

## Law Reform – Future Directions

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Let us consider for a moment why law reform commissions, like the Australian Law Reform Commission (ALRC), were established throughout the Commonwealth. One might say that many of them, particularly those in Australia, NZ, Canada, and the UK, were children of the '70s. As the Rt Hon Sir Geoffrey Palmer QC remarked in the 2015 Scarman Lecture, there was a "crusading" verve at the time in which it was thought that a new world was at hand, where change and decay in the legal system could be arrested and fixed.<sup>1</sup> Law reform filled an institutional vacuum. Legal educators would take up law reform. Professor Michael Coper, former Dean of Law at ANU has lamented that this did not occur.<sup>2</sup> Legal practitioners would take a vital interest in bringing the law up to date. The whole body of law would be reviewed and infused with a sense of social purpose. Sir Geoffrey observed wryly that, "These things have not come to pass."<sup>3</sup>

That is not to say that important reforms have not been achieved following the work of law reform commissions the world over; and even less to belittle the vast contribution to scholarly legal research on a wide range of topics that has been contributed by such agencies and which forms a significant source of the common law, being regularly cited by superior courts. Rather, it is to reflect on the reality that law reform commissions are not central to government policy or its development anywhere in the common law world.<sup>4</sup> Government expenditure linked to political objectives necessarily ranks ahead of law reform.

When I was invited (almost 12 months ago now) to speak at this conference and on this topic, I felt relatively confident that after a year in the role as President of the ALRC, I might have some useful thoughts to share with you about future directions in law reform. That confidence evaporated rapidly when I began preparing these remarks.

I have identified two main reasons for that loss of confidence (in addition to the obvious point that it is not a topic that lends itself naturally to humour). The first, and most important, reason has been the realisation of just how little influence the ALRC itself has in the topics that will be selected for future law reform references and the degree of political expediency involved the topics that are referred to the Commission. The second reason is the great uncertainty that surrounds the funding of the ALRC and the obvious challenge such uncertainty presents for ensuring that the ALRC can attract and retain a legal team of the highest quality.

### ***The selection of future topics for law reform***

Section 21 of the *Australian Law Reform Commission Act 1996* (Cth) provides for the functions of the ALRC. They are:

- (a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:

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<sup>1</sup> The Rt Hon Sir Geoffrey Palmer QC, 'The Law Reform Enterprise: Evaluating the Past and Charting the Future' (*Fifth Scarman Lecture*, 24 March 2015), 25.

<sup>2</sup> Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' in Brian Opeskin and David Weisbrot (eds) *The Promise of Law Reform* (The Federation Press, 2005).

<sup>3</sup> The Rt Hon Sir Geoffrey Palmer QC, 'The Law Reform Enterprise: Evaluating the Past and Charting the Future' (*Scarman Lecture*, 24 March 2015), 25.

<sup>4</sup> *Ibid.*

- (i) bringing the law into line with current conditions and ensuring that it meets current needs; and
  - (ii) removing defects in the law; and
  - (iii) simplifying the law; and
  - (iv) adopting new or more effective methods for administering the law and dispensing justice; and
  - (v) providing improved access to justice;
- (b) to consider proposals for making or consolidating Commonwealth laws about those matters;
  - (c) to consider proposals for the repeal of obsolete or unnecessary laws about those matters;
  - (d) to consider proposals for uniformity between State and Territory laws about those matters;
  - (e) to consider proposals for complementary Commonwealth, State and Territory laws about those matters.

These functions are, however, only to be exercised in relation to matters referred to it by the Attorney-General. There is no ability to “self-refer” or to develop a systematic programme of law reform on our own initiative.

By way of contrast, s 3(1) of the *Law Commissions Act 1965* (UK), provides that it is the duty of the Law Commission to take and keep all the law under review with a view to its systematic development and reform and to prepare and submit to the Lord Chancellor programmes for the examination of different branches of the law with a view to reform. Before deciding what projects to take forward, the Law Commission takes views from judges, lawyers, government departments, the voluntary and business sectors and the general public. It considers reviewing an area of law against three criteria: importance – the extent to which the law is unsatisfactory and the potential benefits of reform; suitability – whether the independent non-political Commission is the most suitable body to conduct the review; resources – whether the Commission currently has the relevant experience and expertise and available funding.

Consequently, the work of the Law Commission of England and Wales, and that of the Scottish Law Commission, is shaped by a thoughtful and thorough examination of which aspects of the law are considered to be most in need of reform. The process is not entirely free from political input. In 2010, a Protocol was agreed between the Law Commission and the Lord Chancellor on behalf of the Government (a process facilitated by the *Law Commission Act 2009* (UK)). Since the adoption of the Protocol, before approving the inclusion of a law reform project in a Law Commission Programme, the Lord Chancellor will expect the Minister with relevant policy responsibility to give an undertaking that there is ‘a serious intention to take forward law reform in this area’. The 2009 Act and the Protocol have enabled the Law Commission to focus on projects with a real prospect of implementation.

The most recently approved Programme of Law Reform was launched in December 2017 (following a six-month consultation process) and includes 14 projects across a diverse range of legal issues including: disposing of the dead, automated vehicles, intermediated securities, modernising trust law, simplifying immigration rules, smart contracts, and surrogacy.

The then Lord Chief Justice of England and Wales, Lord Thomas, observed in the Sixth Scarman Lecture in June 2017 that this approach to the law reform process is a core strength of the Law Commission.<sup>5</sup>

It seems to me that this is a future direction, in law reform process at least, that Australia should consider seriously. The current referral process does not permit any systematic review of Australian law and certainly does not seem to take account of whether similar or overlapping projects are underway in state law reform commissions, such as the almost concurrent inquiries of the Victorian Law Reform Commission and the ALRC in relation to class action and litigation funding reform. Indeed,

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<sup>5</sup> The Rt Hon The Lord Thomas of Cwmgiedd, “‘Law Reform Now’ in 21<sup>st</sup> Century Britain: Brexit and Beyond’ (*Sixth Scarman Lecture*, 26 June 2017), [45].

one could form the view that the work programme of the ALRC is rather ad hoc and comprises referrals of matters which contain elements of political sensitivity that a government might wish to put off to a later date. The current process does not permit of any forward planning. As you may be aware, the Final Report on the *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* was submitted to the Attorney, as required, on 20 December 2018. The Report into the Family Law System is due on 29 March this year. We have not yet received any further references, although it has been foreshadowed in the media that we will be asked to look at a particular issue arising out of the *Religious Freedom Review* (2018). I don't expect to be idle post March, but it would be useful to know what particular legal expertise might be most relevant when recruiting new legal staff. The best are not usually available at short notice.

A more systematic process of identifying appropriate topics for law reform might also permit a careful consideration of whether the project is in fact suitable to be examined by a law reform commission. If I can use the current Inquiry into the Family Law System to illustrate my point. The *Family Law Act* has already been amended by 125 separate Acts of the Commonwealth Parliament. In addition, there have been numerous other inquiries into various aspects of the family law system over the past decade or more. Whilst the Inquiry has revealed many concerns with the way separating couples experience the family law system, it is not yet clear that the cause of the dissatisfaction lies with substantive issues of law nor even with the current procedural law (except perhaps in aspects of its application). Apart from the wholesale redrafting of the legislation that rivals the *Income Tax Assessment Act* in both length and complexity of numbering, it is difficult to conceive of what more the law can be expected to do to provide a solution to the complex emotional, cultural, social, health, and economic issues that underlie the breakdown of an intimate relationship. In other words, it is fair to say that I am not convinced that this Inquiry would have qualified to be included in a work programme developed by the ALRC had we been applying similar criteria to those used by the Law Commission of England and Wales. That is not to say that there is not much that needs to be done in the context of the family law system, but rather that they are matters more appropriately inquired into by social scientists, health professionals, and economists – not lawyers.

### ***Future funding of law reform***

In its heyday in the mid-90s, the ALRC's annual government appropriation approached \$4 million. This was reduced dramatically in 1999 by over \$1 million before climbing back to \$3.8 million in 2009. The Gillard Government then made another drastic cut, from which the organisation has never recovered. Last year's budget delivered an appropriation for the 2018-19 financial year of only \$2.6 million. Agencies can be strangled by underfunding.

So, the question must be asked; why do governments persist with law reform commissions? What is their value proposition for civil society and democracy in a country like this one?

If we consider the fundamental features of law reform commissions, we might come close to an answer. The most important feature of a law commission, and one which differs from many other organisations and 'think tanks' that also have law reform programmes, is its independence: that is, intellectual independence manifested by the way the law reform process itself is undertaken; and the manner in which the commission interacts with government. There can be no truly independent law reform commission without adequate core funding.<sup>6</sup>

First, members of law reform commissions are appointed, not elected. They are therefore not constrained by political considerations. They have the luxury of being above partisan politics. Once an

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<sup>6</sup> Ibid, [57].

inquiry is underway, there is very little interaction with the government, unless it concerns resourcing of the agency. Government representatives are seldom, if ever, appointed to advisory committees and draft recommendations are not given to Government in advance of the release of the final report for the Attorney-General. At least so far as the ALRC is concerned, the commission does not lobby the Government post the inquiry to encourage implementation of the recommendations. They are expected to speak for themselves, supported by the research findings.

Second, the breadth of expertise that law reform commissions can bring to inquiries, even in challenging financial circumstances, is quite extraordinary. This is possible because of the very many legal academic experts, judicial officers (both sitting and retired), senior practitioners, and expert academics and practitioners from other disciplines, all who give freely of their time and knowledge to contribute to the development of a particular area of law. Justice Susan Kenny explored the particular importance of the relationship between the judiciary and law reform bodies in a speech at ALRAC in September 2010, which I commend to you.<sup>7</sup> It makes the law reform process exceptional value for money, with research being undertaken at a fraction of the cost of even a research team within a university. This is truly an exposition of the operation of civil society at its finest.

Third, broad consultation is essential to the law reform process. At this juncture, it is worth considering the broader role of consultation in liberal democratic societies. On a conceptual level, consultation is fundamental to the rule of law, notions of justice and the consent of the governed. In an essay written by Israel Cowen and Adam Delacorn in 2010 entitled 'Consultation and Law Reform; A civic conversation building ownership of the law',<sup>8</sup> the authors drew attention to the fact that the role of consultation in maintaining the rule of law was articulated by Aristotle when he highlighted that the law draws its strength from the obedience of the citizenry, which will only be given if the laws reflect the constitution of the citizens. They note that this principle has been applied by some of the most influential law reformers in history, such as Sir Edward Coke. In a contemporary context however, the principle highlights the need for consultation in order to understand the complexity of society and its 'citizens'.

The authors observe further that, related to this idea is the role consultation plays in manifesting the consent of the governed. For classical contract theorists such as Locke, the concept of consent is the foundation for the right to exercise legitimate political authority. While this concept is still fundamental to liberal democratic societies, the meaning of 'consent to be governed' has taken on a more complex meaning. It no longer merely refers to the grounds for the legitimate exercise of political power; it also has come to indicate the role that society ought to play, either directly or indirectly, in the *process* of government. In this respect, consultation is central to that process. Since the law should reflect society, justice requires that those affected by the law should be involved in its development. Consultation-driven law reform promotes democratic ideals and benefits civil society.<sup>9</sup>

Fundamental to the intellectual independence of law reform commissions is an understanding of the importance of a broad consultation process that is open to disciplines and perspectives beyond the law. Only in this process can problems and issues be identified that may not have been within the initial framing of the research questions. This should be self-evident; laws are not made for lawyers (well with one or two exceptions). Lawyers merely advise, advocate, administer or adjudicate in relation to law. They are not necessarily best placed to comment on the day-to-day impact on the general populace affected by those laws.

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<sup>7</sup> The Hon Justice S Kenny, 'The Relationship between the Judiciary and Law Reform Bodies' (ALRAC, 1 September 2010).

<sup>8</sup> Israel Cowen and Adam Delacorn 'Consultation and Law Reform; A civic conversation building ownership of the law', (2010 Kirby Cup Winning Essay published on the ALRC website, [www.alrc.gov.au](http://www.alrc.gov.au)).

<sup>9</sup> *Ibid.*

Which brings me to what could be done with additional resourcing. Quite apart from certainty of funding to continue doing the work that has become the mainstay of the ALRC, the importance of being able to engage experts beyond our disciplinary expertise is sometimes critical. The economic impact of law reform proposals is sometimes (even often) overlooked despite the exhortation in s 24(2) of the ALRC Act to have regard to ‘the costs of getting access to, and dispensing, justice’ and the economic impact on persons and businesses who would be affected by recommendations.

As a nation, we are already lagging behind other cognate jurisdictions in relation to the adaptation of our laws in the digital age and it is likely that there will soon be a need for the ALRC to have ready access to experts to assist in an understanding of the practical consequences of changes being ushered in by technology and to gain insights into changes to come that, as Lord Thomas observed, may render existing law obsolete or in need of significant revision.<sup>10</sup> We are likely to need to call on the expertise possessed by the likes of Professors Richard Susskind, Ben Barton or Deborah Rohde, none of which is yet prominent in this jurisdiction.

Although the *ALRC Act* makes no specific reference to undertaking international comparative research (as does the *Law Commission Act 1965* (UK)), it has always been essential to the work of the ALRC that such research be undertaken, and it has becoming increasingly important as globalisation has accelerated. Local consultations are critical to understanding the problems faced in the domestic context; creative solutions can often be found by examining the differing approaches elsewhere, particularly, but not exclusively, in cognate jurisdictions. It is not always possible to fully understand another jurisdiction’s approach without speaking with judges, practitioners and relevant stakeholders in that jurisdiction. This requires resourcing.

The ALRC has also reinstated a former practice of the Commission, namely, and only where appropriate, the drafting of provisions to give effect to recommendations, or at the very least, the provision of drafting instructions. The Law Commission of England and Wales benefits greatly from a permanent secondment of a draftsman from the Office of Parliamentary Counsel. In his 2015 lecture, Sir Geoffrey Palmer QC concluded:

The performance of the Commission, within the constitutional constraints in which it operates, has been brilliantly successful. When the Commission’s work on statute law is added into the mix, the record looks even better.<sup>11</sup>

It would be naive to expect any increase in annual governmental appropriation for the ALRC. This means other means of securing an income stream must be sought. Some of you will be aware that, in my previous role, I was expected to spend about a third of my time pursuing philanthropic contributions to the University. Just as law reform does not lend itself readily to humour, neither does it attract much in the way of philanthropy. I have not yet abandoned the challenge entirely. More promising might be the exploration of our nascent partnerships with three universities thus far to attempt to tap into Australian Research Council funding. Such funding might enable the support of post-doctoral fellowships or programmes of research relevant to ALRC projects and which will have the benefit of including the brightest academic minds in the work of the Commission. The Law Commission of England and Wales also has the advantage of being able to accept, from time to time, smaller projects that are not part of its settled Work Programme from Ministers of other Departments (subject to the approval of the Lord Chancellor). The Law Commission is able to charge a fee for such work which is additional to its annual governmental appropriation. In 2017-18, the Commission’s core

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<sup>10</sup> The Rt Hon The Lord Thomas of Cwmgiedd, ‘“Law Reform Now” in 21<sup>st</sup> Century Britain: Brexit and Beyond’ (*Sixth Scarman Lecture*, 26 June 2017), [49].

<sup>11</sup> The Rt Hon Sir Geoffrey Palmer QC, ‘The Law Reform Enterprise: Evaluating the Past and Charting the Future’ (*Fifth Scarman Lecture*, 24 March 2015), 10.

funding was £2.487m but the cost to operate the Commission £4m. The difference was expected to be sourced by law reform projects from other departments funded on a cost recovery basis.

### ***Conclusion***

The proud contribution of the ALRC to the development of the Australian legal system should not be allowed to wither on the vine. The ALRC must be able to approach its role in a forward-thinking way, grounded in a thorough understanding of where reform is currently needed, or likely to be needed, for the betterment of the rule of law in this country. It is only through a systematic approach to the law reform process as a whole, by an appropriately funded independent commission, that we will ensure (to borrow the words of Lord Thomas) 'that the law remains fit for the world in which we live and in which we must compete today and tomorrow.'<sup>12</sup>

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<sup>12</sup> The Rt Hon The Lord Thomas of Cwmgiedd, "Law Reform Now" in 21<sup>st</sup> Century Britain: Brexit and Beyond' (*Sixth Scarman Lecture*, 26 June 2017), [60].