AUSTRALIAN LAW REFORM COMMISSION

THE PROMISE OF LAW REFORM

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30. ARE WE THERE YET?

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Contents

Thirty years on

The establishment of the Australian Law Reform Commission (ALRC) on 1 January 1975, twenty years after the Indian Law Commission and ten years after the Law Commissions in the United Kingdom, constituted an important step for Australian law. As this book shows it is timely, and useful, to pause and reflect. To see where we have come from; where we are; and where we may possibly go.

I am reasonably well placed to tackle the first two topics. I was there at the creation of the ALRC, taking up office as the first Chairman

(as the office was then called in the original Act[1]). As a lawyer, appellate judge and citizen I have watched the progress of the Commission since I left it in 1984. I have its reports close by on my shelves and often use them in my judicial work. However, the future is another country. To answer the question "Are we there yet?", it is necessary to have a conception of where "there" is. This book gives a number of signposts. Maddeningly, some of them appear to point in opposite directions. Such is the nature of institutional law reform.

The ALRC did not arise without forebears. This was no virgin birth. It was conceived as a natural result of the process of institutional reform that had been going on in the legal systems of England and its progeny for centuries. The year 2004 was the bicentenary of the French Civil Code. The codifiers, urged on by Napoleon, conceived of the noble idea of re-expressing and simplifying the vast body of earlier law, so as to make the law more understandable and accessible to ordinary people[2]. The example of the French codifiers was an inspiration for Jeremy Bentham and J S Mill in England. Their writings, in turn, promoted parliamentary revision of English law. It led to a great era of codification that remains an inspiration for codifiers in all parts of the world[3].

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1 *Law Reform Commission Act* 1973 (Cth), s 12.

2 R Macdonald, "Continuity, Discontinuity, Stasis and Innovation", above 99 at 100.

3 Sir Edward Caldwell, "A Vision of Tidiness: Codes, Consolidations and Statute Law Revision", above 51 at 54.

In Australia, systematic law reform began in the nineteenth century in a rather modest way in the work of individual scholars like Dr Hearn, the "hopeful Hamurabi" at the Melbourne Law School[4]. But it was the establishment of the Law Commissions, and especially the English Commission under Lord Scarman, that triggered the move for substantial institutional bodies in Australia, beginning with the New South Wales Law Reform Commission in 1966[5].

This was the point at which I became involved. It has been described as a "golden age" of law reform in Australia[6]. Certainly, the proliferation of federal, State and Territory institutions, and their growing spirit of cooperation and interaction, made it an exciting time - one full of optimism, idealism, hope and confidence.

I can well remember the extremely modest circumstances in which the ALRC began its work. For the first weeks, it was confined to the anteroom of the judicial chambers of the Federal Judge in Bankruptcy, in Sydney. However, without exception, the initial appointees were people of great energy and dedication. We worked well as a team. We enjoyed a strong collegial spirit that is essential to an effective law reform

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4 M Tilbury, "A History of Law Reform in Australia", above 15 at 19.

5 *Ibid,* 21.

6 *Id,* 26.

institution[7]. Soon premises, a first class staff, an excellent library and challenging references from the Federal Government put the ALRC on the national radar. The process of growth, adaptation and change goes on to this day. I will always be grateful that I was privileged to be there in the exciting days when this new and bold experiment in the law was initiated.

It should not be thought that everyone, at the time, welcomed institutional law reform. Many high ups were unenthusiastic about too much change in the law. They looked with suspicion on "those who are paid to be reformers"[8]. I was certainly paid my judicial salary. I had not expected to be doing the work of law reform. But three elements in my life and experience gave me special enthusiasm for the new tasks.

The first was the instruction I had received in my legal education from Professor Julius Stone concerning the policy choices inherent in judicial and other legal decisions. Stone had a profound influence on me and on many Australian lawyers of my generation. Secondly, my eyes had been opened to the defects of the law in operation when, as a young legal practitioner, I acted in *pro bono* causes for Aboriginals, conscientious objectors, anti-war demonstrators and the like. Law on the ground suddenly seemed quite different from law in the books. And

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7 K Warner, "Institutional Architecture", above 67 at 70.

8 Sir John Young, "The Influence of Minority" (1978) 52 *Law Institute Journal* (Vic), 500 cited Warner above n 7, 76.

thirdly, my own experience as a homosexual person taught me that law could sometimes be oppressive, unjust, cruel.

Human motivation is a complex thing. Each one of us in institutional law reform in those golden days had our own reasons for involvement. For me, it was never a purely theoretical or analytical challenge. Law affected intimately the lives of people. To reform it, and thus to make it better, it was essential to consult the "usual suspects" - judges, legal practitioners, public officials and institutions. But it was also important to consult ordinary people. They would offer perspectives that would refine and strengthen our proposals. Moreover, the very process of consultation would build a momentum that would protect the ALRC against the risks of bureaucratic and political indifference when the reports were finally written and tabled in the Parliament.

Consultation

Probably the most original "value added" of the ALRC - and its chief contribution to the law reform technique in the years after its establishment - was its emphasis on public consultation. Apart from everything else, because of my own life's experience, I was curious to hear from other people, living and working in Australia, about aspects of the law that they perceived as seriously unjust. If I could have such experiences, surely others could do so in those areas of the law that affected them. If others with power, including legal power, were blind to the injustice of the law they administered as if affected me, perhaps

there were areas of the law of which I was ignorant, or to which I was indifferent, that could be revealed in the voices of ordinary citizens, to help me and other law reformers to remove affronts to justice that had lasted too long. In the result, this happened.

In the ALRC report on *Criminal Investigation*[9], our public hearings heard the voices of Aboriginals, ethnic minorities, women, people in remote parts of the country, police and criminal accused and others describing the unjust operation of the law in ways that were eye-opening. They definitely affected the ALRC recommendations and the methodology that spread to all of its projects.

It is true that the early references to the ALRC (and references in the same decades to other Australian law reform agencies) concerned social justice topics that were susceptible to lay community input[10]. On the other hand, an investigation of aspects of the operation of the *Judiciary Act* 1903 (Cth) is not likely to promote, or need, the same number of community submissions as an inquiry into the law governing complaints against police[11] or human genetic data[12]. So much is obvious[13].

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[9] ALRC 2, (Interim) 1975.

[10] M Neave, "Law Reform and Social Justice", above 371 at 382.

[11] ALRC 1, 1975. See also *Complaints Against Police* (*Supplementary Report*), 1978 (ALRC 9).

In tasks of a highly technical legal operation, well targeted consultations addressed to experts who have studied and reflected on the operation of the law will sometimes be more useful than public comments. Nevertheless, the general commitment to involving ordinary citizens - and to consulting far and wide and beyond judges, lawyers and public institutions - undoubtedly played a significant role in the life of the ALRC and other Australian agencies that copied its techniques.

The process of widespread consultation was a reminder to the expert participants in the ALRC of the need to step beyond an elitist and purely lawyerly approach to law reform[14]. Sometimes it added perspectives that the experts had missed it or identified sensitivities that need to be addressed. Occasionally it repaired the imbalances between the well organised lobby groups and the interests of ordinary people[15]. It provided a forum to test expert ideas in civil society and to question intelligent laymen about their views and experience. Above all, it was a

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12 *Essentially Yours: The Protection of Human Genetic Information in Australia*, 2003 (ALRC 96). See also *Genes and Ingenuity: Gene Patenting and Human Health*, 2004 (ALRC 99).

13 I Davis, "Targeted Consultations", above 161 at 161; A Rees, "Strategic and Project Planning", above 131 at 137..

14 Macdonald, above n 2, 101; N des Rosier, "Leadership and Ideas: Law Reform in a Federation", above 247 at 252.

15 Davis, above n 14; P Salzmann, "The Growth of Civil Justice Reform", above 343 at 346.

new scene: judges, lawyers and professors asking those affected about the law and how it could be made better.

The ALRC technique symbolised its commitment to a non-elitist approach to law reform. It gave the agency a high public profile that helped to protect it from abolition. It raised expectations in the community of action in the area of law concerned. It made it more difficult for the government and the Parliament to place the recommendations in the too hard basket[16].

I am not saying that every public submission was useful. Of course not. Sometimes the process bordered on a fiasco. Occasionally, the media, invited to a symbiotic relationship with the ALRC, distorted proposals in a cheap endeavour to grab a headline[17]. Yet for every frustrating instance of that kind, the success stories multiplied and outweighed the failures.

Not every lawyer has skills in the use of modern media[18]. Some skills can be learned. Experienced journalists can help. What is needed

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16 M D Kirby, "The ALRC: A Winning Formula" (2003) 82 *Reform* 58. See R Atkinson, "Law Reform and Community Participation", above 173 at 180; cf G Powles, "The Challenge of Law Reform in Pacific Island States", above 417 at 434.

17 Atkinson, above n 17, 183; D Solomon, "Relations with the Media", above 187 at 194.

18 Solomon, above n 18, 192.

is a talent for simplification. Commonly, the legal mind sees all the problems and clutters up simplicity with multiple exceptions and qualifications. Conceding that different topics of law reform call for different techniques of consultation, an outreach to ordinary citizens generally remains a good policy. It demands of law reformers a radical abbreviation and simplification of their main proposals. This is not such a bad thing given that relatively few, even with a special interest, have the time to absorb detailed and lengthy discussion papers[19]. If Cabinet proposals, dealing with the great issues of the nation, must be reduced to a couple of pages, the key proposals of law reform projects must be equally susceptible to general, as well as expert, communication and consultation. This was the philosophy the ALRC embraced. It had an arresting symbolism.

Implementation rates

I remember how concerned we were in the early days of the ALRC about the implementation of our proposals. In part, this was because we were seeking to emulate the good record of the Law Commissions in the United Kingdom and to avoid the perils of the original Canadian Law Reform Commission. The latter was abolished when its proposals were seen as unduly theoretical and unhelpful to government[20]. In part, our concern was because of our training in the

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[19] L Blackman, "Products of Law Reform Agencies", above 199 at 203.

[20] Macdonald, above n 2, 106.

common law which always has a pragmatic bias. In part, it was because our work showed serious instances of injustice that we had laboured hard to repair. Merely to produce a beautiful report, of intellectual utility and academic merit, was not enough[21].

I recall my mortification when my great teacher, Julius Stone, upbraided me in the early days of the ALRC for being unduly concerned with "runs on the board". He had urged a "roots and branches" approach to law reform in Australia. When I demurred, he declared hurtfully: "One day, Australia will have a law reform chairman who perceives the need for basic law reform".

Looking back, I can see the force of his bold aspiration. Law reform agencies must continue to be bold. They are not simply another branch of the official legal bureaucracy. By the same token, it is natural that institutional law reformers will want to be useful. Hence, our anxiety to gain political attention, bureaucratic support and a parliamentary mechanism that would assure our reports of a regular procedure for consideration[22].

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[21] J Hannaford, "Implementation", above 237 at 240; Australian Law Reform Commission, *Annual Report* (ALRC 3), 9 [18]-[19], 45 [92].

[22] cf J B Robertson, "Initiation and Selection of Projects", above 115 at 123.

I can still recall the sense of frustration at the doldrums into which well considered reports fell because the Law Minister of the day was just not interested. This seemed to me at the time, as it still does, a serious institutional weakness in the parliamentary system. We often talk of the glories of parliamentary democracy and the cherished values of the representative character of Parliament. I have done so myself[23]. But if the Executive Government that dominates Parliament is uninterested, or worse still, hostile to law reform proposals - or risk averse so that it will not engage with ideas that are sensitive and have some noisy opponents[24], years of intensive work will just lie on a shelf gathering dust.

This need not, of course, be forever. Governments change. New governments may have an interest in proposals that old governments lacked. When the Hawke Government was elected in 1983, there was a short interval before its legislation was ready for introduction into the Parliament. That was my moment to strike. A number of legislative proposals of the ALRC were picked up, introduced and enacted by the Australian Parliament[25]. But in Australia, we cannot afford to wait for

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[23] eg *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 78 ALJR 1203 [207], 1209 [238]-[239].

[24] Macdonald, above n 2, 99 at 103.

[25] eg *Insurance Contracts Act* 1984 (Cth). The *Privacy Act* 1999 (Cth) also commenced progress to the statute book at this time. See also *Telecommunications (Interception) Amendment Act* 1987 (Cth).

such chance events. There is still a need for the parliamentary institution to devise an effective means to stimulate attention to law reform and other like reports. At stake, is nothing less than the effectiveness of the legislature in legal renewal in a modern democracy[26].

For all that, it is now increasingly recognised that new criteria for the success and utility of law reform bodies must be accepted, beyond the simple implementation of their reports in legislative form. Obviously, the introduction of legislation is a simple, visible and empirical way to measure the utility of the agency to the Parliament that has set it up. However, it does not tell the whole story.

Sometimes law reform proposals recommend no change in the law or reject a radical change that would have required major legislation[27]. Sometimes, the law reform proposals are apt for administrative reform by the Executive Government and do not require legislation[28]. The notion that all law reform worth its salt will be enacted in a "blockbuster" statute that will solve a great range of social justice

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26 M Payne, "Law Reform and the Legislature", above 317 at 325 referring to the Euthanasia Laws Bill 1996 (Cth).

27 The ALRC did not recommend major changes to the adversarial system in its report *Managing Justice: A Review of the Civil Justice System* 2000.

28 D Weisbrot, "The Future for Institutional Law Reform", above 29 at 40.

problems, is now viewed with scepticism and hostility in many quarters[29]. The reduction in the size of the public sector, increasing privatisation and the outsourcing of former public services means that legislation may not always be the way to go. The introduction of reform may require a more complex interaction of strategies and practices[30].

It is beyond doubt that courts and academic institutions are increasingly turning to law reform reports as a significant, intensive and accurate source of legal authority, principle and policy. In this way, even if unimplemented by the Parliament, a law reform report can influence the development of the law by the courts, and also by officials and other agencies[31]. In twenty years as an appellate judge, I have noticed a distinct change of attitude amongst the Australian judiciary concerning the citation and use of law reform reports. Whereas two decades ago, this was comparatively rare and treated with suspicion or even hostility, today that attitude has virtually disappeared. Partly, this is the product of new legislative and judicial approaches to the consideration of such materials in elucidating legislative meaning[32]. But, partly it is the result of a recognition of the high standard of excellence in such reports. Commonly, law reform agencies have the time and purpose to identify

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29 *Ibid*, 40.

30 *Ibid*, 46.

31 B Opeskin, "Measuring Success, above 215 at 217.

32 eg *Acts Interpretation Act* 1901 (Cth), s 15AB; *Newcastle City Council v GIO General Ltd* (1998) 191 CLR 85.

the issues of principle and policy that are otherwise neglected in earlier judicial writings and in the submissions that courts typically receive from the Bar table.

Disappointment that a law reform report is not immediately acted upon can also be mollified by the realisation that it is now a commonplace, in the development of new legislation on a topic that has been the subject of law reform reports, to draw heavily on law reform reports in preparing legislation, including in other jurisdictions[33]. In the early days of the ALRC, we prepared a report on *Human Tissue Transplants*[34]. It was trail-blazing at the time. It was specially useful because it contained a legislative definition of death. Its proposals were soon adopted throughout Australia, providing a uniform approach to a sensitive subject in a country that has long neglected uniformity of State laws[35]. In the years after the report was tabled in the Australian Parliament, we heard many reports of how it had been translated into foreign languages and used in several countries of South America in the development of their laws on the same subject. The processes of

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[33] L Glanfield, "Law Reform Through the Executive", above 303 at 312.

[34] *Human Tissue Transplants,* 1977 (ALRC 7).

[35] Sir Owen Dixon lamented that uniform law appeared to be "beyond us … in Australia". See O Dixon, "Comment on Paper by Shatwell" (1957) 31 *Australian Law Journal* 340 at 342 cited D Chalmers, "Science, Medicine and Law and the Work of the Australian Law Reform Commission", above*,* 387 at 398. See ALRC 3, 1975, 49 [101].

implementation, like the ways of God, can be mysterious and unexpected.

Apart from such instances of implementation, however, it can now be appreciated that a permanent, independent and authoritative law reform body can play a significant role in raising consciousness in the courts and the community about the need for law reform and the urgency of addressing it.

Thus, the ALRC report on *Recognition of Aboriginal Customary Laws*[36] has not, as such, been followed up with comprehensive implementing legislation. However, it has been suggested that the report, and the widespread national discussion of the operation of Australian law upon the indigenous people of the nation, stimulated a climate of opinion that resulted in attitudinal changes in the legal profession and judiciary that found reflection in the important decision of the High Court of Australia in *Mabo v Queensland [No 2]*[37]. That was the judicial decision which reversed more than a century of land law in Australia. It held that, contrary to previous assumptions, the acquisition of sovereignty over the continent by the British Crown (and the radical

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[36] *The Recognition of Aboriginal Customary Laws*, 1986 (ALRC 31). Aspects of the report were implemented. See Australian Law Reform Commission, *Annual Report* 2002-2003 (ALRC 97, 2003), 103.

[37] (1992) 175 CLR 1. See Weisbrot, above n 29, 49.

title to land thereby secured by the Crown) had not extinguished entirely the traditional interests in land of the indigenous peoples.

Whether this particular instance was affected in that way or not, the existence of a national institution that is constantly questioning the state of the law and engaging the people in reshaping it, has a long term impact on perceptions of law and on the need to make it simpler, fairer, more modern and cheaper to use[38]. Not so long ago, in Australia and elsewhere, there was a widespread attitude that mixed reverence and resignation about the law. Generally, the law was considered as something that should not be changed much. Judges and lawyers contributed to this attitude by constantly singing paeons of praise. For those who did not quite share this enthusiasm, there was a sense that it was futile to struggle to secure change, especially of things that had long been the law. Aboriginal title to land was one such field. Homosexual offences was another.

Law reform bodies, at least in Australia, have very publicly challenged this complacent conception of law. They have asserted accountability of law, including lawyers' law, to the people who are governed by it. They have taught that things long ordained can be

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[38] English Law Commission, 32nd *Annual Report*, 1997, *Modern Law for Modern Needs* (LawCom No 250), 1997, 45. See Robertson, above n 23, 116.

changed and that we all have a responsibility for the state of the law and for the injustices that law sometimes visits on fellow human beings.

Whilst attitudes to justice, and the community sense of urgency to prevent injustice undoubtedly shift and change over time[39], the long term impact of institutional law reform on society should not be under-estimated. The psyche of law has altered. We now realise that there is virtually nothing that is set in stone. Even the Australian Constitution can (very occasionally) be changed with the involvement of a referendum of the people[40]. Periods of conservatism and resistance to change occur in the swings and round-abouts of law reform[41].

In my view, there will be no going back to the self-satisfaction and deep resistance to change that I experienced thirty years ago when the ALRC was founded. A new generation of judges and lawyers has replaced the old. The new generation will increasingly number people whose entire professional lives have been lived alongside institutional law reform agencies. Many will have served in, consulted with or made submissions to such bodies. Doubtless, to some extent, the creation of the law reform agencies may be seen as window dressing to give an institutional appearance of steady law reform where the reality may not

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39 D Brown, "Challenges to Criminal Justice Reform", above, 357 at 359.

40 Australian Constitution, s 128.

41 Neave, above n 11, 371 at 382-383.

be quite so bright. But the proliferation of law reform bodies throughout the world - especially within the Commonwealth of Nations[42] but now increasingly also in jurisdictions of the civil law tradition[43] - indicates the great power of the law reform idea.

Moreover, whilst sometimes law reform bodies have been abolished, "vampire like" they have an uncanny tendency to re-emerge in a new form a few years later[44]. This could, it is true simply demonstrate the infatuation, especially of English speaking countries, for a committee into which can be poured many of the most difficult problems of society. But the more likely explanation of this institutional persistence, in one form or other, of a general independent law reform agency of some kind is that it fulfils a deep need that no other institution can equally discharge. Yet it is a need that is not yet fully integrated into the other constitutional institutions of lawmaking - the legislature[45]; the courts[46]; and the Executive Government[47].

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[42] Foreword by Justice E Singini, i.

[43] In Indonesia, Quebec, Rwanda and Thailand.

[44] Weisbrot, above n 29, 35.

[45] Payne, above n 27, 317 at 328.

[46] Sir Anthony Mason, "Law Reform and the Courts", above, 329.

[47] Glanfield, above n 37 at 306.

The way ahead

A life in the law teaches the constant changes that are happening in society to which law must respond. Never have those changes been more numerous and more perplexing than today. In the United Kingdom, the very process of lawmaking has been profoundly influenced by the impact of European law. This, and the proliferation of statute and regulatory law has expanded the combined output of primary and subordinate legislation from about 7,500 pages a year in 1965 when the Law Commission was established to about 26,400 pages in 2003[48]. There has been an equivalent expansion in Australia, indeed more so because of our federal system. Whilst the proportions would be different, the same truth has been witnessed in virtually every country on earth.

Not only has this made the task of simplification, consolidation and codification of the written law more difficult[49], it has made the task of law reform bodies in lifting their voices and having them heard in the din of specialised agencies more problematic. Amidst such an avalanche of lawmaking - to which must be added the development and re-expression of the law in the higher courts - the high expectations attributed to law reform agencies in the 1960s and 1970s now seem naïve and even,

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48 Caldwell, above n 3, 53.

49 *Ibid,* 53.

occasionally, unrealistic. How could any one group of mortals, with extremely modest resources and many tasks, ever have a real chance of reforming the whole body of the law when this was expanding at a frightening pace.

We should not be unduly pessimistic. There are powerful forces at work - many of them more powerful than law reform commissions - to simplify particular statutes. Both in the United Kingdom[50] and in Australia[51] major projects to rewrite the national income tax law have been launched, with support from the Treasury, a body that never seems to be wanting in funds for its own pet projects of law reform. In addition to this, many specialised agencies have been established over the past forty years to tackle particular topics of law reform, as in the areas of family law, administrative law and intellectual property law[52].

Occasionally, there is an overlap in personnel or arrangements for consultation between such specialised bodies and the law reform agency[53]. But, generally speaking, the several bodies go their own

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50 Caldwell, above n 3, 56.

51 Payne, above n 27, 327; cf *Commissioner of Taxation v Stone* (2005) 79 ALJR 956 at 968 [76].

52 Such as, in Australia, the Family Law Council, the Administrative Review Council, the Copyright Law Review Committee and the Advisory Council on Intellectual Property Law. See R Sackville, "Law Reform Agencies and Royal Commissions: Toiling in the Same Field?", above 289 at 291.

53 Under the *Administrative Appeals Tribunal Act* 1975, s 49(1)(c) the Council includes in its number the President of the ALRC

Footnote continues

separate ways. The dream of having the one great national or sub national institution to gather together all of the relevant projects of law reform and to keep them progressing in seamless harmony has founded on the rock of reality. Such a body would need to be unmanageably large. It would involve too many generalists and not enough specialists. And, most practically, it would answer in the institutional arrangements of government, to a Law Minister and not to other ministers and their officials who are commonly more politically significant and determined to keep their hands on the personnel and progress of law reform in their areas of concern[54].

In Australia, Royal Commissions have sometimes proved useful in developing proposals for law reform in particular areas. Occasionally, reform proposals grow naturally out of their inquiries into instances of wrong-doing, such as the Royal Commissions in several Australian States into alleged corruption in government. Out of such inquiries have emerged law reform proposals to tackle corruption and to promote transparency in public life that have gathered a momentum towards adoption precisely because of the highly charged nature of the reports of the Royal Commissioners.

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established by the *Australian Law Reform Commission Act* 1996 (Cth).

54 Sackville, above n 53, 291.

Royal Commissions date back to the reign of William the Conqueror. They are described in the *Domesday Book*[55]. But they are not always suitable instruments of law reform. And the proliferation of bodies proposing law reform presents a new issue: identifying those subjects that are suitable for investigation and report by law a reform agency and those that suggest a different treatment, utilising other hands. Certainly, in Australia, we have reached the point of recognising that a thousand flowers will bloom. The old dream of a single body in charge of law reform is dead. Discerning the subject suitable for LRCs is a contemporary challenge upon which the voices of experienced Ministers[56] and officials[57] cast much light.

But what of more fundamental post-modernist doubts about institutional law reform? The same voices that now question the assumptions of neutrality and value-free decisions in the judiciary are lately turned on law reform agencies, and other inquiries, given the responsibility of influencing the future shape of the law[58]. I was too well taught by Julius Stone and have served too long in appellate court to deny the influence that personal values of decision-makers can play in the outcome of their deliberations. The notion of completely pure and neutral law is a fiction, as much in the judiciary as in law reform bodies.

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55 *Ibid*, 292.

56 eg Hannaford, above n 22.

57 eg Glanfield, above n 34.

58 Weisbrot, above n 29, 40; Macdonald, above n 2, 101.

We may accept that such bodies are influenced by the values of those who serve on them. They may also be affected by the attitudes of those who work for them as staff. We can also accept that society has greatly changed since the 1980s. The conviction that all problems can be solved by social justice legislation has given way to a more discerning and selective approach to law reform and a mixture of strategies and answers to any problem. However, these elementary truths about the contemporary work of law reform are no more a reason for abandoning law reform agencies or closing the courts or shutting down the Parliament because there are opinionative people in them whose decisions are influenced by their upbringing, experience and attitudes.

In courts, and now in the bureaucracy, changing governments influence the appointment of personnel. In Parliament, the electorate, at given intervals, returns people who spend most of their time identifying the faults in, and differences with, their opponents. Law reform agencies need to face squarely the consideration that much of what they do is *not* value-free. Many recommendations are affected by the values of those who make them. Inescapably, a lot of law reform is therefore politically and socially sensitive. The notion that the recommendations are totally neutral is, in such cases, subject to the same critical examination as the claims of total neutrality on the part of the courts[59].

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[59] Macdonald, above n 2, 103.

But, once again, this is not a reason to close law reform agencies. It is a reason to insist on complete honesty and transparency in the provision of candid law reform reports[60]; care in the appointment of personnel to ensure that they reflect differing perspectives and values in the law[61]; the adoption of methodologies that tap and identify different approaches to the subject in hand; and turnover of appointees, staff and consultants so that, over time, differing voices will be heard.

Are we there yet?

To the question "Are we there yet?" In a typical law reform way another question returns. Where is "there"? How will we know when we arrive? By what criterion do we judge the existence of "there"? Does "there" actually exist? Or is it like the end of the rainbow, doomed forever to be beyond our reach?

We can certainly say that much has been achieved in the three of four decades since national institutional law reform bodies of the modern era were created[62]. The proliferation of such bodies, so that there are now more than sixty of them in all parts of the world, could be explained

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60 *Ibid*, 103.

61 Neave, above n 11, 382.

62 P Hennessy, "Independence and Accountability of Law Reform Agencies", above 83 at 90

by a theory of post-imperial copycatting. But in a hardnosed economic age, when the trend had been to cut the public sector and to reduce its role[63], that would not be a sufficient explanation for the developments we have witnessed[64]. They include developments in parts of the world where every penny spent on public activity is very precious[65]. The robustness of the institutional idea of law reform and especially its recent spread beyond the common law countries, suggests that it is still an idea of utility for good governance and modernisation. The most enduring politics and economics are those that have inbuilt methods of updating the law and removing the barnacles of injustice and inefficiency. Absent effective and timely procedures of law reform, the market tends to solve legal problems by corruption or revolution. Law reform is part of the stable machinery of modernity.

There remains, in most countries, an institutional flaw that has yet to be solved. This is how to secure governmental, legislative and official attention once law reform reports are produced. Nowhere has this issue been tackled institutionally and effectively. Propositions have been advanced and promises made by governments[66]. However, all too often

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63 *Ibid,* 85.

64 Singini, Foreword, above n 43, i and Powles, above n 17.

65 M Kamuwanga, "The Challenge of Law Reform in Southern Africa", above 435.

66 Robertson, above n 23, 125. The New Zealand Minister undertook to respond within six months of tabling in Parliament of reports of the Law Commission of New Zealand

law reform proposals go to the bottom of the ministerial and legislative pile. They secure much less attention than the political ideas and personality and party schemes that dominate contemporary politics. This institutional defect reflects the parallel failure of our system of government to channel judicial proposals for law reform towards routine considerations. Occasionally, such proposals are swiftly implemented[67]. But, generally speaking, even the most obvious need for reform, that may have been addressed in simple terms in other countries, sometimes lies fallow not for reasons of political opposition but sheer indifference and institutional failure[68].

In terms of this log-jam in our institutions, we are certainly not "there". In my view, we are not even on the way to "there". We are no closer to "there" than we were thirty years ago when I began my work with law reform agencies. No one is there. "There" seems to be an illusion. Sometimes, we think we see it. Law reformers cultivate officials and look for the "triggers of activation" that will gain an advocate in cabinet who will initiate official consideration and action on a law reform report[69]. But it seems amazing that our constitutional government

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67 eg reform of the *Pawnbrokers and Second-hand Dealers Act* 1996 (NSW) in 2005 following the decision of the High Court of Australia in *Palgo Holdings Pty Ltd v Gowans* (2005) 79 ALJR 1121.

68 eg reform of the *Bankruptcy Act* 1966 (Cth), s 82. See Australian Law Reform Commission, *General Insolvency Inquiry*, 1988 (ALRC 45), Vol 1, 16.

69 Hannaford, above n 22, 238.

should be so dependant on chance factors of that kind. If it could be explained by controversy and difficulty, the impediment would be more understandable and tolerable.

The best that can be said of the impediment is that it is sourced in simple human emotions and capacities. Unless there is interest and a sufficiently long attention span, anything but the simplest law reform proposal will often wait a long time until someone powerful in the Parliament or the bureaucracy lifts a voice and moves the proposal forward. This is a real weakness of the system of representative and accountable democracy as we practise it. It is as bad today as it was thirty and forty years ago. We are not there.

For all that, there have been improvements in institutional law reform that have adapted to changing times and different technologies. Global technology has helped law reform to leap national and subnational borders. It has stimulated the use of law reform reports from the other side of the world, or next door, for we have found, in courts and agencies alike, that the inherited law is often sufficiently similar to make such reports useful and relevant to our local endeavours[70].

In virtually every country, the law is now increasingly affected by its global environment[71]. International law, including the international

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[70] M Sayers, "Co-Operation Across Frontiers", above 257 at 265.

[71] Tilbury, above n 4, 28.

law of human rights, affects the exposition of the law today. It encourages the use of common sources. It sends judge and law reform agency looking at the Internet for sources of analysis and research that would have been unimaginable in my early days in the ALRC[72]. In those days, we were lucky if we could accumulate the hard copy volumes of the reports of law reform and legal research bodies around the world. Now, such materials are available on websites that bring them instantaneously to the fingertips of law commissioners, research staff and citizens[73]. The new media has also radically changed the way law reform agencies speak to their interested audience[74]. It has changed the way they gather data, avoid duplication of effort and procure legal and social information pertinent to their inquiries[75].

Of course, cyberspace is not always a beautiful hunting ground of liberal, reformist and informed opinions. Like talk-back radio, the Internet will often reflect ignorant views and a dark world of prejudice and unjust discrimination[76]. But if this is the world that can influence the making of law and public policy, it is essential that law reform agencies be aware of it. To that extent we are *there* to a degree that was

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[72] M Partington, "Research", above n 8, 157.

[73] Atkinson, above 17, 181.

[74] Solomon, above n 19, 193.

[75] Blackman, above n 20, 212.

[76] Brown, above n 40, 363.

impossible at the beginning. The change of judicial, professional and social attitudes to the law, and to our responsibility for its condition, has already been mentioned. That change is nothing short of breathtaking when the hostility to law reform of earlier times is remembered. Today, in many agencies, research is outsourced including to members of the legal profession because they are knowledgeable, efficient and sympathetic to the cause of law reform[77]. It is true that there are now new hostilities[78]. But in winning over a key professional audience in the judiciary to the need for, and utility of, institutional law reform, I believe that we are there.

In legal education, law reform plays a vital role in professional engagement, in the provision of first rate tools for teaching and in stimulating a critical approach to law that is constantly questing for greater simplicity, accessibility and justice[79]. Even more could be done to bring together the often separate worlds of legal academic and law reform[80]. But I acknowledge my debt to legal academics with whom I first worked closely in my ALRC days. They taught me to conceptualise the solution to problems. This was a new approach, different to the common law's inclination to pragmatic, minimalist solutions based on the

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77 R Simmons, "Professional and Private Bodies" above 275 at 279.

78 *Ibid*, 359.

79 M Coper, "Law Reform and Legal Education: Uniting Separate Worlds", above 401 at 402.

80 *Ibid*, 401.

facts of particular cases[81]. The academics also taught me the importance of good empirical research concerning how the law operates in society. Such research does not come cheap[82]. But it is essential for major proposals of law reform that will work in the city and the suburbs. Moreover, an audit of the operation of laws, once implemented, is essential because no report can express the law or sound policy for all time. We are certainly not *there* with these facilities. But at least we realise where *there* is.

To those who get pessimistic about institutional law reform and think of the 1970s as the "good old days", I have a message. There was optimism and idealism in those days; but we were certainly not *there*. And in the years in between many fine improvements in the law have been achieved. The ALRC, for example, has tackled issues of great complexity in the interface of law with science - in the areas of transplantation[83], privacy and computers[84] and genomic data[85]. Dr Francis Collins who led the Human Genome Project, the greatest cooperative scientific effort in history, described the work of the ALRC on

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81 Hennessy, above n 63, 92 quoting R Sackville, "The Role of Law Reform Agencies in Australia" (1985) 59 *Australian Law Journal* 151, 157.

82 Partington, above 73, 152.

83 *Human Tissue Transplants*, 1977 (ALRC 7).

84 *Privacy*, 1984 (ALRC 22).

85 *Essentially Yours: The Protection of Human Genetic Information in Australia*, 2003 (ALRC 96); *Genes and Ingenuity: Gene Patenting and Human Health*, 2004 (ALRC 99).

law and genomics as "a truly phenomenal job that put Australia ahead of the rest of the world"[86].

When work of such quality can be done by law reform agencies, praised from such a quarter, we can surely know that we are on the right track. The next thirty years will see further changes. But we can be sure that they will present still further needs for law reform.

It is not part of human destiny to finish the task of improving society. Yet, we are not entitled to decline the effort. I believe that our species is genetically programmed to seek justice within a rational civic order. Most people are affronted by injustice and irrationality when it can be drawn to their notice and its wrongs explained. That is why we can be confident about the long term future of law reform, and institutional law reform in particular. We are not *there* yet. But we are *here*. And *here* is closer to *there* than we were when this journey began.

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[86] Dr Francis Collins quoted in Chalmers, above n 36, 39 in News Release, XIX International Congress on Genetics, Melbourne, July 5-9, 2003.

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30. ARE WE THERE YET?

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