Professor David Weisbrot AM
Professor of Law and Governance
Macquarie Law School (W3A Rm 527)
Macquarie University NSW 2109 AUSTRALIA

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Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

Dear Secretary and Senators

Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Australian Law Reform Commission

Introduction

Thank you very much for this opportunity to contribute to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Australian Law Reform Commission (ALRC).

I congratulate the Senators for initiating this important Inquiry after evidence provided to recent Senate Budget Estimates Committees revealed the severe cuts to the ALRC's budget (which had been the subject of some media speculation but had not been publicly announced); the parlous state of the ALRC's finances and the consequent staff losses; and the worrying implications for maintaining the high quality of research and policy advice for which the ALRC has achieved international renown over its previous four decades.

I note that the Committee has been asked to inquire into and report on the Australian Law Reform Commission (ALRC), with particular reference to:

(a) its role, governance arrangements and statutory responsibilities;

(b) the adequacy of its staffing and resources to meet its objectives;

(c) best practice examples of like organisations interstate and overseas;

(d) the appropriate allocation of functions between the ALRC and other statutory agencies; and

(e) other related matters.

Much of the background material requested by the Committee was the precise subject of a chapter I wrote on the profile and future of institutional law reform in Australia and overseas, published as "The Future for Institutional Law Reform" in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005), Ch 2, pp 18-39. I will not paraphrase that material at length, but have *attached* a copy of that chapter to this submission for the convenience of Senators.

MACQUARIE UNIVERSITY

Professor David Weisbrot AM
Professor of Law and Governance
Macquarie Law School (W3A Rm 527)
Macquarie University NSW 2109 AUSTRALIA

Although published a little over five years ago, the demographic portrait of law reform around the common law world, and the discussion of key aspects of law reform and preferred law reform models, all remain current in terms of Best Practice thinking in international law reform circles.

Perhaps the only change of significance in the intervening period has been the most unfortunate downgrading of the role, independence and budget resources of the ALRC since late 2009—all without any public discussion, consultation or even explanation.

My colleagues at Macquarie Law School are also making a submission to this Inquiry, and I am pleased to be a party to that submission. I am also a member of the Academic Advisory Council of the Rule of Law Institute Australia (RoLIA) and have had the opportunity to read RoLIA's submission, with which I agree.

However, I feel it is also necessary to provide the Committee with a personal submission, as a former President of the ALRC and someone experienced in institutional law reform in Australia and overseas.

Personal background in law reform

I believe that there are few, if any, individuals in Australia or overseas with more direct experience of institutional law reform than I have. It has been a great honour and an even greater privilege to have been allowed to serve in this capacity—there is no better or more satisfying job.

I served as a Consultant to the Papua New Guinea Law Reform Commission from 1977-1983 in relation to the recognition and application of customary law by the formal legal system, and then again on the major review of the PNG Criminal Code (1990). As a consequence of my work on the recognition of customary law in the Pacific Islands, the then Chair of the ALRC, Justice Michael Kirby AC CMG, asked me to assist him (in 1982-1985) with the ALRC's reference on the Recognition of Aboriginal Customary Law—my first interaction with the ALRC.

I served as a Consultant to the Victorian Law Reform Commission from 1988-1990 on matters of criminal law and procedure, especially on reform of the law of homicide, including sentencing of homicide offenders and defences to murder.

In 1990, I was appointed the full-time Commissioner of the New South Wales Law Reform Commission for four years, and then re-appointed annually for a further six years (1994-1999) as a part-time Commissioner.

In 1994-1995, during a period in which there was an effort to restore civil society, I served as a part-time Commissioner of the Law Reform Commission of Fiji, initiating and leading the review of Fijian criminal law, criminal procedure and police powers.

Prior to taking up my appointment at the ALRC in June 1999, I also served on a large number of ad hoc law reform bodies, including (among others) the Commonwealth's Access to Justice Advisory Committee (1993-1994, chaired by Justice Ronald Sackville); the NSW Government's Gender Issues Implementation Committee (1996), established to monitor developments following the 1995 report *Women Working in the Legal Profession in NSW*; the NSW Ethnic Affairs

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Macquarie University NSW 2109 AUSTRALIA

Commission's Working Group on Cross-Cultural Issues in the Practice of Law (1992–1993); the NSW Government's Justices Act Review Select Committee (1991–1992); and Standards Australia's Technical Committees on ADR and Dispute Management (1993-1996 and 2003-2005).

I served as President of the ALRC from 7 June 1999 through 30 November 2009—which makes me the longest serving President in the ALRC's history—and during that period I led 14 major inquiries through to completion, including the reviews of:

- the federal civil justice system in Australia (Managing Justice);
- the *Judiciary Act 1903* (Cth);
- the *Marine Insurance Act 1909* (Cth);
- the use of civil and administrative penalties in federal regulatory jurisdiction;
- the protection of human genetic information, with special reference to genetic privacy, discrimination and ethical standards (*Essentially Yours*);
- intellectual property aspects of genetic materials and technologies, with special reference to gene patenting and human health (*Genes and Ingenuity*);
- the protection of classified and security sensitive information (*Keeping Secrets*);
- the Uniform Evidence Acts and harmonisation of Australian evidence laws;
- sentencing and administration of federal offenders under Part IB of the *Crimes Act 1914* (Cth) (*Same Crime, Same Time*);
- federal sedition laws (*Fighting Words*);
- legal professional privilege and Commonwealth investigatory agencies;
- review of the *Privacy Act 1988* (Cth) and related laws and practices (*For Your Information*);
- Royal Commissions and other official inquiries; and
- federal secrecy laws.

Apart from these duties, I also served as an *ex officio* Member of the Administrative Review Council (ARC) for over a decade (1999–2009), and on the Attorney-General's International Legal Services Advisory Committee (ILSAC) from 2006–2009. Beginning in August 2000, at the request of the then Attorney-General, the Hon Daryl Williams AM QC MP, I served as Chair of the National Pro Bono Task Force, which reported in June 2001 and (among other things) led to the establishment of the National Pro Bono Resources Centre.

In early 2004, following discussion by law reform officers from around the world at the previous two meetings of the Commonwealth Law Conference, the new Commonwealth Association of Law Reform Agencies (CALRAs) was established, comprising the roughly 60 institutional law reform bodies found in Commonwealth countries (as well as a few non-Commonwealth countries,

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Professor David Weisbrot AM
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such as Ireland and Brazil). I was honoured to be elected the Foundation Vice-President of CALRAs (2004-2006) and then served as President of CALRAs from 2007-2009 (only resigning in November 2009, when I no longer held a position at the ALRC).

During my time at the ALRC, we took a very active and enthusiastic role in providing advice, training and support to other, less well-resourced, law reform agencies. Among others, these included the newly established or re-established law reform commissions in Papua New Guinea, the Solomon Islands, Samoa and Vanuatu. Apart from those in immediate our region, it also included the Singapore Law Review and Reform Division, the Malawi Law Commission, the Namibian Law Reform and Development Commission, and the Law Reform Commissions of South Africa, Kenya, Tanzania and Lesotho, among others.

In early 2009, I was invited by the Government of the Republic of Botswana to serve as its Technical Adviser on the establishment of a Botswana Law Reform Agency, reporting directing to the Attorney-General of Botswana, Dr Athaliah Molokomme. (I did this on a pro bono basis.) Dr Molokomme told me that the Botswana Government had sought me out partly because of my leadership role with CALRAs, but mainly because they regarded the ALRC as easily the best performing Law Reform Commission in the world, and thus the one that they most wished to emulate down the track.

The absence of consultation or cooperative strategic planning about the future of the ALRC

I apologise for providing the level of personal detail above—which I would otherwise be loathe to do—except to make one very simple but salient point:

Despite a lifetime of service and leadership in law reform, when the Commonwealth Attorneys-General Department apparently determined in 2009 that it would radically alter the composition, nature, role and resourcing of the highly successful Australian Law Reform Commission, none of these matters were ever discussed with me.

My views were never sought about how best to proceed, nor about the implications of the radical surgery conducted to the complement of Commissioners and staff. I was never asked to provide my views about the strengths of the ALRC, nor its weaknesses or missed opportunities, nor any changes I might suggest to improve the breadth or quality of its work, the efficiency of its systems or the pertinence of its advice to Government.

No exit interview or the like was conducted when I departed at the end of November 2009.

Not long after taking up his position of Secretary of the Attorney-General's Department, Mr Roger Wilkins paid me the courtesy of a brief 'meet and greet'. Curiously, Mr Wilkins said that he had previously commissioned a review, which indicated to him that the ALRC was an unaffordable 'Rolls Royce luxury operation' that should be wound up, or perhaps rolled back into the Department—but Mr Wilkins reassured me that he was *not* proposing to accept that advice.

I was quite perplexed, as I had not heard of any review being conducted in relation to the ALRC; had not been asked to provide any information for such a review; was never interviewed in relation to such a review; and was never shown any draft for comment or correction, nor a copy of the final report or its recommendations. (That remains the case to this day.)

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Mr Wilkins did indicate that he wanted law reform reports to be produced in a much more timely fashion, rather than the 'seven or nine years' he asserted it was taking. Mr Wilkins said he preferred a 'rapid response' model. I pointed out that, in fact, it had been the policy for at least the previous decade or more (pre-dating my time at the ALRC) for the Government to specify the reporting date in the Terms of Reference for each inquiry, and these were typically one or two years, depending on the size and scope of the inquiry.

The ALRC was generally meeting those targets without problem, and where minor extensions were sought this was almost always to accommodate the pleas of key stakeholders—including Commonwealth Government departments and agencies—for more time to complete their submissions and for more opportunities for consultation and discussion.

Mr Wilkins also suggested that the ALRC might focus more on 'black letter law' issues, and in particular raised the possibility of producing an 'Australian Restatement of the Law of Torts', along the lines of the one famously produced by the American Law Institute (ALI) many decades ago. I reminded Mr Wilkins that under its legislation, the ALRC cannot generate inquiries on its own motion, but rather works only on matters referred formally in writing by the Attorney-General. While somewhat restrictive, this mechanism is not something I would seek to change, since it provides greater accountability and guarantees that the ALRC's energy and resources will be harnessed to work considered to be of priority importance by the Attorney and the Government.

Of course, if the Government of the day wanted a Restatement of the Australian Law of Torts, then it could refer the matter to the ALRC and it would be done. (I did point out, however, that it took the ALI nearly 30 years to produce its first Restatement, so this sat rather oddly with a desire for 'rapid response' law reform.)

The critical need for a cohort of Commissioners

Mr Wilkins also wondered why ALRC Commissioners were appointed for a term of years (usually three to five years, although the ALRC Act permits appointments of up to seven years, and re-appointment is possible), rather than for a much more limited period targeted to the completion of specific inquiries.

My advice at the time—which I still strongly stand by, based on my long practical experience in law reform—was that the work of a good Commissioner involves a great deal more than simply providing expert advice on a single subject. Law reform has moved on a long way from the pre-1960s era of part-time, technical law reform committees, with experts meeting on the occasional evening, and with no research dimension or public involvement.

Modern law reform operations involve a great deal of:

- strategic research planning (including determining whether any empirical or other novel research elements should be incorporated—and if so, by whom);
- day-to-day management of ALRC research teams and sometimes multi-disciplinary consultants;

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Professor David Weisbrot AM
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Macquarie University NSW 2109 AUSTRALIA

- planning and implementing major community and professional consultation exercises, and then managing competing and conflicting stakeholder views;
- fashioning policy advice and recommendations to Government (and others, such as industry bodies, professional associations, educational authorities, regulators and so on) that is practical, effective, cost-efficient, and widely seen as fair and legitimate—even, or especially—by those who are not 100 percent happy that their own views or solutions didn't prevail; and
- working with Government (and others) afterwards to ensure the successful implementation of those bits of ALRC policy advice and recommendations that have been accepted (which, happily, is a very high proportion—as documented each year in the ALRC's Annual Reports). This phase generally takes quite a bit longer to complete than it takes the ALRC to finish its reports and recommendations—and so it is extremely valuable for the ALRC to retain the expertise and experience gained for some time after it has reported.

It is usually the case that a new Commissioner is initially appointed because his or her expertise closely aligns with a particular current inquiry. However, in my experience, it is *always* the case that the Commissioner's performance in the job improves measurably over time, as they gain experience with the institutional law reform process, even if subsequent inquiries are not in their specialist field. (In fact, it may be that moving experts out of their comfort zone is almost as critical to this improvement as the experience gained with the process.)

So, for example, Professor Brian Opeskin was initially appointed because his expertise in the area of federalism and constitutional law was useful for the ALRC's reference on the Judicial Power of the Commonwealth. Professor Opeskin did a fine job in that inquiry, but then went on to achieve even greater things in the references on Gene Patenting and Human Health and on Sentencing of Federal Offenders. Ian Davis was initially appointed because he was a leading expert on Marine Insurance, and he did a very fine job in running that Inquiry—but then went on to do a great job leading the much larger inquiry into civil and administrative penalties in the federal regulatory sphere. (And Ian subsequently went on to handle beautifully a very wide range of inquiries at the Queensland Law Reform Commission, before his untimely passing last year).

Professor Les McCrimmon was initially appointed to head up the Uniform Evidence inquiry because of his academic and professional expertise in evidence and civil procedure. Again, he did an excellent job in that inquiry, leading to real gains in the rationalisation, reform and harmonisation of Australian evidence laws—but he did an incredibly brilliant job leading the mammoth ALRC inquiry into Australian privacy law and practice, an area in which he previously had no expertise or interest. (To date, the Australian Government has accepted about 90% of the first 200 recommendations it has dealt with from the ALRC's 2008 report *For Your Information*.)

The presence of a cohort of senior lawyers at Commissioner level is also critical for a number of other reasons, including that:

- the governance of the ALRC—or any important public institution—benefits greatly from a number of different voices, perspectives and pairs of eyes;
- Commissioners play an important role as sounding boards and supports for each other, in the collegial development and management of their inquiries, and in the formulation of effective public policy;

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- Commissioners provide an invaluable 'corporate memory' about how previous inquiries were conducted, what information remains available for mining, and which experts and stakeholders made useful contributions (and might be called upon to do so again in future), and so on.

It is interesting to note that, just yesterday, the Government announced that it would boost the number of Commissioners at the Australian Human Rights Commission (AHRC)—the ALRC's sister body—from four to six (including the President), with the appointment of separate Race and Disability Discrimination Commissioners from 1 July 2011.[1]

This is indeed welcome news, and I warmly applaud this initiative. However, it sits rather oddly, and unsatisfactorily, with the Government's axing of two of the three ALRC Commissioner's positions in late 2009, leaving only the most junior Commissioner in place as Acting President (to be subsequently confirmed as President for a five year term—but, surprisingly, without the traditional advertisement and open recruitment process that is supposed to be firm Government policy, and is flagged for the AHRC positions).

The critical need for adequate staffing and budget resources

As mentioned, the direct spur for this Senate Committee Inquiry was the evidence of severe budget cuts and staffing losses at the ALRC revealed at the last Estimates hearings. As documented in the ALRC's submission to this Inquiry, this amounts to a $0.242 million reduction in 2010–11, followed by a further $0.495 million reduction per year in the following two years, representing a 20% cut on 2009–10 funding levels.[2]

Slowly over the last decade (mainly as a consequence of accumulated 'efficiency dividends'), but greatly accelerated by the recent major cuts, the ALRC has lost about 30% of its staffing complement—in a research institution comprised almost solely of its people.

This is not due to the GFC, or reduced Government budget income, or the need for Australians to tighten their belts in pursuit of some other, more pressing, national needs. During the same period, the staffing level at the Australian Attorney-General's Department doubled, from about 750 to about 1500. (One would think that there was plenty of existing capacity for 'rapid response' work in a Department with 1500 staff.)

Again, none of these matters was discussed with me at the time I was ALRC President. The first word I had of any planned budget cuts was when a middle-level manager in the AG's Department telephoned the Executive Director one evening in late 2009, to instruct her to enter into the electronic finance system and remove the amounts described above from the ALRC's portfolio budget statements.

When I was contacted about this by the Executive Director, I said that it was unprecedented, and that we should not do this without an instruction in writing, to make certain of the precise

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1 Attorney-General Robert McClelland MP and Parliamentary Secretary to the Prime Minister, Senator Kate Lundy, 'Gillard Government Strengthens Human Rights Commission', *Media Release*, 27 January 2011.

2 Australian Law Reform Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Law Reform Commission: Background Submission* (2010), p 27, para 4.8.

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Professor David Weisbrot AM
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Macquarie Law School (W3A Rm 527)
Macquarie University NSW 2109 AUSTRALIA

amounts involved—and that I would also appreciate some explanation or discussion. We did get the instruction in writing a few days later, detailing the precise amounts to be cut, but I never received any explanation of the reasons for this nor were my requests for a meeting to discuss the cuts with the Secretary or Deputy Secretary of the AG's Department ever granted—despite my presence in Canberra for Senate Estimates and other meetings.

Conclusion: the current debacle

It is much easier to describe the devastating effects of these budget cuts, which include (among many other things):

- two full-time Commissioner's positions have been lost, as described above, leaving only the President as a senior officer of the ALRC carrying statutory responsibility for performance, accountability and governance;
- critical research positions and other essential support positions have been lost—including the Research Manager and the Communications Manager—with the ALRC's staffing complement falling from 25 EFT in 2000-01, to 20 in 2009-10, to an optimistically estimated 16.2 in the next several years (which would maintain the present staffing level despite continuing significant budget cuts);[3]
- apart from the sheer loss of numbers, there has been a savage blow to morale and an extraordinary run of resignations: as I understand it, there has been more than 100% turnover of legal research staff—the core of ALRC operations—in the past year (since a few newcomers have already joined the old hands in resigning), with the consequent tragic and permanent loss of law reform experience;
- the ALRC has abandoned its flagship journal *Reform*—either in print or electronic form—after 35 years of producing two or more editions per annum (it was founded by the ALRC's Foundation Chair, Justice Michael Kirby, in 1975);
- virtually all other community education initiatives (beyond direct reference work) will also have to be abandoned;
- the ALRC will be forced to leave its purpose built premises in the Sydney CBD, despite having negotiated very favourable lease arrangements—and I understand the proposed new premises will not include any reception area, meeting rooms or library—which likely means that the ALRC's Michael Kirby Library, the major dedicated law reform library in Australia, of 35 years standing, will be eliminated; and
- one of the key factors upon which the ALRC nonpareil international reputation has been built and maintained over many years will have to be severely curtailed—namely, its deep commitment to, and excellence in undertaking, extensive community engagement and consultation.

In the current and projected circumstances, my view is that the ALRC will lack the leadership core of Commissioners and the required complement of professional and support staff to maintain the traditionally outstanding quality of its research, consultation, writing, and legal and public policymaking.

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[3] Ibid, pp 29-30, Table 3.

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Professor David Weisbrot AM
Professor of Law and Governance
Macquarie Law School (W3A Rm 527)
Macquarie University NSW 2109 AUSTRALIA

All of this occurs at the time when a 'new political paradigm' was meant to promise greater opportunities for individual and community engagement in law reform and public policymaking, more open and transparent government and more evidence-based debate and discussion about the best ways forward for our nation in dealing with complex challenges.

One only has to look at landmark ALRC reports like *Essentially Yours, Fighting Words* and *For Your Information*—all of which have been substantially or wholly implemented by successive Governments—to see the important role the ALRC plays in keeping our laws modern, fair and effective, marshalling the enormous expertise and energy of the community (all provided, it should be emphasised, on a voluntary basis) and in safeguarding our precious human rights and civil liberties from encroachments by technology, outdated or poorly constructed laws, or simple bastardry. Will doubling the size of the Attorney-General's Department compensate for these losses in any way? No.

Ironically, when the current Attorney-General held the Shadow Attorney-General's portfolio in 2003, he issued a media release describing the 2003 federal budget as 'a disaster for law reform' that would lead the ALRC 'to lose a full-time Commissioner and one legal officer in 2004-05, with further losses after that'. Mr McClelland argued then with some passion that 'these savage and ongoing cuts show that the Howard Government doesn't care whether our laws keep pace with the needs and expectations of the Australian people'.[4]

While there were some stresses and strains at the time, little did we realise then that by comparison with the present sad state of affairs, we were enjoying the Golden Age of Law Reform in Australia

If the members of the Legal and Con Committee handling this Inquiry have any further matters or questions they would like to raise with me, please do not hesitate to ask.

With kind regards

Yours sincerely

[4] Robert McClelland MP, Shadow Attorney-General and Shadow Minister for Workplace Relations, 'Statement: Budget a disaster for law reform', *Media release*, 14 May 2003.

ATTACHMENT A

From Brian Opeskin and David Weisbrot, *The Promise of Law Reform* (Federation Press, 2005)

2. The Future for Institutional Law Reform

David Weisbrot

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Introduction

Institutional law reform commissions first made their appearance in the United Kingdom in 1965 and quickly spread throughout the Australian states and territories;[5] New Zealand and the Pacific Islands;[6] Canada

5 See Chapter 1.

(federal and provincial); Hong Kong and South Asia (India, Pakistan, Sri Lanka); the Caribbean; and Eastern and Southern Africa (South Africa, Namibia, Malawi, Lesotho, Kenya, Uganda, Tanzania, Zaire and Zimbabwe).[7]

The creation of the Australian Law Reform Commission (ALRC) by legislation in 1975 coincided with that larger societal change in thinking about law and law reform. Until the mid-1960s, work by state law reform committees had largely focused on aspects of 'black letter law', which were seen to be province of judges and lawyers. However, the mood of the community had begun to shift in the 1960s, demanding more opportunities for direct participation in the democratic process and greater accountability and transparency of public institutions.

Similarly, there was a growing sentiment that our laws and legal institutions should be 'relevant', reflecting contemporary conditions and community attitudes. This saw the Australian Government ask the ALRC to work on references with a strong social policy emphasis, leading to reports on: complaints against police; police powers; alcohol, drugs and driving; insolvency and bankruptcy; human tissue transplants; privacy; defamation; sentencing of federal offenders; insurance contracts and agents; child welfare; and the recognition and application of Aboriginal customary law.

The establishment of institutional law reform commissions in the 1960s and 1970s fits snugly within the 'modernist' project of that era, which featured:

- the strong faith in progress through specialist expertise and technocratic solutions;
- the view of law as a neutral technology, providing solutions as applicable to the problems of Indigenous communities and the Third World as to those of advanced, industrialised societies;[8]

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6 See Chapter 28.

7 See Chapters 17, 29.

8 As exemplified by the 'Law and Development' and 'Law and Modernisation' movements in the United States and the United Kingdom in the 1960s and 1970s. See D Trubek and M Galanter, 'Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Review* 1062; J Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement' (1977) 25 *American Journal of Comparative Law* 457. Compare E Burg, 'Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement'' (1977) 25 *American Journal of Comparative Law* 492.

- the belief in the socially transformative power of 'big law', through omnibus legislation and high-powered, public interest, test case litigation; and
- the belief that government can, and should, play a central organising role in such activities.

Thus, it is no surprise that at around the same time the ALRC was established, Australia also saw:

- the creation of the Human Rights and Equal Opportunity Commission (HREOC) and the Commonwealth Ombudsman's office;
- the establishment of the Federal Court of Australia, the Family Court of Australia, the Administrative Appeals Tribunal and other federal merits review tribunals;
- the assumption of federal responsibility for legal aid and a massive increase in funding, as well as the advent of Aboriginal Legal Services and the community legal centres movement; and
- the recognition of the compulsory jurisdiction of the International Court of Justice, as well as ratification of a range of major human rights and anti-discrimination treaties.

A crowded field

The context of law reform in Australia has changed markedly in the 30 years since the establishment of the ALRC—certainly the field has become very much more crowded.

Joint ministerial councils—drawing together the federal, state and territory ministers (and sometimes the New Zealand counterpart) with similar portfolio responsibilities—have become more active in pursuing the modernisation and harmonisation of laws across boundaries. For example, the Council of Australian Governments (COAG), which brings together the Prime Minister, Premiers and Chief Ministers, was instrumental in forging a common approach to regulating stem cell research; and the Standing Committee of Attorneys-General (SCAG) has driven moves towards a national legal profession.

The system of active and well-supported committees in both Houses of the Australian Parliament—but especially in the Senate—is now well-entrenched, with these committees increasingly prepared to range over many of the same sorts of complex socio-legal problems that were once

largely the preserve of the ALRC.[9] Examples include: how to assure privacy in the computer age; how to regulate the rapid advances in bio-medical technology; how to provide procedural fairness for persons in the armed services charged with offences; how to deal with the rising costs of justice; and how to deal with issues of bio-prospecting and bio-diversity.[10]

Similarly, departmental and interdepartmental committees, task forces,[11] and working parties now routinely engage in law reform activities, and most adopt at least some of the techniques pioneered by the ALRC to stimulate public debate, canvass opinions and elicit submissions.

Within the Commonwealth Attorney-General's portfolio alone, there are a number of bodies providing specialist advice—among them the Administrative Review Council; the Family Law Council; HREOC; the Office of the Federal Privacy Commissioner; the National Alternative Dispute Resolution Advisory Committee; the International Legal Services Advisory Committee; and the Copyright Law Review Committee.

Over the past 15 years or so, much of criminal law reform at the national level has been driven by the Model Criminal Code Officers Committee, with the aim of achieving harmonisation of the federal, state and territory regimes. This has involved both a progressive codification of traditional areas of criminal law, as well as developing new areas of regulation such as Internet and e-commerce crime, and DNA profiling.

The general shift in Australian public policy-making towards the primacy of economic and business considerations means that many of the most important initiatives are now driven by Treasury. For example, the Corporate Law Economic Reform Project (CLERP), the tax law simplification project, and the Review of Business Taxation all operate out of Treasury. Yet they are, in effect, specialised law reform projects and utilise many of the hallmarks of the traditional law reform process, such as the iterative nature of documents and the emphasis on extensive community consultation.[12]

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9 See Chapter 21.

10 Committee reports sometimes conclude that a reference to the ALRC would be a good idea, permitting further research and consultation.

11 For example, the Attorney-General's National Pro Bono Task Force (2000–2001), for which the ALRC provided leadership and secretariat services.

12 See P Costello (Treasurer of Commonwealth of Australia), 'Review of Audit Regulation and Corporate Disclosure' (Press Release, 27 June 2002), commenting on the consultative process to be followed in CLERP 9.

It is telling that one of the most pressing socio-economic and legal issues identified by the ALRC[13]—developing a coherent approach to the consequences of Australia's ageing population—is being conducted by Treasury, through a series of intergenerational reports, incidental to the annual Budget process and papers.[14]

Royal Commissions and other *ad hoc* inquiries also are used to investigate particular matters of public concern, and to make recommendations for law reform.[15] In recent years, for example, there have been federally-established royal commissions inquiring into the collapse of HIH Insurance[16] and into aspects of the building and construction industry,[17] as well as a specially constituted *ad hoc* committee, headed by former High Court Justice Daryl Dawson, which conducted a review of the *Trade Practices Act 1974* (Cth). However, consistent with the more pragmatic sensibilities of the time and of the political leadership, Royal Commissions are now seen as extra-judicial bodies, able to use coercive powers and forensic techniques[18] to get to the bottom of a corporate disaster, a miscarriage of justice, or systemic malpractice in a particular field—rather than being charged with setting the broad socio-political agenda, as happened in the 1970s under both the Whitlam and Fraser governments.[19]

In recent years, with the blurring of the public-private distinction, it is increasingly common for public authorities to commission private consultants to review operations and report on means for improvement.[20] Similarly, there is a strong push to encourage more empirical, applied and industry-linked academic research.[21]

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13 'Older People and the Law' (2002) 81 *Reform* 1–122.

14 See P Costello (Treasurer of Commonwealth of Australia), *2002–03 Budget Paper No 5: Intergenerational Report 2002–03* (2003) <http://www.budget.gov.au/2002-03/> at 12 May 2005.

15 See Chapter 19.

16 HIH Royal Commisson, *Website* <www.hihroyalcom.gov.au> at 31 March 2005.

17 Royal Commission into the Building and Construction Industry, *Website* <www royalcombci.gov.au> at 12 May 2005.

18 Some law reform agencies have coercive powers available to them, but they rarely, if ever, exercise them. For example, under the *Law Reform Commission Act 1967* (NSW) s 10(2), the NSWLRC may assume, for the purposes of an inquiry, the 'powers, authorities, protections and immunities' of a royal commission. However, neither the 1973 nor 1996 Acts constituting the ALRC conferred such powers.

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

20 See Chapter 18.

21 The ALRC's *Managing Justice* report, Recommendation 1, strongly encouraged this research, noting 'the need for civil justice policy making and reform to be informed by empirical research': Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Rec 1.

An obvious disadvantage of the various *ad hoc* law reform arrangements is their transience. Unlike permanent law reform agencies, they lack established processes, quality control mechanisms, tried and true staff, established links or databases to facilitate effective consultation, and a track record of excellence. *Ad hoc* bodies are also unable to contribute to the reform process at a later date—in a field with long lead times—through the maintenance of documents and websites, submissions to parliamentary or other inquiries, and so on.

Attributes of a modern law reform commission

Writing at the dawn of the modern law reform era in 1970, the noted expert on Australian government and public administration, Professor Geoffrey Sawer, observed that this development reflected:

> the qualitatively new principle … that the whole body of the law stood potentially in need of reform, and that there should be a standing body of appropriate professional experts to consider reforms continuously.[22]

For Sawer, this 'new principle' of law reform should be embodied in a commission with four distinguishing characteristics: it should be permanent, full-time, independent, and authoritative.

The increasing questioning of the established institutions of that time included a lack of faith in other alternatives for bringing about legal change. This scepticism extended to:

> the judges, who were generally unwilling to reform the law by court decision and were still dominated by the literal rule of statutory interpretation, and parliaments, which were no longer willing to enact law reform by copying Imperial legislation, and the law was seen as not keeping up with technology and changes in social values; and yet there was an optimistic belief that state-sponsored activity could cure social problems.[23]

Senior members of the judiciary also expressed reservations about whether the courts were the best sites for systematic law reform. In 1979, Sir Anthony Mason noted that the responsibility of the High Court is 'to decide cases by applying the law to the facts as found', and that the Courts techniques and procedures were adapted to that responsibility and not to legislating or engaging in law reform activities.[24] Several years earlier, Sir Anthony had raised the possibility of law reform commissions being given delegated legislative authority, subject to the power of disallowance by either House of Parliament.[25]

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22 G Sawer, 'The Legal Theory of Law Reform' (1970) 20 *University of Toronto Law Review* 183.

23 P Handford, 'The Changing Face of Law Reform' (1999) 73 *Australian Law Journal* 503, 506–507.

24 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617. See Chapter 22.

25 A Mason, 'Where Now?' (1975) 49 *Australian Law Journal* 570, 573.

Permanent

As noted above, the permanence of an institutional law reform agency provides some inherent advantages over more *ad hoc* arrangements in furthering the reform process. The permanence of law reform agencies is somewhat less assured than it must have appeared to Sawer in 1970, when new commissions were being established throughout the Commonwealth of Nations, budgets were flush, and lists of exciting topics for inquiry seemed endless.

However, beginning in the late 1980s and 1990s, the Law Reform Commission of Victoria was abolished and replaced by a parliamentary committee; the national law reform commission and some provincial bodies were abolished in Canada; and other commissions struggled to maintain viability with limited staff and financial resources.[26] The ALRC was subject to a major review by a House of Representatives committee in 1993–94,[27] and its functions and powers were again the subject of a review by a Senate committee in 1999.[28]

What is clear is that law reform commissions are no longer seen as commanding support and scarce public resources simply by reason of their existence. They must compete for support (governmental, professional and community) within the crowded reform field described above, and in competition with other under-funded service providers (such as legal aid commissions and social welfare agencies), to demonstrate that they are special, and essential, for proper public policy formation.

Happily, law reform commissions, like vampires, appear to be difficult to kill. The Law Commission of Canada was re-established in 1996—with equally impressive ambitions but a much more modest budget.[29] The Victorian Law Reform Commission is also now back among us,[30] with an ample work program.

In some jurisdictions, formally constituted law reform bodies have been replaced by 'law reform institutes', with support from a university and the local legal profession, as well as some degree of public funding. The Alberta Law Reform Institute, established in 1967, was the first of these,

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26 See Chapters 1, 4, 6.

27 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform: The Challenge Continues* (1994). The review led to the *Australian Law Reform Commission Act 1996* (Cth), which repealed and replaced the 1973 legislation.

28 The Committee held hearings and received submissions, but did not produce a report.

29 Law Commission of Canada, *2003–2004 Estimates Report on Plans and Priorities* <www.tbs-sct.gc.ca/est-pre/20032004/LCC-CDC/LCC-CDCr34_e.asp#net> at 12 May 2005.

30 *Victorian Law Reform Commission Act 2000* (Vic).

and generally has been regarded as a significant success, with its reports and recommendations regularly finding their way into legislation.[31]

When standing law reform agencies began to fold two decades later, a number of other jurisdictions began looking to the Alberta model as a sustainable alternative. For example, the Law Reform Commission of British Columbia was established by statute in 1969, but ceased operations in 1997 when the provincial government discontinued funding. The British Columbia Law Institute (BCLI) was created shortly thereafter.[32] In Tasmania, a law reform commission operated from 1974 until 1987,[33] followed in 1988 by the office of the Tasmanian Law Reform Commissioner, which was abolished in 1997. In July 2001, the Tasmania Law Reform Institute was established, following a partnership agreement signed by the University of Tasmania and the state government.[34] The Legislative Council of the South Australian Parliament has passed a resolution calling for the establishment of a law reform institute, but has referred the matter to the Legislative Review Committee for investigation. The Committee is currently undertaking public hearings into the matter and is expected to report in mid-late 2005. It is understood that the most likely model will involve a partnership between government, the Law Society, and one of more of the university law schools.

Authoritative

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

A commission report should have independent and enduring value as an authoritative text on a given topic, even where the recommendations have not been acted upon by government. For example, the ALRC's reports on admiralty, evidence, recognition of Aboriginal customary laws, sentencing,

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31 Alberta Law Reform Institute, *Website* <http://www.law.ualberta.ca/> at 24 March 2005.

32 With general operational funding from the BC Law Foundation, and project-specific funding from government. The BCLI includes membership from the two university law schools in the province, the Law Society and Bar Association, and selected appointees: British Columbia Law Institute, *Annual Report 2001–2002* (2002), 3.

33 *Law Reform Commission Act 1974* (Tas).

34 Under the agreement, the Director of the Institute is appointed by the University Council, after formal advice from the state's Chief Justice, the Attorney-General, and the Law Society. The Institute's Board has similar representation, as well as up to two co-opted members.

children in the legal process, marine insurance, the judicial power of the Commonwealth, the protection of human genetic information, and gene patenting, among others, serve as definitive texts in an area[35]—sometimes *the* definitive text—and have proved to be of value to the courts, lawyers, scholars and students in Australia and overseas, irrespective of the degree or timing of government implementation.[36] Such texts also may serve to shape attitudes, values and understandings into the future, laying the groundwork for reform at a later time.

For this reason, the ALRC embarked on a project in 2002 to provide the entire collection of reports online—scanning and posting on the Commission's website the 66 reports produced before 1994, many of which were out of print or difficult to obtain—where they now may be consulted or downloaded at no cost. It is interesting to note that the 1986 report on *Recognition of Aboriginal Customary Laws*[37] remains the most requested document, despite its age and the lack of any significant implementation by successive Australian Governments.

Full-time

Many different models have emerged in Australia and elsewhere about how to structure and manage the operations of standing law reform commissions—driven mainly by considerations of funding rather than optimal performance.

For example, the ALRC operates on a full-time model, typically with three or four full-time Commissioners (including the President), plus a number of part-time Commissioners (usually drawn from the Federal Court bench), and a sizable, permanent research staff. The New South Wales Law Reform Commission has operated for some time now using the model of a part-time Chair, one full-time Commissioner, a large number of part-time Commissioners (currently 16), and a permanent research staff. The

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35 Australian Law Reform Commission, *Civil Admiralty Jurisdiction*, ALRC 33 (1986); Australian Law Reform Commission, *Criminal Admiralty Jurisdiction*, ALRC 48 (1990); Australian Law Reform Commission, *Evidence (Interim)*, ALRC 26 (1985); Australian Law Reform Commission, *Evidence*, ALRC 38 (1987); Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986); Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988); Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997); Australian Law Reform Commission, *Review of the Marine Insurance Act 1909*, ALRC 91 (2001); Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001); Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003); Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, ALRC 99 (2004).

36 See Chapter 14.

37 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986).

Queensland Law Reform Commission is smaller, but operates on a similar basis. As re-established, the Victorian Law Reform Commission has two full-time Commissioners (including the Chair), seven part-time Commissioners and a permanent research staff. By way of contrast, the Law Reform Commission of Western Australia is comprised only of part-time Commissioners (including the Chair) and it is notable for outsourcing most of its research and writing to external consultants.

My view is that a standing law reform commission needs at least *some* full-time and engaged Commissioners and a critical mass of excellent research staff in order to achieve a high quality product. This is what provides the intellectual drive; the commitment; the quality control and internal consistency; and the time for contemplation, consultation and empirical study, which are necessary to design and complete major research projects. It has been observed that:

> The truth is that law reform, if it is to be done properly, is a slow, complex, and time-consuming business … This sort of thing cannot be done adequately or within reasonable time limits by members serving part-time who come to the task 'at the fag end of the day' or on week-ends.[38]

These qualities are also necessary to provide consistency and corporate memory, including proper records and files, over time. The value of a law reform commission's work should be enduring and this in turn requires some mechanism to ensure ready access to reports and other materials. Preservation of the expertise is also important given the time it takes to implement recommendations (even where the government is so disposed) and the frequent need to make submissions to other bodies (usually parliamentary committees) that may consider similar issues at a later date. This feature is also what separates law reform commissions from Royal Commissions, *ad hoc* committees and the myriad part-time committees and interest groups established by professional associations and other bodies, which may make valuable contributions to the reform process but are rarely able to drive sustained research or provide a tangible legacy.

Independent

It is fundamental to success that a law reform commission maintain its independence.[39] To some extent, this flows from the formal establishment of institutional law reform agencies by statute—although few enabling acts specifically use the term 'independent'. Rather, the independence of a commission is primarily a cultural matter, both internally and externally.

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38 K Sutton, *The Pattern of Law Reform in Australia* (1969), 15.

39 See Chapter 5.

Internally, this refers to a commission's intellectual independence—the willingness to make findings and offer advice and recommendations to government without fear or favour. Without this essential quality, a commission would be no different from a ministerial office or government department operating under political direction, or a consultancy contracted to deliver a desired result. Whatever the views of individual members and staff, the commission as a whole be, and must be perceived to be, scrupulously free of political partisanship or association with private or special interests.

It also means that the culture must be sufficiently robust to weather strong criticism at times, at all stages of the process. Few other institutions in our society are as accustomed as law reform commissions to sharing openly their work in progress. This invariably means having some preliminary views and 'trial balloons' shot down along the way—with some bruised egos, perhaps, but in the ultimate interests of better policy making. Sadly, our immature media and political cultures make it very difficult for governments to formulate and refine policy in this way: a politician who floats ideas or is persuaded by someone else's tends to be roasted for 'inconsistency' or 'flip-flopping', rather than being applauded for creativity or flexibility. Institutional law reform provides an outlet for this more considered policy development process, without attracting so much heat.

Externally, this means that governments must respect this culture and ensure that appointments are non-political and free from conflicts of interest, that terms of reference for inquiries are not 'loaded', and that informal pressure is not brought to bear to achieve a particular outcome. To the extent that law reform bodies become politicised, they lose the ability to attract outstanding commissioners and members of advisory committees, and to play the 'honest broker' role in policy development. It is fortunate that, in Australia at least, federal Attorneys-General and governments of both political complexions have behaved entirely honourably in all of these respects, and there has been a welcome bipartisanship about the role and importance of institutional law reform.

For these same reasons, however, governments and departments sometimes may be cautious about referring matters to law reform commissions. Although the government gets to settle the formal terms of reference for an inquiry, turning a potentially contentious subject over to a commission

means that the government loses control over the process, over the substantive outcome, and over the suggested 'spin' for media purposes.[40]
It is common wisdom that a barrister should never ask a question on cross-examination to which he or she does not already know the answer. Similarly, it is common political wisdom that a government should never establish an inquiry unless it knows in advance what the outcome will be. By way of contrast, a law reform commission should never undertake an inquiry unless it does *not* know what the outcome will be—otherwise the matter should left to departmental officers, acting under public service disciplines in giving effect to government policy.
Whether or not there is public confidence in the genuine independence of a law reform commission determines whether members of the public, the legal profession, peak professional and industry associations, and others, will take the time and trouble to provide evidence, make submissions, comment on drafts, respond to discussion papers, and otherwise engage and co-operate fully in the law reform process.
This feature is also particularly critical where access to confidential information is valuable to the policy-making process—such as commercial-in-confidence material from industry, or highly sensitive personal stories from individuals. Members of the public, community groups, academics, professional associations and other relevant parties also must feel comfortable in coming forward with views critical of established authority. Confidential submissions are regularly made to law reform commissions, containing sensitive information that never would be revealed to 'the government'.
Another major benefit of an independent law reform commission is its ability to generate and harness an extraordinary volunteer effort in the course of its work, to supplement in-house research and expertise. The direct government expenditure on a law reform commission may be seen as a form of 'pump-priming', providing the focus and co-ordination that enables much greater public participation and the unleashing of volunteer effort in the public interest.
For example, it is now standard operating procedure for the ALRC to establish a broad-based, expert Advisory Committee to assist with the development of all of its inquiries. These committees have particular value in helping the inquiry to maintain a clear focus and determine priorities, as

40 See Chapter 20.

well as in providing quality assurance in the research and consultation effort, and commenting upon the practicability of reform proposals.
The ALRC seeks to involve the acknowledged leaders in their respective fields—already busy people, whom the Commission could not possibly afford to pay what they are worth or could easily command as consultants in the private market. And yet, virtually all such invitations are accepted. There is little doubt that this is attributable to: (a) the opportunity to influence policy and practice in an area that the person feels passionate about; and (b) the real and perceived independence of the ALRC. No sitting or former judge, leading legal practitioner, or scholar, would ever volunteer their services to an agency under the influence or control of the executive.
While intellectual independence must be fiercely guarded, it is also true that, as a public agency, a law reform commission must remain accountable. Commissions do not have plenary powers, but rather must operate within boundaries defined by their constitutive legislation. Commissions generally having to report to parliament through the Attorney-General's portfolio (or something similar), comply with public sector budget and management reporting requirements, and account to Senate Estimates Committees with respect to the efficient and effective use of public funds.
Although law reform commissions must engage in a number of important ancillary activities—such as community education, conference organisation, publishing, and making submissions to other inquiries based upon previous or current research—they must remain focussed squarely upon their main function: to provide the highest quality legal and policy advice on matters referred to them, and thus to be useful to government.

Attributes of a 'post-modern' law reform commission

To Sawer's 1970 list, I would now add four more essential characteristics for a contemporary law reform commission: it also must be generalist, interdisciplinary, consultative, and implementation-minded.
To some extent, these additional attributes simply elaborate upon Sawer's basic group. However, these additions also reflect the changing political and social climate in which the law reform process operates.
Under this 'post-modern' sensibility:

- there are doubts about the 'traditional certainties' and a questioning of traditional authority, including public institutions;
- there is a greater appreciation of the complexity of social institutions and problems, including the fact that there may be intractable

competing interests for which no easy compromise or consensus solution is possible;

- power is seen to be much more diffused, and not entirely invested in the formal organs of government;
- governments are not necessarily seen as central to the solution of all social problems, with a preference for private sector or community-based strategies in at least some circumstances;
- there is greater reluctance to see all disputes as 'legal'; and
- there is an increasing clamour for mechanisms that enhance opportunities for genuine public participation in civil society and public policy-making.

As a consequence, there is greater scepticism of blockbuster legal solutions, with a preference for more textured, holistic strategies that place greater emphasis on process, education, communication, and the allocation of responsibility and authority to multiple stakeholders.

Generalist

I have indicated above the great proliferation and dispersal of law reform activity in Australia, much of it in the hands of *ad hoc* committees or specialist bodies. Thus, one of the most important contributions a standing law reform agency can now make is to remain a generalist body, endeavouring to work in any area of law or procedure, when asked, and making a virtue of this flexibility. Indeed, the most exciting references are those that take you outside your comfort zone.

Standing law reform commissions are also well placed to:

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

- transcend categories that may be narrowed by specialist bodies.[41]

In developing ideas for potential new references, especially ones that are complex and cross portfolios, a threshold question should be: 'If the Commission doesn't take on this project, who else possibly could?' For example, some matters may be left to the courts to deal with incrementally on a case-by-case basis. However, courts are poorly positioned to manage fundamental re-organisation of the law; and they are effectively barred from dealing with 'over-the-horizon' modernisation issues (such as genetic privacy and discrimination) because they are generally limited to the consideration of an active case or controversy.

Interdisciplinary

The systemic complexity inherent in contemporary society means that law reform commissions must see their research as having an interdisciplinary dimension.[42]

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

For example, the multi-disciplinary nature of the ALRC's inquiry in 2001–2003 into the protection of human genetic information—conducted in association with the Australian Health Ethics Committee of the National Health and Medical Research Council—meant that it was critical to involve leaders in the areas of: bioethics; genetic and molecular biological research; medicine; clinical genetics; genetic counselling; community health and medicine; indigenous health; public health administration; community education; health consumer issues; genetic support groups; insurance and actuarial practice; privacy law; anti-discrimination law; forensic medicine; DNA profiling; policing; and trial practice.

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41 An example is the recognition that 'family violence' cuts across criminal law, family law, housing law, social security law and administrative law; crosses state and federal law, and court and tribunal processes; and raises many non-legal issues, such as mental health, poverty and drug addiction.

42 Different inquiries may benefit from expertise in, among other things, statistics; economics; management; public administration; psychology; anthropology; sociology; political science; moral philosophy; natural sciences; and information technology.

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

A good law reform commission should contain staff comfortable working with social science materials and methodologies, and at least some who have strong empirical research skills. Perhaps it is an aspect of common law culture or legal training, but policy-making in law has relied far too much on anecdotes and notorious cases, and far too little on comprehensive empirical research. When such research is undertaken, it is interesting to note how often the received 'common wisdom' is challenged by the data. For example, the ALRC's *Managing Justice* report was underpinned and greatly influenced by a major empirical study of the operations of the various federal courts and tribunals, which provided critically important data on case numbers, duration and type; the efficacy of different case management strategies, practices and procedures; the degree of legal representation and its impact on outcomes; the use of alternative dispute resolution mechanisms; the costs of litigation; as well as follow-up attitudinal surveys of litigants and lawyers.[43]

Consultative

Another of the defining characteristics of a law reform commission is that it operates fully in the public domain. A deep commitment to undertaking extensive community consultation as an essential part of research and policy development is the *sine qua non* of a law reform commission. Ultimately, it is the attribute that distinguishes it from other bodies that have a law reform aspect to their work. Brian Opeskin has noted that:

> The desirability of engaging the public in the process of law reform may be explained in many ways. For convenience, these can be divided into three groups: benefits for those consulted, benefits for the process of law reform, and benefits in terms of enhanced effectiveness of the law once reformed.[44]

The nature and extent of this engagement normally is determined by the subject matter of the reference. Areas that are, or are seen to be, narrow and technical tend to be of interest mainly to expert legal practitioners, industry

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43 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000). See also Australian Law Reform Commission, *Review of the Federal Civil Justice System*, DP 62 (1999).

44 B Opeskin, 'Engaging the Public—Community Participation in the Genetic Information Inquiry' (2002) 80 *Reform* 53, 54.

associations and government agencies. For example, the ALRC reviews of the *Marine Insurance Act 1909* (Cth)[45] and the *Judiciary Act 1903* (Cth) may fall into this category. Other ALRC references—such as those relating to children and the law; Aboriginal customary law; multiculturalism and the law; gender equality before the law; and the protection of human genetic information—involved high levels of interest and involvement from the general public.

The real and perceived independence of a law reform commission is crucial in providing the level of confidence needed for successful community consultation. At least as important, people also must feel that the time and effort involved in their participation in the law reform process is worthwhile—that is, that they will be given a meaningful opportunity to be heard and there is some reasonable prospect for achieving positive change. As noted above, law reform is now a crowded field, and 'submission fatigue' is often a very real phenomenon. In most cases, it will no longer be enough for a law reform commission to publish an issues paper or discussion paper, perhaps schedule a few public hearings, and then sit back and wait for the raft of comprehensive, thoughtful and beautifully crafted submissions to flow in.

In inquiries in which public participation is less naturally forthcoming, greater creativity will be required in fashioning a consultation program, which might include extensive use of the mass media (including talkback radio); use of surveys of particular memberships or participants; telephone hotlines; public opinion polling; and market research techniques, including focus groups.

Although it is still early days in the law reform context, it may be expected that commissions will soon begin to develop more creative and intensive ways to harness the potential of the Internet and other forms of electronic communications—for example, by providing more interactive websites, including on-line questionnaires, discussion groups and chatrooms. Public forums and consultations could be streamed to a much larger audience (domestically and internationally). Planned carefully and managed sensibly, such efforts can promote community debate and education, elicit views and information which assist in fashioning policy recommendations, and

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[45] Although the integrity and efficiency of the market for marine insurance should be of great importance to a shipping nation such as Australia, it was very difficult to generate any interest in the media—and, consequently, among the general public.

provide the law reform commission with a public profile, which encourages further interaction in future.[46]

However, law reform commissions also need to develop media management skills and strategies to ensure that they do not lose control over the presentation of issues. It is very unfortunate for proper public debate and policy-making, but media coverage typically prefers personal conflict to the contest of ideas; prefers simple explanations to complex ones; and prefers striking images to interesting ideas.[47]

There is also strong media resistance to the iterative approach favoured by law reform commissions. While a final report with recommendations for change fits the media paradigm—reporters readily can find experts and representatives of interest groups who will argue passionately for and against the particular recommendations—it is more difficult to gain effective media coverage of the preceding community consultation papers, where the object is to raise consciousness and develop issues and ideas for further consideration.

Even with final reports, it is sometimes difficult for a law reform commission to convey more than a single message, and that message may not always be the one the commission itself rates most highly. For example, there was extensive media coverage of the release of the *Managing Justice* report, but it was overwhelmingly fixated on the ALRC's strong criticism of the Family Court's poor case management processes and the management culture—which was contained in one of nine chapters in the report. Virtually no coverage was given to the range of equally important recommendations relating to: legal education; judicial education; judicial accountability; legal professional ethics and rules of conduct; case management, practice and procedure in the Federal Court and the federal merits review tribunals; legal costs; legal aid; the government as a litigant; and the use of expert evidence.

Similarly, media coverage of the landmark *Essentially Yours* report was disproportionately skewed towards the emotive issue of DNA paternity testing—a hot-button issue for fathers' groups—which was covered in one of the report's 46 chapters.[48] The media thus missed or glossed over most of the major issues and recommendations, including: the ethical oversight of

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46 See Chapter 11.

47 See Chapter 12.

48 Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC 96 (2003), ch 35.

genetic research, tissue collections and genetic research databases; the delivery of clinical genetic services, including genetic counselling; the regulation of access to genetic testing; the necessary changes to privacy and discrimination laws; the use of DNA testing and databases by law enforcement authorities; the use of genetic testing and information by insurers, employers, immigration authorities and sporting bodies; and the role (if any) of genetic information in the construction of ethnic or racial identity.

In retrospect, it might have been more effective, from a media strategy point of view, to release a series of final reports covering those issues, over a space of time, to secure better coverage. However, this would have meant fragmenting some of the research and general discussion, such as the important consideration of underlying themes and overarching principles. This also would mean withholding from government for a period of time some of the findings and recommendations, after they had been finalised, simply for media purposes—which the ALRC was not prepared to do. However, handled properly, a further benefit of open and extensive public consultation is that the process clearly identifies competing arguments, interests and groups—and their relative support in the general community—well in advance of any governmental action.[49] The public ventilation of issues, including the opportunity for education, debate and participation, sometimes may be enough to defuse lingering tensions.

Sometimes a broad consensus may be achieved through the law reform process; more often, a commission has to make hard decisions and identify a preferred approach. A law reform commission's final report is not an advocate's brief—rather, it should set out for the government's consideration a thorough analysis of the relevant law and policy; identify the various models and options considered; document the range and relative strength of the opinions encountered (through meetings, submissions and a review of the literature); and then provide sound reasons for its recommendations.[50]

Whether or not a government ultimately agrees with the approach taken by the commission, the fact of an open inquiry should guarantee that the government is never taken by surprise when it engages in lawmaking in the area. It also may be that Opposition criticism will be more muted where an

49 See Chapters 15, 20.

50 See Chapter 13.

initiative has the imprimatur of an independent law reform commission, and thus is seen to be non-partisan.

Implementation-minded

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

This requires a clear sense of both the possibilities and the limitations of law reform. If it were ever the case, the old conundrum of 'do you recommend the ideal solution or the pragmatic one?' now has little resonance. The current political era is one in which public sector funding is highly contested, and deregulation and privatisation have dispersed power and responsibility.

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

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

Similarly, the 144 recommendations contained in *Essentially Yours* were directed at 31 different bodies and, for the first time, the ALRC incorporated an 'Implementation Schedule' to highlight the actions required of each of these bodies, and to facilitate monitoring of the implementation process.

These days, a law reform commission also must think very carefully about any recommendation that entails increased public expenditure: far more than was the case some years ago, it must spell out very clearly the precise amounts, offsets and cost-benefit analyses involved. Similarly, there is now a greater reluctance to recommend the establishment of additional governmental authorities unless there is no plausible alternative. This represents something of a change in approach. In the past there often seemed to be a simple reform equation: if there is a problem, recommend a specialised agency, court or tribunal to deal with it. Instead, the current preference is to utilise or build upon existing institutions.

The ALRC actively measures the quality of its output in part by evaluating the degree to which its reports are accepted and implemented by government.[51] However, implementation by government cannot be the sole barometer of the quality or success of a report. Law reform commissions must be implementation-minded, but should not become implementation-obsessed. Some outstanding reports and recommendations have been consigned to the 'too hard' basket, or are seen as not pressing enough to merit scarce parliamentary time. And, as discussed above, it is also increasingly the case that the ALRC's recommendations are aimed at other stakeholders, inside and outside the legal system.

Nevertheless, in an age of 'benchmarking', implementation rates have both internal and external importance to law reform commissions. A commission is not an academic institution that may pursue pure research. The object is to influence government policy, and public funding is provided primarily, if not exclusively, for that purpose. The ALRC carefully maintains a register of major developments in relation to issues covered in its past reports, and assesses the level of implementation achieved in each case. In many cases, implementation occurs some years after the completion of a report. This data is analysed and published in the ALRC's annual report, and is thus publicly available.[52]

It is trite to say that implementation is not the sole, nor even the best, indicator of quality. Other important measures are discussed in Chapter 14, and include:

- the degree to which community awareness has been raised as a result of the inquiry process and the resulting report;

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51 See Chapter 14.

52 See, eg, Australian Law Reform Commission, *Annual Report 2003–04*, ALRC 100 (2004), 22.

- the stimulation of debate on related issues;
- the spurring of legislative or other reform action in an area, even where the ultimate outcome is the adoption of an option other than the one recommended;
- the influence on reform in other jurisdictions; and
- the extent of citation in further reports, judgments, treatises and journal articles.

Sometimes the very existence of an open inquiry is enough to stimulate introspection, internal review, or reform by the institutions under scrutiny. Social scientists have described the 'Hawthorne effect' (and natural scientists the 'Heisenberg effect'), by which the observation of an activity itself has an impact on that activity.[53] Benson and Rothschild have noted that the establishment of a Royal Commission of inquiry:

> creates a climate of opinion which can often be effective in bringing about changes of thought and attitude … which would not have happened if the [review] had not been appointed. Some hold the view that this is the major benefit … and is of more practical value than the subsequent decisions which may or may not be taken.[54]

This 'spotlight' phenomenon has been apparent to the ALRC in recent inquiries. The review of the federal civil justice system prompted a great deal of internal review activity among federal courts and tribunals. Although the then leadership of the Family Court was stridently and publicly resistant to the findings and recommendations of the ALRC, the Court's own 'Future Directions Committee' ultimately produced recommendations that closely tracked those of the ALRC in most respects. The inquiry into the protection of human genetic information spurred the peak life insurance body to commission research, review its policies and practices, and develop good educational literature for consumers and salespeople. Employers and trade unions, which had not begun to consider these issues at the time of the inquiry, are now beginning to grapple with them and develop policy. Similarly, many genetic research laboratories have been admirably pro-active in reviewing their processes for securing consent, maintaining privacy, and so on.

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53 See Chapter 14 regarding the effect of measuring performance on the behaviour of those whose performance is measured.

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

Finally, the law reform process and final reports may contribute significantly to the changing social atmospherics or *Zeitgeist*—or as Oliver Wendell Holmes put it, 'the felt necessities of the time'[55]—which lead to significant judicial expansion of the common law or parliamentary development of the statute law. For example, the ALRC's report on the recognition of Aboriginal customary law may not have been formally implemented, but it may nevertheless have influenced the thinking of the majority of the High Court in the *Mabo* case,[56] when it declared the existence of a form of customary native title under Australian common law, after more than 200 years of resistance to this concept by the legal system. Similarly, Commissioners and staff returning to the Bench, the practising profession, and the academy, are likely to bring back with them the sorts of perspectives, techniques and approaches found among law reformers, extending informal processes of influence.

Conclusion

Institutional law reform owes its existence to the modernist project of the post-World War II era, embodying the optimistic view that all challenges—including fundamental legal, social and political ones—could be met by the judicious application of specialist expertise and technology.

The ALRC can proudly boast of significant contributions in:

- rationalisation of the law in some key areas—such as through the development of the Uniform Evidence Act;
- promoting open and accountable government—through the development of freedom of information laws, better archives laws, better handling of complaints against police, and in safeguarding basic civil liberties while protecting classified and security sensitive information;
- modernising the law to accommodate new technology and circumstances—such as through its pioneering work on human tissue transplants, genetic privacy and discrimination, and gene patenting;
- promoting access to justice—through its work on federal civil justice, costs shifting, and pro bono practice; and

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55 O Wendell Holmes, *The Common Law* (1880).

56 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

- highlighting areas of human rights and social justice—such as the recognition of Aboriginal customary law, the rights of the child, gender equality before the law, and multiculturalism and the law.

It can be argued that institutional law reform has provided an intelligent voice and has been a positive influence on the progressive development of the law in Australia. However, it cannot be said that it has been successful as an agent for social transformation—nor is it likely that it could, or should, have been fundamentally transformative, given its separation from political and economic power.

Ironically, the next 30 years should demonstrate that institutional law reform is actually better suited to the post-modern environment than it was for the era in which it emerged. Contemporary law reform commissions now recognise the importance of, and have the capacity to provide, independent, contestable advice for Attorneys-General and governments. They can design and manage complex empirical and interdisciplinary research. Law Reform commissions incorporate as part of their basic ethos and operations the community's desire for direct participation in democratic decision-making, and are now adept at developing sophisticated strategies for dealing with issues, which understands the multiplicity of stakeholders and assigns each the appropriate responsibilities. And they can do all of this successfully while operating in a cost-effective manner, using modest core public funding to unleash a larger private contribution.