

LAW REFORM

20 years of the Australian Law Reform Commission



1 January 1995 marked the 20th birthday of the Australian Law Reform Commission (ALRC). The occasion was celebrated in Canberra with a conference and dinner on 23 August 1995, with the conference's keynote address given by Michael Lavarch, the federal Attorney-General.

In late 1993, the Attorney-General had referred an inquiry into the role and function of the ALRC to the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee). It seems timely to review briefly those first 20 years of the ALRC, in the context of the Committee's Report.¹

Establishment

The legislation establishing the ALRC (the *Law Reform Commission Act 1973* (Cth)) only commenced on 1 January 1975.

By 1973 State law reform bodies existed but, despite calls for a national body since at least the 1950s, there was no such body with a *national* approach to law reform. Federal law reform could be seen as, at best, fragmented and piecemeal.

During the second reading of the Bill in the Senate, the then Attorney-General, Lionel Murphy, stated that it expressed 'the Government's view that except where local circumstances justify different treatment, people wherever they live in Australia should be subject to the same law'.²

Functions

The functions of the ALRC are 'in pursuance of references to the Commission made by the Attorney-General':

- to review Commonwealth laws 'with a view to the systematic devel-

opment and reform of the law', particularly including 'the modernization of the law'; 'the elimination of defects in the law'; 'the simplification of the law'; and 'the adoption of new or more effective methods for the administration of the law and the dispensation of justice';

- to consider proposals for the making, or consolidation, of Commonwealth laws; or for the repeal of obsolete or unnecessary Commonwealth laws;
- to consider proposals for uniformity of State and Territory laws; and
- generally, to report to the Attorney-General on any such reviews and considerations, making such recommendations as it 'thinks fit' (s.6 of the Act).

In carrying out its functions the ALRC, under s.7 of the Act, is bound to ensure that the laws under review and the proposals under consideration:

- 'do not trespass unduly on personal rights and liberties and do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions'; and
- are, 'as far as practicable . . . consistent with the Articles of the International Covenant on Civil and Political Rights'.

Structure and history

The ALRC is a body corporate, consisting of a President (known, until 1985, as the 'Chairman') and four or more other members, all appointed by the Governor-General, each of whom must be:

- a judge of a Federal Court or a State or Territory Supreme Court; or
- a legal practitioner of at least five years standing; or
- a law graduate with experience as a legal academic; or
- a person who, in the Governor-General's opinion, is suitable because of qualifications, training or experience, for appointment (s.12).

The ALRC was headed first by Justice Michael Kirby, from 1 January, 1975 to September 1984. Justice Kirby, with a concern for a participatory law

reform process, instituted research methods that included:

- the appointment of honorary expert consultants from a wide range of disciplines;
- publication of discussion papers and summaries of discussion papers written in plain language and widely distributed free of charge;
- public hearings;
- surveys, polls and questionnaires; and
- specialist consultations. [p.13]

Under Justice Kirby's chairmanship the ALRC completed 14 major reports, including police powers, human tissue transplants, privacy, defamation, insurance contracts and agents, and child welfare (p.14).

Justice Murray Wilcox was appointed as the acting, part-time chairman (for nine months). The Hon Xavier Connor was appointed as full-time President in May 1985, until December 1987. While during this time only two new references were given to the ALRC, earlier, unfinished work was able to be completed. The 14 reports included evidence, standing in public interest litigation, domestic violence, Aboriginal customary laws, contempt, insolvency, and matrimonial property (p.15).

The next full-time President of the ALRC was Justice Elizabeth Evatt, from January 1988 until November 1993. Five areas for law reform were targeted: business law, family law, access to justice, government law, and the Australian Capital Territory, and work was undertaken in conjunction with specialist federal agencies (for example, the Family Law Council) in order to avoid unnecessary duplication of research. Recently completed ALRC reports have included censorship procedure, multiculturalism and the law, customs and excise, choice of law, superannuation, personal property securities, and collective investment schemes (p.16).

After Justice Evatt's departure, Ms Sue Tongue, the Deputy President, was the most senior member of the ALRC, until the appointment of Mr Alan Rose as President from late May 1994.

Women's equality

More recent ALRC work includes the reference on women's equality before the law. The completed reports³ reflect the consultative nature of the ALRC's work, and the importance that such a body has for the Australian legal system. As the ALRC itself noted:

All over Australia women came to the Commission to explain how the legal system had failed them . . . The accumulated experiences of the women shocked and moved members of the Commission and imbued them with a sense of urgency of the need for change . . .

The Commission received over 300 written submissions in response to the reference and the discussion paper . . . Approximately 270 oral submissions were made at [public] hearings . . . The Commission has never had such a broad response to any reference. [Report No. 67, pp.1-3]

Importantly, as the Attorney-General stated at the anniversary conference:

In response to the Commission's report and the report of the Access to Justice Advisory Committee, the Government announced in the Justice Statement the establishment of a National Women's Justice Strategy.

The Strategy encompasses many of the recommendations made by the Commission, highlighting the practical relevance of its work and the health of the relationship between the Commission, the Government and the Attorney-General's Department.⁴

Inquiry into the ALRC

The Committee confirmed that the ALRC is a 'national body, whose role is to provide legal policy advice to the federal Attorney-General' and that the 'evidence indicates that there is a continuing need for a national law reform commission' (p.50), with few suggestions for change being received by it.

The Committee noted the statutory nature of the ALRC and the fact that, while it is a part of the executive arm of government, it is an independent, separate and permanent agency. Nevertheless, there is, of course, always scope for a government to abolish the ALRC by Act of Parliament — and the Committee noted the recent dissolution of the Victorian Law Reform Commission by the State Government of Victoria (p.54).

The Committee considered the alternatives to a separate and permanent law reform agency (for example, subject specialist advisory bodies; special purpose ad hoc committees and Royal

Commissions; government departments; parliamentary committees; and contracted consultants), and found that all were subject to limitations (pp.56-57). In particular, and of special relevance to present day Victoria, the Committee found that 'one feature of parliamentary committees [as law reform bodies] is that they are by their nature more closely tied to the political process and their reports will reflect those more direct political concerns. This may lead to piecemeal changes to legislation when what is required often is an overhaul' (p.57).

The Committee took a threefold approach to its evaluation of the ALRC's work. It looked at 'the implementation of the Commission's recommendations; the reputation of the Commission in the eyes of those outside government; and the record of the Commission in completing references by stipulated dates' (p.17). As the Committee acknowledged, 'evaluation requires . . . a qualitative assessment of [the ALRC's] work which is not a simple task' (p.21).

Implementation of the ALRC's recommendations

In its own submission, and while not accepting that implementation rates are the best means of evaluation, the ALRC claimed that 62% of its recommendations had been fully or partly implemented. Within Australia, only the New South Wales Reform Commission can claim a higher rate, at 74% (p.23). The ALRC also noted that it takes on more references about controversial social issues than do other law reform bodies, and that it is therefore often difficult for government to act on its recommendations (p.23).

The Committee considered that the influence of the work of the ALRC over (then) almost 20 years was 'very significant, but to measure its effectiveness solely through implementation rates is not satisfactory' (p.24). Factors (such as political, resource and time constraints) affect the implementation of ALRC reports that do not reflect on the performance of the ALRC.

The Committee recommended 'that the government recognise that there is a continuing need for a commission to carry out law reform functions' (Rec.1, p.25); and 'that the Commission should continue to do high quality, well researched and well documented reports' (Rec.3, p.26). The Government has agreed to Recommendation 1; and approved Recommendation 3.⁵

Reputation of the ALRC

The Committee noted that 'the evidence contains much praise of the Commission's work' in relation to, among other matters, the ALRC's influence in the shaping of public opinion about the law; its 'contribution to a democratic society' (p.33); and to the extent to which it has helped raise the level of debate about law and policy in Australia (p.33).

There was some criticism of the ALRC. That criticism 'focused on three references in the areas of business and commercial law' (p.34), and was to the effect that the ALRC did not consult effectively; did not consider the cost implications of its recommendations; and did not engage in sufficiently detailed analysis. Other criticisms were that recommendations were formulated prematurely; and that there was an unwillingness to engage outside experts. Indeed, one critic called for the abolition of the ALRC, or, at least, more economic expertise among its membership.

The Committee felt that some of the criticisms were based on an impression that the ALRC is not completely objective and that this was 'a view that should be avoided at all costs' (p.39). The Committee accepted the importance of expert consultants to the ALRC, and felt that guidelines about the processes used by the ALRC could be provided to people who, not being members or staff, were still interested in or involved in its work.

Meeting deadlines

Some submissions referred to an inability on the part of the ALRC to meet reporting deadlines. The ALRC itself submitted that where there have been delays, they have been mainly because of limited resources as well as 'a poor estimate of how long the inquiry process will take' (p.45). Importantly, the Committee recommended 'that the Commission should not be burdened with more work than it can possibly do. The Attorney-General should ensure that the Commission should not be given a reference unless the Commission has the resources necessary to commence work promptly and continue' (Rec.13), and the Government has agreed.

The Committee made many other recommendations, too numerous to detail or discuss here, for the effective functioning of the ALRC. The government has agreed to many (although by no means all) of these recommendations, including Recommendation 24 which proposes that the Act be redrafted 'in accordance with modern drafting styles'.

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The Immigration Kit: A practical guide to Australia's immigration law (4th edn)

The Immigration Advice and Rights Centre; Federation Press, Sydney, 1995; 553 pp; \$60.00.

The *Immigration Advice and Rights Centre (IARC)* has produced a thorough, clearly written and user friendly manual of immigration practice and procedures. This is not a textbook about immigration law. It is a practical manual that is intended for use by practitioners in the field. Reference to case law is kept to a minimum. The *Kit* is an excellent companion to the *Butterworths Immigration Law Service*. However, it should be read in conjunction with the legislation. Immigration law has become incredibly complex and this guide should be of great assistance to both legally and non-legally qualified migration advisers. The consequences of mistakes in this area can be dire for applicants and ultimately for their advisers, especially as the grounds for precedent setting judicial review have been greatly restricted.

The *Kit* is a step-by-step guide to how the immigration system works, covering: who can come to Australia; the criteria for every visa; the evidence that should accompany every type of visa application; visa cancellation; time limits, how to find one's way around the *Migration Act 1958* and the *Migration Regulations 1994*; application forms; lodgement of applications; how applications are processed; and how to challenge an immigration decision. Each visa category is dealt with separately. Review rights are mentioned under each visa category. A useful explanation of definitions is also included. The *Kit* gives a good overview of the political considerations which can influence immigration policy and how to deal with the Department.

More emphasis could have been given to the realities of dealing with the Immigration Department such as the necessity of never relying on advice given by Immigration Department officers. In the reviewer's experience, departmental officers, regardless of seniority, have widely varying expertise and it is not uncommon to be given totally different advice in relation to the same issue by different officers. Migration case law abounds with examples of persons who followed such advice to their great detriment and who found it very difficult to raise a successful estoppel against the Department regardless

of whether the representations relied on were oral or written. The other area which could have been emphasised is the heavy reliance by departmental officers on the *Procedures Advice Manuals* (known as the PAMS) and the *Migration Instructions Series (MIS)*. These sources contain the Department's interpretation of the legislation but departmental officers tend to base their decisions on them rather than on what the legislation actually says. Practitioners should be cautioned against uncritically accepting decisions based on the PAMS or the MIS.

In addition, it would have been desirable for the *Kit* to give more emphasis to the need for applicants or advisers not to engage in 'off the record' discussions with a departmental officer. Departmental officers have an over-riding obligation to ensure that the *Migration Act* is not breached. Their usual practice is to make a record of all discussions with applicants or their advisers and to act on that information. Furthermore, there should also have been more emphasis on the necessity of not making inconsistent statements to the Department in relation to either the same application or different applications. These are easily cross-referenced and adverse inferences can be (and usually will be) drawn against an applicant. It would have been desirable for the *Kit* to contain a more extensive coverage of offences under the *Migration Act*.

The user-friendly nature of the *Kit* has led to over-simplification in some sections. For example, the chapter concerning applications for protection visas (refugee status) in Australia implies that the Refugee Review Tribunal will hold a hearing in every case. While this occurs in relation to most review applications before the Tribunal, there are instances where an application can be determined without a hearing. Applicants can elect not to have a hearing or the presiding member can decide to set aside a departmental decision because he or she is satisfied with the evidence presented in the review application. Hence, a well prepared review application that specifically addresses the relevant legal criteria can obviate the need for a hearing. Generally, however, the *Kit* contains excellent sections on how to make review applications to MIRO, the IRT and the RRT.

The major drawback with the *Kit* is that it has gone from a looseleaf service to bound form. No explanation is given for this unfortunate change which significantly lessens the durability of the *Kit* as a practice manual because immigration legislation is frequently amended. The *Kit* is current until March 1995 but there have been changes to the legislation since that date. A looseleaf service would be preferable as it can be kept up to date. The Refugee Advice and Casework Service produces an excellent looseleaf Refugee Manual which is regularly updated.

Overall, the *Kit* is an excellent publication which should hopefully make a significant contribution to raising the standard of practice in the migration law field — an essential text for all immigration practitioners.

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Conclusion

It is to be hoped that the future of the ALRC as a national, independent and permanent body is assured. The view expressed in 1973 by Lionel Murphy that 'people wherever they live in Australia should be subject to the same law' may never be completely realised. Nevertheless, the ALRC has contributed greatly over its 20 years to a national agenda for law reform.

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References

1. See Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Law Reform: The Challenge Continues*, May 1994, Canberra. (Page nos in brackets in this column refer to this Report.) See also, *20 Years of Law Reform: Volume 1: The History*; and *Volume 2: Report Summaries*, published recently by the ALRC.
2. Australia, Senate 1973, *Debates*, Vol. S 57, p.1347.
3. Report No 67: 'Equality before the Law: Women's Access to the Legal System'; Report No 69, Part I: 'Equality before the Law: Justice for Women'; and Report No 69, Part II: 'Equality before the Law: Women's Equality'.
4. Lavarch, Michael, 'Law Reform in Australia: Continuity, Consultation and Change', Transcript of Attorney-General's speech at ALRC Anniversary Conference, p.2.
5. Government Response to the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs Entitled 'Law Reform — The Challenge Continues'.