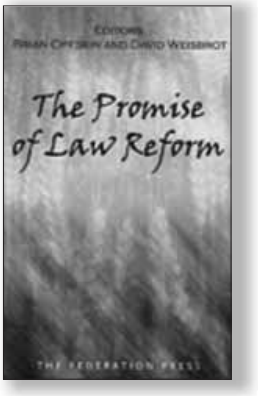
The Promise of Law Reform

Brian Opeskin & David Weisbrot (eds) | The Federation Press, 2005



Law reform commissions, that is to say, independent advisory bodies of experts engaged in a continuous process of law reform, began in their modern form in the 1960s and 1970s. The New South Wales Commission was established early, in 1967.

This book reproduces 30 diverse and instructive papers given to a symposium to celebrate the 30th anniversary of the Australian Law Reform Commission.

Several contributors to the present book mention a famous passage written by Professor Geoffrey Sawyer in 1970 in which he suggested that 'the whole body of law stood potentially in need of reform' and supported the existence of a permanent body of experts to consider reform continuously. It is possible to believe that some early enthusiasts felt that a LRC could be made responsible for all law reform but of course that could never have been. The job in a modern society is far too big for any single body.

With the exercise of almost unfettered political power Napoleon could direct the codification of the French civil law. However, in modern societies, as Professor David Weisbrot, President of the Australian Law Reform Commission acknowledges, law reform activity has become steadily more diffuse. Parliamentary committees, interdepartmental committees, policy divisions of government agencies, specialist councils and commissioners and even the Standing Committee of Attorneys General have entered the law reform lists.

By way of example the Uniform Rules Committee established under the *Civil Procedure Act 2005* – a taskforce of officials, practitioners and judicial officers chaired by Justice Hamilton – has done admirably well in its project to establish new common rules of court across all jurisdictions in NSW. The NSW Sexual Assault Offences Taskforce – including practitioners, officials and NGOs and chaired by Lloyd Babb, former director of the Criminal Law Review Division of the Attorney General's Department of NSW – has done exemplary work to establish new and principled practices and procedures to improve the treatment of complainants in sexual assault matters as well as significantly reform difficult areas of the law of sexual assault.

There does not appear indeed to be a compelling reason why this sort of extremely important law reform should particularly be carried out exclusively by a LRC. They are matters that can effectively be dealt with by practitioners at the workface carrying out their normal responsibilities. The future for LRCs for the most part lies elsewhere.

In her contribution to the present book Kate Warner, an academic with much experience in law reform commissions, suggests that their future survival 'is likely to depend on their ability to work on projects beyond matters of the technical law…that involve difficult and controversial issues of social policy, projects that no-one else will pursue'. Weisbrot suggests, consistently, that LRCs have a future role in monitoring, perhaps co-ordinating wider law reform activity, promoting harmonisation and complementarity of law in a federal system and inquiring into complex issues 'at the intersection of law and society'.

I have several more suggestions but these predictions certainly reflect recent experience in the Standing Committee of Attorneys General. They may usefully be read together with the contribution of Marcia Neave, chairperson of the Victorian LRC before her recent elevation to the Victorian Court of Appeal. She describes the increase in social law reform undertaken in Australia in recent years by LRCs around Australia and also the consultation with the community that has been fundamental to it. Laws about, say, de facto relationships or human genetic information are best drafted with the assistance of specialist research and consultation in the community.

In another paper of particular relevance, Peter Hennessy, Executive Director of the NSWLRC explains the benefit of the independent status that distinguishes LRCs from other agencies with law reform responsibilities. They have been free to develop new methodologies. They may conduct long term projects independent of change of the attorney general or government. Above all, their independence permits them to attract the voluntary service of active judges and other scholars of the highest order who may have difficulties in joining a government committee. In turn, a LRC speaks with the authority of universally accepted integrity. It is that authority which makes their advice in difficult areas of legal and social policy valuable to government and to everybody else, whether it is accepted or not.

Several contributions to the present book point out that the ALRC's seminal report on Aboriginal customary law, exactly the kind of multidisciplinary project that will remain important into the future, was never formally implemented. Nevertheless it has been widely influential, including possibly with the majority of the High Court in *Mabo No 2*. Similarly, although I did not accept the recommendations of Report 111 of the NSWLRC dealing with majority verdicts – after some difficult deliberations I accepted the contrary view also held by the chief magistrate and the chief judge of the District Court – I continue to seek advice from the NSWLRC in the course of drafting the new jury legislation.

It is an uncomfortable truth that the methods that LRCs properly bring to long term inquiries – involving regular meetings of commissioners, painstakingly conducted consultations and prolonged intellectual discourse – often cannot provide information quickly enough to meet the needs of our media-charged, contemporary political environment in an area like criminal law reform.

It is futile to suggest that governments can wait years for reform recommendations about matters that are being subjected to intense and daily media commentary. It is undeniable, on the other hand, that the attorney general could from time to time benefit from advice on such matters from the NSWLRC if it were immediately available.

The NSWLRC is indeed now working to establish the capacity to complement the advice that I receive from time to time from the Attorney General's Department, the DPP, Legal Aid Commission and the Public Defender's Office with immediate comment that reflects the experience and knowledge of the commissioners about criminal legislation. Indeed, I would like to see the NSWLRC more generally extend its ability to provide fast, and of course detached, advice on legal policy issues as they arise without the need for highly formal terms of reference.

Advice given in this form is by its nature contestable, part of a policy dialogue, responsive to events as they arise. Such flexibility may be adapted however, to establish a permanent reference for criminal law policy advice.

The NSW Sentencing Council, for example, was established by the government to advise the attorney general on sentencing related law reform issues, to monitor and report on sentencing trends and practices and to prepare research papers or reports on particular subjects concerning sentencing. Part of the council's charter is to undertake extensive consultation, enabling the wider community to make a contribution to the development of sentencing law and practice in NSW.

The Sentencing Council operates in a manner not dissimilar from that of LRCs – its emphasis is upon impartial research and broad consultation. Furthermore, like the LRC, the council is chaired by a senior former judicial officer and its members are appointed on the basis of specific experience or expertise in prosecution and defence, in Aboriginal justice matters and in victims of crime issues. The representative membership is similar to the range of experience sought in law reform commissioners appointed to particular references.

The strength of the council, like the LRC, is the authority which comes from an acceptance of its impartiality in controversial circumstances.

Given these synergies in approach and philosophy, a strong case exists for bringing the functions of the Sentencing Council into the LRC structure, while still retaining its specialist nature by doing so by way of an individual, standing reference to the commission.

The contribution of LRCs to legal affairs in this country, as the present book makes clear, has been substantial. Many of the most significant law reforms and legal debates of the last thirty years would have been impossible without their contribution. Government and the community can only benefit into the future from LRCs which undertake new roles within a more flexible framework, which continues to maintain their precious independence.

Reviewed by the Hon Bob Debus MP, Attorney General of New South Wales.