AUSTRALASIAN LAW REFORM AGENCIES

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SESSION 1: SURVIVAL - FACTORS AFFECTING THE SUPPORT GIVEN TO LAW REFORM AGENCIES

POTENTIAL MEANS BY WHICH AGENCIES CAN RESPOND TO POLITICAL IMPERATIVES TO GET THINGS DONE

PETER HASTIE QC[1]

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1 Part-time member of the Queensland Law Reform Commission. The views expressed in this paper are those of the author and not those of other members of the Commission, the Commission itself or the Queensland Government.

1. Law reform commissions were conceived as one way of dealing with the existence of out-dated laws and the inability of elected governments to deal with the problems caused by such laws in an efficient way.

2. Law reform commissions were, and remain, also an appropriate place for the consideration of complex and significant law reforms, as well as a convenient place for socially or politically hard subjects to be debated.

Competing methods of law reform

3. One of the difficulties for commissions is that there are now a number of competing means for governments to obtain advice and commendations for changes in the law. Governments have taken to the appointment of consultants to undertake reviews for the purpose of legislative change and have chosen to retain many aspects of law reform in-house. Some public agencies develop their own reforms and the advent of uniform (or nearly uniform) national laws cuts across the utility for referrals to state and territory commissions. Obviously commissions can and should be used as part of national law reform. A recent example was the Uniform Succession Laws Project. It is an infrequent occurrence, however.

Possible reasons for the use of alternative means to achieve reform

4. A number of reasons may be advanced for the use of sources other than established law reform commissions for recommending changes to the law. None of them, in my view, sufficiently explain the trend.

5. It might be said that none of these alternative methods of law reform necessarily requires public consultation in the way that law reform commissions generally operate nor the publication of detailed reports explaining and justifying the reforms proposed. This might be thought to produce a quicker and cheaper result.

6. Non-law reform commission agencies do, however, consult. Law reform commissions do not have a monopoly on the release of discussion papers. To the extent that public consultation is considered desirable by any of these

entities or the appointing government, it can be and is undertaken by the public release of discussion or working papers and by the publication of reports which are provided to the government.

7. It will no doubt be said that budgetary constraints have had a significant effect on the number and quality of referrals to law reform commissions and on the provision of resources for the performance of those referrals. It is, however, not clear that financial pressure is a sufficient explanation for the development.

8. Commissions involve the creation of a separate agency and a separate budget, but it is not obvious that there is much saving if the work is done internally or contracted externally. It is unlikely that the cost of lawyers is different if they are separately employed in a commission rather than in the mainstream public service. There would always be a need for administrative and managerial support, however or wherever the work is performed. External consultants are presumably paid a reasonable commercial price. Part time commissioners are unlikely to be a significant cost for most commissions.

9. There is the possibility that alternative methods are chosen because they are politically safer. Controversy is perhaps avoided by ministers having departmental lawyers consider matters on the basis of specific instructions as to the desired result or, perhaps, on the basis that they might be taken to understand the desired result without the necessity for explicit instructions.

10. It is conceivable that some attorneys-general might baulk at referring a matter to a commission for fear that they will be confronted with a report that is not only inconsistent with their own view, but which also engenders needless controversy. That could be true equally of an attorney-general not particularly adventurous or interested in reform, as an attorney anxious to make a difference.

11. Commissions which court or receive publicity for either the subject matter about which they are asked to report or the recommendations made may offend some governments or members of Parliament who might perceive the

commission as usurping the role of governments to make policy decisions. It might also arouse conflict as the commission explains the alternatives, or makes a recommendation favouring one alternative rather than another.

12. Some would conceive these matters as being more significant at a time of either more closely balanced parliaments or more evenly balanced voting patterns. Placing matters in the hands of an independent law reform commission might throw up unwanted proposals for reform, or it might engender, even by the consultation process, controversy in the way that some governments would prefer or might need to avoid.

13. On the other hand, some politicians are of course unafraid of controversy, like the fray, and seek to make change.

14. Not all law reform deals with controversial issues, or is even controversial. Some areas in need of reform can be rather technical. Some ministers and parliamentarians might not regard technical reform as important or politically useful and this itself might stymie reform, but skilled politicians may, and should be, quite willing to undertake these areas of reform even if only to show that they are doing something.

15. Moreover, even if the reason for the use of agencies other than law reform commissions for the advancement of change is to avoid controversy, it is hardly a good one.

16. There is much to be said for transparency in decision-making and getting the populace involved in law reform. Discussion of legal topics is beneficial in a democracy for its own sake, and there remains the liberal idea that good public policy (and many other things) arise out of the existence and expression of conflicting ideas. Public interest and engendering public interest may itself promote reform.

17. Law reform commissions are suitable vehicles for change precisely because their members are appointed (not elected) and not directly constrained by political considerations. They have the luxury of being above partisan politics. Although obviously some law-making necessarily involves value

judgements, much of the law is a product of common sense considerations and general notions associated with a liberal society.

18. There is, in addition, little that can be done to avoid controversy if the topic under review is one about which there are conflicting views or emotionally charged responses. It is not as if a commission can avoid entering the fray.

19. It is also not feasible for a commission to avoid governmental concern that anything sent to the commission would end up in controversy by the two privately consulting about the matters in issue or the recommendations that could or should be made. Ministers and governments do change and successors might be suspicious of a commission which is or is perceived to be too close to the previous government. It is moreover self-defeating for a commission to become tied to a position for purely political reasons and quite inconsistent with its statutory role for it to attempt to do so.

Advantages of law reform commissions

20. Despite the fact that law reform commissions have faced and continue to face challenging times, the fact is that the important role law reform commissions play in the community is well recognised and appreciated.

21. Law reform commissions usually represent good value for money. The reports are usually well researched and considered. Commissions are not constrained by the need to address day to day issues and can bring a medium to long-term perspective to issues. Reports are not simply the product of full-time employees who have the interest, time and intellect to study a problem. They are also the product of full-time and part-time commissioners who, more often than not, have the knowledge and experience to stand back and consider proposals for reform from a broader view.

22. Law reform commission reports are often such that even if they do not lead directly to law reform, they can assist members of the community in their understanding of the matters in issue and can play a part in the understanding and operation of existing law. The inference is inescapable,

for instance, that the exploration of the law of standing, customary law and privacy by the Australian Law Reform Commission had an impact upon developments in these areas in the common law (and also, even if indirectly, statutory law).

The risk of comprehensive report-writing

23. The breadth and length of commission reports do, however, present a problem of its own. Reports can be so well researched and documented that it makes it difficult for attorneys- general and other members of the ministry or the Parliament to even contemplate the subject matter. Those in politics are likely to find themselves with little time to read extensive reports, let alone digest them. The presentation of a summary is no real answer to the problem.

24. This aspect of some law reform commission reports is further complicated by the fact that they are now not usually accompanied by draft legislation which would make it clear how the commission intended the new laws to operate.

25. The end result is usually an extended process by which change can be affected. Ministers will invariably request that their political or even departmental advisers briefly explain the whole of the report and the recommendations and the implications for the government of accepting them. Any decision by the minister may necessitate consultation with, or a decision by, cabinet on the recommendations. If there is agreement in principle, the legislation is required to be drafted by the Parliamentary draftsman, and that no doubt involves some second guessing by that office of the advisability, let alone manner of implementing, the recommendations in the report.

26. From the point of view of the minster and the government, the process can therefore be quite extended. That is not attractive in a political environment where politicians are expected to solve problems and not put off doing anything about them.

27. It is also not attractive to politicians who realise that their period in office might be quite limited; either because it does not take much for governments to change or for ministers to lose office for events quite unrelated to performance. Three year parliaments do not help.

28. The issue is whether law reform commissions can or should change their manner of operation to meet these demands. It is obviously important for governments to have available a means of obtaining advice on non-urgent complex referrals from a body which has completed a full course of public (and private) consultations and written a fully reasoned report which traverses legal history, draws upon empirical data (to the extent available and relevant) and balances in a deliberative way the competing considerations.

Possible area for change

29. It is not clear, however, that this is always necessary. Some reforms and perhaps more reform could be accomplished if the process was modified so that the resources expended and the time taken to report was reduced.

30. This may not be always possible, but it could no doubt conveniently be done in a number of situations. If the area of law under consideration had been the subject of consideration and legislation in other relevant jurisdictions, such as another state or territory, the Commonwealth, England, Canada or New Zealand, it would surely be difficult to justify lengthy consideration of the alternatives. Indeed, perhaps the way to proceed in those situations might be for the commission to invite discussion on a draft bill essentially using the same words as that enacted elsewhere or, if there is a difference between jurisdictions, adopting the model preferred by the submitting commission; with or without modifications considered desirable by the submitting commission.

31. If the referral is concerned with reviewing earlier legislation, either because a review was built into the earlier legislation or some time has elapsed since it was enacted, it might be possible to limit the review to those aspects of the

legislation which the commission considers should be changed; with few words spent on those provisions regarded as satisfactory.

32. The breadth and length of the examination may obviously depend upon the terms of the referral, but that is not always entirely out of the hands of law reform commissions and might be a legitimate subject for discussion.

33. There is also no real reason in principle why the terms of the referral could not direct the commission to the manner in which the report should be undertaken, limit the matters to be considered by the commission or give general directions about the desired end result. There are plenty of instances where this approach has been adopted already. It is quite acceptable, for instance, in my view, for a minister to ask the commission for a draft bill on a particular subject similar to that adopted elsewhere but appropriately adapted to the prevailing circumstances and drafted in the light of experiences elsewhere. The minister could ask how the commission considers a particular object could be achieved; rather than for a report on the subject generally or whether the desired object can or should be sought.

Risks of abbreviated referrals

34. There are obvious potential problems with an abbreviated approach.

35. One of the most important is the risks associated with the absence of fully considered reasons. It is well known and accepted that the discipline of writing of itself adds to the process of coming up with a satisfactory conclusion.

36. On the other hand, it is also well known that the process can be very time consuming. It necessarily adds expense and delay to decision-making. There are surely times when a trade-off between the two is required. Public money, after all, is involved.

37. Reports by law reform commissions may be relevant to the construction by lawyers and courts of the legislation under consideration. Indeed it has become customary for courts to be shown and for consideration to be given

to the reports of law reform commissions to assist with resolving matters of statutory construction.

38. The importance of law reform commission reports should not be overstated. At common law, reports may be accessed to provide context to legislation; particularly to discern the mischief which the statute was intended to remedy. Under statute, reference by a court to extrinsic materials is permitted to confirm that the meaning of an act is the ordinary meaning conveyed by the text and purpose of the act, or to determine the meaning of the act when the statute is ambiguous or obscure or where the ordinary meaning given to the words would lead to a manifestly absurd or unreasonable result. Ultimately, however, it is the text of the legislation which is important and extrinsic materials cannot obviously displace the clear meaning of the text. There are, in any event, few occasions when general commentary by law reform commissions is likely to answer the particular problem posed by the facts and legislation in issue.

39. Commission reports are also often useful sources of information and the law. The question is whether the public should pay for the accumulation of that knowledge and information, or, more accurately perhaps, pay for that accumulation when the outcome sought was not information, but law reform.

40. A more contentious disadvantage in any truncated process might be its effect on the consultative process. Criticism is often made of government decisions because they have not been through a process of consultation. Sometimes the criticism is illusory. Even if the interested parties are consulted, the result would often be the same. Even on these occasions, however, mere consultation might have had a beneficial effect – it might have enlightened the party on the objects sought to be achieved in an informal and non-adversarial environment and thereby taken some of the wind out of the objections. Consultation, sometimes, is simply a way of ensuring that people feel a part of the process. A parliamentary democracy is about more than voting once every few years.

41. There may be a point, however, when an entirely open discussion paper does not meet the requirements of procedural fairness. It might, sometimes, be better for a commission to present its preliminary views and lead the discussion rather than wait for wide ranging responses. Apart from potentially shortening the period taken for any review, that process would also have the advantage of its views being subjected to scrutiny before the commission reports.

Conclusion

42. No one approach will obviously meet all the needs of society. The point of the paper is simply that it is worthwhile both commissions and their referring agencies thinking about the intended and most desirable processes for considering law reform and then embarking upon it rather than for commissions to proceed only on the basis that they conduct long periods of consultation and produce extensive reports.

43. Independent law reform commissions have a lot to offer. They have available to them an intellectual resource of considerable value. Hopefully there is in each commission a mix of idealistic young adventurous lawyers and experienced people who understand the limits of the law to solve social problems. There is considerable benefit in having law reform undertaken by independent entities not driven by partisan or ideological notions.

44. These characteristics are not only useful for the consideration of complex and long-term legal issues, but could be quite usefully employed in the timely production of law which addresses matters of immediate concern to the people or which deals with problems in a way that the elected representatives of the people desire.

45. Some issues will require a lengthy consultative process and a wide ranging report, but many can be dealt with in a much more truncated way. Law reform commissions, which are independent and seen to the independent by the community and comprised of persons who usually have a broader view of the world than might be expected of government officers or specialist consultants, are a great avenue for reform of both types.