

# THE BIRTH AND REBIRTH OF LAW REFORM AGENCIES

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## Introduction

Institutional law reform is, as Justice Michael Kirby has reminded us, ‘a rational solution to a central dilemma of law itself – how to maintain the order and predictability in the law whilst making sure that it constantly evolves, changes and adapts to new times’.<sup>1</sup> Given this obvious rationale for the existence of law reform commissions, it is surprising that so many of these agencies have led a perilous existence over the past 20 years.

This paper charts the rise and fall of institutional law reform in many Commonwealth countries from the early days in the 1960s, to the troubled 1980s and 90s, and finally to the days of revival (for some) in the first decade of the 21<sup>st</sup> century. I describe the sometimes volatile relationship between law reform agencies and government, with an eye to lessons that may be learnt by reflecting upon the cycles of institutional law reform.

Because the Australian state of Victoria provides such an interesting case study, the evolution of institutional law reform in that jurisdiction is the central focus of the paper. The Victorian experience will be described, largely, through the words of those people who participated in the demise and rebirth of institutional law reform in that state.

## Brief historical overview

### *1. The Birth of Law Reform Agencies*

Early law reform bodies had one feature in common – all were established for a limited time, or for a limited purpose, or both.<sup>2</sup> An important step was taken in England in the 1930s when the first permanent part time law reform agency, the Law Revision Committee, was created. The first permanent Australian bodies, comprised largely of judges, were established in Tasmania and Victoria in the 1940s. These bodies were unique in that they were established, not for a limited time or purpose, but because ‘...the whole body of the law stood potentially in need of reform, and there should be a standing body of appropriate professional experts to consider reforms continuously’.<sup>3</sup>

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<sup>1</sup> Justice MD Kirby, ‘More Promises of Law Reform – an Antipodean Reflection’ (Speech delivered at the Law Reform Commission of Ireland, Dublin, 17 July 2007) 33.

<sup>2</sup> William H. Hurlburt, QC, *Law Reform Commissions in the United Kingdom, Australia and Canada*, (1996) 36.

<sup>3</sup> *Ibid* 37.

Their primary function, however, was to revise and consolidate the law rather than to deal with matters of policy.<sup>4</sup>

Law reform was a plank in the UK Labour Party's election platform in 1964.<sup>5</sup> By June 1965, both the Law Commission of England and Wales and the Scottish Law Commissions were established under Lord Scarman.<sup>6</sup> These commissions were the first permanent, institutional law reform bodies staffed by fulltime commissioners and supported by fulltime research and administrative staff.<sup>7</sup> The Labour party's law reform policy '...recognised that government resources could not achieve comprehensive law reform and recognised the importance of law reform being conducted independently of the political agenda of the government of the day'.<sup>8</sup>

The establishment of the UK commissions increased the pressure to establish similar bodies in Australia. By 1966, the first modern law reform commission in Australia – the New South Wales Law Reform Commission – had been established.<sup>9</sup> Other states and territories soon followed: *Law Reform Commission Act 1968* (Qld), *Law Reform Commission Ordinance 1971* (ACT), *Law Reform Commission Act 1972* (WA), and *Law Reform Commission Act 1974* (Tas).<sup>10</sup> In Victoria, the statutory office of the Law Reform Commissioner was established in 1974, but it was not until 1984 that a commission was created.<sup>11</sup>

In 1969, the Australian Labour Party included a proposal for the establishment of a national law reform commission in its election platform.<sup>12</sup> The Whitlam Labor Government, which came to power in 1972, established the Australian Law Reform Commission (ALRC) under the leadership of Justice Michael Kirby in 1975.<sup>13</sup> Debate surrounding the Bill to establish the national commission focused on the need for

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<sup>4</sup> FC O'Brien, 'The Victorian Chief Justice's Law Reform Committee' (1971) 8 *Melbourne University Law Review* 440, 445.

<sup>5</sup> Hurlburt, above n2, 53.

<sup>6</sup> The commissions were established under the *Law Commissions Act 1965* (UK). These Commissions still exist in 2008. See, eg. Scottish Law Reform Commission, *Scottish Law Reform Commission, Promoting Law Reform* <[www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)> at 8 September 2008 and Law Commission, *Law Commission, Reforming the Law*, <[www.lawcom.gov.uk](http://www.lawcom.gov.uk)> at 8 September 2008.

<sup>7</sup> Michael Tilbury, 'A History of Law Reform in Australia' in Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (2005) 3, 13.

<sup>8</sup> Victorian Law Reform Commission, *Law Reform – History*, <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/About+Us/History/>> at 4 August 2008.

<sup>9</sup> The Commission commenced operation in January 1966 but was given legislative footing in 1967 by the *Law Reform Commission Act 1967* (NSW). See Tilbury, above n7, 12.

<sup>10</sup> South Australia and the Northern Territory do not have standing law reform commissions but both formed law reform committees in 1968 and 1976 respectively. See, generally, Hurlburt, above n2, 104 and Peter Hennessy, 'Independence and Accountability of Law Reform Agencies' in Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (2005), 72, 73. The ACT Law Reform Commission operated from 1971-1976 after which the ALRC assumed responsibility for law reform in the ACT. See Dr Peter Handford, 'The Changing Face of Law Reform' (1997) 73 *The Australian Law Journal* 503, 506.

<sup>11</sup> *Law Reform Commission Act 1984* (Vic). In Victoria, the Labour Party's 1983 election platform had foreshadowed more emphasis on law reform and had called for a new law reform agency. Premier Cain blamed the previous government for an unprofessional and uncommitted approach to law reform. See Hurlburt, above n2, 162.

<sup>12</sup> Hurlburt, above n2, 107.

<sup>13</sup> Handford, above n10, 505.

uniformity across the states and territories, as well as the Government's responsibility to ensure that the law reflected current needs and values.<sup>14</sup>

Other current and former Commonwealth countries followed the institutional law reform trend. In Canada, the new liberal government established a national law reform commission in 1970. By the mid 1970s, most of the provinces had a standing law reform agency.<sup>15</sup> South Pacific countries soon followed. Law reform agencies were created in Fiji, Papua New Guinea and the Solomon Islands.<sup>16</sup> New Zealand established a Law Commission in 1985.<sup>17</sup> Law reform bodies were also established in the Bahamas, Bangladesh, Bermuda, Cyprus, Dominica, the Gambia, Ghana, Hong Kong, India, Ireland, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Namibia, Nigeria, Northern Ireland, Pakistan, Sierra Leone, South Africa, Sri Lanka, Tanzania, Tonga, Trinidad and Tobago, Uganda, Zambia and Zimbabwe.<sup>18</sup>

The proliferation of law reform bodies throughout the common law world '...arose out of the realization that the increasing demands of law reform in a modern society could not longer be met by the ad hoc, part-time efforts of volunteers, no matter how capable, well-intentioned, or enthusiastic'.<sup>19</sup>

## 2. *The Golden Age of Law Reform*

Justice Michael Kirby labelled the 1960s and 70s the 'golden age' of law reform.<sup>20</sup> The social, political and legal factors of the time supported the establishment of permanent law reform bodies. Public debate around legal issues was prominent.<sup>21</sup> These were times of prosperity, optimism and 'big government'. Many people had confidence in the capacity of government to bring about social change and solve social problems by

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<sup>14</sup> Professor Marcia Neave, *Law Reform in the 21<sup>st</sup> Century – Some Challenges for the Future* (2001) Victorian Law Reform Commission <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches>> at 1 August 2008.

<sup>15</sup> New Brunswick did not create a standing law reform body but created a law reform branch within the Department of Justice in 1971. There are also no permanent law reform agencies in the three territories of Yukon, Northwest Territories and Nunavut. See Gavin Murphy, *Law Reform Agencies* (2005) Department of Justice of Canada <<http://www.justice.gc.ca/eng/az/asp>> as at 6 May 2008, 95.

<sup>16</sup> *Fiji Law Reform Commission Act 1979*, *Law Reform Commission Act (Solomon Islands)*, *Law Reform Commission Act 1975* (Papua New Guinea). See discussion in, Guy Powles, 'Law Reform in Pacific Island States' in Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (2005), 404, 415. Both the Fiji Law Reform Commission and Papua New Guinea Law Reform Commission (now known as Papua New Guinea Constitutional and Law Reform Commission) remain active. See, Fiji Law Reform Commission *Law Reform* <<http://www.lawreform.gov.fj/common/Default.aspx>> at 8 September 2008 and Papua New Guinea Constitutional and Law Reform Commission, *Latest News* <<http://www.clrc.gov.pg/>> at 8 September 2008. The Constitutional Review Commission and the Law Reform Commission merged in 2005 to become the Papua New Guinea Constitutional and Law Reform Commission. More recently, commissions were established in Samoa and Vanuatu however, the Vanuatu Commission has never been constituted and the Samoa Commission has never been formalized. See, Journal of South Pacific Law, *Law Reform in the South Pacific* (2005) Journal of South Pacific Law, <<http://www.pacii.org/journals/fjSPL/vol09no1/3.shtml>> at 6 August 2008.

<sup>17</sup> *Law Commission Act 1985* (NZ).

<sup>18</sup> Handford, above n10, 506.

<sup>19</sup> Law Reform Commission of Nova Scotia, *A Continuing Need for Law Reform: The Case for the Law Reform Commission of Nova Scotia*, (2001) 1.

<sup>20</sup> Hurlburt, above n2, 117. See also Tilbury, above n7, 15 and Professor Marcia Neave, *Law reform in the Age of Managerialism* (2002) <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches>> at 1 August 2008.

<sup>21</sup> Professor Marcia Neave 'Institutional Law Reform: Back to the Future?' (2003) *The Law Commission of Sri Lanka Commemorative Journal*, 59, 60.

reforming the law.<sup>22</sup> At the same time, there was increasing recognition of the need to update, modernise and localise the law.<sup>23</sup> In Australia, and no doubt the rest of the Commonwealth, lawyers were beginning to rely less on English law as a model for domestic legislation and to search more for distinctively indigenous solutions to legal problems.<sup>24</sup>

Many law reform bodies, such as the ALRC in Australia and the Law Commission in New Zealand, were established by newly elected, left of centre governments voted in after long periods of conservative rule.<sup>25</sup> According to Professor David Weisbrot, law reform commissions were:

...established in the 1960s with the aspiration of being socially transformative. The idea was that commissions would study socio-legal problems involving discrimination and disadvantage and propose laws that would be implemented by progressive governments...<sup>26</sup>

The legal and political climate of the era was conducive to the “rationalising project of institutional law reform”<sup>27</sup> and there was also a growing sentiment in the community that laws and legal institutions should reflect current conditions and community attitudes.<sup>28</sup> For this reason, law reform commissions began handling broad social policy and legal issues that ‘...crossed the boundaries between ethics, science and the law’.<sup>29</sup> No longer was law reform conceptualised as dealing only with ‘lawyers’ law’.<sup>30</sup> It represented a new phase in law reform history:

Until that time, work by state law reform committees had focused largely on aspects of ‘black letter law’, which were seen to be the sole province of judges and lawyers. However, the mood of the community had begun to change, demanding more opportunities for direct participation in the democratic process, and greater accountability and transparency of public institutions.<sup>31</sup>

Tackling social and legal issues that had complex moral and ethical dimensions resulted in changes to approaches and methodologies. Commissions began to undertake interdisciplinary, empirical and qualitative studies to understand how the law was working in

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> For example, the establishment of the ALRC was a proposal by Lionel Murphy, Attorney-General to the Whitlam Labour government. The New Zealand labour party included in its election manifesto the establishment of a law reform agency and after elected, the Bill and commission were introduced (and the Bill passed). See Rt. Hon Sir Geoffrey Palmer, *Evaluation of the Law Commission*, Report for the Associate Minister of Justice and Attorney-General Hon. Margaret Wilson (2000) 32. This also happened at the state level in Australia. The Labor governments of Tonkin (WA), Reece (Tas) and Cain (Vic) all established law reform commissions. See, Professor Marcia Neave, above n21, 60.

<sup>26</sup> Prof David Weisbrot, ‘The Historical Necessity of Law Reform’ (Paper presented at the Alex Castles Memorial Lecture in Australian Legal History, Flinders University Law School, 24 August 2006) 14.

<sup>27</sup> Roderick A. Macdonald, ‘Recommissioning Law Reform’ (1997) 35 *Alberta Law Review* 848, 845.

<sup>28</sup> Tilbury, above n7, 19.

<sup>29</sup> For example, the New South Wales Law Reform Commission produced reports in relation to De Facto Relationships (1983); Artificial Conception: Human Artificial Insemination (1986); Artificial Conception: In Vitro Fertilization (1988) and Artificial Conception: Surrogate Motherhood (1988). The ALRC produced reports on Alcohol, drugs and driving (1976); Human Tissue Transplants (1977); Child Welfare (1981); Complaints against Police (1978); Domestic Violence (1986); Privacy (1983) and Aboriginal Customary Laws (1986).

<sup>30</sup> Tilbury, above n7, 14.

<sup>31</sup> Prof David Weisbrot, *Comments from the President on 30 years of reform* (2005) Australian Law Reform Commission <<http://www.alrc.gov.au/events/events/30.htm>> at 1 August 2008.

practice.<sup>32</sup> At the ALRC, Justice Michael Kirby pioneered what are now standard law reform approaches in Australia, such as the appointment of expert consultants, publication of discussion papers, conducting public hearings and consultations, and utilising the media to promote the cause of law reform.<sup>33</sup>

### 3. *The fall*

In the decades following the creation of so many commissions, institutional law reform seemed assured of a successful future. In 1985, Ronald Sackville boldly wrote that ‘the formative stages of the new era of law reform have passed and the agencies have gained an apparently secure place in the policy-making structure’.<sup>34</sup> Yet, only a few years later it was clear that government support for standing law reform commissions was declining in many places. Institutional law reform began to unravel, perhaps because it no longer reflected mainstream political ideology:

The law reform commissions created between 1966 and 1984 were, after all, the product of a political era of welfare liberalism. They had yet to confront the present neo-liberal era, with its emphasis on economic efficiency, small government, government by contract, and the application to the public sector of management techniques developed in the private sector.<sup>35</sup>

The first chairperson of the Victorian Law Reform Commission, Justice Marcia Neave, observed: ‘...the golden age of law reform was coming to an end and survival was becoming a major challenge for institutional law reform bodies.’<sup>36</sup>

Many commissions were abolished,<sup>37</sup> downsized, restructured, or ceased to operate.<sup>38</sup> Even those commissions which survived were placed under significant pressure by comprehensive reviews and assessments of their performance.<sup>39</sup>

## Trends in law reform popularity

### 1. *Conservative governments*

Just as the rise of institutional law reform in the 1960s and 70s reflected left-of-centre government initiatives, the demise of many commissions was the product of conservative government reform. No doubt there is deep symbolic value in abolishing an organisation established by one’s political opponents to be in the vanguard of social reform. Axing the

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<sup>32</sup> Neave, above n21, 62.

<sup>33</sup> Tilbury, above n7, 14.

<sup>34</sup> Handford, above n10, 507.

<sup>35</sup> Tilbury, above n7, 15.

<sup>36</sup> Neave, above n21, 63.

<sup>37</sup> Tasmanian Law Reform Commission 1987, Prince Edward Island Law Reform Commission 1989 (Funding was withdrawn in 1983, founding statute repealed in 1989), Victorian Law Reform Commission 1992, Law Reform Commission of Canada 1992, Newfoundland Law Reform Commission 1992 (the Minister for Finance announced the withdrawal of funding), Ontario Law Reform Commission 1996, British Columbia Law Reform Commission 1997.

<sup>38</sup> Nova Scotia Advisory Commission 1981, Law Reform Committee of South Australia 1987, Manitoba Law Reform Commission 1987, New South Wales Law Reform Commission 1988, Western Australia Law Reform (between 1993-1995).

<sup>39</sup> For example, the ALRC underwent a parliamentary inquiry assessing its performance and effectiveness however the inquiry unanimously recommended the commission continue. See Australian Law Reform Commission, *Twenty Years of Law Reform, Volume Two* (1995) 14.

law reform commission is an emphatic way of demonstrating that a new group of people with a different ideology has come to power.

Much changed in Australia in the late 1980s and early 1990s. Conservative governments in Western Australia, Tasmania and New South Wales made budgetary cuts that reduced the size of their law reform commissions. In WA, a new government came to power in 1993 and, by 1995, the WA commission had been reduced to one commissioner.<sup>40</sup> In New South Wales the new conservative government elected in 1988 reduced the NSW Law Reform Commission's staff and overall funding. During the Commission's 'difficult years', its budget was drastically reduced, no new matters were referred to it, and full-time commissioners were not replaced as positions fell vacant.<sup>41</sup> The Tasmanian commission was also abolished in 1987 by a conservative government.<sup>42</sup>

In Canada, the Progressive Conservative federal government abolished the Law Reform Commission of Canada in 1992 stating that the cut was necessary to eliminate duplication and reduce expenditures of the state.<sup>43</sup> The Ontario commission was also abolished in 1996 by a progressive conservative government implementing whole-of-government cuts.<sup>44</sup>

Rebirth occurred a few years later when the Law Commission of Canada was created by a re-elected Liberal government in 1997.<sup>45</sup> While smaller and leaner than its predecessor, it had a more ambitious programme. The new commission was required to adopt a multidisciplinary, long-term approach focussed on social issues and stimulating critical debate.<sup>46</sup>

Just last year the Law Commission of Canada was, for a second time, abolished by the federal government. The government announced the commission's funding would be withdrawn in September 2006, although, it had not yet repealed the *Law Commission of Canada Act*.<sup>47</sup> This step was part of new government cuts on 'wasteful programs' aimed at reducing government debt.<sup>48</sup> The Government claimed the work of the commission

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<sup>40</sup> The mid-1990s saw a weakening in governmental support for the Law Reform Commission of Western Australia. See, Ralph Simmonds, 'Professional and Private Bodies' in Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (2005) 261, 262. The Commission was eventually restructured in 1997 and reduced to one full-time staff member. All the writing and research is now contracted out to expert consultants. See Carolyn Jenkins, 'Law Reform Commissions: Is there a Place for the Principled Study of Criminal Law Issues?' (Paper presented at the International Society for the Reform of Criminal Law 15<sup>th</sup> International Conference, 29 August 2001) 1. Although the downsizing of the commission was under a liberal government, the previous Labor government had also seriously neglected the commission. See discussion in Handford, above n10, at 513.

<sup>41</sup> Handford, above n10, 511.

<sup>42</sup> Ibid 512.

<sup>43</sup> Murphy, above n15, 10-11, 90-91.

<sup>44</sup> The Ontario Law Reform Commission was amongst 22 bodies selected for abolition. Handford, above n10, 515.

<sup>45</sup> Murphy, above n15, 11. The Commission was formed under the *Law Commission of Canada Act*.

<sup>46</sup> Macdonald, 'Law Reform and its Agencies' (2000) 79 *The Canadian Bar Review*, 99, 99-101. The creation of a new law reform body at the federal level was not unanimously supported. See Murphy, above n15, 11. This may have foreshadowed the abolishment of Law Commission of Canada again in 2006.

<sup>47</sup> Evidence to Standing Committee on Justice and Human Rights, Parliament of Canada, Ottawa, November 1, 2006 (Mr. Yves Le Bouthillier, President, Law Commission of Canada) <<http://cmte.parl.gc.ca>> at 8 August 2008.

<sup>48</sup> Department of Finance Canada, 'Canada's New Government cuts wasteful programs, refocuses spending on priorities, achieves major debt reduction as promised' (News Release, 25 September 2006) <<http://www.fin.gc.ca/news06/06-047e.html>> at 8 August 2008. The Law Commission of Canada's predecessor, the Law Reform Commission of Canada was also eliminated by a conservative government

could be achieved through the Department of Justice or the Canadian Bar Association. Those opposed to the funding withdrawal claimed the cuts were more ideological than a cost saving exercise.<sup>49</sup> Sceptics stated the cuts were ‘...intensely ideological, aimed at eliminating agencies and programs that are at odds with the political philosophy of the governing party’.<sup>50</sup>

The Canadian Bar Association opposed the cuts.<sup>51</sup> Parliamentary debate centred on claims that the Canadian Bar Association and the Department of Justice would not be able to replace of the Commission<sup>52</sup> and the lack of transparency by the government when funding was withdrawn. The outgoing president also stated:

Canada will now have the peculiar distinction to have eliminated a federal law reform agency for a second time in 15 years. The impact of this decision is that Canada is distancing itself from the model adopted by other countries such as the United Kingdom, Australia, New Zealand, Ireland and some 30 others.<sup>53</sup>

Those in support of the decision stated that:

Everything that the Law Commission is providing is already done elsewhere. There is also a difference in accountability. If you have the Frontier Centre for Public Policy doing research, it is accountable to its supporters and its donors. If it's not producing quality research, then the donors are not going to keep giving it money. For this program, however, there is no accountability.<sup>54</sup>

During parliamentary debates some legislators suggested that the primary reason for the withdrawal of funding was ideological:

Another part of the mission of this group is to recommend improvements in the law. Who could be against that? Nobody. But not everybody is agreed on what constitutes an improvement. Not everybody has a similar vision, a similar perspective.

It's very easy to say that the Law Commission recommends improvements, but not everybody will agree on what constitutes an improvement. Looking at some of the previous recommendations of the Law Commission and its predecessor, not everybody would agree that a law to allow abortion on demand is an improvement. Some would think it is, some would think it's not. Not everybody would agree that eliminating incest as a crime is an improvement. Some would think it is, some would not. Lowering the age of consent from 18 down to 14, decriminalizing prostitution,

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funding cut in 1996 concerned with fiscal management and ‘waste reduction’, see Murphy, above n15, 10-11; 90-91.

<sup>49</sup> Steven Chase, ‘Liberal programs long loathed by Tories get axe despite government’s big surplus’, *The Globe and Mail* <<http://www.urbantoronto.ca/archive/index.php/t-74.html>> at 6 August 2008.

<sup>50</sup> John Ibbitson, ‘Fatal cuts to law panel deeply ideological’ *The Globe and Mail* (28 September 2006) in Shauna Labman, *Pulling the Plug on Political Publishing: The Closure of the Law Commission of Canada* University of British Columbia <<http://wiki.elearning.ubc.ca/ShaulaLabman>> at 6 August 2008.

<sup>51</sup> The Canadian Bar Association, ‘CBA decries Cuts to Court Challenges Program and Law Commission of Canada’, *Canadian Bar Association*, September 26, 2006 <[http://www.cba.org/CBA/News/2006\\_Releases/2006-09-26\\_cuts.aspx](http://www.cba.org/CBA/News/2006_Releases/2006-09-26_cuts.aspx) at 7 August 2008> at 7 August 2008.

<sup>52</sup> Evidence to Standing Committee on Justice and Human Rights, Parliament of Canada, Ottawa, November 1, 2006 (Ms. Nathalie Des Rosiers, Dean, Faculty of Law, Civil Law, Ottawa University, as an individual) <<http://cmte.parl.gc.ca>> 7 August 2008.

<sup>53</sup> Evidence to Standing Committee on Justice and Human Rights, Parliament of Canada, Ottawa, November 1, 2006 (Mr. Yves Le Bouthillier, President, Law Commission of Canada) <<http://cmte.parl.gc.ca>> 7 August 2008.

<sup>54</sup> Evidence to Standing Committee on Justice and Human Rights, Parliament of Canada, Ottawa, November 1, 2006 (Mr. John Carpay, Executive Directeur, Canadian Constitution Foundation). <<http://cmte.parl.gc.ca>> 7 August 2008.

replacement marriage with registration, and changing the definition of marriage are all things that some people would regard as improvements, while other people would not. For these reasons, I think it's a very wise move to end the funding for the Law Commission of Canada...<sup>55</sup>

Institutional law reform appears to be persevering against the odds at the provincial level in Canada. The following agencies are currently active; the British Columbia Law Institute, the Alberta Law Reform Institute, the Law Reform Commission of Saskatchewan,<sup>56</sup> the Law Reform Commission of Nova Scotia<sup>57</sup> and the Manitoba Law Reform Commission.<sup>58</sup>

Although the New Zealand Law Commission underwent a comprehensive review in 2000, government support for the commission was revitalised in 2005. The government announced in response to the review that it had improved the implementation record with the claim that 53 out of 71 commission reports had contributed to, or were currently contributing to, the Government's policy or legislative programme.<sup>59</sup> In July 2007, the Prime Minister announced a new system for giving references to the Law Commission and for responding to Commission reports.<sup>60</sup>

## 2. *The 'crowded field' of law reform*

The dramatic changes in the public sector since the 1960s and 70s mean that law reform agencies now operate in a significantly different environment.<sup>61</sup> They no longer have a monopoly over law reform activities:

Commissions now face competition from a wide range of bodies which advise government on law and social policy reform including parliamentary committees, policy units within government departments, departmental and inter-departmental committees, Royal Commissions, standing committees of experts established to deal with particular areas of the law, ad hoc committees established to deal with a particular problem and private consultancy firms.<sup>62</sup>

Along with the growing field of law reform 'experts', there has been a diffusion of law reform methodology throughout the public sector: '...instead of referring a law reform problem to an agency with the specialist skills to handle it, government bodies

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<sup>55</sup> Evidence to Standing Committee on Justice and Human Rights, Parliament of Canada, Ottawa, November 1, 2006 (Mr. John Carpay, Executive Directeur, Canadian Constitution Foundation) <<http://cmte.parl.gc.ca>> 7 August 2008.

<sup>56</sup> See, Law Reform Commission of Saskatchewan, *About the Commission* <<http://sklr.sasktelwebhosting.com/>> at 8 September 2008; the British Columbia Law Institute, <<http://www.bcli.org/>> at 8 September 2008 and Alberta Law Reform Institute, *Recent News* <<http://www.law.ualberta.ca/alri/>> at 8 September 2008.

<sup>57</sup> See Law Reform Commission of Nova Scotia, *Introduction* <<http://www.lawreform.ns.ca/introduction.htm>> at 8 September 2008. The Law Reform Commission of Nova Scotia was established in 1990 to replace to The Law Reform Advisory Commission which had ceased operations in 1981. Murphy, above n15, 19. Despite this, government support was withdrawn in 2001, only to be reinstated again in 2004.

<sup>58</sup> Manitoba Law Reform Commission, *Law Reform Commission* <<http://www.gov.mb.ca/justice/mlrc/>> at 8 September 2008.

<sup>59</sup> Minister Responsible for the Law Commission, *Briefing on the Law Commission October 2005* (2005), Government of New Zealand <[www.govt.nz](http://www.govt.nz)> at 19 June 2008.

<sup>60</sup> Rt Hon Helen Clark, 'Address at Book Launch of Reflections of the New Zealand Law Commission, Papers from the 20<sup>th</sup> Anniversary Seminar' (Speech delivered at Book Launch of Reflections of the New Zealand Law Commission, Papers from the 20<sup>th</sup> Anniversary Seminar, Wellington, 24 July 2007) 4.

<sup>61</sup> There have been major changes to the government sector and public sector management since the 1980s. See, eg, Hennessy, above n10, 74-75.

<sup>62</sup> Neave, above n21, 351.

increasingly, in Australia at any rate, want to carry out their own inquiries, adopting law reform methods'.<sup>63</sup>

## The Victorian Experience

Institutional law reform commenced in Victoria in 1944 with the establishment of the Chief Justice's Law Reform Committee. In 1974, the Liberal government created the statutory office of Law Reform Commissioner. A decade later, the Cain Labor government legislated for a law reform commission.

### 1. Abolition

When the Liberal government came to power in Victoria in 1992, it acted swiftly to abolish the Law Reform Commission of Victoria which had been in existence for only eight years. Within a month of being elected, the Kennett government introduced a bill to close down the Commission. The reasons given for the demise of the Commission were its lack of independence and its expense. In her second reading speech, the Attorney-General, Mrs Jan Wade, was forthright in her criticisms of the Commission. She said:

It is widely acknowledged that the Law Reform Commission has been, in general terms, a failure. In fact it is another of the former government's grandiose and expensive experiments that has failed to deliver the goods, while absorbing a great many scarce resources. There have been two chief failures on the part of the commission.

The first is that it has not maintained its independence from government and, indeed, has shown no real interest in doing so. It must be remembered that one of the chief functions of a Law Reform Commission is not merely to make sensible suggestions for legal reform, but to do so as an independent voice, at arm's length from government. Governments are perfectly capable of thinking up changes to the law without a Law Reform Commission: what makes such a body potentially valuable is its theoretical capacity to introduce a separate and critical note in debates over legislative reform.

Regrettably, however, the Victorian Law Reform Commission has too often operated less as an independent statutory authority than as a loyal branch of the Attorney-General's office...

Given that the commission has failed in its fundamental task of providing an independent voice of law reform, it has been an expensive failure... The revised budget, established in August this year, was \$1.499 million, a great deal of money to spend on a body that was, after all, failing to fulfil its most basic responsibility of providing an independent source of proposals concerning law reform.<sup>64</sup>

The Attorney-General concluded her criticisms of the Commission by saying:

All in all, the Victorian Law Reform Commission has been an expensive, self-indulgent servant of government and its abolition should be a matter of considerable satisfaction to the economically burdened people of Victoria.<sup>65</sup>

In response, the opposition challenged the Attorney-General's reasons for the demise of the Commission:

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<sup>63</sup> Handford, above n10, 516.

<sup>64</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 November 1992, 550 (Jan Wade)

<sup>65</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 November 1992, 552 (Jan Wade)

Her motivation for abolishing the commission is extremely poor. No evidence has been given to me or the community to justify the decision. There is an ongoing view that the Attorney-General does not like certain people involved with the Law Reform Commission. That dates back to June 1985 when the current chairman of the commission dismissed her for whatever reasons from the position she then held and she was off to the Equal Opportunity Board. Since becoming the Attorney-General she wasted no time putting into effect her payback. Unfortunately, the people will suffer because of this venal, vindictive, unnecessary act.<sup>66</sup>

The decision to abolish the Commission was described as vindictive and as a way of eradicating an independent voice in the community.<sup>67</sup> Others suggested that ‘...the real reason for the Kennett Government’s abolition of the VLRC was not its alleged extravagance or inefficiency but the danger to the legal profession of the ideas emanating from it’.<sup>68</sup>

## 2. *Rebirth*

Within six months of being elected to power in Victoria in November 1999, the Bracks Labor government introduced a Bill to establish a new law reform commission. The new commission had the same form and functions as its predecessor. Attorney-General Rob Hulls said in his second reading speech:

This government is strongly committed to the establishment of a law reform commission with a charter to facilitate community-wide debate of law reform issues and to assist members of Parliament in identifying key areas of law reform. The aim is to place Victoria at the cutting edge in law reform across Australia

The Victorian Law Reform Commission will closely resemble the former Law Reform Commission of Victoria in its structure, powers and functions. There are many law reform commissions operating in other common law jurisdictions from which a model may be selected. Although there are any number of ways to construct and operate a law reform commission it is proposed to base the Victorian Law Reform Commission on the model of the old commission with some minor variations. The old commission operated highly effectively prior to its abolition and was seen to be a leading edge organisation.<sup>69</sup>

While the opposition did not oppose the Victorian Law Reform Commission Bill, the Shadow Attorney-General expressed concerns about the previous commission:

It was not independent, and there is always a danger of that happening if such a commission is not protected and kept at arms-length from government. There is always a danger of such a body becoming a political arm of government when it is created by the executive, appointments to the body are made in the short term by the executive, payment and allotment of tasks are made by the executive and it must report to the executive prior to reporting to Parliament...

The next thing to watch is whether the commission starts to suck in moneys, as did the previous commission.<sup>70</sup>

The Act that created the new commission commenced in April 2001. Within a space of less than 17 years the people of Victoria had witnessed the birth, the demise and the rebirth of the law reform commission. The first head of the new 21<sup>st</sup> century Victorian Law Reform Commission was a member of the former Commission.<sup>71</sup> So keen was the

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<sup>66</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November 1992, 903 (Neil Cole).

<sup>67</sup> Victoria, *Parliamentary Debates*, Legislative Council, 18 November 1992, 875 (Jean McLean).

<sup>68</sup> ‘Death of a Commission’ (1993) *Summer Reform* 29, 29.

<sup>69</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2000 (Rob Hulls).

<sup>70</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 24 May 2000 (Dr Dean)

<sup>71</sup> Professor (now Justice) Marcia Neave.

new government to restore the notion of institutional law reform that it repealed the Act<sup>72</sup> which repealed the Act<sup>73</sup> that governed the former Law Reform Commission of Victoria.<sup>74</sup>

## Lessons Learnt

There are things to be learnt from the Victorian experience which may resonate beyond the boundaries of one Australian state. I have identified, with due acknowledgment to Justice Michael Kirby,<sup>75</sup> six lessons which merit consideration.

### *1. Local conditions are always of fundamental importance*

This is perhaps more of an observation than a lesson learnt from experience. While there are clearly some issues regarding the health of institutional law reform that transcend jurisdictional boundaries, local conditions, and especially local personalities, will always be of primary importance when the creation or demise of a law reform commission is under serious consideration. We should not underestimate the significance of either deeply felt enmity or the need for a new government to announce its presence by taking quick and decisive action.

There appears to be significant symbolic value in abolishing or creating a law reform commission. It is a means of indicating, without too much effort or upheaval, those policies and practices which a new government values or rejects. When reflecting on the Victorian experience, it is fascinating to observe that the abolition of the law reform commission was one of the first parliamentary actions of the Kennett government following its election in 1992 and that legislation establishing a new commission was a priority of the ALP government when elected a little over seven years later.

### *2. Government support for institutional law reform waxes and wanes over time*

It is inevitable that interest in reforming the law and in relying upon a law reform commission as an engine room for reform will change over time. Reform fatigue sets in for even the most committed advocates of social change.

It has been suggested that law reform may be in a continuous cycle of birth, death and rebirth. Justice Howard Zelling has stated that ‘...the whole history of seven centuries of law reform shows that there are only some times and some generations in which the whole community is receptive to law reform’.<sup>76</sup>

It may be that the answer for law reform commissions approaching the end of a reformist era is to have a range of projects or references, some of which require consolidation or codification of dense bodies of relatively stable ‘black letter’ law. As the role and

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<sup>72</sup> *Victorian Law Reform Commission Act 2000* (Vic) s24.

<sup>73</sup> *Law Reform Commission (Repeal) Act 1992* (Vic).

<sup>74</sup> *Law Reform Commission Act 1984* (Vic).

<sup>75</sup> Justice Kirby recently delivered a speech to the Law Reform Commission of Ireland in which he identified ten requirements for the successful operation of a law reform agency. See, Justice MD Kirby, ‘Law Reform – Ten Attributes for Success’ (Paper presented at the Law Reform Commission of Ireland, Dublin, 17 July 2007).

<sup>76</sup> The Hon Justice Michael Kirby, ‘Law Reform – Past, Present, Future’ (Paper presented at the Alberta Law Reform Institute, Alberta, Canada, 2 June 2008)13.

significance of the common law diminishes because of its inability to bring organising principles and orderly frameworks to so many aspects of modern life, the responsibility for dealing with Justice Kirby's central dilemma of the law – maintaining predictability, while adapting to new conditions – rests firmly with the legislature. Law reform commissions can bring order and coherence, as well as significant change, to the law.

### *3. Law reform commissions must be, and be seen to be, independent*

The strongest criticism made of the former Law Reform Commission of Victoria by those who abolished it was that it lacked independence from the executive branch of government. Whether this criticism was valid or fair is ultimately beside the point. There was sufficient evidence, most notably in the area of senior staff cross-overs, to permit the allegation that '[m]any who have studied the record of the commission in recent years believe that it has been at least as eager to provide the right answer for the Attorney-General on a variety of references as it has been to fearlessly advance the cause of independent law reform'.<sup>77</sup>

Often we use the term independence as a shorthand description of the attributes or values which we hope will accompany autonomy from those with the greatest power. Independence is a means of ensuring an assumed, or unstated, end. For example, we have long insisted upon the independence of the judiciary from the other branches of government not because it is an end in itself but because it is an effective and widely accepted means of ensuring that we have decision-makers who are, and who are seen to be, impartial. What ends are we seeking to achieve when we assert that a law reform commission must be independent?

Law reform commissions have leaders appointed by the executive branch of government for limited periods of time, the executive usually determines most or all of the work to be undertaken by the commission and decides what resources will be allocated to it, the executive often holds much of the information needed by the commission to complete its work and, finally, the executive determines whether to accept and implement the commission's recommendations. Judicial-style independence is not really feasible in these circumstances.

What is an appropriate level of independence for a law reform commission? Much of the emphasis must be upon what Justice Kirby has referred to as 'product differentiation': the need to distinguish that which is produced by the commission from that which could be produced by the relevant government department, or by a consultant appointed to undertake a nominated inquiry. It is also important for commissions not to participate in debate about the correctness or otherwise of their recommendations. Once a report is finalised it is necessary, in my view, to withdraw from the stage and to allow others to debate what the response of government should be.

### *4. Law reform commissions must resist the temptation to be didactic*

Opinions are divided about the types of activities that institutional law reform bodies should undertake. Some hold the view that 'black letter' law alone is the proper province of a law reform commission. Others, including many governments, have a different view. Delivery style is important adjunct to this debate. It is far easier to get away with a

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<sup>77</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 6 November 1992, 552 (Jan Wade)

declaratory style of presentation when the issue under consideration is not hotly contested.

During the 'golden age' of the 1960s and 70s many law reform agencies were asked to tackle controversial social policy issues.<sup>78</sup> References to undertake work of this nature continue. The Victorian Law Reform Commission has published reports on Abortion (2008), Assisted Reproductive Technology (2007), Family violence (2005), Sexual offences (2004), and Defences to Homicide (2004).

The New South Wales Law Reform Commission has published reports on Relationships (2006), Partial Defences to Murder - Provocation and Infanticide (1997), Adoption (1997), Artificial Conception: Surrogate Motherhood (1988), Artificial Conception: In Vitro Fertilization (1988), Artificial Conception: Human Artificial Insemination (1986) and De Facto Relationships (1983).

The Australian Law Reform Commission has published reports on Privacy (1983 and 2008), Sedition (2006), Gene Patenting (2004), the Protection of Human Genetic Information (2003), Equality before the law (1994), Aboriginal Customary Laws (1986), Domestic Violence (1986), Child Welfare (1981), Complaints Against Police (1978), Human Tissue Transplants (1977), Alcohol, drugs and driving (1976).

The New Zealand Law Commission has published reports on Custom and Human Rights in the Pacific (2005), Criminal Defences (Insanity & Partial Defences) (2004), Status of Parenthood (2003), Battered Defendants: Victims of Domestic Violence Who Offend (2000), Adoption (1999), Recognising Same-Sex Relationships (1999), Justice: the Experiences of Maori Women (1997) and Women and Access to Justice (1996)

Shifting from 'lawyer's law' to controversial projects sometimes makes it hard for commissions to distance themselves from allegations of political partisanship. It is also hard to resist the temptation to be didactic: to tell government and the broader community in emphatic and instructive terms what must be done about a particular issue. This approach is relatively harmless when a commission is writing about technical legal problems; it is far more problematic when the matter at hand is hotly contested issue within the community.

Few would dispute Justice Kirby's call for law reform commissions to be 'strong, courageous and bold'.<sup>79</sup> The challenge is to be all of these things without alienating segments of the community by appearing to be morally superior. Reports which are well researched, well argued and expressed in moderate language, no matter what the topic, are unlikely to generate calls for the continued existence of a law reform commission to be questioned.

##### *5. Law reform commissions must be consultative and garner support for their views*

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<sup>78</sup> For example, the New South Wales Law Reform Commission produced reports in relation to De Facto Relationships (1983); Artificial Conception: Human Artificial Insemination (1986); Artificial Conception: In Vitro Fertilization (1988) and Artificial Conception: Surrogate Motherhood (1988). The Australian Law Reform Commission produced reports on Alcohol, drugs and driving (1976); Human Tissue Transplants (1977); Child Welfare (1981); Complaints Against Police (1978); Domestic Violence (1986); Privacy (1983) and Aboriginal Customary Laws (1986).

<sup>79</sup> Kirby, above n75, 22.

Effective community consultation is one of the most important, difficult and time consuming activities of a law reform commission. Justice Roslyn Atkinson has pointed out, community participation has two major purposes: 'to gain responses and feedback; and to promote a sense of public 'ownership' over the process of law reform'.<sup>80</sup> Justice Kirby recently developed the 'ownership' theme when he pointed out that consultation often brings an issue to the attention of the public and creates an expectation that the government will do something about the matter once the law reform commission has reported.<sup>81</sup>

Journalists are often quite insistent in their demands that government respond to the recommendations made by a law reform commission. As the New Zealand experience demonstrates, governments are sometimes sufficiently strong, courageous and bold to publicly announce formal arrangements for responding to law reform commission reports.<sup>82</sup>

### *6. Law reform commissions must be useful and flexible*

Justice Kirby has referred to 'the vital importance of treading the narrow path between institutional independence and winning the respect and appreciation of changing governments and officials who control the lawmaking agenda'.<sup>83</sup> That is no easy task. He has also reminded us that '[u]tility is important because, if it is missing, there is an ever-ready possibility of abolition'.<sup>84</sup>

While law reform commissions cannot afford to be overly anxious about their 'success rate', there is little point in producing reports that are dismissed out of hand because those reports do not provide the government of the day with options they are prepared to consider seriously. Governments will soon tire of a body that produces reports which fill libraries but that fail to attract support within the bureaucracy or the broader community. No doubt our successors in 50 or 100 years time will participate in the perennial debate about the balance to be struck between making recommendations for reform that in the opinion of the commissioners are right and just, and making recommendations which, in the opinion of the commissioners, are realistic proposals that may garner sufficient support to be accepted and implemented. Often, local conditions will determine whether a law reform commission's work is 'useful'.

Flexibility is difficult at the best of times and it is particularly difficult for people who have devoted much of their lives to learning about a discipline which is as vast, challenging and conservative as the law. The tasks which governments ask law reform commissions to fulfil evolve over time. Yet, some people hold strong views about the topics which are properly the subject of law reform commission investigation and those which are off limits. Abortion is such a topic. A year ago, the Victorian Law Reform Commission was asked to advise the government about reform of abortion law. In 1968, its predecessor, the Chief Justice's Law Reform Committee, declined an invitation from the government of the day to consider abortion law reform.<sup>85</sup>

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<sup>80</sup> R Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (2005) 160.

<sup>81</sup> Kirby, above n75, 7.

<sup>82</sup> See n 60.

<sup>83</sup> Kirby, above n75, 16-17.

<sup>84</sup> *Ibid* 16.

<sup>85</sup> O'Brien, above n4, at 446.

Abortion has been a criminal offence in Victoria since it became a self-governing colony in the 1850s. The current *Crimes Act* provisions dealing with abortion, supplying materials for an abortion, and child destruction are local versions of 19<sup>th</sup> and 20<sup>th</sup> century British offences.<sup>86</sup> While there is no express statutory defence to any of these offences, all refer to performing particular actions ‘unlawfully’. The use of this statutory language has permitted various dexterous judges to reason over the years that parliament must have recognised that the activity in question, such as performing an abortion, could be carried out ‘lawfully’ in some circumstances. During the course of the trial in 1969 of a doctor charged with performing a number of abortions,<sup>87</sup> a Victorian Supreme Court judge<sup>88</sup> relied upon this approach to statutory interpretation to describe the circumstances in which an abortion could be performed lawfully. The statement of the law given in that trial, which relied upon the common law doctrine of necessity and became known as the ‘Menhennitt rules’, has been widely accepted since that time as the law which governs abortion in Victoria.

It is estimated that there are now approximately 18,750 abortions each year in Victoria. Abortions are performed openly by qualified medical practitioners at various locations. Abortion services are provided at some of the major public hospitals and at various day centres or clinics throughout Melbourne. There appears to be no call for the services of ‘backyard’ abortionists. The last time a person was charged with performing an unlawful abortion in Victoria was in 1987 and the last conviction was recorded in 1970.

In mid-2007 an ALP member of parliament and former Minister introduced a private member’s Bill which sought to decriminalise abortion. A few weeks later the Victorian government announced that it would decriminalise abortion. It also announced that the private member’s Bill would be withdrawn and that the matter would be referred to the Victorian Law Reform Commission for advice.

The terms of reference required the Commission to provide background information about clinical practices and abortion law, as well as providing the government with options for implementing its policy of decriminalising abortion. In broad terms the Commission reported that it could identify three options or models that could be adopted in order to decriminalise abortion. We suggested means by which each model could be implemented.

This week, a Bill based upon one of those models and supported by both the Premier and the Leader of the Opposition is being debated in Parliament. As members of all of the major political parties have been allowed a ‘conscience vote’, it is too early to make predictions about the Bill’s fate.

Our role was to provide background information about the law and practice of abortion and to give advice of a technical legal nature, leaving decisions about the extent to which the state should regulate abortion to the legislature rather than the judiciary, which is where decision-making responsibility fell when the Menhennitt rules were devised 39 years ago. Time will tell whether the Commission has been useful and flexible.

## Conclusion

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<sup>86</sup> See Victorian Law Reform Commission, *Law of Abortion: Final Report*, Report 15 (2008) 18.

<sup>87</sup> *R v Davidson* [1969] VR 667.

<sup>88</sup> Justice Clifford Menhennitt.

The cyclical nature of support for permanent law reform agencies is no surprise to students of history. As Macdonald explains:

The story of the waxing and waning of the idea of independent, expert law reform agencies just recounted should be no surprise to close observers of social institutions. In politics, as in life generally, discontinuity, change and movement are the rule; stability the exception. Institutions are meant to moderate, modulate and mediate change, but they are not themselves immune from change.<sup>89</sup>

There is little doubt that institutional law reform has been a major innovation in the legal world since the 1960s: 'At their best, they provide principled and imaginative new law, and are catalysts of change, responsive to the world around them and to the public they serve'.<sup>90</sup>

The cycles in law reform have generally had little to do with the 'success' of individual agencies themselves. Changes in levels of support flow from broader political, economic and social forces. New governments, new ideologies, new competitors and failure to evolve are all danger signs.

Justice Neave warns that law reform agencies must learn from their chequered past in order to withstand the challenges of the future.<sup>91</sup> The cycles in institutional law reform show us that '...the future of generalist law reform bodies is by no means guaranteed'.<sup>92</sup> In times of financial hardship a law reform commission is a relatively easy target.

The fact that governments have been prepared to reinstate commissions which have been dormant or dead for years confirms the attractions of institutional law reform. As rapid developments in technology provide new frontiers for regulation, as the community continues to deal with constant change, and as the common law struggles to cope with 21<sup>st</sup> century life, law reform commissions provide governments with a means of developing new laws that are principled, considered and capable of enduring beyond the life of the government.

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<sup>89</sup> Roderick Macdonald, 'Continuity, Discontinuity, Stasis and Innovation' in Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (2005) 87, 92.

<sup>90</sup> Michael Sayers 'Co-operation across Frontiers' in Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (2005) 87, 243.

<sup>91</sup> Neave, above n14.

<sup>92</sup> Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds.), *The Promise of Law Reform* (2005) 87, 71.