.

Other action

Establishment of Domestic Violence Unit

Judicial citations

Fisher v Fisher [1988] VR 1028

The recognition of Aboriginal customary laws**Reference received**

9 February 1977

Preliminary papers

Aboriginal customary law – recognition?

ALRC DP 17, 1980

Aboriginal customary law – marriage, children and the distribution of property

ALRC DP 18, 1982

Aboriginal customary law – criminal law, evidence and procedure

ALRC DP 20, 1984

Report

The recognition of Aboriginal customary laws

ALRC 31, 1986

Date tabled

12 June 1986

Legislative action

See *Adoption Act 1984* (Vic)

See also *Children (Guardianship and Custody) Act 1984* (Vic)

Community Welfare Act 1983 (NT)

- Judicial citation** *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (ALRC DP 7)
Walden v Hensler ((1987) 163 CLR 561
Mabo & ors v Queensland (No 2) (1992) 175 CLR 1
Attorney-General v Queensland (1990) 25 FCR 125
- Selected articles** J McKenzie 'Recognition of Aboriginal customary law' (1993) 31(5) *Law Society Journal* 37
- Loss of consortium**
- Reference received** 23 October 1986
- Preliminary papers** Loss of consortium: consultative paper
 ACTLR 3, 1984
- Report** Community law reform for the Australian Capital Territory:
 Second report – Loss of consortium and compensation for loss
 of capacity to do housework
 ALRC 32, 1986
- Date tabled** 21 February 1984
- Legislative action** *Law Reform (Miscellaneous Provisions) (Amendment) Act (No 2)*
 1991 (ACT)
- Civil Admiralty jurisdiction**
- Reference received** 23 November 1982
- Preliminary papers** Admiralty jurisdiction
 ALRC DP 21, 1984
- Report** Civil Admiralty jurisdiction
 ALRC 33, 1986
- Date tabled** 2 December 1986
- Legislative action** *Admiralty Act 1988* (Cth)
- Judicial citation** *Empire Shipping Co. Inc v "Shin Kobe Maru"* (1991) 104 ALR
 489
*Survival and Industrial Equipment (Newcastle) Pty Ltd v "Alley
 Cat"*
 (1992) 36 FCR 129
Port of Geelong Authority v "Bass Reefer" (1992) 37 FCR 374
- Selected articles** MWD White 'Arrest of ships - Queensland jurisdiction' (1988)
 18 *Queensland Law Society Journal* 19
 I Maitland & R Kriedemann 'Civil admiralty jurisdiction –
 Australia' (1988) 10 *Law Society Bulletin* 321
 MWD White 'Changes in maritime law: the Admiralty Act 1988'
 (1989) 19 *Queensland Law Society Journal* 111
- Contempt**
- Reference received** 7 April 1983
- Preliminary papers** Reform of contempt law
 ALRC IP 4, 1984
 Contempt and family law
 ALRC DP 24, 1985
 Contempt and the media
 ALRC DP 26, 1986
 Contempt: disruptions, disobedience and deliberate interference
 ALRC DP 27, 1986
- Report** Contempt
 ALRC 35, 1987

Date tabled 3 June 1987
Legislative action *Family Law Amendment Act 1989*
Other action Attorney-General's Department has issued a Discussion Paper about criminal contempt proposals; on the agenda for consideration by SCAG.

Judicial citation *Hinch v Attorney-General (Vic) (No 2) (1987) 164 CLR 15*
In the Marriage of Schwartzkopff (1992) 15 Fam LR 545
Prothonotary v Collins (1985) 2 NSWLR 549 (ALRC IP 4)
McIntyre v Perkes (1987) 15 NSWLR 417
R v Day [1985] VR 261

Selected articles H Giuringa 'The law of contempt of court - a guide for legal practitioners' (1987) 61 *Law Institute Journal* 1044
 ME Errington 'Applications in relation to contempt in the Family Court' (1988) 4 *Australian Bar Review* 268
 SB McNicol 'Privilege in a academia: a consideration of the power to resist disclosure of information obtained by academics in confidence' (1989) 9 *University of Tasmania law Review* 205

Debt recovery and insolvency

Reference received 10 May 1976
Preliminary papers Debt recovery and insolvency
 ALRC DP 6, 1978

Report Debt recovery and insolvency
 ALRC 36, 1987

Date tabled 21 October 1987
Legislative action

Spent convictions

Reference received 11 August 1978
Preliminary papers Criminal records
 ALRC DP 25, 1985

Report Spent convictions
 ALRC 37, 1987

Date tabled 3 June 1987
Legislative action Partly accepted: *Crimes Legislation Amendment Act 1989 (Cth)*

Evidence

Reference received 18 July 1979
Preliminary papers Evidence
 ALRC DP 23, 1985

Report Evidence
 ALRC 38, 1987 see also ALRC 26

Date tabled 5 June 1987
Legislative action Evidence Bill 1991 (Cth): introduced 15 October 1991. Lapsed with the dissolution of Parliament
 See also Evidence Bill 1991 (NSW) (lapsed). NSW has released an exposure draft of the Evidence Bill 1993. The Commonwealth has not yet released its bill, but the NSW bill is in effect a uniform bill. Differences between the NSW and Commonwealth bills are noted in the text.

Judicial citation *Natta v Canham (1991) 104 ALR 143*
R v Connors (1990) 20 NSWLR 438

Selected articles

C Arnold 'Expert and lay opinion evidence' (1990) 6 *Australian Bar Review* 219
 'Evidence reform: moves towards a national scheme' (1991) 29(7) *Law Society Journal* 42

Matrimonial property**Reference received**

16 June 1983

Preliminary papers

Matrimonial property

ALRC DP 22, 1985

Report

Matrimonial property

ALRC 39, 1987

Date tabled

16 September 1987

Legislative action**Other action**

The Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act recommended some of the ALRC's proposals on superannuation.

Selected articles

J Fogarty 'Family law in Australia. Part A: property and child support reforms' (1988) 18 *Queensland Law Society Journal* 161

A Lanteri 'Superannuation, the Family Law Act 1975 and the Hambly Report' (1989) 63 *Law Institute Journal* 161

F Bates 'Australia: towards the familiarization of family law' (1988-89) 27 *Journal of Family Law* 7

F Bates 'Reforming Australian matrimonial property law' (1988) *Anglo-American Law Review* 46

Service and execution of process**Reference received**

29 November 1982

Preliminary papers

Service and execution of process

ALRC IP 5, 1984

Report

Service and execution of process

ALRC 40, 1987

Date tabled

9 December 1987

Legislative action*Service and Execution of Process Amendment Act 1991* (Cth);*Service and Execution of Process Act 1992* (Cth)**Judicial citation***David Syme & Co Ltd v Grey* (1992) 38 FCR 303*Seymour-Smith v Electricity Trust of SA* (1989) 17 NSWLR 648*Paroukas v Katsaris* [1987] VR 39 (Service and Execution RP 7)**Occupiers' liability****Reference received**

18 July 1984

Preliminary papers

Occupiers' liability

ALRC DP 28, 1987

Report

Occupiers' liability

ALRC 42, 1988

Date tabled

13 April 1988

Legislative action*Law Reform (Miscellaneous Provisions) (Amendment) Act 1991* (ACT)**Judicial citation***Morawski v State Rail Authority* (1988) 14 NSWLR 374 (ALRC DP 28)

The Commonwealth Prisoners Act (interim)

Reference received	11 August 1978
Preliminary papers	
Report	The Commonwealth Prisoners Act (interim) ALRC 43, 1988
Date tabled	24 March 1988
Legislative action	Implemented in part: <i>Crimes Legislation Amendment Act (No 2) 1989</i> (Cth)

Sentencing

Reference received	11 August 1978
Preliminary papers	Sentencing: procedure ALRC DP 29, 1987 Sentencing: penalties ALRC DP 30, 1987 Sentencing: prisons ALRC DP 31, 1987
Report	Sentencing ALRC 44, 1988
Date tabled	25 August 1988
Legislative action	<i>Crimes Legislation Amendment Act (No 2) 1989</i> (Cth); <i>Crimes Amendment Bill (No. 2) 1993</i> (ACT) introduced 25 March 1993
Judicial citation	<i>The Queen v P</i> (1992) 39 FCR 276 <i>In the Marriage of Williams</i> (1992) 16 Fam LR 217 <i>Morris v East</i> (1988) 83 ACTR 1 (ALRC DP 29) <i>Attorney-General v David</i> [1992] 2 VR 46 (ALRC DP 30) <i>DPP (Cth) v el Karhani</i> (1990) 21 NSWLR 370

General insolvency inquiry

Reference received	20 November 1983
Preliminary papers	General insolvency inquiry ALRC IP 6, 1985 General insolvency inquiry ALRC DP 32, 1987
Report	General insolvency inquiry ALRC 45, 1988
Date tabled	13 December 1988
Legislative action	As to corporate insolvency: implemented: see <i>Corporate Law Reform Act 1992</i> (Cth)
Judicial citation	<i>Re La Rosa ex parte Norgard v Rocom Pty Ltd</i> (1990) 21 FCR 270 <i>McIntyre v Gye & Perkes</i> (1990) 23 FCR 260 <i>Re Dallhold Investments Pty Ltd v Dallhold Estates (UK) Pty Ltd</i> (1991) 6 ACSR 378 <i>Heenan, ex parte Collins v Official Receiver</i> (1992) 39 FCR 428 <i>Fielding v Vagrand Pty Ltd</i> (1992) 39 FCR 251 <i>Macquarie Bank Ltd v Fociri</i> (1992) 27 NSWLR 203
Selected articles	J O'Donovan 'The Harmer proposals' (1988) 6 <i>Company and Securities Law Journal</i> 203 A Herzberg 'The Metal Manufacturers Case and the Australian Law Reform Commission's insolvent trading recommendations' (1989) 7 <i>Company and Securities Law Journal</i> 177

- A Herzberg 'Insolvent trading' (1991) 9 *Company and Securities Law Journal* 285
 CB Penman & TW Ferrell 'Bankruptcy and directors' duties: the United States perspective' (1991) 9 *Company and Securities Law Journal* 347
 D Everett 'Debt subordination in insolvency' (1991) 4 *Corporate and Business Law Journal* 21
 B Baxt 'Laws of diminishing return' (1992) 63(2) *Charter* 16
 P Lipton 'Voluntary administration: is there life after insolvency for the unsecured creditor?' (1993) 1 *Insolvency Law Journal* 87

Grouped proceedings in the Federal Court

- Reference received** 1 February 1977
Preliminary papers Access to the courts – II: class actions
 ALRC DP 11, 1979
Report Grouped proceedings in the Federal Court
 ALRC 46, 1988
Date tabled 13 December 1988
Legislative action *Federal Court Amendment Act 1991* (Cth)
Judicial citation *E v Australian Red Cross Society and ors* (1991) 99 ALR 601
Re Sheehan v Sheehan (1990) 13 Fam LR 736
Esanda Finance Corp Ltd v Carnie (1992) 29 NSWLR 382
Selected articles 'Cy Pres – the Australian situation' (1989) (May/June)
Consumer Views 9

Enduring powers of attorney

- Reference received** 21 April 1984
Preliminary papers Enduring powers of Attorney
 ALRC DP 33, 1987
Report Community law reform for the Australian Capital Territory: Third
 report – Enduring powers of attorney
 ALRC 47, 1988
Date tabled 6 April 1989
Legislative action *Powers of Attorney (Amendment) Act 1989* (ACT)
 See also *Property Law Amendment Act 1990* (Qld)

Criminal admiralty jurisdiction and prize

- Reference received** 23 November 1982
Preliminary papers Admiralty jurisdiction
 ALRC DP 21, 1984
Report Criminal Admiralty jurisdiction and prize
 ALRC 48, 1990
Date tabled 27 November 1990
Legislative action *Crimes Legislation Amendment Act 1992* (Cth) Commenced
 8 January 1993. Similar policies implemented: see *Crimes (Ships
 and Platforms) Act 1992* (Cth). Commenced 20 May 1993.
Other action Aspects of the report dealing with crimes at sea are on the
 agenda for consideration by SCAG.

Informed decision-making in medical procedures

Reference received	21 February 1984
Preliminary papers	Informed consent to medical treatment VLRC DP 7, 1987
Report	Community law reform for the Australian Capital Territory: Fourth report – Informed decision-making in medical procedures ALRC 50, 1989 (a joint report with the Law Reform Commission of Victoria and the New South Wales Law Reform Commission)
Date tabled	21 November 1989
Legislative action	
Selected articles	R Scott 'Duty to disclose risks of treatment and procedures: informed decisions' (1993) 2(1) <i>Australian Health Law Bulletin</i> 1

Product liability

Reference received	11 September 1987
Preliminary papers	Product liability ALRC IP 7, 1988 Product liability ALRC DP 34, 1988 Product liability: draft legislation ALRC DP 37, 1989
Report	Product liability ALRC 51, 1989
Date tabled	15 August 1989
Legislative action	
Other action	Not implemented: see <i>Trade Practices Amendment Act 1992</i> (Cth); Act referred to Senate Standing Committee on Legal and Constitutional Affairs for report; the report supported the Act (dissent from Senator Walsh)

Guardianship and management of property

Reference received	29 August 1988
Preliminary papers	Guardianship and management of property ALRC DP 39, 1989
Report	Guardianship and management of property ALRC 52, 1989
Date tabled	20 December 1989
Legislative action	ACT: implemented with minor changes: <i>Guardianship and Management of Property Act 1991</i> (ACT) and associated legislation:

Censorship procedure

Reference received	10 May 1990
Preliminary papers	Censorship procedure ALRC DP 47, 1991
Report	Censorship procedure ALRC 55, 1991
Date tabled	11 September 1991
Legislative action	

Other action

SCAG is considering the report. SCAG Officers meeting reached broad agreement supporting proposals. Standing Committee of Censorship Ministers (SCOCM) met in Darwin in June. They agreed that ALRC proposals for a single censorship code should be presented to them in the form of drafting instructions for legislation and they would consider these at their next meeting in 5 November.

NT: It is understood that the enforcement recommendations are being considered for adoption

Multiculturalism and the law**Reference received**

2 August 1989

Preliminary papers

Multiculturalism and the law

ALRC IP 9, 1990

Multiculturalism: family law

ALRC DP 46, 1991

Multiculturalism: criminal law

ALRC DP 48, 1991

Multiculturalism: contract law

ALRC DP 49, 1991

Report

Multiculturalism and the law

ALRC 57

Date tabled

28 April 1992

Legislative action

Racial vilification legislation introduced (*Racial Discrimination Amendment Bill 1992* introduced 16 December 1992): open for public comment. Bill lapsed with the dissolution of Parliament.

Other action

The Office of Multicultural Affairs has commissioned an audit of community legal education and the issue of uniform laws relating to de facto relationships is now on the agenda of SCAG.

Choice of law**Reference received**

16 December 1988

Preliminary papers

Federal and Territory choice of law rules

ALRC IP 8, 1989

Choice of law rules

ALRC DP 44, 1990

Report

Choice of law

ALRC 58, 1992

Date tabled

28 May 1992

Legislative action**Other action**

On the agenda for consideration by SCAG.

Judicial citation

McKain v Miller (1991) 174 CLR 1 (ALRC DP 44)

David Syme & Co Ltd v Grey (1992) 38 FCR 303

Selected articles

M Davies 'Conflict of laws issues in fatal accident actions' (1993) 1 *Torts Law Journal* 45

M Moshinsky 'Choice of law in torts' (1993) 1 *Torts Law Journal* 169

Collective Investments**Reference received**

4 September 1991

Preliminary papers

Collective investment schemes: superannuation

ALRC DP 50, 1992

- Report** Collective investments: superannuation
ALRC 59, 1992
- Date tabled** 28 April 1992
- Legislative action** Many recommendations reflected in report of Senate Select Committee on Superannuation (the Sherry Committee): the Government has announced that it will implement many of these recommendations. Details of these measures announced 21/10/92: vast majority of recommendations accepted. Superannuation Industry (Supervision) Bill 1992 and cognate bills were introduced on the 16th of December 1992 but lapsed with the dissolution of Parliament. The bills were reintroduced on 27 May 1993.
- Selected articles** A Fairley 'Is a middle ages law system good enough?' (1992) 27(5) *Australian Law News* 34
- Customs and excise**
- Reference received** 26 November 1987
- Preliminary papers** Customs and Excise: Offshore provisions
ALRC DP 35, 1989
Customs and Excise: Administrative provisions
ALRC DP 36, 1989
Customs and Excise: Cargo Control
ALRC DP 38, 1989
Customs and Excise: Licensing provisions
ALRC DP 41, 1989
Customs and Excise: Customs prosecutions, jurisdiction and administrative penalties
ALRC DP 42, 1990
Customs and Excise: Seizure and forfeiture
ALRC DP 43, 1990
Customs and Excise: Draft legislation
ALRC DP 45, 1990
- Report** Customs and Excise
ALRC 60, 1992
- Date tabled** 7 May 1992
- Legislative action** The Minister for Science and Small Business, Senator Schacht, had said that a bill implementing many of the report's recommendations may be introduced in the Autumn 1994 session of Parliament.
- Judicial citation** *Whim Creek Consolidated NL v Colgan* (1991) 103 ALR 204 (ALRC DP 43)
- Administrative penalties in customs and excise**
- Reference received** 27 November 1991
- Preliminary papers** Administrative penalties: Customs Act 1901 (Cth) Part XIII, Division 4, 1992
ALRC DP 51, 1992
- Report** Administrative penalties in customs and excise
ALRC 61, 1992
- Date tabled** 9 September 1992
- Legislative action**

Children's evidence

Reference received 24 May 1991
Preliminary papers Children's evidence by video link
 ALRC DP 40, 1989
Report Children's evidence: closed circuit TV
 ALRC 63, 1993
Date tabled 26 May 1993
Legislative action

Personal property securities

Reference received 8 June 1990
Preliminary papers Personal property securities
 ALRC DP 52, 1992
Report Personal property securities
 ALRC 64, 1993
Date tabled 27 May 1993
Legislative action

Collective Investments

Reference received 24 May 1991
Preliminary papers Collective investment schemes
 ALRC IP 10, 1991
 Collective investment schemes
 ALRC DP 53, 1992
Report Collective Investments: Other people's money
 ALRC 65, 1993
Date tabled 30 September 1993
Legislative action

Health, housing and community services legislation

Reference received 18 August 1992

Designs

Reference received 18 August 1992
Preliminary papers Designs
 ALRC DP 11, 1993

Trade Practices

Reference received 17 December 1992

Equality before the law

Reference received 8 February 1993
Preliminary papers Equality before the law
 ALRC DP 54, 1993

Appendix F

List of successive holders of office of the
Law Reform Commission

(reproduced from submission no. 8 – volume one of the Commission's submission)

Successive Holders of Office under the *Law Reform Commission Act 1973 (Cth)*

	From		To	
President (previously Chairman)				
The Hon Justice MD Kirby AC CMG	January	1975	September	1984
The Hon Justice MR Wilcox (Acting)	September	1984	May	1985
The Hon Justice FX Connor AO QC	May	1985	December	1987
The Hon Justice EA Evatt AO	January	1988	November	1993
Deputy President				
Mr J Greenwell	October	1987	October	1992
Ms S Tongue	September	1993	September	1996
Full-time Commissioners				
Mr D St L Kelly	August	1976	January	1980
Mr MR Wilcox QC	July	1976	December	1977
Mr R Scott	June	1976	June	1978
Professor D Chappell	September	1978	September	1979
Mr BM Debelle	August	1978	June	1983
Associate Professor R Hayes	March	1980	March	1983
Mr TH Smith	March	1980	December	1983
Dr JR Crawford	January	1982	June	1984
Professor AD Hambly	June	1983	September	1986
Professor MR Chesterman	July	1983	December	1986
Mr RW Harmer	July	1984	June	1987
Mr G Zdenkowski	July	1984	December	1987
Professor JL Goldring	December	1987	June	1990
Mr CD Sidoti	February	1992	February	1997
Mr S Mason	February	1992	October	1993
Part-time Commissioners				
Professor AC Castles	February	1975	December	1981
Mr GJ Evans	February	1975	November	1975
Associate Professor GJ Hawkins	February	1975	December	1981
The Hon Justice FG Brennan	February	1975	March	1978
Mr J Cain	February	1975	June	1977
Emeritus Professor Sir Zelman Cowan	June	1976	August	1977
Mr HMS Schreiber	August	1976	August	1981
Mr J Spigelman	August	1976	February	1979
Mr JQ Ewans CMG CBE	January	1978	January	1980
Mr AN Hall	July	1977	June	1979
Mr BJ Shaw QC	July	1977	June	1981
Mr MR Wilcox QC	January	1978	July	1979

Part-time
(continued)

Dr JA S
Mr J M
Mr D S
Mr GW
The Ho
Mr GE
Mr BM
Mr T S
Profess
Dr MC
Profess
Profess
Associ
Mr TH
Sir Ma
The Ho
The Ho
Mr NC
Profess
Associ
The Ho
Mr R F
Mr J B
Mr P C
Profess
Profess
Mr T S
Mr J B
Mr P C
Profess
Mr NC
The Ho
Mr G Z
The Ho
Mr RW
Ms G E
Dott P
Profess
Mr J A
Mr L H
The Ho
Profess
Profess
Profess
The Ho
Profess

Part-time Commissioners
(continued)

	From	To	
Dr JA Seymour	March 1979	June 1980	
Mr J Mazza	August 1979	August 1984	
Mr D St L Kelly	February 1980	June 1981	
Mr GWP Aarons	July 1980	July 1983	
The Hon Justice FM Neasey	October 1980	October 1984	
Mr GE Fitzgerald QC	July 1981	June 1984	
Mr BM DeBelle	July 1981	June 1983	
Mr T Simos QC	January 1982	December 1986	
Professor A Erh-Soon Tay	February 1982	February 1987	
Dr MC Pryles	June 1983	June 1987	
Professor D St L Kelly	July 1983	November 1985	
Professor JR Crawford	June 1984	June 1987	
Associate Professor R Hayes	May 1984	May 1985	
Mr TH Smith	January 1984	December 1986	
Sir Maurice Byers CBE QC	May 1984	December 1985	
The Hon Justice JM Maxwell	March 1984	November 1988	
The Hon Justice DM Ryan QC	April 1984	April 1990	
Mr NC Seddon	April 1985	April 1988	
Professor RW Harding	September 1984	August 1989	
Associate Professor R Hayes	June 1986	June 1989	
The Hon Justice MR Wilcox	February 1986	February 1988	
Mr R Fisher	April 1986	April 1989	
Mr J Basten	April 1986	April 1987	
Mr P Cashman	April 1986	April 1987	
Professor MR Chesterman	January 1987	September 1992	
Professor D Hambly	December 1986	June 1989	
Mr T Simos QC	April 1987	April 1990	
Mr J Basten	August 1987	December 1987	
Mr P Cashman	August 1987	December 1987	
Professor J Crawford	April 1988	December 1990	
Mr NC Seddon	August 1988	December 1991	
The Hon Justice MR Wilcox	August 1988	December 1989	
Mr G Zdenkowski	January 1988	March 1988	
The Hon Justice P Nygh	February 1989	July 1992	
Mr RW Harmer	July 1987	July 1988	
Ms G Bird	February 1990	September 1991	
Dott P Totaro AM	February 1990	September 1991	
Professor JL Goldring	June 1990	December 1992	
Mr J Armitage	October 1991	December 1992	
Mr L Hall	December 1991	December 1992	
The Hon Justice J Von Doussa	September 1992	September 1996	
Professor J Lahore	January 1993	December 1995	
Professor B Cass	January 1993	December 1995	
Professor P Baume	January 1993	December 1995	
Professor R Bailey-Harris	January 1993	December 1995	
The Hon Justice I Coleman	January 1993	December 1995	
Professor B Fisse	September 1993	August 1994	