Bella Mickan and Michaela Puntillo***

THE PAST, PRESENT AND FUTURE OF LAW REFORM IN SOUTH AUSTRALIA: PAVING THE WAY FORWARD

Abstract

A dedicated and institutionalised law reform body is instrumental to any civilised society. These bodies play a fundamental role in effecting meaningful change and improving laws that prove to be inadequate for the community they regulate. Yet, history shows that law reform agencies have always struggled to stand the test of time, and South Australia is no exception to this. This article explores the reasons why this is so and aims to ascertain the key characteristics that can be associated with 'successful' law reform agencies. Drawing upon the works of Gavin Murphy, this article considers the following features associated with law reform bodies: 'membership'; 'financial resources'; 'nature of work'; 'independence'; and 'method of work'. This article then examines the experience of law reform agencies in both Canada and South Australia in respect of each of these features.

I Introduction

Law reform is instrumental to any civilised society. As recognised by Howard Zelling in 1977, '[t]here is no area of the law in South Australia which is not in need of reform'.[1] This assertion rings true 45 years later. The way in which such reform takes place varies amongst jurisdictions, however, the existence of an independent body that is solely dedicated to improving the law is fundamental to making effective change. Although it is recognised that there is no one-size-fits-all successful law reform model,[2] there are certain characteristics

* LLB (Hons) Candidate (Adel); Student Editor, *Adelaide Law Review* (2021); Student, Law Reform course (2022).

** LLB Candidate (Adel); Student Editor, *Adelaide Law Review* (2022); Student, Law Reform course (2022).

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1 Andrew Ligertwood, 'Law Reform in South Australia: An Interview with Mr Justice Zelling' (1977) 2(5) *Legal Service Bulletin* 178, 181 ('Interview with Mr Justice Zelling').

2 David Plater and John Williams, 'The South Australian Law Reform Institute a Decade on: "May You Continue Well into the Future"' (2022) 43(1) *Adelaide Law Review* 37.

that can be attributed to successful models.[3] This article seeks to ascertain the characteristics associated with such models by studying the history of law reform in both South Australia and Canada. By acknowledging the challenges faced by past and present law reform bodies, this article hopes to identify the appropriate path moving forward for South Australian law reform to effect positive change in the justice system.

It is worth recognising from the outset that much academic attention has been paid to federal law reform bodies both in Australia and Canada,[4] however, less attention has been given to law reform bodies in provincial Canada and Australian states and territories. As will be demonstrated in this article, looking to experiences of state and provincial bodies will have much to offer the broader realm of law reform by way of both negative and positive lessons. It is also necessary to consider the reasons for choosing Canada as a comparator. Canada and South Australia notably have similar institutions and legal systems allowing an appropriate comparison of the operation of their past and present law reform bodies.[5] Further, Canada's experience with law reform bodies is rich and extensive, seeing the rise and fall of many agencies at both the federal and provincial level.[6] Both Canada and South Australia are Commonwealth jurisdictions, in addition to both seeing the establishment of many reform bodies in the 'golden age of … reform'[7] in the 1970s.[8] Yet,

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3 Gavin Murphy relevantly identifies these to include: creation; financial resources; membership; nature and scope of work; independence and accountability; research programs; method of work; and form of report: see Gavin Murphy, *Law Reform Agencies* (Report, Department of Justice of Canada, March 2004) ch 2.

4 In particular, Michael Kirby has considered the Australian Law Reform Commission and Canadian law reform commissions in detail: see, eg: Justice Michael Kirby, 'Law Reform: Past, Present, Future' (Speech, Alberta Law Reform Institute, 2 June 2008); Justice Michael Kirby, 'Law Reform Alberta Style: Words of Wisdom' (Speech, Alberta Law Reform Institute, 3 June 2008); Justice Michael Kirby, 'The Politics of Achieving Law Reform' (1988) 11(3) *Adelaide Law Review* 315.

5 See William H Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, 1986) ('*Law Reform Commissions*').

6 See below Part III.

7 Marcus Moore, 'The Past, Present and Future of Law Reform in Canada' (2018) 6(2) *Theory and Practice of Legislation* 225, 231.

8 Despite their similarities, there are some differences in systems where Québec, a province in Canada, is the only province with a French civil code that is based on the Napoleonic Code, in addition to still being influenced by the common law system: Jean Goulet, 'The Quebec Legal System' (1980) 73(2) *Law Library Journal* 354, 355–6, 367, 371. Canada is also distinctive in respect of the external impact that the United States has had economically, politically, and socially: J Douglas Gibson, 'The Changing Influence of the United States on the Canadian Economy' (1956) 22(4) *Canadian Journal of Economics and Political Science* 421, 421. The partnership of Canada and the United States is evidenced by shared geography, common interests, and longstanding partnerships in respect of boarder management, bilateral trade and foreign policy: 'Canada–United States Relations', *Government of Canada* (Web Page, 9 June 2022) <https://www.international.gc.ca/country-pays/us-eu/

by the 1990s, nearly all bodies in both jurisdictions had been abolished or at least extensively downsized.[9]

Part II of this article considers the past and present of law reform within South Australia, whilst Part III considers the equivalent in Canada, however, at both a provincial and federal level. Drawing upon these findings, Part IV then considers the best way forward for law reform within South Australia, focusing on the core features associated with membership, financial resources, independence, nature and scope of work, and method.[10] In doing so, three reports published by reform agencies in the relevant jurisdictions are heavily relied upon as case studies. These papers include: *Law Relating to Women and Women's Rights* ('*Women's Rights Report*') in 1970;[11] 'Studies on Family Property Law' in 1975;[12] and 'Study Paper on Assisted Suicide, Euthanasia and Foregoing Treatment' in 1996.[13] Consideration of these reports assists in revealing the conservative history of South Australian law reform bodies and the extremely progressive nature of Canadian law reform bodies, both historically, and presently.

II South Australia

A *Past*

South Australia had two unsuccessful attempts at sustaining a free-standing law reform agency. First, the South Australian Law Reform Committee ('SALRC') which ran from 1968–86 and second, the Criminal Law and Penal Methods Reform Committee ('Mitchell Committee') which existed from 1971–77.[14] Both agencies, although contributing to significant law reform in South Australia, were subject to heavy criticism by scholars, with their limitations being easily identified.[15] The SALRC was established by proclamation on 19 September 1968 by the then Liberal Government and was chaired by Zelling J of the Supreme Court

relations.aspx?lang=eng>; Bureau of Western Hemisphere Affairs, 'US Relations with Canada', *US Department of State* (Web Page, 19 August 2022) <https://www.state.gov/u-s-relations-with-canada>.

9 See generally Justice Michael Kirby, 'Forty Years of the Alberta Law Reform Institute: Past, Present, Future' (2009) 46(3) *Alberta Law Review* 831.

10 These characteristics, amongst others, were recognised by Gavin Murphy: see above n 3 and accompanying text.

11 South Australian Law Reform Committee, *Law Relating to Women and Women's Rights* (Report No 11, 1970).

12 Law Reform Commission of Canada, 'Studies on Family Property Law' (Research Paper, 1975).

13 Ontario Law Reform Commission, 'Study Paper on Assisted Suicide, Euthanasia and Forgoing Treatment' (Study Paper, December 1996).

14 See generally Andrew Ligertwood, 'Law Reform in South Australia: An Overview' (1976) 2(2) *Legal Service Bulletin* 35 ('An Overview').

15 See, eg: ibid 36–7; David St L Kelly, 'The South Australian Law Reform Committee' (1967) 3(4) *Adelaide Law Review* 481, 485.

of South Australia.[16] It was initially made up of five members: two of whom were recommended by the Attorney-General; one by the Law Society of South Australia; one by the leader of the opposition; and the other, a full-time law academic — all of whom were men.[17] All members were required to be lawyers of seven years' standing or full-time legal academics.[18] Within its lifetime, the SALRC produced a total of 106 reports, considering legislative reform within 'the *Evidence Act*, *Oaths Act*, *Testator Family Maintenance Act … Motor Vehicles Act*, *Wills Act*, Foreign Judgments, Construction of Statutes, Limitation of Actions, [and] Sealing of Documents'.[19] Consistent with its era, the SALRC did not take on issues that were of a social nature, rather its focus was on black letter law, or as Andrew Ligertwood described it, 'lawyers' law'.[20] However, by virtue of the SALRC's power to propose to the Attorney-General any matter of law reform to be referred to it, the SALRC's terms of reference were considered to be 'far more liberal' than other Australian law reform agencies.[21] Overall, its record was 'good',[22] however, its greatest downfall, according to Ligertwood, was its lack of consideration outside anything that was not technical law. The SALRC's demise was ultimately the result of being seen as a duplication of the State Attorney-General's Department, and therefore, no longer necessary.[23]

Three years into the SALRC's existence, the Mitchell Committee was established by the then Attorney-General, Len King, to deal solely with criminal law issues.[24] According to Ligertwood, the formation of this committee was a reflection of the Labor Government's realisation that the SALRC was severely limited, driving the need for '*ad hoc* committees' to deal with specific areas of reform.[25] Ligertwood also believed that the Mitchell Committee had 'rather more going for it', compared to the SALRC, as its terms of reference were wider, giving the Mitchell Committee considerable scope to initiate policy.[26] At the same time, however, it was recognised that the terms of reference were 'too wide-reaching for a three man committee with three assistants'.[27] As such, one of its first reports was heavily criticised for being hurried and not presenting recommendations in sufficient detail to be immediately implemented.[28] As such, there was suggestion that the Attorney-General would

16 Kelly (n 15) 481.

17 Ibid.

18 Ligertwood, 'An Overview' (n 14) 35.

19 Ibid 35–6.

20 Ibid 35.

21 Kelly (n 15) 482.

22 Ligertwood, 'An Overview' (n 14) 35.

23 Plater and Williams (n 2) 40–1.

24 For further discussion of the Mitchell Committee, see Ligertwood, 'An Overview' (n 14) 36–7.

25 Ibid 37.

26 Ibid.

27 Ibid.

28 Ibid.

have to put up further committees to merely implement the recommendations of the Mitchell Committee.[29] Although the Mitchell Committee ended up providing influential reports in the realm of prison reform,[30] it ultimately closed in 1981[31] from what the authors assume was a lack of resources. In one of the only locatable articles written about the Mitchell Committee, Ligertwood noted that 'in the end time and resources have severely restricted' its work, where he hoped that its recommendations were to be introduced into legislation or else 'the whole exercise will have been a waste of time'.[32]

B *Present*

After the collapse of the SALRC in 1987, South Australia, for some time was the only Australian jurisdiction without a law reform body.[33] This changed on 7 December 2010 when a Memorandum of Understanding was signed by the then Attorney-General of South Australia, John Rau, President of the Law Society, Ralph Bönig, and the Vice-Chancellor of the University of Adelaide, James McWha, for the establishment of the South Australian Law Reform Institute ('SALRI').[34] Bönig considered SALRI to be an integral institution to provide an 'instrument of change', and Rau stated that SALRI could help 'modernise, simplify and consolidate laws'.[35]

SALRI, rather than being a statutory body, is based on the institute model used in Alberta.[36] This structure is considered less rigid than statutory bodies, but results in the body having more reliance on, and collaboration with, other members of the legal profession and the Adelaide Law School.[37] SALRI's terms of reference are

29 Ibid.

30 'About Roma Mitchell', *Roma Mitchell Chambers* (Web Page, 2019) <https://www.romamitchellchambers.com.au/about-roma-mitchell/>.

31 Ibid.

32 Ligertwood, 'An Overview' (n 14) 37.

33 'Society Welcomes Law Reform Institute' (2011) 33(1) *Bulletin (Law Society of South Australia)* 11, 11. See also South Australia, *Parliamentary Debates*, Legislative Council, 9 July 2003, 2780–3, when the Legislative Council moved forward a motion of Ian Gilfillan to urge the government to support the establishment of a Law Reform Institute in South Australia as an independent reviewer.

34 'Society Welcomes Law Reform Institute' (n 33) 11.

35 Ibid. See also South Australia, *Parliamentary Debates*, House of Assembly, 7 April 2011, 3378–9 (John Rau, Attorney-General).

36 Sarah Moulds, 'Community Engagement in the Age of Modern Law Reform: Perspectives from Adelaide' (2017) 38(2) *Adelaide Law Review* 441, 442. See also Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55. The Alberta Law Reform Institute was similarly founded by way of an agreement between the Attorney-General of Alberta, the Law Society of Alberta, and the University of Alberta in 1968. The Tasmanian Law Reform Institute has also followed this model: at 62–3. See below Part III for discussion about the Alberta Law Reform Institute as one of Canada's present reform bodies.

37 Moulds (n 36) 442.

relatively broad and include the modernisation, simplification, and consolidation of the law.[38] SALRI additionally seeks to eliminate any defects in the law, repeal unnecessary laws and create uniformity between other states and the Commonwealth.[39] The subject references of SALRI are ultimately decided by the SALRI Expert Advisory Board,[40] but may also be informed by the Attorney-General or the Law Society of South Australia.[41] Upon completion of a report, reform recommendations are provided to the Attorney-General.[42]

SALRI is a small institute with only one part-time employee, Louise Scarman as administrative officer. SALRI is also supported by its Director, John Williams, Deputy Director, David Plater, and qualified personnel through the University of Adelaide including staff, students from the Law Reform course, and graduates.[43] SALRI is run on minimal resources as it receives limited funding from the state government, in addition to limited project-based funding from the Law Foundation of South Australia.[44] To date, SALRI has undertaken many references ranging from technical legalistic issues to those of major social and policy importance.[45]

38 Plater and Williams (n 2) 42.

39 Ibid.

40 The current members of the SALRI Expert Advisory Board include David Bleby (retired judge of the Supreme Court), Terry Evans, Stephen McDonald SC, Dini Soulio, Justice Tim Stanley and Aimee Travers: 'South Australian Law Reform Institute', *The University of Adelaide* (Web Page, August 2022) <https://law.adelaide.edu.au/research/south-australian-law-reform-institute#advisory-board>.

41 Plater and Williams (n 2) 43. The government has also previously requested SALRI investigate certain laws or topic references, including in January 2015 in respect of discriminatory laws against sexual minorities or gender: South Australia, *Parliamentary Debates*, Legislative Council, 14 April 2016, 3798 (Gail Gago). In response to SALRI's report, the government sought to rectify some of the injustices identified through the Statutes Amendment (Gender Identity and Equity) Bill 2016 (SA).

42 Plater and Williams (n 2) 43.

43 Ibid 43, 62–3. SALRI may also sometimes receive assistance from practitioners from other disciplines who have an interest in a particular project reference, in addition to some of the members of the Advisory board: at 62–3. For example, David Bleby was a co-author of SALRI's report on provocation: see David Plater et al, *The Provoking Operation of Provocation: Stage 2* (Report No 11, South Australian Law Reform Institute, April 2018).

44 Plater and Williams (n 2) 43, 62.

45 For example, SALRI has considered topics of electronic evidence, LGBTIQ, abortion, surrogacy, succession and powers of attorney: see 'South Australian Law Reform Institute' (n 40) for a list of all projects prepared and released by SALRI.

III Canada

A *Past*

1 *Federal Law Reform Agencies*

At the national level, Canada has seen the rise and fall of a law reform agency, not once, but twice. The Law Reform Commission of Canada ('LRCC') was established in 1971, abolished in 1992, later re-established in 1997 as the Law Commission of Canada ('LCC') and again, abolished in 2006.[46] Last year, however, the federal government announced that it would be reintroducing funding for the LCC and re-establishing the body for the third time.[47] The main similarity that these bodies had to one another was the way in which they ended — the federal government eliminating their funding. Their differences, however, are significant.

The first body, the LRCC, had a very slow start where a final report was not issued until after its fifth year.[48] It had a terse relationship with the government, where during its first decade of operation, none of its recommendations were enacted by the government.[49] Further, the Minister only requested a study by the LRCC twice during its lifetime.[50] Its mandate was typical of most law reform bodies: 'It took as a starting point existing legislation and asked how it could be modernised to account for a changing society.' [51] As such, it acted mainly as a legislative reform body. In 1992, the LRCC was disbanded by the Conservative Government, who reasoned that the disbanding was a decision to 'save expense[s] and eliminate duplication'.[52]

Based on the failed attempt of the first LRCC, the new LCC put 'forward a new approach to law reform'.[53] It seemed to encroach further into issues of social policy with its work appearing to be structured around themes of 'personal relationships, social relationships, economic relationships and governance relationships' — thereby being viewed as a 'social policy think-tank' rather than a law reform body.[54] This, however, was the scope of its mandate. Whilst the role of the LRCC was to merely

46 For further discussion see Murphy (n 3) 6–13. See also Moore (n 7) 239.

47 Dale Smith, 'Reviving the Law Commission of Canada: Third Time Lucky?', *CBA/ABC National* (Web Page, 19 May 2021) <https://nationalmagazine.ca/en-ca/articles/law/in-depth/2021/reviving-the-law-commission-of-canada>. See below Part III(B)(1).

48 Andrew Burrows, 'Some Reflections on Law Reform in England and Canada' (2004) 39(3) *Canadian Business Law Journal* 320, 334.

49 Moore (n 7) 238.

50 Ibid.

51 Yves Le Bouthillier, 'The Former Law Commission of Canada: The Road Less Travelled' in Matthew Dyson, James Lee and Shona Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Bloomsbury, 2016) 97, 98.

52 Moore (n 7) 238.

53 Bouthillier (n 51) 106.

54 Burrows (n 48) 334.

embark on legislative modification, the LCC's role was much broader and bolder.[55] It was 'to question the role of law in our modern society where relationships in various spheres are constantly evolving'.[56] Its mandate required:

> (a) the development of new approaches to, and new concepts of, law;
>
> (b) the development of measures to make the legal system more efficient, economical and accessible; and
>
> (c) the stimulation of critical debate in, and the forging of productive networks among, academic and other communities in Canada in order to ensure cooperation and coordination; and
>
> (d) the elimination of obsolete laws and anomalies in the law.[57]

Yves Le Bouthillier recognises that this approach was severely criticised for being 'so far removed from what [was] expected from a Law Commission'.[58] However, it ought to not be the LCC itself that should be criticised as it was simply fulfilling the mandate that Parliament placed upon it.[59]

A suggestion has been made that the two commissions' abolishment was inherently political.[60] Notably, the Liberal Government created the two agencies, and the Conservative Government closed them. Further, the recent reintroduction of the LCC's funding was, indeed, by the Liberal Government.[61] Peter Lown stated that the cuts in funding were a direct result of the committees not sharing the same values as the Conservative Government.[62] Further, when announcing the LCC's closure, the Federal Minister of Justice indicated that he could simply 'receive independent advice from tenured law professors, bar associations and from his own department', and "'does [not] need an interlocutor like the Law Commission of Canada to do this"'.[63] However, as recognised by the Federation of Law Reform Agencies of Canada, 'nonpartisan consultative and transparent law reform work carried out by independent law reform agencies simply cannot be done within government'.[64]

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55 Moore (n 7) 238.

56 Bouthillier (n 51) 99.

57 *Law Commission of Canada Act*, SC 1996 c 9, s 3. See also ibid.

58 Bouthillier (n 51) 106.

59 Ibid.

60 Peter Lown, 'Good News/Bad News in Canada: A Study in Contrasts' [2006] (89) *Reform* 80, 80.

61 See Smith (n 47).

62 Lown (n 60) 80.

63 Ibid 81.

64 Ibid 80.

2 *Provincial Law Reform Agencies*

Initial efforts of provincial law reform agencies in Canada comprised of volunteer committees and operated with a lack of resources and independence.[65] Many committees were set up during the 1940–50s with the specific objective of reforming 'lawyers' law'.[66] As to permanent law reform agencies, the provinces of Canada saw an influx of law reform committees created during the 1960–70s — a period often referred to as the "'golden age" … of law reform'.[67] Many, however, ceased operation in the 1990s, all as a result 'of the government's policy to reduce the deficit and eliminate agencies considered non-essential'.[68]

By way of example, the Ontario Law Reform Commission ('OLRC') existed from 1964–96. It led the way for Commonwealth law reform bodies by being the first agency to choose projects independent from the government. However, as with most agencies, they were expected to take on projects on the recommendation of the Attorney-General.[69] The OLRC had stable financial resources and benefited from permanent staff.[70] It has since been extremely influential on many other Canadian commissions which remain in operation today. As stated by the then Attorney-General of Ontario, the OLRC "'was known to forward progressive ideas, ask tough questions, and engage in creative, innovative, critical thinking"'.[71]

B *Present*

1 *Federal Law Reform Agencies*

Despite the two failed attempts at a federal law reform agency in Canada, the federal government announced last year, by way of its 2021 Budget, that it would be reintroducing funding for the LCC.[72] Following this announcement, the Prime Minister of Canada, Justin Trudeau, distributed mandate letters to the Federal Cabinet which

65 Moore (n 7) 230.

66 Ibid (citations omitted).

67 Ibid 231.

68 'Law Reform Agencies', *Department of Justice, Government of Canada* (Web Page, 1 July 2015) <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/lr-rd/page2.html>.

69 Moore (n 7) 236.

70 Patricia Hughes, 'Lessons from Law Reform in Ontario and Elsewhere in Canada' in Michael Tilbury, Simon NM Young and Ludwig Ng (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong University Press, 2014) 87, 88.

71 Moore (n 7) 236.

72 Funding was announced to be $18,000,000 over five years and $40,000,000 ongoing: see Smith (n 47).

itemised a list of objectives.[73] Amongst these, the Prime Minister called the Minister of Justice to

> [r]evive the Law Commission of Canada so it can provide independent advice on law reform needed on the complex legal issues Canadians face, such as systemic racism in the justice system, advancing reconciliation with Indigenous Peoples, issues around climate change and rapid technological shifts in the world.[74]

Little development seems to have been made since this announcement, however, it is noted that the government is currently advertising appointment opportunities for an LCC Commissioner.[75] Only time will tell whether its survival will continue under future governments.

2 *Provincial Law Reform Agencies*

There are currently six law reform commission bodies operating provincially in Canada: Alberta; British Columbia; Manitoba; Nova Scotia; Ontario; and Saskatchewan.[76] However, in New Brunswick law reform is progressed through the government,[77] and Québec has never established a law reform body despite having enacted legislation to do so.[78] Three of these reform bodies are reflective of traditional models of law reform, namely the Manitoba Law Reform Commission,[79] the

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73 Cristin Schmitz, 'Prime Minister Hands out Mandate Letters to Federal Cabinet Ministers Detailing Specific Objectives', *The Lawyer's Daily* (online, 17 December 2021) <https://www.thelawyersdaily.ca/articles/32271/prime-minister-hands-out-mandate-letters-to-federal-cabinet-ministers-detailing-specific-objectives>.

74 'Minister of Justice and Attorney General of Canada Mandate Letter', *Prime Minister of Canada Justice Trudeau* (Web Page, 16 December 2021) <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-justice-and-attorney-general-canada-mandate-letter>.

75 See 'Commissioner, Law Commission of Canada', *Government of Canada* (Web Page, 17 January 2022) <https://pcogic.njoyn.com/cl3/xweb/XWeb.asp?NTKN=c&clid=52106&Page=JobDetails&Jobid=J1221-0430&BRID=126031&lang=1>.

76 Moore (n 7) 242–4; Hughes (n 70) 89.

77 Hughes (n 70) 89.

78 Ibid. See also Roderick A Macdonald, 'Recommissioning Law Reform' (1997) 35(4) *Alberta Law Review* 831, 839. In 1992, a Bill was introduced by the government to establish a law reform body that would be funded by Québec and named Institut québécois de réforme du droit: Moore (n 7) 240. The terms of reference of the body were quite broad and included reform to adapt 'the judicial system to the needs of society, simplifying, codifying, and seeking consistency amongst the rules of law and rendering more humane the institutions involved in the administration of justice': *Act Respecting the Institut Québécois De Réforme Du Droit*, SQ 1992 c 43, s 2.

79 The Manitoba Law Reform Commission was established in 1970, containing five to seven commissioners and is funded by the government and law foundation. The body has produced over 100 reports with most being implemented by the government: Moore (n 7) 242–3.

Law Reform Commission of Saskatchewan,[80] and the Law Reform Commission of Nova Scotia.[81] These reform bodies are creatures of statute with significant ties to the government — their funding, membership, and project references are all primarily sourced from it.[82] Conversely, the Alberta Law Reform Institute ('ALRI'), the Law Reform Commission of Ontario[83] and the British Columbia Law Institute[84] are structured differently with more independence from the government, and the involvement of various stakeholders.[85]

The ALRI is the longest-running law reform body in Canada.[86] The ALRI was established in 1968 for an initial period of five years through an agreement signed by the Attorney-General of Alberta, the Law Society of Alberta and the University of Alberta.[87] The ALRI is situated at the University of Alberta and is run by a Board representing various interests including the judiciary, two universities, private practice and the government.[88] The ALRI's funding is derived from the signatories to the agreement; however, approximately 60% of its annual agreed budget is sourced from the Alberta Law Foundation.[89] They have a number of staff including full-time counsel and support staff.[90] The ALRI's project references are at the Board's discretion.[91]

80 The Law Reform Commission of Saskatchewan was founded in 1973 by the government, with at least three members appointed by the Cabinet. Its primary mandate is to 'keep all the law of the province under review': Murphy (n 3) 22.

81 Moore (n 7) 242. The Law Reform Commission of Nova Scotia was instituted in 1991, with between five to seven members and contains a broad mandate, where public consultations play an important role in its process: at 243–4.

82 Ibid 242.

83 The Law Commission of Ontario was established in 2007 by way of agreement and is based at the Osgoode Hall Law School: ibid 246. The commission receives 'block' funding from all parties to the agreement who appoint a member to its Board of Governors: Hughes (n 70) 91.

84 The British Columbia Law Institute was established, shortly after the British Columbia Law Commission's funding was cut in 1997, under the British Columbia *Society Act* RSBC 1996, c 433. The institute receives funding from several sources including both core and project-based funding. While there are no judicial members on its board, the institute receives judicial liaison from a separate group of three judges: Hughes (n 70) 91–2.

85 Hughes (n 70) 90.

86 Ibid.

87 Warner, 'Institutional Architecture' (n 36) 62.

88 Hughes (n 70) 90.

89 Warner, 'Institutional Architecture' (n 36) 62.

90 Ibid.

91 Ibid. The agreement founding the ALRI contains no express provision regarding the referral or approval of projects.

IV Future

The evident history of frequent closures of law reform bodies does not detract from the ongoing need for institutional law reform.[92] Alternate means for investigating law reform provided by the government are insufficient to deal with the complexities of ongoing social change.[93] As commented by the former Attorney-General of Ontario, Michael Bryant:

> Some say [law reform] is strictly the role of government … But now, more than ever, governments work in an environment where there are competing priorities and significant [political] pressures to respond to issues of immediate concern. This can make it difficult to focus resources on pragmatic law reform or controversial social policy issues, even though they might ultimately be of great assistance … That's where the Law Commission would step in.[94]

Although there is no one-size-fits-all successful law reform model,[95] with the benefit of hindsight, a consideration of the historical success and failures of law reform bodies can provide an insight into the key features and characteristics of such bodies that should be thought about in respect of the future of law reform in South Australia. Drawing upon the works of Gavin Murphy, this Part considers the characteristics of 'membership', 'financial resources', 'nature and scope of work', 'independence' and 'method of work', in turn.[96]

A *Membership*

Although many have called for permanent full-time members to make up the membership of law reform agencies,[97] the examination of Canadian and South Australian law reform agencies would reveal that this has limited bearing on the

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92 See Moore (n 7) 250–2.

93 See generally: Justice MD Kirby, 'Law Reform, Why?' (1976) 50(9) *Australian Law Journal* 459; Ronald Sackville, 'The Role of Law Reform Agencies in Australia' (1985) 59(3) *Australian Law Journal* 151; Marcia Neave, 'Institutional Law Reform in Australia: The Past and the Future' (2005) 23(2) *Windsor Yearbook of Access to Justice* 343 ('Institutional Law Reform in Australia').

94 Michael Bryant, quoted in Moore (n 7) 252.

95 Plater and Williams (n 2) 38.

96 See generally Murphy (n 3).

97 For example, Gavin Murphy noted that

> an agency with full-time members, or at least some full-time representation, is likely to be a more efficient instrument for law reform than one that depends exclusively on part-time representation. Two former presidents of the Law Reform Commission of Canada are of the view that a law reform body's membership should only consist of legally trained full-time members.

Ibid 34.

success of an agency.[98] This was evidenced by the demise of many law reform agencies despite comprising of full-time employees, and the accomplishments of SALRI despite only having three part-time employees. Nonetheless, Antonio Lamer, former Chief Justice of Canada and former President of the LRCC, identifies that permanent full-time employees provide many benefits to a reform agency:

> part-time members are often busy with other matters, and valuable time can be lost helping them catch up with the work done by others … part-time members cannot benefit from the collegial atmosphere created by working on law reform issues on a full-time basis.[99]

Whilst this is a sound analysis, SALRI acquiring the funding to gain full-time employees does not seem realistic in the near future. Whilst lack of funding means SALRI does not have control over the duration of its employees' appointments, it does have control over the composition of its advisory board. It is no longer the view that the legal profession ought to solely make up the membership of a reform agency.[100] Murphy notes that '[m]any now feel that the legal profession does not have all the answers when it comes to legal reform and that, in some cases, non-legal responses may be just as effective in handling certain contemporary problems'.[101] However, at the same time, previous lay representatives have believed 'that their contribution to [a] Commission's deliberation was minimal due to their unfamiliarity with legal concepts etc'.[102] However, compared to laypersons, experts in other disciplines, including criminology and sociology can contribute their knowledge to the design of a law reform project.[103] Some Canadian reform bodies explicitly provide for the possibility of non-legal appointments,[104] although, if consultation is

98 Cf Warner, 'Institutional Architecture' (n 36) 57, where it has previously been viewed that '[f]ull-time membership is often touted as a hallmark of successful law reform bodies'.

99 Conversation with Antonio Lamer, former Chief Justice of Canada and former President of the Law Reform Commission of Canada (Gavin Murphy, Ottawa, 16 January 2003), discussed in Murphy (n 3) 33.

100 Murphy (n 3) 35.

101 Ibid.

102 Hurlburt, *Law Reform Commissions* (n 5) 310–11, citing Interview with Mr Justice FC Muldoon and RG Smethurty (William Hurlburt, March and April 1983).

103 Hurlburt, *Law Reform Commissions* (n 5) 311–12.

104 The Attorney-General in his second reading speech for the Bill establishing the MLRC stated:

> the composition of the commission will recognize the fact that other citizens of other vocations will have an important role to play in the review of the laws in this province, as is the case with the supreme law-making body composed of the honourable members present.

Manitoba, *Parliamentary Debates*, Legislative Assembly, 24 June 1970, 3217 (AL Mackling, Attorney-General).

done rigorously, this can overcome the absence of layperson-perspectives, particularly from marginalised communities.[105]

B *Financial Resources*

There are many instances where law reform committees are limited by their lack of resources, despite having favourable attitudes and terms of reference as well as enthusiastic members who are willing to make changes. In South Australia, for example, the criticism of the Mitchell Committee's work being 'hurried' was recognised as a direct result of limited funding and resources.[106] Moreover, the frequent termination of permanent commissions in Canada was a direct result of the government cutting its funding.[107] According to Patricia Hughes, in her reflection of law reform agencies, 'governments that establish law commissions as independent impartial law reform bodies must recognize that adequate resources are required'.[108]

Today, the law reform experiences in Australia[109] and Canada are very similar in that the federal bodies are operating with much more funding than the state and provincial bodies. SALRI, for example, receives limited funding from the state government, which merely covers the costs of its one part-time employee while the University of Adelaide covers the costs of the Director and Deputy Director.[110] It does, however, receive project-based funding from the Law Foundation of South Australia and one-off funding from the state government.[111] A notable difference between SALRI and provincial Canadian law reform bodies is that the latter receive significant funding from law societies.[112] Although it has been recognised that in the Australian context, reliance on law societies can increase funding and therefore activity, 'the potential danger' of law reform bodies research priorities 'being skewed by the demands of funders' needs to be guarded against.[113] Funding has and remains to be a common issue for law reform bodies, where ideally they should be guaranteed funding once they are provided with terms of reference.[114]

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105 See below Part IV(E).

106 Ligertwood, 'An Overview' (n 14) 37.

107 Moore (n 7) 239.

108 Hughes (n 70) 111.

109 The Australian Law Reform Commission continues to operate today, despite its budget being significantly cut in 2010: Rosalind Croucher, 'Re-Imagining Law Reform: Michael Kirby's Vision, Human Rights and the Australian Law Reform Commission in the 21st Century' (2015) 17(1) *Southern Cross University Law Review* 31, 45.

110 Plater and Williams (n 2) 43 n 40.

111 Ibid 43–4, 62.

112 Murphy (n 3) 29.

113 Martin Partington, 'Research' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 134, 146.

114 Neave, 'Institutional Law Reform in Australia' (n 93) 357. See also Alan Cameron, 'Law Reform in the 21st Century' (2017) 17(1) *Macquarie Law Journal* 1, 7.

C *Nature and Scope of Work*

1 *Terms of Reference*

SALRI and many Canadian law reform agencies provide for a dual mandate in their terms of reference, meaning they can take on subjects of their own initiative and also on reference by the Attorney-General. However, this is somewhat misleading, especially in Canada. Whilst SALRI has a considerable amount of autonomy over its subject reference, Canadian commissions are much more limited — in that the government has a large say over what projects will and will not go ahead. Indeed, the government is often present during their advisory board meetings when they are considering and consulting on the proposed subject.[115] Though SALRI is restricted by only taking on subjects that are within the scope of its resources, the government does not have a direct voice on the advisory board. As a result, SALRI's approach can be seen to have greater independence and therefore, credibility.[116]

2 *Partisan Issues*

A recurring issue with law reform bodies is the extent they should encroach upon issues of social policy, or rather restrict themselves to areas of maximum law and minimum policy.[117] In many cases, the distinction between technical 'lawyers' law' and social policy in fact becomes blurred[118] — where notably the 'adequacy of a law cannot be evaluated with reference to purely legal criteria, for its legal value does not guarantee its social utility'.[119] However, in doing so, a reform body needs to remain cautious of straying into advocacy.[120]

Compared to South Australia, Canadian law reform bodies have historically taken a much more progressive approach to their law reform reports.[121] In part, this may be attributed to the emergence of social issues as 'a topic of political debate'

115 Murphy (n 3) 16, 44, 51.

116 See Warner, 'Institutional Architecture' (n 36) 67–8.

117 Neave, 'Institutional Law Reform in Australia' (n 93) 349–50. See generally: Macdonald (n 78); Marcia Neave, 'Law Reform and Social Justice' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 358. Also, note the comments of Carmel Zollo from the South Australian Legislative Council when discussing law reform bodies and claiming they should not inquire into matters that are part of the 'government's public policy agenda' or be a 'vehicle for advancing opposition to government policy': South Australia, *Parliamentary Debates*, Legislative Council, 9 July 2003, 2781 (Carmel Zollo).

118 Neave, 'Law Reform and Social Justice' (n 117) 362–3.

119 RA Samek, 'A Case for Social Law Reform' (1977) 55(3) *Canadian Bar Review* 409, 411.

120 See Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Conference Paper, Australasian Law Reform Agencies Conference, 10–12 September 2008) 14–15.

121 See, eg: Law Reform Commission of Canada (n 12); Ontario Law Reform Commission (n 13). See Part III below for further discussion on these case studies.

in Canada from around 1968[122] — where even if the stance of socially conservative political parties minimally changed, there was 'social movement activity on these topics'.[123] The provision of a *Canadian Charter of Rights and Freedoms* in 1982[124] further progressed activists' movements and litigious options, thereby allowing for the firm placement of social issues on the political agenda.[125] In a similar manner, Australia was experiencing social movements during the 1970s and 1980s, with activists influencing public life and 'pressur[ing] Australia's Labor Party to consider wider reforms'.[126] Whether the social and political climate of the time would translate into law reform bodies engaging in social reform would, however, also be dependent on how they chose to approach their reform proposals.

In his 1997 article, in respect of the approach and process of provincial law reform commissions in Canada, William Hurlburt commented:

> The law reform process engaged in by the provincial law reform commissions is pragmatic and prosaic — the application of skills experience, consultation and invention to devise a reordering of law, institutions or practices so that they will have greater social utility.[127]

This broad type of approach to law reform differs considerably from that in Australia, where prior to the mid-1980s, state law reform agencies had generally tended to confine the nature of their work to technical 'lawyers' law' considerations.[128] Despite South Australia having been recognised as a progressive state

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122 James Farney, *Social Conservatives and Party Politics in Canada and the United States* (University of Toronto Press, 2012) 84–5. This occurred following the publication of a divorce law reform report by the Joint House of Commons/Senate Committee and proposed reforms to Canada's *Criminal Code*, including the decriminalisation of homosexuality. Many organisations pressed for this legislative change, such as the Canadian Medical Association, Canadian Bar Association, Protestant Churches and the media: at 85.

123 Ibid 89. The period from the 1970s to the early 1980s was even suggested as being 'the golden age of Canadian feminism'.

124 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

125 Farney (n 122) 91–2.

126 Sean Scalmer, 'The History of Social Movements in Australia' in Stefan Berger and Holger Nehring (eds), *The History of Social Movements in Global Perspective: A Survey* (Palgrave Macmillan, 2017) 325, 343.

127 WH Hurlburt, 'The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to "Recommissioning Law Reform" by Professor RA MacDonald' (1997) 35(4) *Alberta Law Review* 880, 893.

128 Sackville (n 93) 157. The SALRC identified its role as 'recommending technical changes to better effect existing policies' rather than engaging in detailed discussions of policy issues that affected any proposed reforms: Ligertwood, 'An Overview' (n 14) 36.

with a history of many 'parliamentary firsts',[129] the SARLC had perceived its role as 'recommending technical changes to better effect existing policies' rather than engaging in detailed discussions of policy issues that affected any proposed reforms.[130] In his 1979 article, Zelling J, an original member and chairman of the SALRC, spoke to this attitude of Australian law reform bodies. Justice Zelling stated: 'we deal only with legal issues, we will have nothing to do with social issues'.[131]

The discussion in Part IV(C)(3) below of report examples from South Australian and Canadian law reform agencies further evidences this stark contrast to the more progressive and social approach taken by Canadian law reform bodies.

3 *Law Reform Report Case Study Examples*

(a) Law Relating to Women and Women's Rights Report 1970

An important social issue addressed in South Australia by the SALRC in 1970 was included in its 11th report — the *Women's Rights Report*.[132] The members of the board at the time were Howard Zelling, SJ Jacobs, KP Lynch and John Keeler.[133] The report initially acknowledged the historical common law position of women possessing rights 'akin to proprietary rights … during her infancy', with these types of rights continuing into their marriage.[134] In doing so, there are noted to be 'certain survivals' which the report sought to address and amend.[135]

The report subsequently discusses the survivals one by one and addresses several laws that may require reform which affected women's rights including:

- the ability for married women to exercise powers of attorney;[136]

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129 'Timelines for SA Firsts', *Parliament of South Australia* (Web Page) <https://www.parliament.sa.gov.au/en/About-Parliament/Timelines-for-SA-Firsts>. Some of these firsts included: allowing all men to participate in voting, including Indigenous men (1856); being the first part of the British Empire to legalise trade unions (1876); and the establishment of the Aboriginal Lands Trust to hold lands acquired for Aboriginal people (1966).

130 Ligertwood, 'An Overview' (n 14) 36.

131 Justice Zelling, 'Law Reform in Retrospect: The Achievements' (1979) 53(11) *Australian Law Journal* 745, 750.

132 South Australian Law Reform Committee (n 11) 2.

133 Ibid 2. All members at the time were men, however, the report does mention that her Honour Roma Mitchell and Mrs Iris Stevens of the Crown Law Office provided some contributions or comments to the report: at 8. The extent of their contributions is unknown.

134 Ibid 3.

135 Ibid.

136 Ibid. At that time, the validity of married women being able to give powers of attorney was uncertain as it was founded in the common law.

- actions in tort between husbands and wives;[137]
- gifts and bequests to three persons, two of whom are husband and wife;[138]
- savings from housekeeping and profits from boarders for wives;[139]
- loss of consortium not available to a wife;[140]
- the right of a husband to chastise his wife;[141]
- actions for seduction;[142]
- actions of enticement and harbouring;[143]
- breach of promise;[144]
- restraint upon anticipation in respect of income of a married woman;[145]
- the deserted wife's equity;[146] and
- loss of shared income where the relationship arises partly from marriage and partly from partnership.[147]

Despite the topic of the report itself being a matter of social importance, the report made only minor recommendations on archaic laws rather than discuss wider policy issues.[148] The consideration of 12 issues with laws affecting women's rights in eight pages is clear evidence of the report's brevity and absence of any detailed

137 Ibid 3–4.

138 Ibid 4. In this instance, the husband and wife were being treated as one entity, rather than two separate persons, which in essence removed a woman's personal entitlement to the gift.

139 Ibid 5. The law at the time provided that any belongings purchased by the wife with the husband's allowance, or earnings arising from labour performed by the wife would still belong to the husband.

140 Ibid 5–6. This meant that wives had no right or action against the person whose negligence lead to their husband's suffering or impairment.

141 Ibid 6.

142 Ibid. These actions of seduction were available only to the parent rather than the girl seduced — and ultimately provided parents with a trespass cause of action against a man who seduced their daughter in the family home.

143 Ibid. The SALRC referred to this law as being 'based squarely on the property which a husband had in his wife'.

144 Ibid 6–7.

145 Ibid 7.

146 Ibid.

147 Ibid.

148 The report concluded that other issues, including matrimonial property, 'raised wide and fundamental matters … [that] ought to be the subject of separate referral if it was desired by the Government': ibid 8. In this regard, these issues were likely to be viewed as matters of policy for the government to have control over.

consideration of the issues. The report — while supposedly tackling a fundamental social issue — appears to do little more than conservatively acknowledge the archaic laws in place and provide some minor reform proposals that, in most cases, only involved an adoption of English legislation that had already dealt with the issue.[149] The reliance upon English law to make proposed reforms was acknowledged by Zelling J who in his 1979 article acknowledged that Australia is 'still not very successful in trying to think from outside an English law standpoint'.[150] He proceeded to recommend that it is time for Australia to adopt a more comparative law approach to reform and 'stand outside the English tradition'.[151]

The failure of the *Women's Rights Report* to provide any consideration of social or policy issues goes against what would be expected of a comprehensive, well-researched law reform report that thoroughly considers issues with the law.[152] Nonetheless, the SALRC did undertake the important task of recommending 'technical improvements of existing laws',[153] thereby removing '"trip wires" from the law' so that technicalities would not defeat an honest litigant in the future.[154] This cautious approach taken was also a product of its time.[155]

(b) Studies on Family Property Law 1975

A more progressive and partisan approach appeared to have been taken in Canada in 1975 when the LRCC published its 'Studies on Family Property Law' Research Paper.[156] The recommendations for reform arose in response to the injustice arising from the *Murdoch v Murdoch* ('*Murdoch*') case.[157] In *Murdoch*, after separating from her husband in 1968, Ms Murdoch sought an order for 'spousal support' and a declaration that her husband held on trust for her one-half interest in the property, of which he held the title for, because they were 'equal partners'.[158] The Supreme Court of Canada ultimately held that the doctrine of resulting trust could not be

149 See ibid 3–5, 7. An example of a cautious approach taken by the SALRC is given in respect of whether wives should be entitled to the profits earned from their labour (for example through boarders). The SALRC, despite explicitly acknowledging how 'inequitable' it was for the husband to receive the earnings, chose not to adopt the 'quality is equity' principle because of factors such as the husband's ownership of the house and other household items: at 5.

150 Zelling (n 131) 750.

151 Ibid.

152 See generally AF Mason, 'Law Reform in Australia' (1971) 4(1) *Federal Law Review* 197, 215.

153 Ligertwood, 'An Overview' (n 14) 36.

154 Ligertwood, 'Interview with Mr Justice Zelling' (n 1) 178.

155 These changes, albeit minimal, were undoubtedly one step forward in a long process of recognising and appreciating women's rights.

156 Law Reform Commission of Canada (n 12).

157 [1975] 1 SCR 423; Mary Jane Mossman, '"Running Hard to Stand Still": The Paradox of Family Law Reform' (1994) 17(1) *Dalhousie Law Journal* 5, 14–15.

158 Mossman (n 157) 13.

applied as there was insufficient proof of a 'common intention' that they intended to jointly share the property.[159] The case itself became a major catalyst for reform by denying Ms Murdoch any interest in the property, in addition to the comment that the work done by her on the property was the 'work done by any ranch wife'.[160]

The research paper recognised that the public reaction to *Murdoch* evidenced that 'existing [property] laws discriminate to the prejudice of the married woman and are no longer acceptable in contemporary society'.[161] In this regard, the report noted that a 'property regime must be devised that will promote equality of the sexes before the law'.[162] The LRCC therefore sought to comment on the unsatisfactory state of the law and respond with suitable reform recommendations.[163] The paper included two major studies dealing with property rights of family members, followed by a working paper. The studies included: (1) a study on the regimes operating in the Québec province; and (2) consideration of the injustices and inequities arising in respect of separation property laws in the common law provinces.[164]

In comparison to the *Women's Rights Report*, the paper itself is significantly more comprehensive and includes consideration of legal, policy and social issues.[165] Absent in the *Women's Rights Report*, the paper also contains some very progressive attitudes in respect of future subject references, in addition to how law reform should be approached. In doing so, the LRCC noted that while the study focuses upon 'traditional monogamous marriage[s]', there may be a future need to consider 'reform of the property laws in a broader spectrum' with consideration to other interpersonal relationships including de facto and same-sex relationships.[166] Further, one of the problems discussed with the current law included it being out of touch with the 'attitudes, desires and expectations of a substantial majority of Canadians'.[167] Despite the different approaches taken to address the contentious rights of women and issues of social policy, both reports were important in attracting attention to issues and deficiencies in the law.

159 Ibid 14.

160 Ibid.

161 Law Reform Commission of Canada (n 12) 3.

162 Ibid.

163 See ibid 2.

164 Ibid 3. It was noted that a summary of common law property regime in respect of family separation would have been redundant given the OLRC's report on Family Property in 1974.

165 Law Reform Commission of Canada (n 12) differs significantly in length and substance compared to the South Australian Law Reform Committee (n 11), which instead is only eight pages long. See also Law Reform Commission of Canada (n 12) 33–8 for a consideration of policy and equality issues in respect of property law rights.

166 Law Reform Commission of Canada (n 12) 3.

167 Ibid 271.

(c) Study Paper on Assisted Suicide, Euthanasia and Foregoing Treatment in 1996

According to Lown, the Canadian experience of establishing and abolishing the law reform agencies under different governments is a direct reflection of 'partisan politics' which 'law reform does not involve itself in'.[168] Not only is it vital for the survival of a body to not excerpt its subject references into the political sphere, but it is also essential in appearing independent and accountable. Despite this, in 1996, the OLRC published a 'Study Paper on Assisted Suicide, Euthanasia and Foregoing Treatment'.[169] In its paper, the OLRC notes that as the debate regarding the end of life has become more widespread and complex, 'the need for clarity in the law [has become] more urgent'.[170] It also considers that given the contentious nature of the issue, it is preferable that a public policy stance is advanced prior to the commencement of legal proceedings or criminal charges being laid.[171] The introduction of the study paper states that there is a need to carefully examine these issues 'disengaged from the compelling circumstances of an individual case' in order to consider how euthanasia, suicide and forgoing treatment accord with Canada's societal values and what should therefore be recommended.[172]

The paper is 263 pages long and therefore quite comprehensive in respect of considering the law and issues, prior to providing recommendations. In doing so, the paper examines the operation of the common law and operating legislation, in addition to a comparative analysis of legislative approaches in Australia, England, the Netherlands and the United States.[173] Chapter 13 of the study paper provides several recommendations for reform, including proposing amendments to the *Criminal Code*,[174] and development of health and social service policies.[175] Although the OLRC's ultimate recommendation at the time was that euthanasia should remain a criminal offence,[176] it demonstrates that Canada was considering partisan issues well before Australia, with South Australia yet to take on an issue as partisan as

168 Lown (n 60) 80.

169 Ontario Law Reform Commission (n 13).

170 Ibid 2.

171 Ibid.

172 Ibid 5.

173 See ibid.

174 RSC 1985, c C-46. Interestingly, the *Criminal Code* is a federal piece of legislation, demonstrating the ambition of provincial law reform bodies to consider law outside of their specific jurisdictions. It may be suggested that provincial Canadian law reform bodies are somewhat more pioneering than Australian states' law reform bodies. In this sense, the latter bodies seem to be much more cautious not to overstep.

175 Ontario Law Reform Commission (n 13) 261–2. The OLRC engaged in consultations with a number of different bodies including the Advocacy Centre for the Elderly, College of Physicians and Surgeons of Ontario, College of Nurses Ontario, Disabled Women's Network, Dying With Dignity, Hospital for Sick Children, Multiple Sclerosis Society and Right to Die Society: at 263.

176 Ibid 261.

this.[177] Whether the OLRC was seen to cross the partisan or advocacy line with its report remains unknown, however, the body was disbanded the same year the report was released.[178]

Accordingly, law reform agencies should continue to 'push the envelope' with social issues, but in doing so they must 'strike an appropriate balance' between not being abolished or having their report ignored and bringing these issues to the public's attention.[179] In doing so, it is important to bear in mind that 'law reform agencies are not self-executing' and any controversial report will still require the support of an elected Parliament to have any binding force.[180]

D *Independence*

Law reform has and always will be conceived as an inherently political process. Political bodies themselves are, or purport to be, 'law reform agencies *par excellence*'.[181] The success of law reform bodies is ultimately guided by the elected government of the time viewing their report and accompanying recommendations favourably.[182] Despite the undeniable politics associated with law reform, a successful law reform body critically must present itself to possess 'intellectual independence'.[183] This type of independence does not mean working in isolation from the government but rather having a 'good and open relationship' and '[m]aintaining an appropriate communication loop' — thereby preventing any surprises for the government.[184] Law reform bodies should also act 'without fear or favour' when providing their advice or recommendations.[185] There is notable difficulty in 'maintain[ing] independence while

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177 However, of note, the Queensland Law Reform Commission appeared to have published reports on progressive topics, with consideration of social and policy issues in around the 1990s, including the report on Female Genital Mutilation: Queensland Law Reform Commission, *Female Genital Mutilation* (Report No 47, September 1994). See also 'Publications', *Queensland Law Reform Commission* (Web Page) <https://www.qlrc.qld.gov.au/publications>.

178 There is no identifiable evidence to support this claim and may simply be a coincidence. Nevertheless, the authors thought it was worth flagging in the event there was some correlation that had not been addressed publicly.

179 Laura Barnett, 'The Process of Law Reform: Conditions for Success' (2011) 39(1) *Federal Law Review* 161, 171.

180 Sackville (n 93) 158.

181 Francis C Muldoon, 'Law Reform in Canada: Diversity or Uniformity?' (1983) 12(3) *Manitoba Law Journal* 257, 259.

182 Ibid.

183 See Rosalind Croucher, 'Law Reform Agencies and Government: Independence, Survival and Elective Law Reform?' (2018) 43(1) *University of Western Australia Law Review* 78, 78.

184 Ibid 83–4.

185 David Weisbrot, 'The Future for Institutional Law Reform' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 18, 27.

responding to government expectations', particularly in the political climate where governments and their agendas are subject to change.[186]

Greater independence has been accorded to agencies created by statute as it demonstrates the importance attached by Parliament to the reform process.[187] These types of agencies are also perceived to have greater protection from being abolished due to their security of tenure.[188] Even so, in the 'political and bureaucratic climate', governments may simply still disband a law reform body[189] — particularly if it becomes viewed as obsolete or too political.[190] Although SALRI was not established by statute, there may be a benefit in that SALRI has fewer ties to, or reliance on, the government for funding or renewal of tenure.

As part of their independence, law reform bodies should also reflect a sense of openness and amenability when engaging with relevant stakeholders.[191] It is, therefore, critical that law reform bodies approach every new project with questions, not answers as expressed by Albert Einstein:

> If I had an hour to solve a problem and my life depended on the solution, I would spend the first 55 minutes determining the proper question to ask, for once I know the proper question, I could solve the problem in less than five minutes.[192]

The proposed reform or outcome to any project should, therefore, evolve as research into the area of law and consultation and associated issues emerge. By not being politicised or emanating a strong ideological stance, law reform bodies will be considered more credible.[193] This is heightened by law reform agencies being represented by persons outside the government and legal profession, allowing for integral layperson perspectives of proposed reforms being brought to the forefront of the discussion, rather than government agendas driving the discussion.[194]

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186 Croucher (n 183) 84, quoting Hughes (n 70) 107.

187 Murphy (n 3) 28. Cf Neave, 'Institutional Law Reform in Australia' (n 117) 352. However, a separate statutory agency could be maintained by imposing a 'secure term of appointment unless they are guilty of misconduct': at 355.

188 Plater and Williams (n 2) 57.

189 Neave, 'Institutional Law Reform in Australia' (n 93) 352. See above Parts II and III where law reform commissions in both South Australia and Canada have previously been abolished or disbanded at the hands of the government.

190 Neave, 'Institutional Law Reform in Australia' (n 93) 352.

191 Ibid 352, 361.

192 The quote is commonly attributed to Albert Einstein, see Jamie Jirout and David Klahr, 'Questions — and Some Answers — about Young Children's Questions' (2020) 21(5) *Journal of Cognition and Development* 729, 729.

193 Justice Marcia Neave, 'Making Law Reform Work: The Promise and Limits of Law Reform' (2007) 14(1) *James Cook University Law Review* 7, 12.

194 The operation of SALRI allows for the diverse perspectives of students who partake in the Law Reform class. In doing so, the diverse backgrounds of students (many of whom undertake double degrees and multidisciplinary experiences and perspectives) allow for different perspectives to be shared.

E *Method of Work*

A law reform project is comprised of various processes including research, decision-making, consultation and drafting of proposals.[195] The combination of these stages allows for the creation of an informed and comprehensive report with adequate consideration of all relevant issues.[196] Research is fundamental to the law reform process, where it lays the groundwork for later substantiating and justifying reform proposals, rather than 'appeal[ing] to intuition or to a parliamentary majority for the implementation of … proposals'.[197] The research methods adopted by a law reform commission are in part funding dependent, however, they tend to involve legal research, consultation, empirical research[198] and public hearings.[199] Some of these resource-intensive activities undoubtedly pose difficulties for SALRI and Canadian law reform bodies, where government cost-cutting remains a constant threat to their resource stability.[200] Even so, Plater and Williams have identified SALRI's ability to overcome this barrier by using social media, consultation of representative groups and targeted resources to still allow for the production of comprehensive reports.[201] When considering issues of social policy, there is also a necessity for the research to adopt a multidisciplinary approach.[202]

Consultation has played, and continues to play an integral part in the law reform process.[203] The absence of public consultation has been a criticism of many failed

195 Hurlburt, *Law Reform Commissions* (n 5) 317.

196 The absence of a well-informed and drafted report was a criticism of the Mitchell Committee, where the reports were considered hurried with insufficient detail on the recommendations for reform provided: Ligertwood, 'An Overview' (n 14) 37. This in turn affected the immediate implementation of such recommendations in the absence of further committees being created by the Attorney-General to draft legislation.

197 Hurlburt, *Law Reform Commissions* (n 5) 317.

198 Empirical research plays a part in the socio-legal research that supplements 'black letter' research about the state of the current law. This type of research permits an understanding of the practical operation of existing laws; however, it is also resource-heavy with a need to have access to persons with the relevant research skills: Partington (n 113) 137–8.

199 Hurlburt, *Law Reform Commissions* (n 5) 318. There are some scepticisms about the necessity of public hearings, where although Michael Kirby supports their use as a democratic tool, they have also been viewed as polarizing opinions since such hearings would not be able to represent a 'scientific sampling of public opinion': at 321.

200 Moore (n 7) 254.

201 Plater and Williams (n 2) 64. The response to SALRI's recent report on abortion, published in 2019, is evidence of this where it was noted that '[t]he 553-page comprehensive report covers every aspect of abortion law reform in South Australia and is an extraordinary piece of reference': South Australia, *Parliamentary Debates*, Legislative Council, 12 November 2020, 2170 (Irene Pnevmatikos).

202 See Neave, 'Institutional Law Reform in Australia' (n 117) 360–1.

203 See generally Michael Kirby, 'Changing Fashions and Enduring Values in Law Reform' (Speech, University of Hong Kong, 17 September 2011).

law reform bodies, including the SALRC,[204] which may be attributed to their rigid, statutory-based structures. Whereas modern reform bodies that adopt the more flexible institute model, have been recognised to have the capacity to 'experiment with new forms of community consultation', particularly since communities are more likely to confide in bodies independent from the government.[205] The former Director of the Tasmanian Law Reform Institute, Kate Warner, discussed the importance of public consultation in these circumstances:

> 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.[206]

The consultation process and obtaining public opinion will benefit not only those who had been consulted, but also the law reform process and the effectiveness and overall practical utility of the reformed law.[207] Many bodies based on the institute model have been able to attain a reputation of being seen to genuinely commit to listening and reflecting the views and concerns of society, particularly traditionally overlooked communities.[208] Accordingly, consultation is integral for clearly identifying competing arguments surrounding a proposed reform, and anticipating the support of an affected community prior to legislative action.[209] This ensures the final report of a law reform body contains a comprehensive account of all the

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204 South Australia, *Parliamentary Debates*, Legislative Council, 9 July 2003, 2780 (Carmel Zollo). Zollo also commented at that time that public consultation is an 'important consideration in law reform and in the constitution of any future committee'.

205 Moulds (n 36) 442. For example, Indigenous communities have suffered decades of 'oppressive and racially discriminatory governance by the colonies and their successor states'. Accordingly, they are unsurprisingly more open to sharing their views as to independent bodies who build partnerships to demonstrate they are there to listen and meaningfully engage with their issues: Dani Larkin et al, 'Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States' (2022) 41(1) *University of Queensland Law Journal* 35, 36.

206 Kate Warner, 'Lessons from a Small University-Based Law Reform Body in Australia' in Michael Tilbury, Simon NM Young and Ludwig Ng (eds), *Reforming Law Reform*: *Perspectives from Hong Kong and Beyond* (Hong Kong University Press, 2014) 113, 127, quoted in Moulds (n 36) 442.

207 Brian Opeskin, 'Engaging the Public: Community Participation in the Genetic Information Inquiry' [2002] (80) *Reform* 53, 54.

208 See generally Moulds (n 36). The Deputy Director of SALRI, David Plater, refers to the need for 'wide, active and inclusive consultation' and notes that 'SALRI is especially committed to involving regional and Aboriginal communities': Louise Scarman, '2021: Another Busy Year for SALRI and Law Reform in South Australia', *The University of Adelaide* (Web Page, 23 December 2021) <https://law.adelaide.edu.au/news/list/2021/12/22/2021-another-busy-year-for-salri-and-law-reform-in-south-australia>.

209 Weisbrot (n 185) 34.

relevant issues that have 'independent and enduring value as an authoritative text' that could lead to meaningful reform.[210]

V Conclusion

Through studying the past and present experiences of law reform in both South Australia and Canada, many lessons, both negative and positive, have much to offer the broader realm of law reform. To summarise, law reform bodies ought to consist of members who reflect the community it represents. If membership comprises solely of those with legal background, then consultation must be conducted rigorously in order to overcome the absence of wider perspectives, particularly from marginalised communities. As to financial resources, Murphy summarises it well:

> If a country expects its commission to produce persuasive reform recommendations, it should also consider the allocation of sufficient financial resources to help attract leading intellectuals and jurists to the cause.[211]

In terms of independence, seeing the establishment and abolishment of reform bodies based on the government of the day is not only disheartening but also troublesome. The value of law reform bodies having 'intellectual independence' is undeniable for maintaining the ongoing conversation between the public, government, and legal justice system. Although law reform bodies should be wary of straying into advocacy, there is merit in allowing law reform bodies, as impartial bodies, to comprehensively consider social and controversial legal issues. The nature and scope of its work should therefore amount to a combination of both technical 'lawyers' law' issues and important social issues. Law reform bodies can produce meaningful reports when their method encapsulates comprehensive research, drafting, consultation, and drafting of proposals. In this regard, consultation remains integral for allowing any proposed reforms to be responsive to community needs and allowing for law reform bodies to 'help … bridge the gap between the community and the legal system'.[212]

Further, the three case studies provide an important point of comparison as to the differing approaches of South Australian and Canadian law reform bodies when their terms of reference engage with social issues. The conservative and brief *Women's Rights Report* by the SALRC barely scrapes the surface of the issues faced by women during that period of time. Conversely, the 'Studies on Family Property Law' Research Paper and the 'Study Paper on Assisted Suicide, Euthanasia and Foregoing Treatment' in Canada represent comprehensive reports that holistically consider all the relevant legal, social and policy issues. This demonstrates the ambitious nature of Canadian law reform bodies compared to the more cautious nature of South Australian law reform bodies that seem to be cautious not to overstep

210 Ibid 25.

211 Murphy (n 3) 38.

212 Sackville (n 93) 162.

the mark. However, in order to make meaningful change, law reform bodies cannot disregard the policy or social implications of any proposed reform if its proposal is to be receptive to the needs of society.

As society continues to progress, with the advancement of civilisation and technology in ways currently unimaginable, there is a need to reform laws that become manifestly inadequate for regulating society.[213] Law reform agencies are essential to creating such advancements, by providing an impartial, inquisitive body to help understand the problems within the law and how they ought to be best resolved. History would reveal that law reform agencies have struggled to always stand the test of time. As Michael Kirby recognised, many members of the profession, and even judiciary, were once apathetic or even hostile to law reform.[214] The same can be said with respect to the government, seeing the rise and fall of countless reform bodies across a range of jurisdictions, as a result of 'budget cuts'. However, with the re-establishment of the LCC and the steady nature of SALRI, the future of law reform seems promising — especially for that of South Australia. By identifying the above range of core characteristics that are associated with successful law reform bodies, this article hopes to contribute to the longevity of law reform bodies within South Australia and beyond.

213 EC Mayers, 'The Need for Law Reform: Foreword' (1918) 38(2) *Canadian Law Times* 86, 86.

214 Michael Kirby, 'The Past, Present and Future of Institutional Law Reform in Australia', *Australian Public Law* (Blog Post, 18 December 2017) <https://www.auspublaw.org/blog/2017/12/institutional-law-reform-in-australia>.