RENEWING A GREAT IDEA FROM THE 1960s? THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

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Introduction

My aim tonight is to reflect with you on an experience in institutional design that is also work in progress. In terms of the typology of administrative law, my paper raises issues of administrative process and bureaucratic rationality – it will become obvious that I do not regard the latter as an oxymoron.

My presentation is largely based on a paper I gave to a gathering of law reform commissions from across the Commonwealth in June of last year[1].

There are agencies like the Law Reform Commission of Western Australia (the Commission)[2] across the Commonwealth, all inspired, in different degrees, by what are now the Law Commission for England and Wales[3], and the Scottish Law Commission[4], both established in 1965[5]. The WA Commission had its origins, as will be explained shortly, in 1967, although we did not become a 'permanent' agency until the coming into force of the *Law Reform Commission Act 1972* (WA).

Now skip forward to 2003. We still operate under the same legislation, but, as I will also explain, we underwent a fairly dramatic restructure, in 1997, that very much changed how we worked. In a lovely closing of an historical loop, I learnt at the 2002 ALRAC that we were recently studied very closely by the Scottish Law Commission. They were (apparently) rather impressed by what they understood we had achieved. They particularly noted that our restructure had made us, in current 'bureau-speak', a lean agency. However, my source – a person very senior in the Scottish Commission – told me that in the final analysis they had decided not to follow 'the WA model'. He said, rather interestingly (and I suspect partly, but only partly, in jest), that they feared the new Scottish parliament would welcome such a restructure for the opportunity it would afford to reduce the Scottish Commission's funding.

I concluded from that exchange, not only that bureaucratic rationality was alive and well in Scotland, in partnership with a Scottish sense of humour, but also that we must have done something of interest to people other than ourselves.

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So just what have we done, and why? How has it worked out? What (if anything) does this say about what one of the great ideas of the 1960s is good for?[6] And, perhaps even more interestingly, what are we *not* good for?

The plan of these remarks is this. I begin by describing where the WA Commission now finds itself, cataloguing how we got there, and what we have been doing with our structure lately, in so doing providing my evaluation of the structure we have arrived at.

Then, to drive home my major points, and show that I am not parochial, I turn to look at creating another, national, organisation, one that would, like the Commission, be characterised by substantial part-time activity. I want to suggest that this sort of work requires continuing attention to single topics, and as such is not best done by law reform commissions. In some ways the AIAL is a model; but I want to suggest the generalisation of your institution. I do this drawing on an example from my main field of interest, commercial law.

30 Years of Law Reform in WA

WA has had a law reform body since 1967, and a permanent Commission with at least some full-time staff since 1972[7]. The Commission has had a history of considerable activity and success. But there were unmistakable signs of loss of momentum in more recent years.

The Commission over its first 30 years had produced 92 Final Reports.[8] In addition, it had produced 80 Discussion Papers (DPs). 53 Reports were implemented, in whole or in part; 6 did not require implementation; 6 did not recommend any legislative change; and thus 27 awaited implementation. At the request of the Attorney-General to whom we report, and to coincide with the thirtieth anniversary of the passage of our Act, we had published a detailed inventory of all of this activity[9]. That account showed the Commission and law reform in WA doing well. But it had not consistently been so.

Our history marks a waxing and waning of activity that was not always or even often explicable in terms of projects that dominated the Commission's agenda. Most recently, in the mid-1990s, the Commission had seen a clear weakening in governmental support manifest in fewer Commissioners, and fewer staff positions. This was not because law reform was not occurring. Major changes in social law, particularly in relation to health and education, involving formation of expert advisory committees and public consultation, as well as in the legal staples of commercial and public law, were afoot. But the Commission was not part of them.

There had been little change in the Commission's own modus operandi over this period[10]. It was measured, careful, technically thorough - and slow. DPs took on average 3.3 years, Final Reports 5.6 years. Most work was done using staff researchers, who could not be expected to be legally omnicompetent, and thus had to learn a Project's area as part of the process. Consultation was with the identified stakeholders, who were those who could be expected to respond to defined written proposals in the same form - in writing.

Against this background, the Commission in 1997 decided on a restructuring and on a new (for WA) approach to its work. It had parallels with the structure and approach being decided upon at the same time for what became the Law Commission of Canada[11].

The WA Commission went from 7 staff to 1, with no full-time researchers. Instead, we became geared to the use of consultants. Since 1997 we have made heavy use of them, with considerable results.

Our *Criminal and Civil Justice System Review*, Project 92 (1999)[12] is one illustration of what we were able to achieve that the Commission would have been hard pressed to achieve under its previous structure. In less than two years, over 50 consultants produced 27 Consultation Drafts (25 to 100 page documents) on different aspects of WA's civil and criminal justice system, as well as 3 further Consultation Drafts in the form of Background Papers that mapped out the basic characteristics of WA's civil and criminal justice system and standards for changes in them.

Project 92 also involved us conducting the widest range of public consultations in the Commission's history. These included 'Have your say' public meetings around Western Australia as well as an interactive television broadcast and a revamped Commission Web site.

The Final Report for Project 92 (also produced within the two year time frame) runs to 428 pages with 447 recommendations. With the Consultation Drafts and background papers, this represents the largest body of up-to-date literature on a state legal system in this country that has ever been produced at any one time.

Like the Canadians, we have found this approach to law reform has involved in it a much wider group than was the case previously. Like the Canadians too, we have discovered that we needed to develop a new set of skills, to do with project management[13]. This has been our principal practical challenge under this new approach to our work. It is one that has required considerable elements of what, in law reform commission terms at least, is creativity in the design of institutional arrangements. This creativity is manifest in the arrangements for our current large project, Project 94 *Aboriginal Customary Law*[14].

For Project 94[15], the Commission, with the advice of representatives of the indigenous community, appointed Ms Cheri Yavu-Kama-Harathuniam, a woman of the Cubbi Cubbi clan (North Queensland), as the full-time Project Manager, together with two fellow but non-indigenous members of the Crime Research Centre at the University of Western, Dr Neil Morgan and Dr Harry Blagg, as its Research Directors. We also had appointed two indigenous Special Commissioners for the project, in Mick Dodson and Beth Wood. In addition we had appointed a twelve person Aboriginal Research Reference Council, with its membership drawn from across the Aboriginal community in this state, including 'men and women elders, community representatives and relevant representatives of key indigenous agencies and peak bodies'[16]. The Special Commissioners and the Council will work throughout the project with the Research Directors, the Project Manager and the Commission on the development and implementation of the strategy for undertaking the research and consultation in the Aboriginal community that the project requires. That research and consultation have called for the development of protocols and procedures to respect the sensitivities and concerns, while encouraging the participation, of the Aboriginal communities across the state.

Out of this research and consultation, we expect there to be a series of papers and other material produced on a range of topics within the terms of reference. This is to permit further consultation to take place out of which the Final Report of the Commission can be prepared.

This structure is, like that we used for Project 92, quite different from anything that I understand the Commission to have used before the restructure. At the same time, the Project 94 structure is unlike the one we used for Project 92.

But beyond these sorts of changes in the way we have approached our work, restructuring went to the Commissioners themselves. We formalised the practical reality of recent years in WA, of a Commission of part-time Commissioners. There had been a full-time Commissioner, who was also the Executive Director. However, his role, with some notable exceptions, was primarily one of administrative coordination rather than directing policy formulation. The other Commissioners had all been part-time.

Now all of the Commissioners, including the Chairman, are part-time. We have an Executive Officer, our only full-time staff member, who coordinates meetings and other work of the Commissioners, keeps an eye on the structures we put in place for our projects (such as any specially appointed project management and research direction we contract in), and administers our office. The office has a part-time Finance Officer and editorial and secretarial staff on contract.

Further reform of the WA Law Reform Commission

It has become clear to us, from the work our restructuring has permitted us to do, that further reform of the Commission itself is needed.

The next step is non-lawyer representation on the Commission, rather like that in some other Australian states. We have begun this with the appointment of Special Commissioners for the purposes of our largest current reference, on Aboriginal Customary Law, as I have already indicated. But it seems to us there is scope for a position or positions of this sort on a regular basis, of a sort we understand the New South Wales Law Reform Commission has used.

Beyond this we would plan to use Project Commissioners, where we would be emulating our federal counterpart, the Australian Law Reform Commission (ALRC) as well as other Australian commissions. We would have such Commissioners appointed for their expertise in and capacity to manage particular projects, to further expedite deliberations at the Commission level.

But beyond these, we have continued to reflect on our structure. In the spirit of law reform, we want to ensure a healthy scepticism about ourselves as well as the legal system. Have we got the balance right, between the use of those with occasional connections with the process and those whose job it is (if not whose career it is: a different matter) to maintain the process?

My own view now is that, in a jurisdiction the size of WA and with the current budgetary environment, it is probably impossible to justify an establishment anything like that of the New South Wales Law Reform Commission (NSWLRC) or the ALRC. The size of our jurisdiction in particular is an issue. There simply are not enough possible candidates in, or interested in moving to, WA who are also likely to be attracted to full-time positions as Commissioners for fixed terms. Such terms are needed, in my view, to ensure the sort of periodic institutional renewal that I believe law reform agencies require. I do believe, however, there are sufficient numbers of candidates interested in part-time fixed term positions to provide the commissioners required. I also believe that the numbers of alumni commissioners thereby produced help to attract others.

What are law reform commissions like us good for? What are we not *best* for?

Our recent experience has also prompted me to ask these questions. Legal change is of course inevitable. The issue is the place for *directed* change, and within that for the sort that law reform agencies from the 1960s, like us or like ones with greater staff establishments, such as the ALRC or the NSWLRC, can help to produce.

In simple terms, I see the fit being where a recognisably legal issue of significance has arisen that Courts may not have confronted yet, or have confronted but are seen to have had difficulty with or not satisfactorily resolved. For their part, politicians are concerned that no ready solution of the issue has yet presented itself, they are not (yet) required themselves or through high profile arrangements (such as Royal Commissions) to produce one, and there is no specialised agency to which it would be 'more natural' to refer the matter. So that leaves out matters such as microeconomic reform (not sufficiently 'legal', and the 'solution' is clear) or the lessons of the collapse of the liability insurance market (the HIH Royal Commission). It leaves out (in Australia) reform of the law of insider trading (because of the Companies and Markets Advisory Committee).

But there is something more to this line of inquiry than that. I suggest that bodies like law reform agencies are not *optimal* for reform of an area where there is *already* outside government a commitment to, and ability to deliver on a continuing basis, high quality analysis and reform - whether or not this ability is the result of a law reform agency's work.

An obvious example for me is from commercial law, in the area of Personal Property Security Law reform. Here there is a coalition of academic and practising lawyers working as the Banking and Financial Services Law Association Personal Property Securities Committee. There was the ALRC's *Personal Property Securities* Interim Report No 64[17] on the subject. But the Committee has gone much further, both in technical terms, and in terms of building support for the project of modernising such law and making it uniform across Australia. There are lessons here, I believe.

Law reform by other means: the place for other institutions

The Personal Property Security Act (PPSA) project is a valuable case study for a number of reasons, and not only because it is one I am also engaged in, outside my work as a law reform commissioner. It is an area of considerable technical complexity for which law reform commissions would find it very difficult to assemble, let alone maintain, a strong team to tackle the issues. And such maintenance is necessary, in view of the way any new comprehensive law of this sort needs regular adjustment and updating at an equivalent level of sophistication to that of the original exercise. At least this has been the US and the Canadian experiences, with the law on which the PPSA is based – Article 9 of the Uniform Commercial Code[18]. Of interest are the common institutional arrangements adopted to deal with the matter in both countries, in Canada alongside its law reform agencies.

In both cases there are Uniform Law Conferences that are independent of government (a key element of law reform commissions, I believe), even if they have material support from governments. In the US, there is the National Conference of Commissioners of Uniform State Laws[19] and in Canada the Uniform Law Conference of Canada[20]. They both have membership drawn from lawyers in government and private practice and the academy, as well as from the bench. They can command the

array of sorts of specialised expertise that no law reform commission could have, let alone maintain, on its staff, nor afford to keep on a continuing retainer.

The US case is particularly interesting, because in the area of personal property security reform the Conference there works in partnership with another body, with even wider aims, not restricted to uniform or model laws, the American Law Institute (ALI)[21]. It has parallels outside the US, as the ALRC's *Managing Justice* Report No 89[22] notes, in the Singapore Academy of Law. And it has attracted attention, in *Managing Justice*, as a possible model to emulate in Australia, in an Australian Academy of Law[23].

Back to the Future: an Australian Academy of Law

In effect what I am commending here is a model that predates law reform commissions like the WA one, and that in a world like ours (rather than say that in the US) would exist alongside them. The model would seek to draw on the spirit of interest in the law for its own sake that I identify with the American Law Institute, on which the Australian Academy of Law is based.

Of course those involved in the law reform projects like the Article 9 one I have referred to have strongly instrumentalist aims. Some want law that is, for secured lenders (for whom most of them work), cheaper, faster, simpler, safer and more flexible, to use the language of the doyen of the would-be reformers of Australian secured transactions law, Professor David Allen of Bond University[24]. But there are others involved, with different instrumentalist aims, in service of such as consumers and governments.

What is of considerable interest in their projects is the way they come together over the project, and share an interest in better understanding that law in practical terms. My own (limited) experience, at the fringe of the matching Canadian PPSA enterprise, done through its Uniform Law Conference, was of a willingness to share experience, to talk through its implications, and work out legislative responses. This is as part of a continuing dialogue on the area of law under review; it is of a sort a discrete law reform reference would (rightly) not encourage because of our focus on the generation of the summative final report.

The ALI does all of this in a context of concern for 'legal improvement', as the ALI puts it, which may or may not translate into discrete reform proposals. It might yield something law reform commissions would find it hard to justify, a 'restatement' of areas of the law, like those in contract and torts that the ALI has produced. This is altogether apart from the Academy's possible contributions to the improvement of Australian legal education of the sort that attracted the ALRC's attention to the idea in their *Managing Justice* report.

Beyond these virtues, the Academy idea could not only assist in drawing on the resources of the national legal profession in the interests of law reform (as above), but also foster interchange and cooperation among constituencies from which its membership would be drawn. That is, in law reform terms, it would involve a partnership of such constituencies, without the Final Report pressures.

In these and other respects, the institution I have in mind embodies many of the virtues of your own Institute. The difference is largely I think in it its more general scope.

The Academy idea has not advanced much further since *Managing Justice*. It deserves to. And it deserves support in particular from bodies like yours, and from I would hope any one who has been even moderately convinced by my defence of one of the great ideas of the 1960s.

Endnotes

1 'Modernising Reforming National Law: Back to the Future? The Case for Another Institution', which was a paper for the Australasian Law Reform Agencies Conference (ALRAC) June, 2002, in Darwin. My title for this current version, as well as most of the ideas of the original version, borrow heavily from the work of Professor Rod Macdonald, FR Scott Professor of Public Law at McGill University, in particular 'Legal education on the threshold of the 1980's: whatever happened to the great ideas of the 60's?' (1980) 44 *Saskatchewan L Rev* 39; and 'Recommissioning Law Reform' (1997) 35 *Alberta L Rev* 831.

2 A mouthful: unlike our federal counterpart, we do not ever seem to have acquired a jurisdictionally portable acronym, like their 'ALRC'. 'LRCWA' has not caught on. So, as we are after all in Perth, I will from now on refer to the WA body as the Commission; others will have to be more distinctively described.

3 See http://www.lawcom.gov.uk/ (accessed 6 May 2003).

4 See http://www.scotlawcom.gov.uk/ (accessed 6 May 2003).

5 See Law Reform Commission of Western Australia, *30th Anniversary Reform Implementation Report* (Perth: the Commission, 2002), at 2.

6 Remembering, of course, the joke about the 1960s: If you can remember them, you weren't *really* there.

7 The material in this section is largely drawn from our *30th Anniversary Reform Implementation Report*, note 5, above.

8 For some Projects, of which there had been 92 brought to some sort of completion, more than one for the Project. Since then, we have produced one particularly noticeable further report: *Judicial Review of Administrative Decisions* (December 2002), with another, on contempt, close to completion. Preceding them were a number of further discussion papers, to add to the numbers ferred to in the text.

9 Our *30th Anniversary Reform Implementation Report*, note 5, above.

10 It is very well mapped out in the article by the last Executive Director of the Commission, Dr Peter Handford, in his 'The Changing Face of Law Reform' (1999) 73 *ALJ* 503.

11 Presaged by the most interesting article by Professor Rod Macdonald of McGill University (who was the inaugural President of the Commission) in his 'Recommissioning Law Reform', note 1, above.

12 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (Perth: the Commission, 1999).

13 I gather this from my conversations at ALRAC 2002, note 1, above, with Professor Roderick Wood of the Law Commission of Canada.

14 See our Web site for the terms of reference: http://www.wa.gov.au/lrc/, under 'Current references'.

15 The following text is from my paper 'Customary Law and Treaty: Notes for an Address', for the conference *Treaty - Advancing Reconciliation*, Murdoch University, 26 – 28 June 2002. That paper in turn drew on Neil Morgan, Harry Blagg and Cheri Yavu-Kama-Harathuniam, 'Aboriginal customary law in Western Australia', *Reform*, Issue 80 (2002) 11.

16 Morgan et al, note 15, above, at 12.

17 [Australian] Law Reform Commission, *Personal Property Securities* (Canberra: the Commission, 1993).

18 See a most useful recent account comparing the Canadian and US experiences, Ronald CC Cuming and Catherine Walsh, 'Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property Security Acts' (2001) 16 *Banking and Finance L Rev* 339.

19 See http://www.nccusl.org/nccusl/default.asp.

20 See http://www.ulcc.ca/en/home/.

21 See http://www.ali.org/ali/thisali.htm.

22 Australian Law Reform Commission, *Managing Justice* (Canberra: the Commission, 2000), at 150 – 154.

23 Ibid, at 150 ff.

24 His project is nicely chronicled in his 'Personal Property Security – a Long Long Trail A-Winding' (1999) 11 *Bond L Rev* 178. See also his more recent account, 'Uniform Personal Property Security Legislation for Australia [:] Introduction to the Workshop on Personal Property Security Law Reform' (2002) 14 *Bond L Rev* 1.