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**AUSTRALIAN LAW REFORM COMMISSION
REDEDICATION OF THE MICHAEL KIRBY LIBRARY**

THE ALRC - A WINNING FORMULA

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The Australian Law Reform Commission (ALRC), from its foundation in 1975, was built upon the institutional experience of law reform bodies in Australia, England and elsewhere. But some of the techniques of the ALRC were different. A number of them were unique. In combination, they have been followed over more than a quarter of a century. They represent a winning formula for a national law reform agency that has proved of great utility to the Parliament and people of Australia.

There are ten ingredients to this formula. Those ingredients help to explain the success of the Commission as an institution. Close adherence to this formula promises further success in the years ahead.

* Text of remarks at the re-dedication of the Michael Kirby Library of the Australian Law Reform Commission, in its new premises in Sydney, 17 February 2003.

** Justice of the High Court of Australia. Foundation Chairman of the ALRC 1975-1984.

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1. **STRICT BIPARTISANSHIP**

The ALRC receives its references from the Federal Attorney-General, a Minister in the Government of the day. But its reports are addressed to, and must be tabled in, the Federal Parliament. It is for the Parliament, ultimately, to accept or reject the Commission's recommendations.

From the outset, viewing its challenges from the perspective of other national and subnational law reform agencies, it was clear to the ALRC that the follow-up of reports was essential if the Commission was to fulfil its mandate and not simply to become another academic or research institution. This meant that it was important to gain the support of members of the Parliament regardless of political affiliation and the trust of the elected Government. Because most proposals for reform depend upon the initiatives of government it was imperative to avoid the slightest entanglement in partisan conflicts.

Following my appointment in 1975 as the inaugural chairman, I sought the agreement of the Attorney-General to meet the Opposition spokesman on legal affairs, at the time Senator Ivor Greenwood QC. Agreement was readily given. The Senator had a number of very useful suggestions for the work programme and methodology of the Commission. He was a distinguished lawyer and

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his early death was a great loss. Also in the Opposition at the time were members of the Coalition parties who were keenly interested in law reform, including Mr R J Ellicott QC (later a federal Attorney-General) and Senator Allen Missen. On the Labor side there were strong supporters of the new institution including, from the outset, Prime Minister Gough Whitlam who had declared that the "life of a reformer is hard in Australia". He and Senator Lionel Murphy ushered the ALRC into life. Mr Whitlam's presence does honour to the Commission and to me.

I do not doubt that it was the strong commitment to service to the Parliament and engagement with members of both Houses who were interested in law reform that saved the ALRC from abolition when the Whitlam government was dismissed and the Fraser government elected. The presence at this function of Mr Nick Greiner, former Liberal Premier of New South Wales, is a symbol of the bipartisanship of the ALRC which has extended across the State and federal scenes. In the event, the electoral commitments of the Fraser government included a promise to refer to the ALRC the preparation of a report on privacy. When I heard that commitment, I knew that the future of the Commission was secure. Since then, the ALRC has worked successfully with federal, State and Territory governments of differing political persuasion, interests and priorities. The unwavering avoidance of any hint of partisanship has been faithfully observed, a course not only proper but also prudent.

2. MIXTURE OF PROJECTS

Also from the start the ALRC has proved itself ready to tackle small and urgent projects as well as major projects involving examination of a large canvas of federal law. In the early days, the initial references to the Commission were of the former category. They included the two earliest projects that grew out of the planned creation of a federal police force (ALRC 1: *Complaints Against Police* and ALRC 2: *Criminal Investigation*). Also included in this category were urgent tasks addressed to particular aspects of the law in federal territories (such as ALRC 4: *Alcohol, Drugs and Driving* and ALRC 18 *Child Welfare*).

In territory references, the Commission could undertake projects of potential assistance to the States in the development of uniform laws. Such a project was ALRC 7: *Human Tissue Transplants*. Yet whilst these references were important, so were the major tasks that the ALRC was typically better able to handle than government departments or private consultants. Multifactorial subjects such as reform of sentencing, the development of privacy laws and preparation of comprehensive laws on insurance were within this category.

It remains important for the Commission to have such a mix of projects: demonstrating a capacity to respond quickly to urgent issues of particular utility to the government and Parliament but also

to undertake substantial reviews of major areas of the law, sometimes neglected and requiring fresh conceptualisation.

Early in the life of the Commission, the Secretary of the Attorney-General's Department (Sir Clarrie Harders) warned me against disrupting this balance. In particular, he pointed out that if the Commission were merely a problem solver, working too closely with departmental officers, it would sometimes seem quicker and more efficient to absorb the Commission within a department. The ALRC had to establish its product differentiation. It did this by demonstrating a capacity to perform effectively in large and small projects alike.

3. EMPIRICAL EVIDENCE

A feature of the ALRC, from 1975, has been an insistence upon gathering empirical data as a foundation for a thorough understanding of how the law operates in practice. For the ALRC it was not sufficient (as of necessity it often must be for judges) to study legal problems through the judicial opinions. For the ALRC it was essential to get out into the field and to discover how the law actually operated and affected ordinary Australians.

Thus in ALRC 2: *Criminal Investigation*, the Commission went to police stations, rode in police cars, spoke to Aboriginal legal aid specialists and many others to find how the theories of the law

operated in practice. Similarly, in ALRC 6: *Insolvency - The Regular Payment of Debts*, the Commission addressed the realities of mismanagement of consumer credit. It consulted not only with specialists in bankruptcy law but also with *Lifeline* and other agencies that helped people who could not cope in the credit economy. The capacity to gather empirical data on the actual operation of the law is a critical element of product differentiation in ALRC reports. As well, the ALRC can ensure that different perspectives are heard and that reform proposals are not only tailored to the voices of officials and powerful interest groups but also respond to the needs for law reform as viewed by consumers and ordinary citizens.

4. WIDESPREAD CONSULTATION

A unique contribution of the ALRC has been the outreach to the community generally and interested persons affected by reform proposals. From the beginning, not only was this done through the procedures of discussion papers and issues papers that had been developed by the English and Scottish Law Commissions. For every project, the ALRC assembled a team of outstanding consultants from different perspectives. They worked closely with the ALRC Commissioners and staff in developing the reform proposals. In addition, the ALRC conducted public consultations, as it still does. These have at least four purposes: to gather information and opinion; to test preliminary ideas against interest groups and their

perspectives; to protect the Commission from criticism of special interests; and to strengthen political decision-makers so that they accept the reform proposals that have been tested in the community.

The willingness of the ALRC Commissioners to engage, through the media, in consultation with the general public was an important innovation in law reform technique pioneered by the ALRC. Apart from everything else, it has helped to keep the name of the Commission recognisable throughout the nation and not only in governmental and legal circles. Over a quarter of a century, the ALRC has built up credibility and a reputation by involving a broad spectrum of interests in its work. But in my view, its process of consultation has had an even more beneficial impact in helping to demystify the law and its development. In fact, I do not believe that it is too much to say that the ALRC has helped to improve community understanding of law in Australia and the ultimate obligation of citizens to take responsibility for the state of the law.

5. ANALYSIS OF LAW

When the ALRC was established in 1975 it was natural that the long-standing institutions such as the courts, the departments of state, the universities and elsewhere should view the Commission with a measure of caution, even suspicion. So they did. That was to be expected in a discipline such as law. In the early days, it was difficult to persuade most serving judges to have regard to ALRC

reports, either in an understanding of the current law or in the development of new legal principles. In part, this restraint was a product of the then current theories of legal development and statutory construction. Since those days, common law principles have changed. Statutory provisions have been enacted to permit, indeed encourage, judicial examination of law reform reports where these are of help to the judicial process.

The use of ALRC reports is now perfectly common in courts throughout Australia. In part, such use occurs in cases involving the interpretation of legislation based on ALRC reports. Such is the case where the *Insurance Contracts Act* 1984 (Cth) is in question, based as it on the ALRC report (ALRC 20 of the same name). So also when a case comes before the courts concerning the *Uniform Evidence Acts*, based on the ALRC reports on evidence law (ALRC 26 and 38).

In addition to this, it is now quite common for ALRC reports to be cited in Australian courts, including in the High Court of Australia, in submissions addressed to elucidation of the current state of the law and clarification of questions of legal policy and legal principle. So it was recently in a case before the High Court concerned with the meaning of the *Marine Insurance Act* 1909 (Cth). Both sides invoked the report of the ALRC of the same name (ALRC 91). In that report may be found an extremely thorough examination not only of the Australian statute but of the law as it has developed in other

countries whose legislation was , like that of Australia, adapted from the British template.

The confidence with which advocates now refer to ALRC, and other law reform reports, and the willingness of contemporary judges to use those reports in the performance of the judicial function, is a notable achievement. It is of the nature of a national law reform agency that it will usually have greater resources and more time to examine such legal questions than judges typically do. When there is a reasonably current report of the ALRC on a subject, it is always of great help to me and to most other Australian judges. Indeed, in a real sense, ALRC and other law reform reports can sometimes achieve their general objectives, even where Parliament has failed to act, if the power of legal analysis and the examination of the legal concepts persuades judges with the authority to do so that judicial reform is appropriate, taking into account the recommendations of the law reform report.

6. PROJECT TEAMS

Because, from the beginning, the ALRC had numerous projects on varying subjects, it became essential to mobilise the scarce resources of the Commission in an effective way. This was done by the appointment of a commissioner in charge of each project. It was his or her task to assemble the team of commissioners, staff and

consultants, to prepare the consultative documents and to lead the process of consultation throughout the country.

This form of delegation led to a decentralisation of responsibilities within the Commission and the sharing of responsibility by the several Commissioners, full-time and part-time. It was equally important that the Commission as a whole be aware of the development of reports and the efficient discharge of the references given by the Attorney-General. I believe that this system has proved highly productive for a body of restricted resources. It has ensured an efficient use of personnel and an effective procedure for the timely production of reform proposals.

7. PERSONNEL INVOLVEMENT

From the start, the ALRC departed from an overly hierarchical structure common in the law in favour of a generally democratic one. The staff at every level have been regarded as part of the ALRC team. Initially the ALRC comprised little more than my own personal judicial staff whom I brought with me to the Commission on my appointment in February 1975. I pay tribute to them: Jennifer Sealey, Rae Hay, Bill Koeck and later Steven Crawshaw, now Senior Counsel. They worked closely with the foundation Commissioners whose high distinction ensured the early success of the ALRC: Mr F G Brennan QC (later Chief Justice of Australia), Mr J Cain (later Premier of Victoria), Professor A C Castles, Mr G J Evans (later

Federal Attorney-General and Minister for Foreign Affairs) and Professor G J Hawkins. Soon thereafter, the Commission was expanded with further appointments, including Sir Zelman Cowen (later Governor-General) and Sir Maurice Byers QC (Solicitor-General of Australia). The list of ALRC Commissioners represents a galaxy of stars in the Australian legal firmament. Several Justices of the High Court and of other Australian courts have played active roles as Commissioners or consultants. In addition, the staff appointments have been at a very high level. As I recall the early law reform officers, I recognise many who have gone on to leading parts in the legal profession as judges, senior counsel and academics.

The first appointed staff member in 1975, beyond my personal staff, was Mr Keith Johnson. He came to the ALRC from service with the Woodhouse Commission of Inquiry into National Compensation in Australia. He was an outstanding officer. It is worth noting that in the Australia Day Honours List for 2003, he and his partner Malcolm Saintey were both appointed Members of the Australia of Australia for their work on Australian history and genealogy during and after the years that they worked with the ALRC.

Very soon after Keith Johnson was engaged, I employed a young lawyer, Ms Pamela Smith, as a law reform officer. I did so on the recommendation of Mr J G Starke QC, then editor of the *Australian Law Journal*. She proved an outstanding researcher.

Now, twenty-eight years later, our lives intersect again. Last week she came to the High Court as Mrs Dyson Heydon, wife of the latest Justice of the Court. He has himself played an important role in law reform, federal and State. He is here to mark this occasion. Through him I pay tribute to the Australian academic community, of which he was a leader, without whom the ALRC's achievements would have been negligible.

The Commission was also fortunate to have Chief Executives of great ability and principle. In those early days they included George Brouwer and Ian Cunliffe. As well, the Commission drew upon the enormous experience in federal law of two outstanding legislative drafters, Mr John Q Ewans QC, one-time First Parliamentary Counsel and Mr Noel Sexton. They were followed by Steven Mason and Alan Rose and other distinguished federal lawyers.

Maintaining a close team relationship with the staff and respecting and honouring their dedicated contribution to the work of the ALRC has been a feature of the institution. Only one staff member from my days in the ALRC remains, Ms Anna Hayduck. She pioneered word processing within the Commission and now plays a leading part in the production of the ALRC reports and other publications. I pay tribute to the Commissioners and staff. Their teamwork has been a notable reason for the success of the ALRC.

8. LAW REFORM COOPERATION

When the ALRC was created, there were sharp tensions in the relationships between a number of federal and State bodies. We were determined to avoid those tensions and I believe that we did so. From the outset the ALRC worked closely with State and Territory law reform bodies and law departments. Most such cooperation occurred on a bilateral level. But the expansion of the Australasian Law Reform Agencies Conference (ALRAC) and the close cooperation of the law reform agencies in that body helped to avoid unnecessary duplication, shared work and experience and removed territorial conflicts. The first ALRAC conference in which the ALRC participated was held in Canberra in 1976. The series of conferences continues. It is now an established feature of national cooperation in law reform.

In addition, the ALRC has opened links and cooperation with law reform agencies in England, Canada, New Zealand, South Africa, India and around the world. The publication of the Commission's journal, *Reform*, and its revival in a new format in recent years, has been a major outlet for information and opinion about ALRC work, experience and views.

The close cooperation between the ALRC and the Australian Health Ethics Committee in recent projects has continued the involvement of the ALRC in the important contemporary problems of

biotechnology. In that area, the ALRC is a recognised world leader. In the past quarter century, the number of tasks of law reform that have international significance has grown commensurately with the advance of global technology. There could be no more vivid illustration of this fact than the most recent reference to the ALRC on aspects of intellectual property law and the developments of genomic science. The international outlook about law and its development has been an important change since 1975. In this as in other respects the ALRC has been a pioneer.

9. LIBRARY RESOURCES

Every law reform agency depends on its library. This is why I was grateful for the decision of the ALRC to name its library after me.

The ALRC has been blessed with outstanding librarians. In my time they were two first class officers. The first librarian, Mr Roy Jordan, helped establish the ALRC library and then returned to the federal Attorney-General's Department. The second librarian, Virginia Purcell, responded heroically to the unreasonable demands placed on the library by the early work of the Commission.

The nature of library services has changed radically since 1975. To a very large extent legal materials have been placed on line. Each officer and staff member of the ALRC now has access to

online legal information. This reduces the need for a large library of printed materials. Yet as Justice Dyson Heydon pointed out in his farewell speech to the New South Wales Court of Appeal, many older legal materials are still not available on line. Care must be taken in down-sizing printed material not to discard useful legal sources not otherwise accessible. Justice Windeyer, one of the greatest of the judges of the High Court of Australia, taught that legal principle and policy can usually best be found in a thorough understanding of legal history.

The library named for me, that is now rededicated, is actually much smaller in physical size than the library of the ALRC of my days. It is smaller even than the library that I first opened soon after my retirement from the Commission in 1984. I hope that my library, if so I can so call it, will remain an important place in the ALRC enterprise - not only for its contents but also as a space for thinking and serendipity, for general reading and the exchange of views. Law reform, like other things, works in mysterious ways.

10. MOTIVATION FOR REFORM

The ALRC has been successful in keeping the proper mean between over-enthusiasm for reform for its own sake and the too ready acceptance of all the reasons why nothing should be done. It is essential to maintain this balance. It is sometimes easy, from within the legal paradigm, to overlook the needs and urgencies of

law reform. Regrettably, they can be neglected by the legislature. Often, the judges faithful to their offices cannot respond to the pleas for reform. It is inherent in the separation of powers established by the Australian Constitution, that the creative role of the courts will be comparatively limited. Most of the responsibility for law reform will continue to rest where it should - with legislators elected by, and answerable to, the people. Yet they can be stimulated by bodies in civil society. Now they can be helped by expert bodies such as the ALRC. I believe that the ALRC has faithfully fulfilled that role.

From my youth I always knew that reform of the law was important. In 1951 my grandmother's second husband stood at risk of losing many important civil rights. He had fought at Gallipoli in 1915 and later at the Somme in France where he was gassed. He won the Military Cross, a high decoration conferred on him by King George V. But in the 1930s he became disillusioned with society and its laws. He embraced communism. To me he was a fine human being and idealist, indeed a man of deep spiritual and humanitarian values. Yet to society he was an ogre.

The High Court's action in invalidating the *Communist Party Dissolution Act* was an important moment for Australian liberties. But for my family it was an important moment for a person who lived in our midst. Now I look on his views as misguided. Possibly if he were alive, so would he. But the way to fight ideas is with better ideas. The High Court, and the Australian electors at the referendum

that followed the Court's decision, showed great wisdom. The episode taught me that there must sometimes be a struggle for justice and principle within the law. Justice does not always triumph; but we should never be content with injustice.

In my youth my own experience of discrimination on the grounds of sexuality also taught me that the law is not always a fine instrument of freedom. Sometimes, even in Australia, law can be an instrument of oppression. The law's practitioners may not always see the injustices of the law. They may need the stimulus of those who feel the wrongs, identify them and express their feelings.

Since its creation, the ALRC has been, and remains, a sensitive barometer of injustice and inefficiency in the law. There is a need in the Commission for high professional skill and expertise. And there is an equal need for strong motivation where that is justified. Lawyers often have to struggle to avoid complacency and self-satisfaction. It is the ALRC's institutional role, so entrusted to it by the Australian Parliament, to be a stimulus for the reform of Australian law. If it retains the ten point strategy of the past quarter century, it will continue to contribute significantly to our Commonwealth. I do no doubt that the best years of the ALRC lie ahead.