

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*.

Standing Committee on Legal and Constitutional Affairs

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Mr Alan Cadman MP

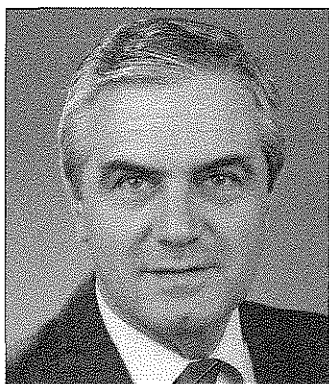
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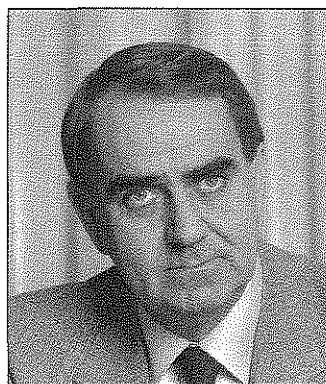
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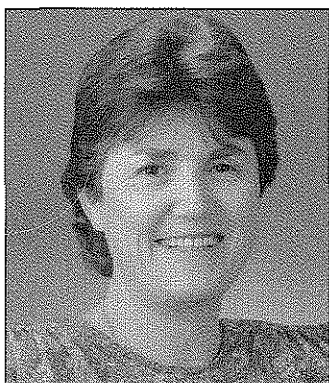
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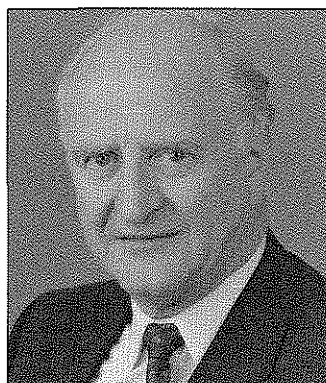
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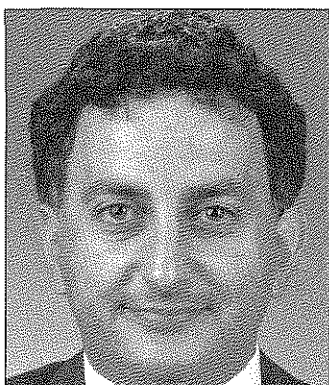
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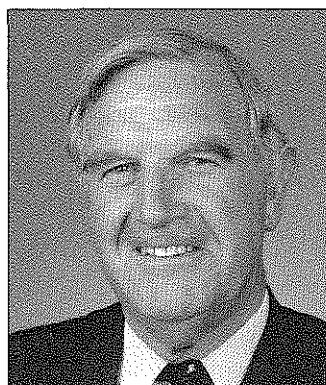
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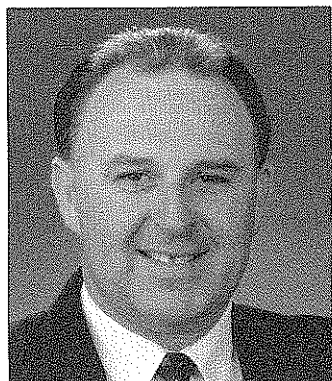
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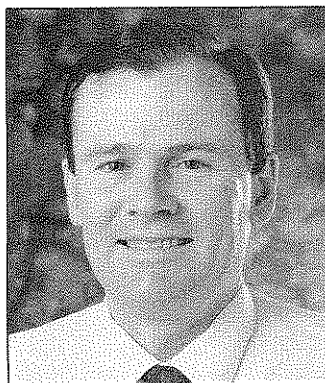
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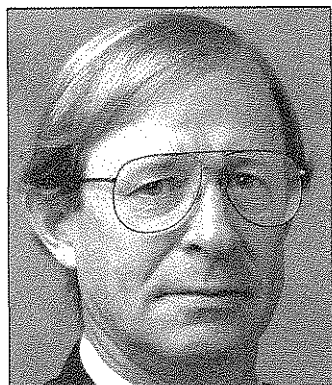
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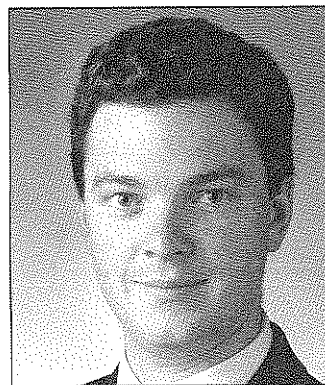
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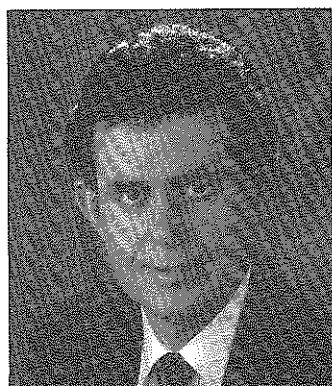
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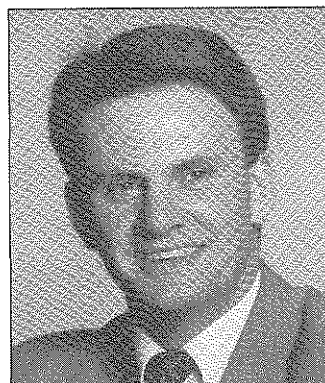
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Abbreviations and acronyms

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.

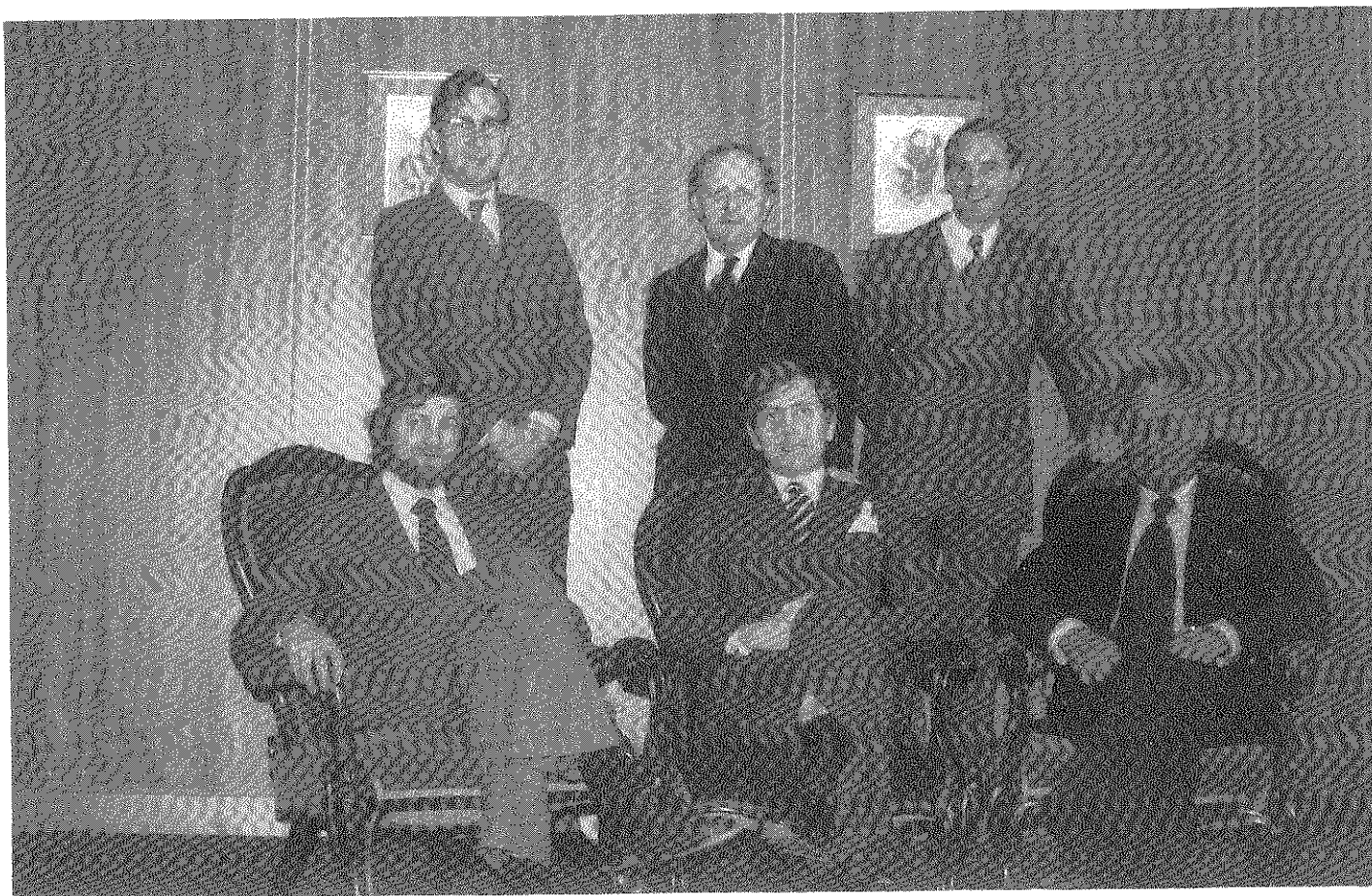
Recommendation 39

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.

Introduction

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

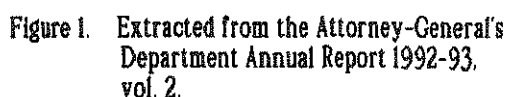


Figure 1. Extracted from the Attorney-General's Department Annual Report 1992-93, vol. 2.

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 sub-contracting 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.

¹⁸² 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.

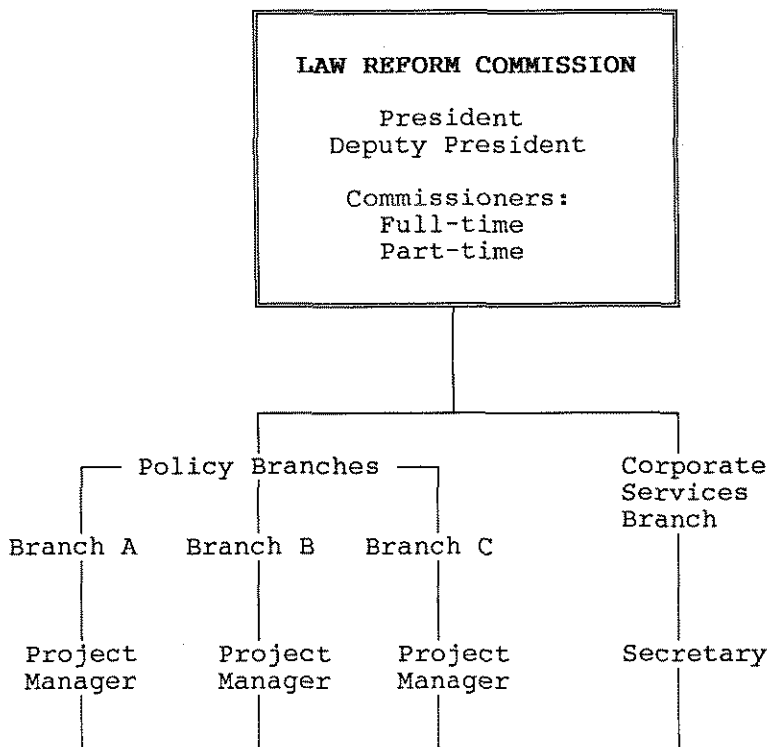
186 Section 27 of the Act.

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.

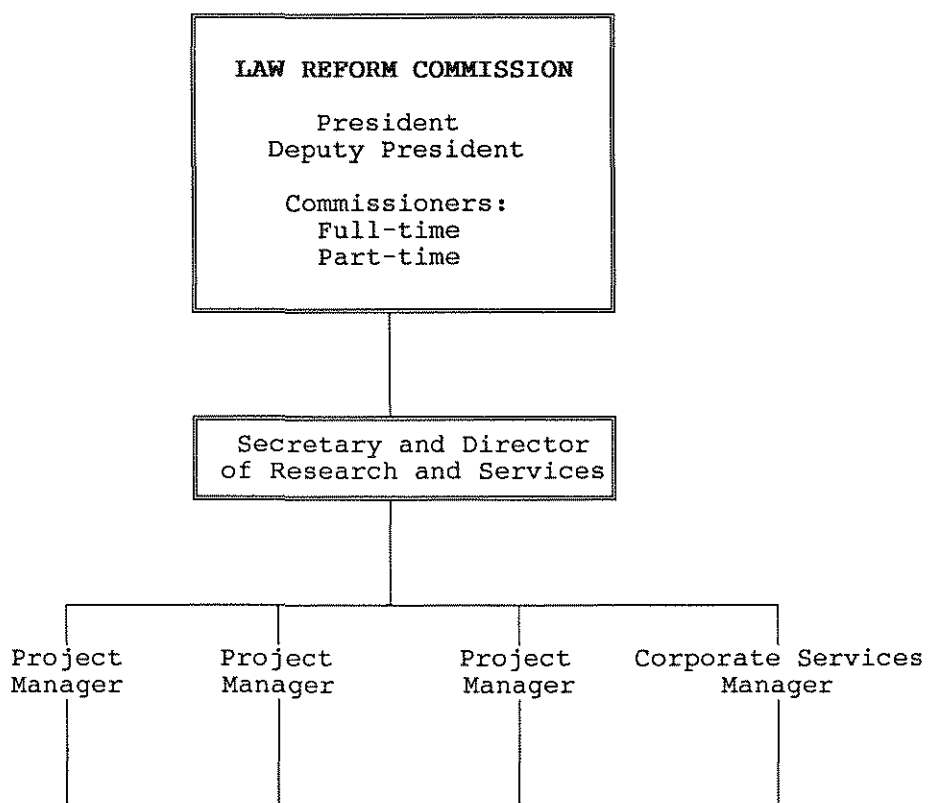
5.3.10 The Committee considers it is important for the Commission to have firm control and direction over a reference. The current organisational structure of the Commission seems unwieldy as the president must deal with four senior executive service officers. The Committee considers it would be more 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.