



Senate Legal and Constitutional Affairs Committee

Inquiry into the Australian Law Reform Commission 2011

Submission of the NSW Law Reform Commission

19th January 2011

Relationship Between the New South Wales Law Reform Commission (NSWLRC) and the Australian Law Reform Commission (ALRC)

The NSWLRC has a long history of co-operation and collaboration with the ALRC. It has worked with ALRC on a number of recent references including

- 2005 *Review of Uniform Evidence Law* (ALRC 102, NSWLRC 112)
- 2009 *Privacy Principles* (NSWLRC 123)
- 2010 *Family Violence: A National Legal Response* (ALRC 114, NSWLRC 128.)

Consequently the NSW Commission has a detailed, practical and contemporary knowledge of the structure, practices and personnel of the ALRC.

Importance of Law Reform Commissions

Law Reform Commissions are not alone in providing advice about law reform and legal policy: for example advice frequently comes from government departments, other government agencies, parliamentary committees of various types, academics, and commissions established for particular purposes. However law reform commissions have a number of characteristics that are of particular value to governments and citizens.

First, they provide independent advice. They are established in a way that ensures that Commissioners cannot be removed by government except in limited circumstances. These and other protections ensure that, although good law reform takes into account the social and economic context of law, the recommendations of law reform commissions are independent of the position of any particular government. Often the matters referred to law reform commissions are socially and politically contested issues on which there may be a strong divergence of views in the community or on which key stakeholders disagree. Independent advice about law on such topics is likely to be of great utility to governments.

A further important quality of law reform commissions is their engagement with the community. They ensure that stakeholders are consulted and involved in the process of developing recommendations for reform of the law. Whilst it is comparatively easy to engage with some stakeholders (for example the judiciary, legal profession and government agencies) law reform

bodies ensure that consultation engages a broad range of stakeholders including organisations, individuals and sectors of the community who may find it less easy to engage with law reform. For example, they will ensure that the opinions and perspectives of rural and regional stakeholders are represented, and that Indigenous peoples are included. For some stakeholders, law reform commissions may be the only effective conduit through which their perspective on an important law reform topic is represented. Commissions build strong relationships with key stakeholders, and have developed expertise in effective methods of engagement with the community.

Commissions also present thorough, well-researched and properly supported arguments and take a careful analytical approach. The reasoning behind their recommendations, including the way in which stakeholder perspectives impact on those recommendations, is apparent and can be assessed by governments and others who use the reports. Commissions also provide comparative reviews of law in other jurisdictions both inter-state and overseas, and engage with legal scholarship and policy documents.

Consultation papers and reports from law reform commissions also have utility beyond advice about the appropriate legislative response by government. They inform legal education, legal research, and reform in other jurisdictions (both within Australia and internationally.)

Australian law reform commissions also have a developmental role in providing support and assistance to law reformers in developing countries.

The Australian Law Reform Commission

The ALRC has a strong national and international reputation. Its work is widely respected both by other Australian commissions and by commissions in cognate jurisdictions.

It has a history of distinguished Presidents and Commissioners who have contributed to the high quality of its work and its reputation over many years.

It has a reputation for being well resourced and for the deployment of those resources in the production of high quality consultation documents and reports.

It has made a strong contribution to collaborative law reform efforts in support of consistent legislation across Australia. It has carried out significant work on uniformity and consistency of laws across Australia – see for example its recent reports on evidence and family violence referred to above. As globalisation increases, international and inter-state trade develops further, and the population of Australia and the region becomes increasingly mobile this work will become more important.

The ALRC has also played an important role in providing support for Pacific regional law reform bodies

Structural Issues

The NSWLRC has some concerns about recent structural and funding changes to the ALRC. The NSW Commission understands that there have been funding cuts to the ALRC that have reduced staffing levels. In particular there has not been a Deputy President at the ALRC for some time. There is now no full-time Commissioner apart from the President, Professor Rosalind Croucher.

We understand that there are stringent budgetary constraints on governments, and that law reform commissions must operate within these in the same way as any other government agency. However, a consequence of the present structure of the ALRC is that the President must manage the organisation, including its internal and external relationships and, at the same time, lead two references. The NSW Commission would suggest, in its experience, that this is a workload that requires at least an additional Commissioner.

Whilst the ALRC attracts excellent staff and has Senior Legal Officers with a great deal of experience, they are not well positioned or remunerated to provide the leadership that is required to run references (see the description of the role of full-time Commissioners at para 2.25, ALRC *Background Submission*.)

Further, Part-time Commissioners are presently regarded by the ALRC as having an advisory role (*Background Submission* 2.28). After July 2011 it is proposed to abolish Divisions of the ALRC for the purposes of specific references (*Background Submission* 2.41). This means that the President alone will be the ultimate arbiter of any recommendations made by the Commission, there being no other Full-time Commissioners and the Part-time Commissioners having only an advisory role. Under the previous structure there was a President and two Full-time Commissioners. The President and at least one Full-time Commissioner would therefore be required to sign off on the recommendations of the Commission. A third Commissioner would be either involved or available for consultation in relation to each reference.

The NSW Commission must constitute a Division for each reference consisting of the not less than three Commissioners. All recommendations of the Commission must be approved by the members of the Division (including Part-time Commissioners.) If there is not agreement a dissenting Report may be made by any member of the Division. This arrangement supports high quality recommendations, and provides for balance in decision making by ensuring that no one person can determine the direction of any report or recommendation. These checks and balances are not present in the same way in the present and proposed arrangements for the structure and governance of the ALRC.

The ALRC has said that the present arrangement, of having only a President and no other Full-time Commissioner, is a temporary savings measure (*Background Submission* 4.11) and that the effect of the present arrangements has been ameliorated by the involvement of the NSW Full-time Commissioner in the recent reference on Family Violence. This is correct. However the NSW Commission notes that the Family Violence reference, in which the NSW Commission was actively involved, is not the only reference the ALRC has under the present arrangements.

In making these points the NSW Commission seeks to address structural issues. No reflection on the actions or abilities of the President or staff of the Commission is intended. The NSW Commission has worked closely with the ALRC (see above) and has first-hand experience of the strong role played in references by Part-time Commissioners. It also has witnessed the important contributions made by the legal officers at the ALRC and the robust debates about recommendations in which the President, Part-time Commissioners and legal officers have all participated.

Nevertheless the ALRC's practice, to be embodied in its structure after July 2011, does place the President in a very difficult and exposed position because there are no other Full-time Commissioners.

Prompt responses to law reform questions

The NSW Commission also notes that the time frame for reporting on references by the ALRC is frequently of short duration. Prompt responses to law reform questions may be important – law reform may lose its immediacy and relevance if a relatively speedy response cannot be secured. However, thorough, independent research that includes consultation in meaningful ways with stakeholders and produces sound recommendations cannot be carried out speedily without resources, including resources of leadership.

Conclusion

In order to maintain its capacity to produce high quality work, and to do so within tight time frames, ALRC funding should be increased from its present level. In particular there is a need for funding for more full-time Commissioners to provide leadership and to add weight to the input from the President and part-time Commissioners. This is especially important given that there are to be no Divisions of the Commission, and that part-time commissioners are not to have a determinative role in relation to recommendations of the Commission.

The Hon James Wood AO QC

Chairperson

Emeritus Professor Hilary Astor

Full-time Commissioner