LAW REFORM AGENCIES AND GOVERNMENT – INDEPENDENCE, SURVIVAL AND EFFECTIVE LAW REFORM?

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This article examines the meaning of 'independence' in the context of law reform agencies funded by government. It explores the idea of independence expressed as a way of doing law reform—through independence of mind—and what this means in practice for the conduct of law reform inquiries, regardless of the particular structure of the law reform agency. Using this lens of independence, the article considers the relationship of law reform agencies with the executive and with government and reflects upon the issues of survival and effectiveness

I INTRODUCTION

The focus of this article is on the relationship between law reform agencies and the executive and legislature. The key question is about the meaning of 'independence' in the context of agencies funded by government. It is much heralded, but what does it mean?

The key message I wish to convey is that the essence of effective law reform is independence and that this is *not* about how law reform agencies are structured—and there are many differences amongst law reform agencies across the common law world of the Commonwealth—but how we go about our work. It is about *intellectual* independence; and it is *this* that makes our work of value to government, and governments across the Commonwealth. This is our shared mission and responsibility and is the raison d'être of our continued relevance.

II LAW REFORM STRUCTURES AND INDEPENDENCE

In terms of structure, we are not all the same. I recall a paper at the Australasian Law Reform Agencies Conference (ALRAC) in 2016, which was making comparisons between 'Rolls Royce' and 'T-model Ford' models of law reform agency or, for those of us who are not so familiar with the relative merits of automobiles, an expensive but quality model as opposed to a cheaper one, but that still gets you to your destination. I'm not sure this is a useful analogy. The reality

* President of the Australian Human Rights Commission. Until July 2017 President, Australian Law Reform Commission. This article began as an invited presentation to the meeting of the Commonwealth Association of Law Reform Agencies, Melbourne, 25 March 2017. The views expressed are based on my experience in the Australian Law Reform Commission since my appointment on 6 February 2007.

is that some law reform agencies in the Commonwealth of Nations (formerly the British Commonwealth) have the direct involvement of parliamentarians; some are located within a branch of the executive, as part of a justice or Attorney-General's department; some are set up as more formally 'independent' bodies—like the Australian Law Reform Commission (ALRC), the New Zealand Law Commission and the Law Commission on England and Wales; some are located within, or associated with academic institutions—like the Tasmanian Law Reform Institute, a model based on the Alberta Law Reform Institute, and copied also in South Australia and the Australian Capital Territory.[1] As the Hon Sir Grant Hammond KNZM, former President of the New Zealand Law Commission, remarked, 'They are what they are'.[2] What I want to argue in this presentation is that, *however* a law reform body is constituted, if it can retain its intellectual independence, then this is where its value lies, to governments and the communities it serves.

What about the ALRC? The ALRC is an Australian Government agency, within the Attorney-General's portfolio of agencies and currently operates under the *Australian Law Reform Commission Act 1996* (Cth). The primary function of the ALRC, set out in s 21, is to advise the Parliament and Australian Government on the systematic development and reform of areas of the law referred to the ALRC by the Attorney-General.[3] Under the Australian Government 'outcomes and programs framework', the ALRC has one outcome, namely:

> [I]nformed government decisions about the development, reform and harmonisation of Australian laws and related processes through research, analysis, reports and community consultation and education.[4]

The work program is set by the Attorney-General in the form of Terms of Reference with a view to reforming Australian Commonwealth laws and harmonising Commonwealth, state and territory laws.[5] From this point it is for Government to implement the recommendations in each report. We have the Australian Government logo on our website and business cards. We are on the government payroll. But 'independence' is our guiding mantra. So *how* are we 'independent'?

Aspects of our structure, and location, assist an *appearance* of independence. Our office is not in Canberra, where the Attorney-General's Department is located. So this is a physical expression of independence—not being located in the same

1 A good description of this model is provided in T Henning and D Plater, 'Law Reform on the Smell of an Oily Rag' (Australasian Law Reform Agencies Conference, March 2016) 7.

2 G Hammond, 'So Where Is It All Going?' (Australasian Law Reform Agencies Conference, March 2016) 7.

3 See also *Australian Law Reform Commission Act 1996* (Cth) s 20(1), which contemplates a role for the ALRC in suggesting references to the Attorney-General.

4 Australian Law Reform Commission, *Annual Report 2013–2014*, Report 125, 17.

5 On the completion of each inquiry, the report is presented to the Attorney-General, who must table it within 15 sitting days of Parliament: *Australian Law Reform Commission Act 1996* (Cth) s 23.

building, even the same city, as the main departments of government.

Our Commissioners are appointed, and are not members of Parliament—so it is a different model from some jurisdictions, such as Papua New Guinea, where the Constitutional Law Reform Commission includes two serving Members of Parliament.[6] In a presentation to ALRAC in Melbourne last year, Peter Hastie QC, a part-time member of the Queensland Law Reform Commission, remarked about the importance of this aspect of structure to independence: it means that members are 'not directly constrained by political considerations' and 'have the luxury of being above partisan politics'.[7]

We do have sitting judges as part-time Commissioners, but, unless appointed specifically to lead an inquiry, they are more of a distinguished presence, and sage background advisers, than the active leaders and writers of our reports.

We rarely include departmental officers on Advisory Committees and only at times when we consider it beneficial to an inquiry because of particular expertise. We prefer to consult departments to maintain the arm's length relationship that our independence requires.

Structurally, therefore, and physically, we appear quite independent. But it is not just about structure. Crucial to independence is *how* we go about our work. This is what I call *intellectual independence*. And it is a matter of substance, not form: it is the way of 'doing' law reform.

III INDEPENDENCE – THE WAY OF 'DOING' LAW REFORM

By always starting our inquiries with questions, never answers, it gives a message of openness and amenability to listening—of independence of *mind*—not being seen to be aligned with, or an advocate for, any particular viewpoint.

For a law reform agency, the outcome should never be known until the process has been worked through. This openness facilitates securing stakeholder engagement. This is so important when extensive public involvement in law reform is crucial to the integrity of the process—it is the *sine qua non* accepted among institutional law reform bodies internationally—because it is a demonstration of independence of mind.

Roland Daysh, General Manager of the New Zealand Law Commission, argued that independence 'allows a unique review process': 'not to be constrained by

6 *Constitutional and Law Reform Commission Act 2004* (PNG). Australasian Law Reform Agencies Conference, March 2016.

7 P Hastie, 'Potential Means By Which Agencies Can Respond To Political Imperatives To Get Things Done', [17].

existing political expectation or the values of particular interests'.[8]

> This process provides understanding, public scrutiny of the issue in a structured manner, and through the engagement process provides a connection of interested parties to the final recommendations. … The process can also facilitate future implementation; by building public trust in the review process as the Law Commission brand is respected by the public.[9]

Similarly, the Hon Justice Roslyn Atkinson AO of the Supreme Court of Queensland and Chair of the Queensland Law Reform Commission refers to public consultation as promoting 'a sense of public "ownership" over the process of law reform'.[10]

But public consultation also provides a great service to Government when it comes to a consideration of recommendations in law reform reports. As Atkinson explains, community participation helps ensure that law reform reports are 'intellectually rigorous' *and* 'practical':

> [H]aving considered evidence of how the area of law in question operates in practice; gathered information from a variety of sources and perspectives; and tested proposals with interest groups and affected parties. All these factors produce a document that political decision-makers can accept as community tested, before consideration and hopefully implementation of the reform proposals.[11]

I am suggesting that independence from the executive is expressed through this relationship to consultation, because there is a deep and sincere commitment to finding out what the community feels about the laws under review and gives them a voice in suggesting how the laws could be reformed. There are many law reforms that happen as a result of government will or ideology—as part of political platforms. But this should not drive independent law reform.

The commitment to consultation and outreach remain of high order for the ALRC. Even in periods of ongoing budget cuts, this commitment remains central. It is crucial to our way of 'doing' law reform.

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8 R Daysh, 'The Challenge of Demonstrating Value' (Australasian Law Reform Agencies Conference, March 2016) 11. Daysh cites our ALRC mantra of 'starting with questions, not answers' in support of his argument.

9 Ibid 11.

10 R Atkinson, 'Law Reform and Community Participation' in *The Promise of Law Reform* (Federation Press, 2005) 160–74, 166. Peter Hastie, part-time member of the QLRC, described it as 'a way of ensuring that people feel a part of the process': Hastie, above n 7, [40].

11 Atkinson, above n 10.

Commitment to consultation is evident in all the law reform bodies discussed in a collection of essays prepared as a result of conference in Hong Kong in 2011, and given the published title of 'Reforming Law Reform'.[12] Consultation serves different purposes and takes different forms. Patricia Hughes, Executive Director of the Law Commission of Ontario and former Professor and Dean of Law, University of Calgary, Alberta, commented that 'All commissions consult: it is the "with whom" and "how" that distinguishes them.'[13]

> Consultation can occur at different stages of a project and for different reasons: it may be to involve those who are likely to be affected by the project to learn about the way the law affects them and what is needed, from their perspective, to make it effective and responsive to their needs; it may be to learn from the legal community how they view the law and the problems they face in working with it to represent clients or in applying or implement it; it may be to obtain academic or other professional expertise.[14]

> Consultation is the 'fundamental principle' on which the Law Commission of England and Wales works: before and after any consultation paper is published. Emeritus Professor Martin Partington, former Law Commissioner and Special Consultant to the Law Commission of England and Wales, explained that

> > Sorting out difficult areas of law by getting advice from and building consensus with those likely to be most affected by proposals to change the law seems eminently sensible to me. In addition, the availability of new forms of communication media means that law reform bodies no longer need to rely on written submissions in response to consultation documents. Many investigations are now carried on through questionnaires completed on line, with comments being received in a variety of modes of e-communication. These developments will become more and more commonplace.[15]

Hughes notes that consultation can be 'relatively easy' or it can be 'a bit messy'—and costly.[16] But it is also crucial—particularly in 'law in context' projects. She

12 P Hughes, 'Lessons from Law Reform in Ontario and Elsewhere in Canada' in M Tilbury, S Young and L Ng (eds), *Reforming Law Reform—Perspectives from Hong Kong and Beyond* (2011) 87 (*Reforming Law Reform*). I wrote a review essay of this work: '*Law Reform Process in Hong Kong and Beyond,* Eds Michael Tilbury, Simon NM Young and Ludwig Ng, Hong Kong University Press 2014. A Review Essay—Defending Independence' (2014) 34(3) *Legal Studies* 515.

13 Ibid 99.

14 Ibid.

15 Ibid 84.

16 Ibid 103.

agrees with the comments of Professor Marcia Neave, in a speech delivered in 2004, that 'consultation contributes to the development of civil society, and of democracy, because it involves citizens in the law reform process'.[17] Hughes also emphasises that 'the days are long gone when law reform bodies can be insular, not only because, in many places, modern scholarship and government practices recognise the need to hear from those affected by the law, but for "public relations" purposes'.[18] She also identifies the problem of managing stakeholder expectations and the constraints that limited resources necessarily place upon consultation planning.[19]

Even in a jurisdiction that is small, the commitment to consultation is a central concern. (Then) Professor Kate Warner's chapter on the Tasmania Law Reform Institute in Australia said that

> The fact that law reform bodies are independent of government is what sets the consultation process apart from community consultations conducted by governments. It provides a level of confidence, which is essential to achieving wide community input. While the nature and extent of community engagement depends upon the subject matter of the reference, it is no longer considered enough for a law reform body to publish a discussion or issues paper, schedule a public hearing or two and wait for the submissions to flow in. Greater creativity is expected.[20]

The results of public consultation, including submissions, add to the information that provides the evidence base for the conclusions of a law reform inquiry, expressed as recommendations. Governments can decide not to follow the recommendations, but they can see the arguments for and against the policy solutions being advocated. And where formal tabling of law reform reports is required, the arguments are public and can be used as leverage by others who want to push for implementation, if this is not a first order priority for Government.

IV INDEPENDENCE – THE WAY OF RELATING TO GOVERNMENT

Intellectual independence does not mean we snub our noses at government. Having a good and open relationship with the relevant departments and relevant Ministers is important. Regular communication is sensible. Ensuring there are no surprises for Government is a different concept entirely from taking *direction*, which is anathema to independence. Again to quote Sir Grant Hammond, 'the

17 Ibid 104. Marcia Neave, 'The Ethics of Law Reform' (11 August 2004). At the time Professor Neave was the Chair of the Victorian Law Reform Commission. In 2006 she was appointed as a Judge of Appeal, Court of Appeal, Supreme Court of Victoria.

18 *Reforming Law Reform,* 104.

19 Ibid 104–5.

20 *Reforming Law Reform,* 127.

learning is, one has to transcend the bureaucrats'.[21]

In framing the idea of independence in the collection of essays on law reform, Emeritus Professor Partington affirmed that 'it does not mean that law reform bodies should work in isolation from government'.[22] Maintaining an appropriate communication loop is part of what Patricia Hughes described as being 'nimble'.[23]

Hughes identifies the relationship with government as 'the most significant' one for law commissions.[24] It is crucial to a commission's success 'and very likely to its existence'. She describes the struggle 'to maintain independence while responding to government expectations'. This is compounded in the context of implementation as, by the time a report is released, 'the government's agenda and even the government itself may have changed'. Hughes stressed the importance of communication: '[t]here is no magic solution other than ongoing dialogue and ensuring that the commission does not exist in isolation, that it has "friends" who support it and will speak for it'.[25] This may especially be the case if inquiries take a long time (for example, longer than two years). The timeframe for an inquiry may not fit neatly within the electoral cycle. Perhaps one advantage of shorter timeframes (and by this I mean around 12–15 months) is that an inquiry is more likely to fit within an electoral cycle and so that the Minister who initiated the inquiry is the same Minister (or Government) that initiated it. The subject is more likely to still be on the law reform agenda of the government and the inclination to implement the recommendations may therefore be stronger than if the government has changed.

Respectful relationships involve communication with and remaining clearly at arm's length from government—including being seen to be non-political/non-partisan. If you overreach that relationship, and lose the confidence of government as a result, then, as Michael Tilbury (a very experienced law reform commissioner) observed, a law reform commission 'is effectively functionless for the period that government is in power'.[26]

In England reforms introduced in 2010 formalised the relationship between the Lord Chancellor and the Law Commission, setting out how government departments and the Law Commission should work together 'to deliver law

21 Hammond, above n 2, 8.
22 Martin Partington, 'Law Reform: The UK Experience' in *Reforming Law Reform*, 67–86, 84.
23 Hughes, above n 12, 103.
24 Ibid 107.
25 Ibid.
26 Michael Tilbury, 'Why Law Reform Commissions?: A Deconstruction and Stakeholder Analysis from an Australian Perspective' (2005) 23 *Windsor Yearbook of Access to Justice* 339.

reform in the most effective way possible'.[27]

While the ALRC does not have a formal protocol, we maintain an active communication loop with the Attorney-General's Department and with the Attorney. We also restrict commentary on current law reform matters to those that the ALRC has worked upon over the years (not just current inquiries), using the parliamentary inquiry process to draw to the attention of particular committees what our reports recommend, and perhaps where there are differences with our recommendations in the proposed legislation. For example, in our report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*,[28] one chapter concerned freedom of speech. We identified a particular aspect of the *Racial Discrimination Act 1975* (Cth) as possibly being amenable to review, as the section which was directed towards 'hate speech', was, in some respects, broader than is required under international law to prohibit the advocacy of racial hatred, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge'.[29] When a Parliamentary Inquiry was set up to look at the particular provision, we made a submission identifying the issues that we set out in our Report.[30] I was also called to give evidence, based on the submission. I limited my comments to those we had set out in the Report.[31]

In a presentation that the Hon Michael Kirby AC CMG, the first Chairman of the ALRC, made in 2008 in Alberta, he said that one difficulty to the job of law reform was law reformers being 'constantly torn between getting too close to politicians and the media, in order to attract interest in, and action on their proposals. Or keeping too great a distance, in order to avoid seduction and so as to maintain product differentiation in the creation of reforming ideas'.[32]

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27 *Law Commission Act 2009* (UK) and see *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No 321, 29 March 2010 (HC 499)): <http://lawcommission.justice.gov.uk/docs/Protocol_Lord_Chancellor_and_Law_Commission.pdf/>. The protocol came into force on 29 March 2010. The protocol covers the various stages of a law reform project: before a project commences—in determining the programme of law reform; at the outset of the project; during the currency of the project and after a project is completed: see chapters 4 and 5 of *Reforming Law Reform* for good accounts.

28 ALRC Report 129 (2105).

29 ALRC Report 129 (2105), [4.9].

30 The submissions are found at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FrFreedomspeechAustral/Submissions>.

31 The Hansard for 17 Feb 2017, including my evidence as the first person to present, is at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FrFreedomspeechAustral/Public_Hearings>.

32 Michael Kirby, 'Law Reform — Past, Present and Future' (Address to the Alberta Law Reform Institute, Monday 2 June 2008) 20. Referring to P North, 'Law Reform: Problems and Pitfalls' (1999) 33 *UBC Law Review* 37, 45.

It is a delicate line. But a vital one. Distrust is not helpful to independence.[33] Survival is a prerequisite to the maintenance of existence, let alone independence. I included it in my title, so here are some observations.

V SURVIVAL

As Michael Kirby succinctly observed, 'No one owes a law reform agency a free lunch'.[34] The ALRC, like all other areas of government spending, is subjected to routine scrutiny through the processes of Parliament itself, especially the scrutiny undertaken by the Senate Standing Committee on Constitutional and Legal Affairs as part of the budget estimates processes. (And this can be gruelling.)

Periodically the relationship between Parliament and the ALRC becomes more intense, the glare of Parliament being turned into the heart and soul of the agency. Three times this has happened through parliamentary committees. Other times it has occurred through bureaucratic inquiries, conducted, for example, by the Treasury.

Challenging our existence can be helpful—to a point. In periods of economic constraint, and a desire of governments to restrain public spending, it is a natural thing to look at the public service, and structures of departments and agencies and to explore things that might appear untidy, wasteful, or even unnecessary. Agencies which are very small (indeed 'micro') are a natural target, even just out of a sense of 'tidiness'. Functions that look like they *could* be done somewhere else prompt questions. Governments that place a premium on centralised control are naturally suspicious of functions that sit outside central control—especially those that are 'independent'. A questioning of such matters is not necessarily a challenge to law reform agencies. It can reinvigorate a sense of who and what we are, and the essential conditions on which our work is best conducted—and of most value—to government, in an extended sense, and to law.

As Parliament gave birth to the ALRC, so Parliament can bury it. In 1994 the House of Representatives Standing Committee on Legal and Constitutional Affairs conducted 'the first comprehensive parliamentary review of the Law Reform Commission of Australia in its almost 20 years of existence'.[35] The Committee commented, ominously, that '[t]he statutory nature of a law reform agency does not of course preclude it being abolished'.[36] Set up by statute,

33 See further on this theme my presentation of the 9th Annual Michael Kirby Lecture 2015, published as: 'Re-imagining Law Reform—Michael Kirby's Vision, Human Rights and the Australian Law Reform Commission in the 21st Century' (2014–15) 17 *Southern Cross University Law Review* 31.

34 Kirby, above n 32, 11.

35 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—The Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994) iv.

36 House of Representatives Standing Committee on Legal and Constitutional Affairs—

the ALRC can be abolished by statutory repeal, or by reduction or removal of funding. There is a danger of disappearance, either in law or in fact, that is always a shadow on the horizon for institutional law reform bodies. We *are* vulnerable. We *are* mortal.[37] The Law Reform Commission of Canada, for example, was established as a federal body, like the ALRC, in 1971. It was disbanded in 1993 (as was noted in the 1994 House of Representatives review), and its successor, the Law Commission of Canada, although created by statute in 1997, did not have its funding renewed in 2006.[38]

In Australia in 2014, the National Commission of Audit, initiated by the then Treasurer, the Hon Joe Hockey MP, included in its report a list of 'Principal bodies for rationalisation'—a word that sends shivers down the spine of law reformers world-wide. The list included bodies that were to be abolished, those to be merged and those that were to be consolidated into departments.[39] The ALRC appeared in that last category. Nothing has happened—so far.

This takes us back to the matter of structure. Some law reform commissions are structured within departments; and some are moved into them. In 2013, Western Australia's Law Reform Commission disappeared into that state's Attorney-General's department and the New South Wales and Queensland Law Reform Commissions have undergone similar moves.

If we stick to the *way of doing* law reform in the manner outlined here, then we demonstrate independence *in fact*. This also provides, in Roland Daysh's words, our 'value proposition', which is a key defence for very small bodies:

> Any Crown funded organisation that is outside of the mainstream, independent, dependent on a third party of its funding, work programme and implementation of its recommendations, and is very small in size has a high risk of being marginalised.
>
> The key mitigation strategy is to have a very clear value proposition that differentiates your organisation for others undertaking a similar role, ensure your work programme aligns with your organisation value proposition, and to deliver value from the various decision makers' perspective.[40]

Parliament of Australia, *Law Reform—the Challenge Continues: a Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994) [4.2.2].

37 To pick up the passage from Michael Kirby, above n 32, 10.

38 *Reforming Law Reform*, 92.

39 National Commission of Audit, *Towards Responsible Government. The Report of the National Commission of Audit—Phase One* (2014) Annex C. The report is at <http://www.ncoa.gov.au/report/phase-one/index.html>.

40 Daysh, above n 8, 12.

VI EFFECTIVENESS

How does Parliament judge that we are doing well—that we are *effective*? 'Implementation' data is one way, but it is not all about statistics. A lack of implementation, of itself, does not mean failure. It is not even a very good guide to performance.[41] The law reform cycle, once launched, does not necessarily match the tenure of Ministers, or governments. To quote Hughes again:

> Ministers change, governments change, members of the agency's governing board will change, new staff will join, and other actors will undertake work in the same area as a law reform project. All of these can affect the progress of projects or require a shift in focus. The trick for law reform commissions is to maintain consistency while continuing to distinguish itself, to maintain ongoing relationships, even while it develops new ones, orienting new members to the commission's methods, yet benefitting from the new ideas they may bring.[42]

While implementation statistics tell one picture, other lenses give a wider and more enduring sense of impact. In a collection of essays published in 1983, Mr Kirby reflected that 'the role of the ALRC in promoting community debate and professional acceptance of the needs of reform may be a more lasting and pervasive contribution to law reform in Australia than any particular project'.[43] And in 2008, twenty-five years later, he expressed this as 'the flame of ideas' kept alight by permanent law reform bodies.

> The flame of law reform affirms a central concept of the rule of law itself: legal renewal. As I repeatedly saw in Cambodia in work I did there for the United Nations, one of the greatest causes of corruption in the world is the absence of regular machinery to modernise and change the law to accord with contemporary values and needs. Where there is no law reform, corruption grows up because it may be the only way of getting things done.[44]

In helping to keep the flame of ideas alight at the ALRC we have adopted new technologies to expand our modes of communication and our community reach. When Kirby was Chairman, he used cassette tapes to convey messages. We now

41 A sentiment echoed by Michael Tilbury in 'Why Law Reform Commissions?' (2005) 23 *Windsor Yearbook of Access to Justice* 313, 327.

42 Hughes, above n 12, 103.

43 Michael Kirby, *Reform the Law—Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983) 19. Kirby noted however that, 'because public discussion about law reform may raise expectations of reform and the acceptance (in community, professional and administrative attitudes) of the necessity of change' this was a constraint on law reform – the seventh in his list.

44 Kirby, above n 32, 29–30.

use their contemporary equivalent, 'podcasts'.[45] We tweet. We offer 'ePubs'. We publish all submissions on our website. We use wikis—even using one to assist in building a catalogue of encroaching laws through crowd sourcing in the Freedoms Inquiry. We have over 9,000 twitter followers and last year we were selected as a finalist the Excellence in eGovernment awards—not bad for a small agency! We accompany all our reports with a short précis version, as a separate Summary Report.[46] We've also started to produce some consultation documents in Easy English, and have published material on the law reform process and on how to submit to an inquiry in 21 community languages. Through a commitment to, and practice of, accessibility, we help to fan the flame.

My personal conviction, after ten years at the ALRC, is that an assessment of the contribution that law reform work makes, and its effectiveness, must be seen through another lens, as Michael Kirby urged. The impact stretches far beyond the reports in and of themselves.[47] Here one must necessarily have a long view. The assessment of the contribution must be seen in the light of legal history. Law reform publications—especially the final reports—provide an enormous contribution to legal history, through the mapping of laws and policy opinions as at a particular moment in history. In reviewing the submissions and consultations the reports also provide a snapshot of opinion on the issues being considered—again providing a fabulous contribution to legal history, to judicial officers in their judgments, and to policy makers and parliamentarians alike in informing changes to law. When I was working on my PhD, I found the reports of the UK Real Property Commissioners of the 1830s just the most wonderful resource. Each law reform commission report not only reviews the past, it also maps the present and envisages the future.

A good example is the inquiry undertaken by the ALRC into the recognition of Aboriginal Customary Laws, completed in 1986—over 30 years ago.[48] That was a mammoth nine-year inquiry, the ALRC's 31st report—running to over 1,000 pages. It remains one of the most-visited reports on the ALRC website—and, since 2010 when we started counting these things, visited nearly 200,000 times.[49] It is also the 4th most downloaded of all our reports—over 5,500 times, counting just our website alone.

45 See <http://www.alrc.gov.au/search/podcast>.

46 They have to satisfy one simple practical principle: that they will fit in a briefcase and be capable of being read on the plane between Sydney and Canberra: 'Defending Independence' (2014) 34(3) *Legal Studies* 515, 533.

47 In my Michael Kirby lecture I describe this under the heading 'Pebbles in a Pond': above n 33.

48 *Recognition of Aboriginal Customary Laws* (ALRC Report 31, 1986).

49 Specifically, it has been visited by 85,831 unique users 194,804 times. Two chapters of the Customary Laws Report also have the highest 'unique page views' (upv): 'Changing Policies Towards Aboriginal People' (Customary Laws 1986 (128,435 upv); 'Impacts of Settlement on Aboriginal People' (Customary Laws 1986) (77,681 upv).

This kind of interest, and especially in work such as the Customary Laws report, continuing now, over 30 years after the report was completed, signifies a dimension of importance of the ALRC's work and impact, even where specific recommendations may not yet find their way into specific legislative action. And, significantly, the reflections in that report were ones we returned to in the Native Title Inquiry and the report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, tabled in June 2015.

Peter Hastie commented about this kind of impact in his ALRAC paper in 2016:

> Law reform commission reports are often such that even if they do not lead directly to law reform, they can assist members of the community in their understanding of the matters in issue and can play a part in the understanding and operation of the law. The inference is inescapable, for instance, that the exploration of the law of standing, customary law and privacy by the Australian Law Reform Commission had an impact upon developments in these areas in the common law (and also, even if indirectly, statutory law).[50]

The authoritative character of the analysis in each report means that, as Kirby observed on the 30th anniversary of the ALRC,

[C]ourts 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.[51]

The Federal Court also observed in a submission to the 2010 Senate inquiry into the ALRC:

> The Court benefits greatly from the ALRC's reports, research and analysis of complex areas of law within federal jurisdiction… More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented. ... In this way, the ALRC's reports have assisted the Court in the tasks of ascertaining the law, interpreting statute

50 Hastie, above n 7, [22].

51 Michael Kirby, 'Are We There Yet?', in Brian Opeskin and David Weisbrot, *The Promise of Law Reform* (Federation Press, 2005), 433–448, 439. See also the observations of David Weisbrot, 'Law Reform, Australian-Style' in *Appealing to the Future* (Thomson Reuters, 2009) 607–37, 625.

and developing the common law.[52]

The law reform process itself also has both an immediate, and a long-lasting impact. The success of the consultation process is that it is *personal*. Commissioners personally lead the consultations with a wide range of stakeholders in each inquiry. Respectful relationships are established and built through the 12 months or so of an inquiry, and often these relationships continue from inquiry to inquiry. It is part of the *practice* of independence.

Building relationships is one way in which the reputation for independence is nurtured and protected. You have to have the confidence of stakeholders that their opinions carry weight, that they will be listened to and evaluated respectfully—with outcomes not determined in advance. Respectful relationships with government and stakeholders across the spectrum of interests in any inquiry enables the impact of an inquiry to continue over the years.[53]

The relationship between Government and the ALRC is a many-layered one: as parent, protector, challenger—and potential executioner. It is sustained by respectful engagement and respectful distance, as befits an independent statutory agency. The ALRC in the 21st century has as much of a role now as it had at its birth. It has earned the respect in which it is held, both nationally and internationally. But it is not something that I, my predecessors and my successors, can ever take for granted. We have a high reputation to maintain. We have demonstrated our independence. We must continue to demonstrate the right to keep it.

52 The submissions are found at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/lawreformcommission/submissions>. The Federal Court's submission is Submission 22. In 2003 Kirby said that the 'willingness of contemporary judges' to use ALRC reports 'is a notable achievement': Michael Kirby, 'The ALRC—a winning formula' (2003) *Reform* 58–63: <http://www.austlii.edu.au/au/journals/ALRCRefJl/2003/11.html>.

53 Relationships are built not just with stakeholders, but also with other law reformers. Many come to visit, to learn by watching and being mentored in our processes—like our colleagues from Samoa and the Solomon islands. On occasion we are enlisted to provide hands-on training, as for example in Papua New Guinea and Botswana (in both cases led by my predecessor, David Weisbrot). We have hosted many visits at the ALRC, like those from Vietnam, Thailand, South Korea and China, wanting to know about our processes and practices.