



THE UNIVERSITY
OF QUEENSLAND
AUSTRALIA

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Research and Reform

A Literature Review of Law
Reform Commission
Methodologies

2025



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Executive Summary

Law reform commission bodies ('LRCs') are deeply committed to extensive research and stakeholder consultation to aid in the recommendation and reform of relevant laws. There are, however, various approaches to these processes. This paper therefore aims to analyse and summarise the critical analysis, commentary, and literature regarding the functions and purposes of LRCs, and the qualities, methodologies, and robustness of research conducted by LRCs. The research question that we aimed to answer is: what are the methodologies that law reform agencies and organisations use to inform their reports and recommendations, and what are the respective advantages and disadvantages of these methods?

Key Findings

- Hurlburt's ideal law reform commissions are independent, primarily legally trained bodies promoting justice, equality and rational law reform. The ALRC applies these principles through reviewing laws to modernise them, improving access to justice, ensuring consistency and protecting rights under the International Covenant on Civil and Political Rights.
- LRCs are independent bodies whose distinctive mix of full-time and part-time members provides governments with unbiased, diverse legal advice, though debates persist about whether full-time input should occur at the commissioner level rather than through subordinate research staff.
- LRCs have direct impacts through concrete legislative reform, and indirect impacts through sparking further debate and publicity on relevant issues.
- Barriers to implementation include the willingness of Government to implement recommendations into legislation, the time-intensive burden of considering the reports, and lack of parliamentary and public interest.
- All LRCs tend to focus on safe, doctrinal topics avoiding politically sensitive areas. Successful projects need both feasibility and government support. Future reform should aim for systematic, not just incremental change.
- Stakeholder consultation is a standard and invaluable aspect of LRC research. Consultation elucidates key issues that LRCs should focus on, increases trust in LRCs, and lends validity to LRC processes.
- QLRC does not use a significant amount of academic literature and the ALRC prioritises community input. LRCs' operations and, potentially, independence can be restrained by funding as seen in Canada, Northern Ireland and NSW.

We begin by explaining our methodology, then briefly outline the features of LRCs which are contextually relevant for our report. Namely, we consider procedural aspects (the purpose, structure, and independent nature of LRCs), the impact of LRCs, and the implementation of law reform recommendations. From this, we turn to the substantive portion of our research, and consider three themes which address our research aim. Firstly, we consider the topic selection of LRCs, then discuss the consultation process, and finally consider LRCs' resource use.



Methodology

To address the research question, we adopted a literature-based approach, focusing on scholarly works that critically reviewed LRCs. The research primarily examined literature reviews of LRCs and identified themes relevant to the topic.

As outlined in the task, the scope of jurisdictions that we considered were not confined to the Queensland Law Reform Commission ('QLRC'). Instead, our analysis extended to commissions at international, subnational, and provincial levels. Nonetheless, particular attention was directed toward the QLRC and other Australian LRCs.

The sources consulted included journal articles, books, PhD theses, and research reports. The resources we considered are set out in Table 1. While there was no strict requirement that sources be peer-reviewed, quality and reliability were central to our selection process, and peer-reviewed works were generally preferred. No formal limitation was placed on the recency of sources, although recent publications were valued for their relevance, particularly journal articles. We considered works published before 2010 cautiously, as they often did not account for contemporary developments in LRCs, evolving societal values, or recent institutional changes. However, such sources remained useful for their broad analytical perspectives.

Google Scholar was the primary research tool, and we strategically employed keyword searches to identify relevant sources. Examples of search terms included: *"resource use law reform commissions,"* *"law reform commissions methodology,"* and *"effectiveness of law reform commissions."* We then found additional relevant sources by examining the footnotes in the sources found through these searches. The report's focus was deliberately narrowed to exclude sources centred on legislation, case law, statistical data, or other primary materials, as these fell outside the scope of this specific task. After excluding these sources, the analysis proceeded by first identifying recurring themes across the literature. Once these overarching themes were established, we examined the gaps and limitations within them and conducted targeted follow-up research to strengthen our findings.

TABLE 1: Resources considered in the scope of this research.

Secondary Source Name	Year	Jurisdiction	Research Methodology Outline	Limitations of Methodology Discussed in the Source?	Publication Type	Peer reviewed?
Susan Kenny, 'The Law Commissions: Constitutional Arrangements and the Rule of Law' (2019) 39(3) <i>Oxford Journal of Legal Studies</i> 604.	2019	Law Commission of England and Wales (LCEW); Scottish Law Commission (SLC)	Analysis of two journal articles	No	Journal Article	Yes
Kieran Tranter and Rodney Meyer, 'The Use of Journal Articles by the Queensland Law Reform Commission' (2015) 27(1) <i>Bond Law Review</i> 57.	2015	Queensland LRC (QLRC); Australian LRC (ALRC)	Citation analysis	Yes	Journal article	Yes
Peter Handford, 'The Changing Face of Law Reform' (1999) 73(7) <i>Australian Law Journal</i> 503.	1999	ALRC; QLRC; New South Wales LRC (NSWLRC); Northern Territory LRC (NTLRC); South Australian Law Reform Institute (SALRI); Tasmanian Law Reform Institute (TLRI)	None	No	Journal Article	Yes
Neil Faris 'Law Commissions - what is the essence of their law reform role?' (2014) 2(1) <i>IALS Student Law</i>	2014	Northern Ireland Law Commission	None	No - Possible bias, author is former Commissioner of the NILC	Journal Article	Yes



<i>Review- Special Issue: Law Reform and Child Protection 52.</i>						
Wendy Larcombe et al, <i>'Making Good Law: Research and Law Reform'</i> (2015) <i>Melbourne School of Government</i> 1.	2015	ALRC, Victorian LRC (VLRC)	None	No	Research Report	Yes
Matthew Dyson, James Lee, Shona Wilson Stark, <i>Fifty Years of the Law Commissions</i> (Hart Publishing, 2016).	2016				Collection of Articles	
Michael Kirby, 'Ten Attributes for Success' (Keynote Address, Law Reform Commission Annual Conference, Dublin Castle, 17 July 2007).	2007	LRC of Ireland; ALRC	None	No	Speech	No
Natalia Hanley et al., 'Improving the law reform process: Opportunities for empirical qualitative research?' (2016) 49(4) <i>Australian & New Zealand Journal of Criminology</i> 546.	2016	VLRC	Qualitative Case Study	No	Journal Article	Yes

Norman S. Marsh, 'Law Reform Commissions Compared: A Review Article' (1989) 38(1) <i>The International and Comparative Law Quarterly</i> 185.	1989	Comparison of commissions set up by statute in the UK, Australia, and Canada	Synthesis of: William H. Hurlburt, <i>Law Reform Commissions in the United Kingdom, Australia and Canada</i> (Edmonton: Juriliber, 1986).	No	Journal article	Yes
Roderick A. MacDonald, 'Recommissioning Law Reform' (1996) 35(4) <i>Alberta Law Review</i> 831.	1996	Canada, but also discusses generally	None	Bias: undertaken research for three LRCs and for two Royal Commissions of Inquiry. Has chaired a government Task Force related to law reform.	Journal article	Yes
Benjamin P. White, 'Consultation, commissions and context: A comparative study of the Law Commission and the Australian Law Reform Commission' (PhD thesis, University of Oxford, 2005).	2005	Law Commission (Eng) and ALRC	Empirical Qualitative research, semi-structured interviews, document analysis. Comparative Study	No (which is surprising to me)	PhD thesis	Yes
Kathryn Cronin, 'Working on the Larger Canvas—Law Reform in a Federal System: Thoughts on Forty Years of the Australian Law Reform Commission' in Matthew Dyson, James Lee and Shona W Wilson Stark (eds), <i>Fifty</i>	2016	ALRC		Bias: undertaken research with the ALRC, worked with Kirby	Article within a book compilation of articles	Yes



<i>Years of the Law Commissions: The Dynamics of Law Reform</i> (Hart Publishing, 2016).						
Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) <i>Erasmus Law Review</i> 130.	2015	Speaks generally	Considers three examples of research and writings by lawyers which are directed to law reform.	No	Journal Article	Yes
Kieran Tranter, 'Citation Practices of the Australian Law Reform Commission in Final Reports 1992-2012' (2015) 38(1) <i>UNSW Law Journal</i> 323.	2015	ALRC	Citation Analysis on a sample of ALRC final reports.	No	Journal Article	Yes
Michael Sayers, 'Catching the Ear of Government: Relations with Government - Before, During and After a Law Reform Project' (Conference Paper, Australasian Law Reform Agencies Conference, June 2002) 6.	2002	ALRC	No	No	Conference Paper	No
Terence Etherton, 'Memoir of a Reforming Chairman' in Matthew Dyson, James Lee and Shona W. Stark	2016	Law Commission for England and Wales	No	No	Book Chapter - Reflective Memoir	No

(eds), <i>Fifty Years of the Law Commissions: The Dynamics of Law Reform</i> (Hart Publishing, 2016) 76.						
Shona W. Stark, 'The Work of the British Law Commissions: Law Reform ... Now?' (Hart Publishing, 2017).	2017	UK - England and Wales, Scotland and Northern Ireland Law Commissions	Yes, outlined in introduction & based on empirical research, such as interviews	Yes, recognises the limitations of interview-based research.	Academic research book	Yes
Paul Mitchell, 'Strategies of the Early Law Commissions' in Matthew Dyson, James Lee and Shona W. Stark (eds), <i>Fifty Years of the Law Commissions: The Dynamics of Law Reform</i> (Hart Publishing, 2016) 31	2016	Law Commission for England and Wales	No	No	Book Chapter	No
Leslie Scarman, 'The Law Commission' (1972) 1(1) <i>Anglo-American Law Review</i> 31.	1972	Law Commission for England and Wales (UK)	No	No	Journal Article	Yes
Martin Partington, 'The Relationship between Law Reform and Access to Justice: A Case Study – The Renting Homes Project' (2005) 23(1) <i>Windsor Yearbook of Access to Justice</i> 375.	2005	Law Commission for England and Wales (UK)	No	No	Journal Article	Yes



Analysis

Context

Procedural

Origins of Law Reform Commission Bodies

United Kingdom

The Law Commission (England and Wales) ('LC') was established by the *Law Commissions Act 1965* (UK), due to concerns that the Government Departments and LRCs overseeing law reform at the time were incompetent in carrying out this duty.¹ The ineffectiveness of Government Departments was caused by the fact that 'no one Minister had an overall responsibility for law reform'.²

Australia

LRCs in Australia have emerged partly through the evolution of its earlier law reform institutions and partly by following in the footsteps of LRCs in the United Kingdom.³ These earlier institutions, inspired largely by the English Law Revision Committee in 1934, were found across almost every Australian State.⁴ Generally unsuccessful, these bodies suffered the same disadvantages as their English predecessor, namely a lack of supporting research staff and dedication from members.⁵ An LRC at the Commonwealth level was only established by statute in 1973 (the Australian Law Reform Commission).⁶ The ALRC was preceded or followed by comparable statutory bodies in every State except South Australia, where the South Australia Law Reform Committee was established by proclamation in 1968 (although with similar operation to other State LRCs).

The ALRC is considered to be 'a child of the English LC'.⁷ However, other relevant Australian factors contributed to the creation of the ALRC such as 'the inadequacy of existing reform machinery, the inefficient use of law reform resources spread across Australia's States and Territories, and the need for uniformity across the nation's legal system'.⁸

¹ Benjamin P. White, 'Consultation, commissions and context: A comparative study of the Law Commission and the Australian Law Reform Commission' (PhD thesis, University of Oxford, 2005) 34.

² Ibid.

³ Norman S. Marsh, 'Law Reform Commissions Compared: A Review Article' (1989) 38(1) *The International and Comparative Law Quarterly* 185, 186.

⁴ Ibid.

⁵ Ibid 187.

⁶ Ibid.

⁷ White (n 1) 35.

⁸ Ibid 35-36.

Purpose of Law Reform Commission Bodies

Hurlburt

Hurlburt sets out seven values which are sought to be effected by the different LRCs: fairness or justice; equality; satisfaction of current human interests; individual freedom; conformity with current morality; and enforceability of the law.⁹

For Hurlburt, the essential features of an ideal LRC are as follows:

- (a) 'separate from the ordinary machinery of government, which would be emphasised by its being established under a separate statute;
- (b) independent of, but having a working relationship with, the executive arm of government;
- (c) composed mainly of lawyers but with some provision for non-legal members, such as economists or sociologists;
- (d) small in the actual number of commissioners but with an adequate legal staff which, however, should not be too large so as to overburden the commissioners with work to be approved before its release to the public.'¹⁰

However, when legislatures subject to popular political influence viewed common law reform as a legitimate exercise of their powers, some method of reestablishing 'the systemic character of law and the rationality of its reform' was required.¹¹

The ALRC

The ALRC mandate is as follows: 'to review Commonwealth laws ... for the purposes of systematically developing and reforming the law'.¹² This review involves specific focus on considerations such as: 'modernising and simplifying the law, improving its administration, and improving both the dispensation of justice and people's access to it.'¹³ The ALRC must also evaluate reform proposals with consideration for possible uniformity across Australia's legal jurisdictions.¹⁴

The *Australian Law Reform Commission Act 1973* has a special provision (later reproduced in the comparable Tasmanian statute) requiring the ALRC to review laws and consider proposals 'with a view to ensuring that they do not trespass on personal rights and liberties or unduly make those rights and liberties dependent on administrative rather than judicial decision' and 'to ensure that they are consistent with the International Covenant on Civil and Political Rights'.¹⁵

⁹ Marsh (n 3) 193.

¹⁰ Ibid 198.

¹¹ Roderick A. MacDonald, 'Recommissioning Law Reform' (1996) 35(4) *Alberta Law Review* 831, 836.

¹² White (n 1) 37.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Marsh (n 3) 188.



Independence of Law Reform Commission Bodies

It is well established that LRCs are independent bodies created to provide governments with independent legal advice.¹⁶ They are independent not only of the government and the bureaucracy, but also of any other group or sector of the community.¹⁷ A 'key factor' in such independence lies in its composition, such that it consists of full-time members and research officers, as well as part-time commissioners.¹⁸ This 'mix of different experiences, approaches and outlooks' within the commission is one of the distinctive features of the advice provided by a LRC which makes it different from anything which a government department is likely to be able to provide.¹⁹

In 1996, the officers of the Department of Justice conducted a review of the QLRC.²⁰ In the wake of the report of the review in 1997, the Queensland Attorney-General at the time concluded that the Commission should consist of part-time members from a wide variety of fields, supplemented by a core group of full-time legal researchers and therefore did not propose to appoint further full-time commissioners.²¹ Some have criticised this decision on the grounds that the QLRC has been one of the few commissions which has managed to retain full-time commissioners. Some posit that this full-time input should be provided at a commissioner level, rather than having the full-time research effort put in at a subordinate level and served up to part-time commissioners.²²

Impact

The impact of LRCs extends beyond concrete legislative reform. Namely, even where law reform does not occur, LRCs are regardless valuable for their role in sparking further community, judicial, and governmental debate. LRCs' work is often 'difficult to assess', but can often tangibly change the attitudes and practices of the public and Government, and can lead to eventual future reform.²³ For example, though the ALRC report on Aboriginal Customary Law²⁴ has not led to comprehensive legislative implementation, there is 'no doubt' that the extensive public and judicial consultation process greatly contributed to changing the relationship between Aboriginal Australians and Australian law.²⁵ Michael Kirby – writing extra-curially – argues that this report 'enlivened widespread community debate and interest', which is particularly significant considering the pre-Mabo²⁶ landscape of Australian law.²⁷

¹⁶ Peter Handford, 'The Changing Face of Law Reform' (1999) 73(7) *Australian Law Journal* 503, 507.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid* 511-512.

²¹ Handford (n 16) 512.

²² *Ibid.*

²³ Marsh (n 3) 190.

²⁴ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (ALRC Report No 31), 11 June 1986.

²⁵ Michael Kirby, 'Ten Attributes for Success' (Keynote Address, Law Reform Commission Annual Conference, Dublin Castle, 17 July 2007), 90.

²⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²⁷ Kirby (n 25) 91.

LRCs, therefore, play a profound role in shaping and creating debates that can lead to significant reforms.

This indirect impact of LRCs can be further examined when considering the intermixed relationship between differing LRC bodies in similar jurisdictions. As the English Law Commission stated, to be effective bodies, LRCs must 'co-ordinate the efforts of all concerned with the reform of the law'.²⁸ Therefore, even if a LRC cannot undertake all the reform it aspires to, it can give publicity to other LRCs in the same, or similar, jurisdiction to ensure that these reforms are consistent and acceptable.²⁹ Further, although many LRCs' official role for a certain project ends after the presentation of their reports, many LRCs continue to work on these same projects while the report is being considered by Government.³⁰ After the official end of the role, LRCs generally discuss their recommendations with consultees (including key stakeholders, judicial bodies, and Government) and continue to publicise their reports.³¹

There is therefore a reciprocal relationship between differing LRCs, the public, and Government. Though not all law reform suggestions will be implemented, LRC work remains valuable in its indirect impact. The publicity of issues can lead to future law reform, and can change the attitudes and practices of the public and various bodies. This re-conceptualisation challenges narratives that LRCs are mere advisory bodies beholden to governmental whims. As discussed further below, lack of support from Government is a key hurdle for LRCs. LRCs often rely on Government for budgetary support and valuable consultation, and Government often controls the topics that LRCs can consider, and makes the final decision on whether the resulting report becomes law.³² Despite this, and as discussed, LRCs are independent from Government and have valuable indirect impacts. LRCs are valuable for their role as law reform advisors, but also for their broader attitude-changing and conversation-starting impacts.

Implementation

Before discussing the strengths and weaknesses of the implementation process, we would like to distinguish partial and substantial implementation. In the context of legislative implementation, the ALRC deems a report to have been substantially implemented when most key recommendations are reflected in the Act which gives effect to it. Intuitively, partial implementation refers to cases where an Act only applies some recommendations. It should be noted that the level of implementation of all ALRC reports is reasonably high with 60% being substantially implemented; 28% being partially implemented; 2% being under consideration; 3% waiting for response; and 7% not being implemented.³³

Barriers to Implementation

As advisory bodies, LRCs rely on the willingness of the government of the day to implement their reports into legislation. Arguably therefore, the government becomes an LRCs' 'most important consultee'.³⁴ Not only can the government control the topics an LRC considers, but it also alone determines whether

²⁸ Marsh (n 3) 194.

²⁹ Ibid 193.

³⁰ Michael Sayers, 'Catching the Ear of Government: Relations with Government - Before, During and After a Law Reform Project' (Conference Paper, Australasian Law Reform Agencies Conference, June 2002) 6.

³¹ White (n 1) 354.

³² Marsh (n 3) 187.

³³ Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) *Erasmus Law Review* 130, 136.

³⁴ White (n 1) 141.



the reports become law.³⁵ From this unique relationship with Parliament emerge three key hurdles to implementation: (i) government opposition;³⁶ (ii) diminished time to consider reports;³⁷ and (iii) lack of interest in law reform.³⁸

LRCs make recommendations to the government. Hence, they operate as advisory bodies at a constitutional level and the government then determines the extent to which it accepts a LRC's recommendations.³⁹ Practically, the LRC's advisory role can limit its independence as to have a tangible chance of implementation – the report must be 'acceptable to government.'⁴⁰ It therefore follows that the more inconsistent the report is with the government's policy objectives, the lesser the extent it gets implemented. By policy objective, we mean considered ideological positions which Parliament is committed to enacting or protecting. On this basis, White creates a distinction between meaningful and achievable reform.⁴¹ This seems to suggest that a report must be framed in such a way as to generate bipartisan support to increase its prospects of implementation, thereby becoming achievable.⁴² However, there must not be an overemphasis on legislative implementation such that LRCs risk 'pander[ing] to government' and ignore worthwhile projects.⁴³ Indeed, the reader may question whether a low chance of government implementation convincingly justifies overlooking important legal issues. A limited implementation of an LRC's report may sow the seeds for more expansive reform in the future. Despite this, legislative implementation is still considered significant among LRCs as only Parliament has the power to legislate.⁴⁴ Therefore, it is crucial that the contentious areas of reform are presented convincingly.

Another, albeit lower, barrier to implementation is that the government may simply not have the time to consider "non-political, non-party Law Commission reports" due to the 'remarkable increase in legislation'.⁴⁵ Government workloads are becoming increasingly burdensome with an increase in legislation to consider and pass, and LRCs' reports therefore fall down the priority list of considerations. Accordingly, LRCs then risk selecting projects and drafting reports tailored to the government of the day's political objectives.⁴⁶

A more significant barrier to implementation is that a lack of parliamentary and public interest in the relevant area of law reform may stunt a report's prospects of implementation. This lack of parliamentary

³⁵ Ibid.

³⁶ Ibid.

³⁷ Terence Etherton, 'Memoir of a Reforming Chairman' in Matthew Dyson, James Lee and Shona W. Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, 2016) 76, 79.

³⁸ Shona W. Stark, 'The Work of the British Law Commissions: Law Reform ... Now?' (Hart Publishing, 2016) 105.

³⁹ White (n 1) 46.

⁴⁰ Ibid 141.

⁴¹ Ibid 328.

⁴² Marsh (n 3) 195.

⁴³ Stark (n 38) 9.

⁴⁴ Susan Kenny, 'The Law Commissions: Constitutional Arrangements and the Rule of Law (2019) 39(3) *Oxford Journal of Legal Studies* 604, 619.

⁴⁵ Etherton (n 37).

⁴⁶ Kenny (n 44).

interest may be rooted in public and political pressure to afford other legislation more priority.⁴⁷ Despite this, consultation and engagement with stakeholders may assist in generating public interest in law reform by giving LRC reports more authority and legitimacy.⁴⁸ Notably, LRCs' capacity to confer with stakeholders distinguishes them from courts or other instruments of law reform, positioning them to make more balanced recommendations. This is invaluable as members of the community and Parliament can grasp how the recommendations would practically operate. Further, appreciating conflicting stakeholder views can address Parliament's political concerns as a nuanced report could engender bipartisan support. This could equally serve to give reports "legitimacy that they would otherwise have lacked".⁴⁹ This is supported by Lord Scarman who suggests that the consultation process stimulates interest in law reform.⁵⁰ The indirect impact of LRCs (as discussed above) is clear when considering the increase in public and parliamentary interest as it relates to implementation of LRC recommendations.

Conclusion

While government opposition, time pressures, and limited interest may limit the implementation of LRC reports, these barriers are not insurmountable. We argue that fear of partial implementation should not preclude LRCs from undertaking meaningful reform given that prospects of implementation can be increased through other means than selecting projects relating to the government's policy concerns. Namely, by engaging stakeholders to build legitimacy, LRCs can overcome obstacles of low parliamentary and public interest. Additionally, while framing recommendations to attract bipartisan support can risk inhibiting exhaustive reform, it can enhance the prospects of meaningful legislative implementation and plant the seeds for future reform.

Substantive Themes

Topic Selection

Process

Law reform commissions face a difficult balance in selecting topics for review, as they must reconcile statutory mandates with practical constraints.

The ALRC

For the ALRC, a reference from the Attorney-General is the sole source of work. This is noted by Hurlburt who expresses that the ALRC, established under its 1973 Act, is required to review the law 'with a view to the systematic development and reform of the law,' and can only act on topics formally

⁴⁷ Ibid 619-20.

⁴⁸ Ibid.

⁴⁹ Paul Mitchell, 'Strategies of the Early Law Commissions' in Matthew Dyson, James Lee and Shona W. Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, 2016) 31, 44.

⁵⁰ Leslie Scarman, 'The Law Commission' (1972) 1(1) *Anglo-American Law Review* 31, 36.



referred by the Attorney-General.⁵¹ Despite this, the ALRC can make suggestions for projects. It is unable to initiate inquiries on its own, but is able to recommend projects to the Attorney-General that it thinks are suitable for reform.⁵² After the Attorney-General chooses the reference and an inquiry has been assigned to the ALRC, the government has no capacity to direct the Commission on its performance, functions, findings or recommendations.⁵³ The typical law reform process of the ALRC is shown in *Figure 1*.

The Commission is also constrained by Australia's federal system. Under the *Constitution*, the Commonwealth is entitled to legislate only on certain topics. As such its advisory body (the ALRC) is limited to primarily dealing with Commonwealth law. The impact of this is that the Attorney-General can only refer matters to the ALRC which are within the scope of legislative power of the Commonwealth. The ALRC cannot conduct inquiries into areas of law that are solely the responsibility of specific states and territories. ALRC interviewees reported that there were difficulties in finding areas of law to investigate. This is since there was a sense that most of the major work in Commonwealth areas had already been reformed by the ALRC themselves. It has even been suggested that occasionally the Commission has been given 'make work' projects to keep it occupied.⁵⁴

Hence, although the Commission can make recommendations directed at achieving uniformity throughout Australia's States and Territories, federal constraints limit the ALRC's ability to recommend systematic and consistent law reforms.⁵⁵



*Figure 1: Typical Law Reform Process.*⁵⁶

⁵¹ Kathryn Cronin, 'Working on the Larger Canvas—Law Reform in a Federal System: Thoughts on Forty Years of the Australian Law Reform Commission' in Matthew Dyson, James Lee and Shona W Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, 2016) 55, 57.

⁵² *Ibid.*

⁵³ White (n 1) 340.

⁵⁴ White (n 1) 127.

⁵⁵ White (n 1), 49.

⁵⁶ See original in Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8(3) *Erasmus Law Review* 130, 136.

English and Scottish Law Commissions

The English and Scottish Law Commissions operate differently to the ALRC. It is only their programmes that require governmental approval and they are free to present such reports within those programmes as they think fit. These 'programmes' refer to a broad, approved agenda of topics for law reforms created by the English and Scottish Commissions.⁵⁷ Thus, White expresses that the English Commission has greater autonomy because it can initiate work on particular areas of law, whereas the Australian Commission must wait for a reference from its Government.⁵⁸

Practical Application

In practice, however, the difference between the approach taken by the ALRC compared to the English and Scottish Commissions does not appear very significant.⁵⁹ Generally the agenda of most Commissions is set reflexively, usually in response to one of three stimuli: expert suggestions, policy constituency like lobbying, or political pressures.⁶⁰ Project selection is an issue taken seriously by the Commissions and they remain cautious about areas of law to investigate. A register is kept of any potential projects suggested to the Commissions through consultation or any other way.⁶¹

Topics

The selection process has typically been described as doctrinal in focus, concentrating on established legal rules rather than broader social or policy considerations.

As such, certain institutions and processes – particularly those with significant political implications like the selection of judicial officers – rarely attract the attention of expert Law Reform Commissions because they are perceived as interfering with political matters.⁶² More technical or administrative processes by contrast, are less constrained. One example of this cautious approach is the English Law Commission, which has been noted to 'avoid the big topics' in favour of piecemeal reform.⁶³

Challenges

In Australia, one fundamental issue with project selection is that many problems in need of reform are either too contentious or too untouchable to secure Parliament's attention. This is expressed by Justice Kirby who labels these projects as either too 'hot' or 'cold'.⁶⁴ An example of an area of law that was 'too hot' and widely contested was the ALRC's report on Aboriginal Customary Law. This report sought to tackle the interface between the laws of the settlers and their descendants in Australia, and the laws of the indigenous peoples of the Australian continent. This topic proved extremely sensitive and hotly contested, resulting in no comprehensive response to the Commission's report. In comparison a 'too

⁵⁷ Marsh (n 3) 185.

⁵⁸ White (n 1) 38.

⁵⁹ Marsh (n 1) 187.

⁶⁰ MacDonald (n 11) 848-849.

⁶¹ White (n 1) 339.

⁶² MacDonald (n 11) 848.

⁶³ White (n 1) 12.

⁶⁴ Kirby (n25), 4.



cold' or untouchable example is a suggestion by the ALRC for one small aspect of bankruptcy law to be reformed. This recommendation has so far 'fallen on deaf ears' due to a lack of interest, failing to secure the appropriate attention by officials or parliamentary time.⁶⁵

In light of these challenges, effective law reform involves identifying projects that have particular characteristics. Selected projects must be suited to the Commissions and likely to lead to significant improvement in the law. They must also be able to attract enough government support which may involve continued funding and, in some instances, the provision of information or expertise. This is fundamental as it is only with sufficient government interest that selected projects stand a real possibility of implementation.⁶⁶

Recommendations

Moving forwards, Macdonald expresses that expert LRCs must alter their approach. Law comprises a complex combination of doctrines, procedures, institutions and practices. As such, the QLRC should not only question legal doctrine but also question procedure, institutional structure, practices and governance.⁶⁷ Overall the most influential reform activities go beyond incremental change. Tinkering with some principle of the common law or with some section of a statute does produce doctrinal change. However, deep and effective law reform changes the symbolic constructions by which law and its institutions are imagined and evaluated.⁶⁸

Consultation

Definitions and Impact

Consultation is 'the seeking of information, opinions, advice or ideas from an individual or group which is external to those making decisions about the content of a Commission's report'.⁶⁹ In other words, a LRC must invite or request comments from those that are not themselves involved in the decision-making process of the LRC. Consultation can range from surveys, interviews, working groups, roundtable discussions, or focus groups, but all emphasise the bottom-up gathering of perspectives.⁷⁰ Consultation processes are generally a wide invitation for public participation with a structured method for the process of collecting the statements.⁷¹ There are sometimes limited circumstances where the decision-making power is shared with a group of people. For example, the ALRC's report on Protection of Human Genetic Information was a joint report with Australian Government National Health and

⁶⁵ Kirby (n 25) 87.

⁶⁶ Kenny (n 44) 618.

⁶⁷ MacDonald (n 11) 856.

⁶⁸ MacDonald (n 11) 865.

⁶⁹ White (n 1) 55.

⁷⁰ Natalia Hanley et al., 'Improving the law reform process: Opportunities for empirical qualitative research?' (2016) 49(4) *Australian & New Zealand Journal of Criminology* 546, 563.

⁷¹ White (n 1) 59.

Medical Research Council,⁷² and this process is therefore not considered consultation, but a part of the decision-making process itself.⁷³

Stakeholder consultation is a vital aspect of the research conducted by different LRCs. Writing extracurricularly, Justice Kirby promotes consultation as of ‘immense value’ due to the participatory nature of the reform it produces.⁷⁴ Over time, consultation has become a standard part of decision making, particularly in the public sector context where consultation has now become ‘accepted without question’ as a standard part of the law reform process.⁷⁵ Under this community engagement consultation approach, the final recommendations in the report are often tied to this process,⁷⁶ but are unlikely to radically change the LRCs’ thinking.⁷⁷

Consultation is an invaluable aspect of the process. Consultation not only helps LRCs by directing their attention to issues they should attempt to address, but also produces ‘better reports’,⁷⁸ and bolsters the credibility and legitimacy of LRCs.⁷⁹ Some English courts have even referred to the value of consultation,⁸⁰ perhaps because judges feel they can give more weight to LRC reports if the recommendations reached were informed by extensive consultation.⁸¹ Since consultation involves a bottom-up approach, this process can counterbalance any potential agendas of organisations involved in law reform,⁸² and lends legitimacy to the final report. Further, consultation can help promote awareness of the work that LRCs do.⁸³ This ties into the importance of the indirect impacts of LRCs, since the additional publicity from consultation can spark further conversations into necessary areas of law reform.

There are various forms of consultation models. The English Law Commission is described by White in his PhD thesis as an *expert* model, where consultation is driven by emphasising engagement with those with expertise in the field.⁸⁴ Lawyers, therefore, often represent a large portion of those consulted on LC reform reports.⁸⁵ This model does not generally exclude those who wish to contribute, but the ‘intended target’ is consultees with expertise in the field of issue.⁸⁶ The ALRC by contrast, is described as an *inclusive* model.⁸⁷ The ALRC takes a broader approach to consultation, applying a participatory approach to law reform which includes members of the general public.⁸⁸ The participatory approach is informed by Justice Kirby, the first President of the ALRC, who believed that the law affects ordinary

⁷² Ibid 57.

⁷³ Ibid 57-8.

⁷⁴ Ibid 59.

⁷⁵ Ibid 116.

⁷⁶ Hutchinson (n 56) 136.

⁷⁷ White (n 1) 331.

⁷⁸ Ibid 294.

⁷⁹ Ibid 306.

⁸⁰ Ibid 307.

⁸¹ Ibid 307.

⁸² Hanley (n 70) 563.

⁸³ White (n 1) 310.

⁸⁴ Ibid 61.

⁸⁵ Ibid 61.

⁸⁶ Ibid 61.

⁸⁷ Ibid 62.

⁸⁸ Ibid 62.



people, and that not only those in the legal profession have a monopoly on wisdom.⁸⁹ The inclusive model, therefore, can be a more effective tool for engagement with the wider community and to gain a more diverse perspective beyond those designated with expert status. The ALRC does also employ expert methods where necessary, going as far as occasionally appointing someone specifically in charge of organising consultation for a project. For example, consulting ethnic minorities was particularly important for the ALRC's Multiculturalism and the Law Report, and this more inclusive consultation model was therefore used.⁹⁰

Limitations

Though fundamental and important, there are various issues associated with consultative processes. Consultation is often conducted through formal publications and discussion papers on the relevant topic, with calls for submissions and interviews being included in these papers.⁹¹ There is therefore scope for greater use of social media and informal calls for engagement to reach a wider group who may be interested in contributing to the consultation process. Further, many LRC Reports often merely provide a statement that submissions have received extensive consideration. There could therefore be lowered public engagement, understanding, and trust in the consultation process since many participants do not understand the extent to which their submissions were valuable for LRCs.⁹² Further, budgetary constraints impact the quality and extent of consultation that LRCs can achieve, since rigorous consultation is an expensive process.⁹³ LRCs with smaller budgets are also often lesser-known than their larger counterparts. Members of the public are generally more interested in consulting with more well-known bodies, contributing to a cyclical relationship of an inability to effectively and broadly consult, leading to lower-quality reports and less publicity.⁹⁴ There is the additional difficulty that consultation could be viewed as ineffective because stakeholders rarely reach a monolithic consensus on the topic.⁹⁵ We do not see this as a fundamental flaw of the consultation process, because this diversity in opinion is of great value to the consultation process and the quality of the final report. Ultimately, the greatest issues associated with consultation appear to be difficulties in engaging the community with consultation, and the budgetary constraints faced by LRCs.

⁸⁹ Ibid 118.

⁹⁰ Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC Report No 57) 14 April 1992.

⁹¹ Wendy Larcombe et al., 'Making Good Law: Research and Law Reform' (2015) 1 *Melbourne School of Government* 1, 7.

⁹² Martin Partington, 'The Relationship between Law Reform and Access to Justice: A Case Study – The Renting Homes Project' (2005) 23(1) *Windsor Yearbook of Access to Justice* 375.

⁹³ White (n 1) 140.

⁹⁴ Ibid.

⁹⁵ White (n 1) 20.

Resource Use

The QLRC and The ALRC

Resource use refers to two overarching ideas: firstly the types of sources including academic literature and journal articles with which LRCs engage when conducting research; and secondly the available budget that allows this research.

Kieran Tranter and Rodney Meyer, faculty of law at Griffith University, conducted a citation analysis on the use of journal articles by the QLRC in 2015.⁹⁶ The citation analysis followed 'counting and cataloguing the citations found in a text to determine the types of sources referenced and then analysing those sources in respect of class, frequency, local holdings, or other factors.'⁹⁷ Their methodology was not only about counting references but about looking at the connections between the work being cited and the work that is citing it.⁹⁸

The results of the citation analysis of the final reports of the QLRC between December 2001 and December 2011 found that an estimated 2.8% of their citations were journal articles.⁹⁹ Additionally, the journal articles were depicted as 'piecemeal and specific' suggesting that academic literature is not extensively used by the QLRC when carrying out law reform.¹⁰⁰ Based on these findings, Tranter and Meyer highlight two potential shortcomings in the QLRC's approach to law reform: a need for deeper engagement with academic scholarship and a risk that the resulting research lacks broader applicability to the issues under consideration.¹⁰¹

One of the underlying issues may be that QLRC's discretion in how to conduct its inquiries is extensive, as the Queensland Law Reform Commission Act 1968 does not require the QLRC to conduct inquiries in a specified manner in response to the Attorney-General's reference.¹⁰² This is set out under s 10(3) of the Queensland Law Reform Commission Act 1968, whereby the QLRC can 'hold and conduct such inquiries as it thinks fit, and inform itself on any matter in such manner as it thinks fit.'¹⁰³

Tranter and Meyer go on to say that the QLRC operates with limited resources, and its improved access to academic literature via digital platforms and its ability to appoint experts from outside the judiciary and legal profession indicate that it could make more sophisticated use of journal articles.¹⁰⁴ A second underlying reason for this, as identified by the findings of the citation analysis, is that the QLRC commonly focuses on lawyers' law reform. Lawyers' law reform is often depicted as having a narrow, black-letter focus, dealing with matters significant to specific segments of the profession but of limited relevance to the public.¹⁰⁵ In contrast, the ALRC is often observed to undertake social law reform, which addresses wide social, political, and economic issues and therefore attracts greater public interest and

⁹⁶ Kieran Tranter and Rodney Meyer, 'The Use of Journal Articles by the Queensland Law Reform Commission' (2015) 27(1) *Bond Law Review* 57, 59-60.

⁹⁷ *Ibid* 60.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* 57.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*.

¹⁰² *Ibid* 58.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid* 57-58.

¹⁰⁵ *Ibid* 73.



participation.¹⁰⁶ These approaches are best understood as ends of a spectrum rather than strict categories.¹⁰⁷

The general concern of Tranter and Meyer is that when the QLRC overlooks relevant material, 'the reports could be seen as based solely on the opinions of the QLRC'.¹⁰⁸ Although the citation analysis in this particular article centred on the QLRC, the study also examined a sample of ALRC final reports.¹⁰⁹ Its finding of a 'high citation of submissions' supported the ALRC's assertion that its law reform processes are characterised by a collaborative and consultative approach.¹¹⁰

A second study examined citation practices within ALRC final reports from 1992 to 2012.¹¹¹ The study found that submissions from the community were the most frequently cited sources, supporting the view that the ALRC has historically sought to situate its recommendations within the perspectives of the broader 'community' as a means of influencing the executive.¹¹² Conversely, similar to the QLRC, the ALRC made relatively limited references to academic sources.¹¹³ The overall position of the study is that the ALRC's law reform approach situates its recommendations within a broader network of legal and academic texts, connecting them to and supporting them with established sources.¹¹⁴

Budgetary Constraints

The second issue relating to resource use is that LRCs often appear to be driven by budgetary concerns. Roderick Macdonald, writing during a period of modern decline in Canadian Law Reform Commissions, attributed this downturn to 'shifting cultural tendencies'.¹¹⁵ He observed that the prevailing view in Canada was that LRCs were an unaffordable 'luxury'.¹¹⁶ Additionally, some have suggested that tension between the ALRC and government contributed to recent funding cuts and concerns arose that this undermines their independence.¹¹⁷

Another example of budget issues can be observed in the Northern Ireland Law Commission (NILC). The Commission technically remains in existence, as the Justice (Northern Ireland) Act 2002, which establishes the Commission, has not been repealed.¹¹⁸ However, it has been inactive since April 2014

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 71.

¹⁰⁹ Ibid 61.

¹¹⁰ Ibid.

¹¹¹ Kieran Tranter, 'Citation Practices of the Australian Law Reform Commission in Final Reports 1992-2012' (2015) 38(1) University of New South Wales Law Journal 323, 323.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid 324.

¹¹⁵ MacDonald (n 11) 831.

¹¹⁶ Ibid 833.

¹¹⁷ White (n 1) 145.

¹¹⁸ Neil Faris 'Law Commissions - what is the essence of their law reform role?' (2014) 2(1) *IALS Student Law Review - Special Issue: Law Reform and Child Protection* 52, 52.

and, while it continues to exist on paper, no longer functions or receives funding.¹¹⁹ No further announcements on the Commission are expected until the government finalises its budget, as its future may depend on whether space can be found in the budget.¹²⁰ The Justice Minister stated that law reform would be conducted 'in-house' within the Department of Justice for Northern Ireland when resources allow, rather than through an independent commission.¹²¹ However, the Department of Justice for Northern Ireland has been criticised for not fully recognising the significance of operational independence.¹²²

The New South Wales Law Reform Commission has also exemplified budgetary issues, particularly in 1988 – 1991, a period of economic downturn and the broader recession in the early 1990s.¹²³ The budget was significantly reduced and new matters were no longer referred to the commission, and full-time commissioners were not replaced, leaving the positions vacant. Eventually the government responded with fiscal reforms, spending cuts, and public sector restructuring, which gradually stabilised the budget and allowed for new references to resume despite the economic downturn.¹²⁴

Concluding Remarks

This literature review has demonstrated that while LRCs share common features of independence, structured purpose, and reliance on stakeholder consultation, the effectiveness of their work is shaped by both internal methodologies and external constraints. Topic selection remains a delicate balance between feasibility, political will, and the need for meaningful reform, while consultation processes provide essential legitimacy and ensure that recommendations are grounded in diverse perspectives. Resource use, including access to academic research and adequate funding, is central to the robustness of LRCs' work but continues to present challenges across jurisdictions. Ultimately, LRCs play a dual role. They can directly influence legislative reform where government support aligns, and they can also generate indirect but equally significant impacts by sparking debate and shifting community and judicial attitudes. While barriers to implementation persist, particularly due to government priorities and political sensitivities, the broader influence of LRCs underscores their enduring value as institutions of principled, evidence-based reform.

¹¹⁹ Ibid 54.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Handford (n 16) 513.

¹²⁴ Ibid.





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