OPINION

THE CHANGING FORTUNES OF LAW REFORM COMMISSIONS

In its generally understood sense, 'Law Reform Commission' refers to a relatively small public institution, staffed principally by lawyers, which is dedicated to the function of law reform and which is supported by, but independent of, government. At the end of 1992 the future of such commissions generally seemed bleak. The Law Reform Commission of Canada, which had been in existence for 21 years, had been abolished as a cost-saving measure. The Victorian Law Reform Commission followed suit. Less than two years later, the tide appears to have turned. In January 1994 the Canadian Government announced, in the Speech from the Throne, its commitment to the creation of a new Law Reform Commission for Canada. More significantly for Australia, the House of Representative's Standing Committee on Legal and Constitutional Affairs, following a reference from the Federal Attorney-General, has issued a report, *Law Reform – the Challenge Continues: A Report of the Inquiry into the Role and Function of the Law Reform Commission of Australia* (the Melham Report), which is a general review of the role and functions of the Australian Law Reform Commission. It is fair to describe the Report, dated May 1994, as a resounding endorsement of the work of the Australian Law Reform Commission in particular and, more generally, of the process of institutional law reform. Among other things, the Committee noted the high quality of the work of the ALRC, as well as the implementation rate of its reports (62%) – a rate which, in Australia, is rivalled only by that of the New South Wales Law Reform Commission (74%).

Why this apparent change in the fortunes of Law Reform Commissions? At base, the answer lies in the methodology of institutional law reform. The characteristic of that methodology as it has developed in Australia, particularly through the influence of Justice Michael Kirby, is its participatory nature, the emphasis being on community consultation and engagement, whether through interest groups or individuals. Participation takes a variety of forms, from involvement in formal hearings and discussions, to making submissions, to purely informal contact. More far-reachingly, the community may take a direct role in setting Commissions' agendas, the example in Australia being the NSW Law Reform Commission's Community Law Reform Program. Under this Program the Commission is entitled to give preliminary consideration to proposals for law reform made by members of the community at large with a view to determining the appropriateness of seeking a reference from the Attorney-General pursuant to s. 10 of the *Law Reform Commission Act 1967* (NSW). Whatever form it takes, the consultation process gives the reform process a democratic base which, in the context of a body which is politically independent, amounts to a real empowerment of the many groups or individuals who want an active voice in the law reform process. The process is strongly endorsed by the Melham Report, which indeed demonstrates (in its treatment of criticisms levelled at the ALRC in the context of its references on product liability, personal property securities and collective investments), that it is when there is even a perceived failure of consultation that Law Reform Commissions come in for criticism.

The appreciation by governments and the public sector of the value of active consultation in policy formulation is perhaps now more acute than it has been for some time. The methodology of institutional law reform in Australia is, therefore, very much in tune with the political realities of the 1990s. But those realities also demand public accountability. This could be seen, theoretically, as a threat to the independence of Law Reform Commissions. In reality, it is a challenge – that of balancing independence and accountability. In striking that balance, two factors seem clear.

First, Law Reform Commissions will have to live with the fiscal realities of the 1990s. In terms of structure, this means that, at senior levels, Commissions will have to continue to rely, as they have done for some time, on the input of part-time (often honorary) experts. The loss of full-time expert staff is less than ideal, and is offset only by the fact that Law Reform Commissions tend to operate in a collegial atmosphere created by the enthusiasm of staff who give generously of their time, whether as legal officers, administrators, librarians or clerks. In terms of work-patterns, it means that Commissions must take advantage of the cost savings which occur in the long term through the use of new technologies. It also means that there must be far greater co-operation between Commissions, both within Australia and beyond, to explore the possibilities of joint projects. There is also a need for further exploration of co-operative ventures with other government departments – an example being the NSW Law Reform Commission's review of adoption legislation – and with the private sector.

Secondly, Law Reform Commissions in Australia must strive to maintain the very high standards in their work which they have already set. This means, first of all, that the processes of community consultation must remain at all costs. But there are other things which also should not be compromised. Professor John Goldring, in a paper presented at the Australasian Law Reform Agencies' Conference in Hobart in September 1993, drew attention to one when he lamented the failure to publish Commissions' research papers discussing the current state of the law, the best of which were often taken as authoritative statements of the law. Not only does the publication of such papers legitimise Commissions in the eyes of one very important constituency, the legal profession, it also helps to explain the reasons for reform proposals, and (where permissible) this will prove useful to the attempts of courts to divine the intention of the legislature which enacts the law reform proposal.

So, while the future of Law Reform Commissions is decidedly more secure than it was two years ago, the challenges which confront the due performance of Commissions' work in the immediate future are as great now as they ever have been.

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The views expressed here are solely those of the author.