Role and Function of the Law Reform Commission,

House of Representatives, Standing Committee on Legal and Constitutional Affairs,

20 December 1993.

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INQUIRY INTO THE LAW REFORM COMMISSION

TRANSCRIPT OF EVIDENCE GIVEN AT A PUBLIC HEARING

SYDNEY

Monday, 20 December 1993

(Official Hansard Report)

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

(Subcommittee)

Role and functions of the Law Reform Commission

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Present

Mr Melham (Chairman)

Mr Duffy

Mr Sinclair

The subcommittee met at 9.19 a.m.

Mr Melham took the chair.

CHAIRMAN—I welcome witnesses and any members of the public who may be present for this inquiry into the role and functions of the Law Reform Commission.

KIRBY, Justice Michael Donald, 2C Dumaresq Road, Rose Bay, New South Wales 2029, was called to appear before the committee.

CHAIRMAN—Welcome, Justice Kirby. Do you have any comment to make on the capacity in which you appear?

Justice Kirby—I am appearing really in a personal capacity but it is not entirely personal. My past experience as an officer of the Commonwealth and Chairman of the Law Reform Commission and my experience at the moment as President of the Court of Appeal are both relevant to what I am going to say. I draw on my experience in the Law Reform Commission and in the court in my submission to the committee.

CHAIRMAN—Although the committee does not require you to give evidence under oath I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Would you like to make an introductory statement before we ask some questions of you?

Justice Kirby—Yes, thank you, Mr Chairman, and thank you for inviting me to appear before the committee. I did prepare a written submission but, unfortunately, such is the pressure on my secretary that she has not yet typed it up. When it is typed up I would ask leave to send it to the committee so that it can be available to you. It sets out my general views on the subject of your inquiry. I welcome the inquiry; I think it is timely and appropriate; I think it is a good thing that all institutions are reviewed. After nearly 20 years of existence, it is appropriate that the Australian Law Reform Commission should have to account to the parliament which set it up.

The experience that makes my contribution of some use to you is, primarily, my work in the Law Reform Commission. I was appointed to the commission in 1975 having

only then recently been appointed to the arbitration commission. I took up my duties in February 1975. At that time the commission had no offices, no staff and no facilities. The commission on day one began in the anteroom to the chambers of the bankruptcy judge, Justice Riley. I sat in that anteroom as the judge's staff moved in and out. It was my responsibility, together with the foundation commissioners, to establish the commission, to get the premises, to hire the staff, and to secure the original program of work. All of that was done.

The commission was fortunate in its initial commissioners—I leave myself modestly out of that. The part-time commissioners who were appointed were an interesting cross-section of Australian lawyers. They included: Mr Brennan QC—now Sir Gerard Brennan at the High Court—and Mr Gareth Evans—now the Minister for Foreign Affairs—Professor Alex Castles, Professor of Law at the University of Adelaide and Professor Gordon Hawkins of the Sydney Law School. Subsequently, Mr John Cain was added as a commissioner. I look back on that time as a very exciting and special time in my life because it was a great responsibility and a challenge to set up a new federal agency, and one which I thought had a very important role to play.

The commission immediately received a reference from the then government, the Whitlam government, under the hand of Attorney-General Enderby. The reference related to the inquiry into two aspects of the establishment of the Australian police force which was then proposed. The first was the criminal investigation procedures of the force and the second was the complaints procedures.

CHAIRMAN—Sorry to interrupt you, Justice Kirby. The Law Reform Commission did actually give us a submission that detailed a lot of that material.

Justice Kirby—I was not going to go through the whole detail. But from there on the commission worked on references, produced reports and settled its methodology. Its methodology was in some respects novel. The respects which were particularly novel were the extension of the idea of consultation into community consultation through the use of the media. I believe that that was an important initiative of the commission and it is one which I think has been generally followed, though not always with the same success.

The chief problem from the beginning of the commission was that of translating its proposals into the law of the land. Various suggestions had been made before the commission was established as to how that could be done. Sir Anthony Mason in an article in, I think, the *Federal Law Review*, suggested that there should be a procedure whereby reports to the commission were tabled in parliament and, unless disallowed, the laws proposed by the commission should be enacted in the nature of subordinate legislation. That has never recommended itself to any of the succeeding attorneys-general and has never been done.

The great problem of the law reform commissions in their effectiveness is to capture a little moment of time in the busy schedule of distracted politicians and overburdened executive government, heavily committed cabinets and sometimes resistant bureaucrats and special interest groups. The way in which that can be done is, I think, one of the principal challenges before this committee. If there have been defects in the implementation record of the Australian Law Reform Commission, part of the responsibility has to be shouldered by parliament. In saying that I am not saying that I consider that the commission's success has been defective. As law reform commissions go, it has done pretty well. But there is a need, as it always seemed to me and as I constantly said when I was chairman and have said since, for a better system of translating law reform reports into action, or at least into having the reports considered in an effective way.

I do not believe that commissions, any more than judges who make law reform suggestions, have a right to command the acceptance of their proposals or to expect that such proposals will pass into law within a specified time. But I do believe that they have an expectation that some mechanism will be established that will take the advantage of the thoughts of these intelligent people who generally know quite a bit about what they are talking about. They are not always right but often are.

During the Fraser government a very important development took place whilst I was still chairman. It was largely brought about, I think, by the effort of the late Senator Missen for whom I had a great deal of respect. Senator Missen and the Senate Standing

Committee on Constitutional and Legal Affairs secured from the Fraser government an undertaking that reports to the Law Reform Commission, which were not otherwise to be earlier implemented by the government, would be referred to the Senate committee, that that committee would then report and that within six months of the report the government would make an announcement in response to the Senate committee's report.

That was not a direct announcement in respect of the law reform report. But it wa indirectly so, and it meant that a mechanism was set in place for the orderly consideration of the Law Reform Commission's reports by a committee with a particular expertise, by committee which, it is fair to say, generally had a degree of commitment to the philosoph of orderly law reform. The system was well in place when I left the commission.

I do not know what has happened to that system since. I have a feeling that it has just faded away. I think it was one of the best mechanisms that I saw during my term as chairman. It is possible that this committee is an appropriate vehicle or this committee an the Senate committee or either of them if they choose to take up this report procedure.

The fundamental question before the committee is whether the Law Reform Commission should survive. My unequivocal view is that it should. I ground that view in my commitment to parliamentary democracy and to the effectiveness of the parliamentary institution. A clear result of the failure of the parliamentary institution to attend to the reform of large areas of the law is either the perpetuation of injustice or very great pressure on the judges, through the techniques of the common law, to provide solutions unattended perceived injustices and needs for reform.

Because I believe that it is preferable that the parliament should provide the answers to the needs for law reform, I favour the enhancement of the capacity and efficiency and productivity of the Law Reform Commission rather than the enhancement of the power of the judges. But the price of that approach is that parliament must set in place a mechanism that will, in an orderly, systematic and timely way, consider the repo of the Law Reform Commission. I believe that parliament has not now done that and th is a responsibility of parliament.

If parliamentarians and citizens look at the cases that produce the controversies in the press about judicial reform of the law, I consider that, at least in part, they have to look to themselves and ask why it is that judges have attended to law reform in this way. I believe a part of the answer is the failure of the parliamentary institution. Because I support the parliamentary institution, I think we should try to revive the mechanism that was established during the Fraser administration. That is one of the chief recommendations which I would urge upon the committee.

I said other things in my written submission but I cannot recall them to mind now. It was dictated some time ago and when it appears it will be sent. But it is inevitable that, with nine years of my life devoted to the work of the commission, I have an intellectual and emotional commitment to it. Allowance must be made for that in considering what I have to say to you.

But looking at it as objectively as I can, I think the commission has done good work. It has a potential to tap resources that would not otherwise be available to the Commonwealth and the parliament. It has the potential to consult the community and to deal with the increasing number of problems that are extremely difficult and very controversial. That is why I think the commission has a place in the orderly reform of the law. I hope that that will be the conclusion of the committee.

CHAIRMAN—It is obvious that in the early years of the commission there was a lot of support from the bar and the professions, if I might add, in terms of part-time commissioners and those who were involved. Were you pro-active in securing that, or was that just a sign of the times? It just seems to me that at the moment, when we look at part-time commissioners or those involved, there do not seem to be members of the bar or indeed the judiciary involved in the numbers that they were in those early years.

Justice Kirby—That could be by reference to the sort of work that is given to the commission. It could be a consequence of the inclinations of commissioners. But its solution is entirely in the hands of government; because it is government that makes the appointments. I certainly saw the commission as a way of tapping the top legal talent on a particular subject. Thus, when we received the program on child welfare laws for the ACT we were able to go to Professor Seymour, who was a national expert on that subject. When we received the reference on bankruptcy, to Mr Harmer, who was a well-established solicitor who did virtually nothing else and really knew that area of the law. So it was a matter of drawing into the Commonwealth's intellectual pool the people who otherwise would not be available to it, who would not be prepared to accept a full-time appointment forever with the Commonwealth but who would be prepared, at a certain stage in their life, to give a certain period of their life to national service. It is a fact that we all realise that at a certain point in professional life you want a new challenge. That is what I was keen to tap.

CHAIRMAN—Were you pro-active in relation of the part-time commissioners in terms of recommendations to the government at that time?

Justice Kirby—Yes, but it was always done in consultation with the Attorney-General, because you had to take into account the fact that attorneys quite often had their own people that they wanted to appoint. I was always happy when an attorney-general appointed his own. I say 'his' because I have only ever had male attorneys. I think I had seven or six of them. For example, Attorney-General Durack appointed Mr Mazza, a solicitor from Western Australia. He was not a person of national legal significance. But he was a practical solicitor. He was faithful in his attendance. He worked hard on the projects. And he had the confidence of the Attorney-General.

There was that level of appointment. But there were also appointments such as Sir Zelman Cowen, F.G. Brennan and others, who brought very great intellectual strength and reputation to the work of the commission. I, quite frequently, went out and asked people would they be willing to serve. Murray Wilcox, for example, came from the bar. He gave tremendous service to the commission and enjoyed it. It remains for him, as it was for me, a very exciting time in his life.

Mr SINCLAIR—One of the aspects of the Law Reform Commission that worries me a little is that you have a number of other competing bodies. Our reference will come to that in a moment. We have state law reform commissions, and they have waxed and waned according to their complexion. I would be interested in your views on the

relationship between the Law Reform Commission and those bodies, and then I will come to the other side of it. Could you tell me a little bit about that relationship first?

Justice Kirby—First of all, within the Commonwealth's sphere, there is a degree of overlap in the advisory bodies on law and law reform. I think of the Institute of Criminology, the Institute of Family Studies, the Family Law Council, the Administrative Review Council, and there are many others. To some extent, that overlap is probably healthy and probably inevitable because of the different statutes, the special interests, the expertise and so on. But, I think, an important challenge before the committee should be to work out some ways of interrelating the various advisory bodies so that there is greater effectiveness and interaction between them. So that there is not a waste of resources, and so that you can have in the national Law Reform Commission a body which can bring together any area of federal law and work on the reform of it and put its proposals up to parliament.

So far as the state commissions are concerned, when I was first appointed there was inevitably a degree of resistance to the new federal commission. There was also a measure of resistance to the state bodies working together. They tended to go off into their corner and do their own thing according to their different constitution, their size, their resources and so on. But soon after I was appointed, with the support of Justice Meares, who was then the chairman of the New South Wales commission, we invigorated the Australian Law Reform Agencies Conference that brought law reform personnel together. They saw the common interest they had. Since then, there has been a degree of cooperation on projects of common concern such as defamation and evidence law reform. You see an interaction between them. I think that is healthy.

Lord Hailsham, in his lecture in Sydney, said that we should not be seeking in democracies to have only one voice. One of the attributes of freedom is a measure of inefficiency and, to some extent, a number of voices speaking to the elected representatives of the people. They can then choose. So I do not seek for a total symmetry of complete efficiency; that is not the democratic way. We have to accept a degree of inefficiency and overlap. That said, there probably are ways of better coordination of

references and instructions from Attorneys-General who agree that there should be joint projects for a better use of resources. I think that is something the committee could well look at.

Mr SINCLAIR—In your comments just a moment ago, you spoke of the extent to which you felt the Law Reform Commission was a better vehicle than judges. You suggested there needed to be some group that looks at law reform. It has seemed to me that, when you set up an organisation such as a law reform commission, you concentrate the mind, certainly, on particular references that might be before that law reform commission; whereas individual judges have their own jurisdiction, and each of them has a capacity within the jurisdiction to develop considerable expertise. There are public forums where they can speak and, were they encouraged, might well make comments about the way in which they see that law might be reformed.

Sometimes it seems to me that perhaps we have, by setting up a law reform commission, denied judges a capacity to suggest reform to a degree that is inhibiting for reform. If you allowed them, and expected of them, comments about the progress of the law, particularly in jurisdictions in which they practise, that might well accelerate consideration that would then allow academic lawyers and members of the judiciary to promote cases. Now whether it would be acted on—and I accept acting on that might just be as difficult as it is for the Law Reform Commission—I wondered why you would explain that you do not think judges are as effective in promoting law reform as the Law Reform Commission. That was the conclusion I came to from your remarks.

Justice Kirby—There are a number of points in that. Judges quite frequently make suggestions for law reform. When I see an injustice that I do not feel I can cure, probably because of my background, more than most, I will always draw it to notice. I do so in my judgment. I may do so under a heading labelled 'need for reform'. I will put it in the head note in the key words that I dictate. And it will be then sent to the Chief Justice for transmission to the Attorney-General.

Attorney-General Dowd in New South Wales, instituted a very good system which, again, reduced this procedure to a routine. He instituted the system whereby the Chief

Justice, upon receipt of a suggestion, would transmit it to a specified officer of the Attorney-General's department; that officer would keep a list; and there would be an annual reporting on the list. Attorney- General Hannaford has kept that. There is no doubt that with 'Law Reform (Miscellaneous)' acts, a lot of proposals made by judges have gone through parliament without any controversy. Some have been rejected for a reason. The practice of Attorney-General Dowd was always to give short reasons as to why a particular suggestion was rejected. That is a very good system. It is the system that applies in most civil law countries in Europe. In France, the Cour de Cassation communicates in a very formal way to the President the problems that have occurred in the law cases during the year. That is then acted upon and processed through the law making system. But that has not been our way— judges are warned: 'Do not put too much faith in other places that they will give attention to judicial suggestions'. Parliamentarians are generally too busy, or they are not interested enough; ministers are distracted. Sometimes judges can make their suggestions until they are blue in the face and nothing much gets done.

As far as I know, New South Wales is the only place that now has this quite formal system that other jurisdictions receive. One of the initiatives I introduced before I left the ALRC was the system whereby suggestions for major law reform work—those ones relevant to federal law—were collected in the annual report. I do not know if they have kept that up. I think it was a useful thing to have a check list. There is not the same response system as there is in New South Wales. I think it is one of the major achievements of Attorney-General Dowd.

My own general view about judicial reform is that judges have a role to reform the law—they have been doing it for 800 years—but they do reach a barrier. I do not think the barrier exists in matters of procedures. I think judges have a great expertise in matters of procedure. They can quite readily adapt court procedures. But, where you get to a significant matter of substantive law, I always feel very serious diffidence about saying, 'I will substitute my opinion on the law in this matter for the established law of the parliament. I do not feel an obligation to wait for parliament. I do not feel an obligation to consult the community. I do not feel an obligation to consult the special interest groups

and the expertise; I will just do it myself'. Being a democrat, I find that to be an uncomfortable notion. Where you draw that line is, of course, a matter of doubt, controversy and debate. Different judges will draw it at different points, even at the level of the Court of Appeal and at the level of High Court. Do not think that there is a judicial free-for-all here: there is not.

It should also not be thought by the committee that, because a judge feels a matter is an injustice, calls it to notice, and refers to it in a judgment, something will be done about it. The academics are busy teaching their classes. The interest groups do not know quite how to organise themselves. The bureaucracy is overburdened with other things. The politicians are distracted by their political concerns. That is where a formal law reform institution comes in. It is the way of reducing these matters to a routine. It is a way of receiving the suggestions. It is a way of suggesting to the Attorney-General, who stands at the gateway, the giving of a reference on the subject. It is the method by which you can have consultation with the best legal minds, the community groups, the experts and then the report to parliament. It is a very rational system to stimulate and help parliament in areas which otherwise, in most cases, would simply not be attended to.

Mr SINCLAIR—And yet there is probably a greater record of inactivity by the Law Reform Commission than there is in a lot of other fields. You have the same problem in getting a legislative reaction and trying to attract the attention of government and the parliament. I can see the necessity, following the Dowd-type system, which requires a response from the Attorney-General, where you then need to pursue the topic, whatever it might be.

I would not suggest that an individual judge could develop his ideas in a particular field of law reform to the point of actually proposing necessarily the detail of the change, and certainly not the legislation. It worries me that, whatever system you have, it is very difficult to attract the time of the ministry or of the parliament to those reforms. The Alan Missen system, which may have merit, was specific as far as the Law Reform Commission's proposal is concerned. It does seem to me that there are many areas which judges suggest need to be analysed to which there is no response from the Law Reform

Commission, from parliament or from anybody else, and I think that the Dowd system might accelerate the chance to achieve that.

I suppose my concern really is that the Law Reform Commission replicates efforts elsewhere. You have mentioned some of the bodies where it works. I am not convinced that, by a specific requirement of a report on an area—whether you do it from an Attorney-General response to a suggested area of reform and you constitute a particular panel led by an academic lawyer or a barrister or somebody else—you would not get just as much response as we do now. Whether it would be adequate, I am not sure.

Justice Kirby—The amount of response is in the hands only of the members of parliament. Therefore, it is parliament that has to look to its own mechanisms for the amount of response it will give. It is fair to say that the system that Attorney-General Dowd set in place in New South Wales tends to concentrate on bits and pieces. They tend to be a problem in the Bail Act or a problem in the Crimes Act. They were the two that were in judgments of mine last week that I drew to the attention of the Chief Justice for transmission to the Attorney-General. They tend to be small matters. Yet there are, as the program of the Law Reform Commission reveals, very large matters which somebody in our community has to attend to, if the law is to remain relevant and just.

Where they are controversial matters and involve different interest groups, you need something that will be a little more flexible and responsive to the community than the bureaucracy—the general administration—tends to be. That is where the Law Reform Commission, certainly in my own time, developed quite a panoply of techniques for going out and consulting community opinions. But I think it would be unfair to the commission to blame it because it has not attended to all areas of the law. It is required by its act to proceed only on references that are given by the federal Attorney-General. It cannot roam at large.

People used to criticise that requirement in my day. But I never thought that was a great handicap because I could always speak to the Attorney-General. If the Attorney was convinced, he would give the reference. Even with changes of Attorney and changes of government, it meant that a political person had judged that this issue was worth spending

federal money and time on.

There was inherent in some of your remarks, Mr Sinclair, the suggestion that the commission had failed to address a whole range of activities. However, the act requires it only to address those which the federal Attorney-General of Australia gives it. You can criticise particular references and say, 'That really was not a high priority' or 'It really was not a matter that was appropriate' or 'They should be working on containable matters such as sovereign immunity or admiralty jurisdiction, so-called black-letter matters, where they have had a very high level of success'. That is entirely in the hands of politicians. They have the power to design and set in place the program of the commission.

To the extent that your question suggested that there were other areas of the law that were unattended, of course there are. There are many. But the commission can become a repository for collecting and drawing to notice the reform suggestions. It can become a pool of people who have experience in reform of the law. It can stimulate community and political discussion about law reform and its methodology.

All of this is very healthy in a democracy. The log jam is reached at parliament. When the report is delivered, it is tabled as the act requires. At the moment, the system which was set in place during my time does not seem to be operating. I think it should be revived.

Mr DUFFY—Justice Kirby, one thing arose to some extent out of what Ian said, when you made the point that judges could make suggestions until they were blue in the face and not a great deal would happen. The only example which I was aware of was the one you gave of the mechanism that John Dowd had. One of the reasons that this inquiry is timely is that I have felt for a long while that, of all the bodies we are talking about and the interrelationships that may exist between the Law Reform Commission and the others, the one that is the most difficult for a government to get rid of is probably the Law Reform Commission, because it has been established for a long while.

Whilst we might disagree, Ian, there was certainly a perception in 1972 that the time was ripe for some changes, and the people who came to the commission at that time as part-time commissioners, in the period that you were there, were of course people of

enormous significance. I have a worry about the interrelationship, unless there is some effort at bringing about more relationship between the bodies, and unless we have a position where the Law Reform Commission is the overarching body—because I think it does have a permanency about it which some of the others may not have.

One other that is referred to is the Companies and Securities Advisory Committee, which is a very new body. It has done a lot of good work, but it could disappear, as could some of the others. One of the things that I would like to see come out of this inquiry is the definitive view that the Law Reform Commission stays. I think you have answered that more than adequately in what you have had to say.

Firstly, what is your view on self-reference for the Law Reform Commission? Secondly, if you would not go as far as that, who else makes references other than the Attorney? Thirdly, could I seek a view from you on a comment that is made sometimes about the Law Reform Commission—and I think this is pointing more at the permanent members of the commission—that they have moved away a little bit from the practice of the law and the practical side of it? A classic example of what can happen there effectively was their report on collective investments, which was one of the most difficult areas you can imagine. With the assistance of people like Ferguson and Martin from Bankers Trust, who gave a lot of time to that inquiry, it was an excellent report.

There are really three things there: firstly, with the comment I have on interrelationship, I think you agree entirely about the retention of the Law Reform Commission. Secondly, there is the matter of self-reference or, if not that, who else, apart from the Attorney-General? Thirdly, there is the question of the criticism which is sometimes made of the commission and the involvement, as much as possible, not of part-time commissioners, necessarily, but of consultants on particular references—as was done in the collective investment one.

Justice Kirby—First of all, I have to be careful that I do not fix my views, which were formed in 1975 and after, upon a different decade with different problems, different politicians, and a different ethos in parliament, and so on.

Mr DUFFY—And more fiscal fiends around, too!

Justice Kirby—That is true, though—

Mr SINCLAIR—A subjective judgment.

Justice Kirby—Though I can tell you, when I was Chairman of the Law Reform Commission, I went through so many inquires, so many staff ceiling cuts, so many of the razor gangs, that I have been through it all many times. Therefore there is nothing in the world that is entirely new in that respect—

Mr SINCLAIR—I am sure you have a sense of deja vu.

Mr DUFFY—It has become an art form!

Justice Kirby—I did not favour self-reference. One of the problems is that lawyer may be the last people in the world to decide what are the matters requiring reform of the law—or, at least, to order their priorities. If you define the problem as the log jam at the end of the process, then you must, I think, be careful not to do anything that makes that problem worse. At least, if a politician of any political persuasion has judged that a subject is a matter that requires attention, then that is more likely to be a matter that will attract the attention of the political process, one way or the other, at the end of the inquiry.

So my own feeling was that the requirement of ministerial reference was a sort of insurance policy at the front door. It was never a great problem. I would discuss topics, where Attorneys-General did not have their own check list. For example, when Attorney-General Ellicott came into office, he had very definite and very clear ideas of what he wanted the Law Reform Commission to do. Attorney-General Durack had fewer ideas of particular program. It would, therefore, have been a waste of my time to be telling Attorney-General Ellicott what I thought the program would be. But Attorney-General Durack would at least listen. He would not always follow it. But that was what the act required. Personally, I thought that it was not a bad system.

If you wanted to look for something other than the Attorney-General, yet not an entirely self-referenced system, perhaps you could enlarge it so that any minister could provide a reference, after consulting the Attorney-General. For example, I had a discussi last week with a number of lawyers in Sydney who are interested, as I am, in the human

genome project. Most citizens, and almost all lawyers, have no conception of the ethical, social and legal problems that will come when you can actually manipulate the human species. These things are happening very quickly.

Those lawyers have written, at my suggestion, to the Attorney-General suggesting that the intellectual property law area—a federal responsibility—of the human genome project and of genetic manipulation should be referred to the Law Reform Commission. They have said, as top intellectual property lawyers, 'We would give a year or two of our lives to this, because this is a tremendous challenge. Australia is not in the forefront of the science, but we can be in the forefront of the law'. I think that is the sort of thing which the minister for science could propose should go to the commission.

The value of keeping it as the Attorney-General is that the Attorney-General will be responsible for answering to parliament for the budget of the commission and the resources that are available. If every minister could refer matters, then you might get a surfeit of references and a lack of coordination and of a coherent program. The alternative would be for some method whereby parliament could refer matters. However, again, under our Westminster system the executive government, while it has the majority, can determine what the parliamentary program will be.

So the bottom line is that I tend to favour the present system. But that may be through a deficiency of perception of viable alternatives. I remain of the view that one of the main problems that the committee has to address is how you tackle the log jam of consideration of reports. If part of that is gaining political attention, then I would not do anything myself that would take out political interest. The Attorney-General's obligation to give the reference—with a good Attorney-General—means that you have a degree of commitment that, at the end of the process, something will be done.

So far as the practice is concerned, I entirely agree with you. It is essential both for the reputation of the commission in the community and in the legal profession, the judiciary, for its discussion papers and consultative documents to be taken seriously in the legal profession. To attract the best possible feedback and submissions, there have to be people of stature and repute. Or the commission has to include people of that kind. I think

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that is another area where perhaps insufficient time has been given to try to track down the people relevant to a particular reference, and providing references which should be, perhaps, given at a time when thought has been given to the particular person who will lead the reference, who is a respected national expert.

Mr DUFFY—I would like to interrupt you on that. If you take the collective investment, the one that I referred to earlier, it was the industry that came to me saying that was an area which just had to be looked at. I think the commission would agree that there was no way that they could do that reference, and that is not being in any way critical of them. It would have been very difficult to say who could have done it. It was the combination of the permanent structure of the commission with the capacity of people in Sydney who were prepared to give their time and go and spend a day or a couple of days with the commission to help them on a consultancy basis. I think the consultancy fees, if I remember correctly for that whole reference was probably a couple of thousand dollars. It was amazing the time that people gave.

That is another way, in a sense, through an Attorney-General, that you can get that reference and they should do that more often. I mean, the business community is at fault there, too. There was $9,000 in total in that. You had people from the Insurance Superannuation Commission, Trustee Companies Association, Macquarie University, Bankers Trust Australia Ltd—leaving aside the public servants—Blake Dawson Waldron, Allen Allen and Hemsley, Life Insurance Federation of Australia. There was a tremendous response to that but they were not part-time commissioners; they came in as consultants.

Mr Justice Kirby—Mr Duffy, that is not an exception. In my time, one of the most exciting references was the one that led to the Insurance Contracts Act, which is almost weekly fare for us in the courts. It is a major piece of national legislation. After more than 80 years, the federal parliament at last fulfilled its constitutional responsibility. We secured a national insurance law code. We had meetings in the commission where we had all of the consultants—they were people from every branch of the insurance industry—the life, the general, the agents, the brokers, the underwriters, the reinsurers and we had community groups and consumer groups. They joined in with tremendous

enthusiasm and devotion. They gave a lot to the Commonwealth and to the parliament. The result is a very good statute. It has removed a lot of the uncertainties. I think it has been a great success. So they were consultants.

You have to have the core of intelligent, hardworking, energetic people of repute at the centre as commissioners and staff. Then you can gather around you this group of consultants. I reckon that this was one of the major achievements of the ALRC during my time. In every project we gathered this penumbra of expertise from different groups in the community relevant to the task in hand. I hope that has been continued. By what you say, it has been. It was always extremely exciting. The devotion of citizens to improving the law was a wonderful thing to see. It was really civic action and responsibility at work.

Mr DUFFY—They are very responsive if they are asked.

Justice Kirby—Yes.

Mr SINCLAIR—I guess my concern is: is the Law Reform Commission the right group? Both you and Michael are talking about bringing in consultants from outside. I am not absolutely convinced that you are not better setting up an independent body with a few lawyers and the specialists for each of these projects. The group you pick—for the time being, the current members of the Law Reform Commission—have not necessarily the background that enables them to come to conclusions in any particular area. I grant you it would be very difficult to get rid of the Law Reform Commission, but I wonder whether the nature of law reform would not be enhanced more by picking people for the particular reference. With your collective investments reference, for example, you said you relied very much on the Sydney profession because that is where there was the emphasis and the concern.

The nature of what we have done federally is to set up this range of bodies, and there is a list of them in that reference of ours: Family Law Council, Administrative Review Council, Companies Securities Advisory Committee, Copyright Law Review Committee, Office of Parliamentary Counsel, Office of Legislative Drafting and Attorney-General's Department; then each of the other federal departments has its own field. Inevitably, most legislative change follows some sort of recommendation for change in the

law within the departmental process. Are you really better served by having a law reform commission than you would be by having specific ad hoc bodies constituted, as you essentially do now, by bringing in consultants?

Mr DUFFY—Yes, except there is a problem with that. Mr Justice Kirby made a point a moment ago about there being a certain stage where people may be prepared to give a year or a couple of years to a government enterprise, whereas they may not be prepared to give their time in terms of a permanent appointment. I think that is true, but it is rare. It is the same thing with governments. We have not moved to the American position. It is not just the different form of government in terms of cabinet, but we have not moved to a position, as the United States has at times, where people come out of industry for a couple of years—not just lawyers, it could be economists or anyone. How much better would Treasury and Finance be if they had some people who came out of the financial sector and went into them?

I do not think that is happening yet in Australia. There could be offers made to people to do that, and you may be able to get them to do it. I think you are right if that would happen. But we are not quite at that point yet in this country, unfortunately. If you take a person mentioned earlier by the judge, Mr Harmer, he has continued on, and he was involved with the bankruptcy reforms which came out of the corporations law changes. They were not based on that entirely; there were some criticisms of the fact that it did not follow it absolutely. There are those people who will give that time, but I do not think there are that many of them.

Justice Kirby—I question that. I think a lot of lawyers, when they get to about 40 are in a vulnerable situation.

Mr DUFFY—If they are not a bit sick of the law, it is very strange.

Justice Kirby—Yes, they are. The call to do something for their country is a very sharp clarion. What we have to do is get politicians who will get on the phone and compliment a person by asking them. They have got to be advised by judges and others who know the sorts of people who would perhaps respond. Those people exist right around this country. It is simply a matter of finding them.

Mr DUFFY—They are not just lawyers, though.

Justice Kirby—No. But for the Law Reform Commission I think the core has got to be a group of lawyers, because they have got to bring it together in the ultimate product—a law. Could I just add two other points about the ad hoc solution. The first is infrastructure. It will be less expensive to the Commonwealth if you have a core body with its premises, its staff and so on, who can be diverted into particular projects. The second is the danger of adhockery. If you get a project that is working on a particular matter only, there is a danger that you do not bring it back to the general development of the law. That, for example, is what the Court of Appeal and the High Court do in the legal system. The danger of adhockery is that special interest groups will capture the law and take the matter off on their own particular direction. A good law reform commission, working well and with highly talented people, will bring the matter back into a coherent, consistent development of the legal system. It will be aware of other developments, including developments in the courts.

CHAIRMAN—One of the reasons for this inquiry being set up was that Justice Evatt's term of appointment was coming to an end and the Attorney was in the process of appointing a new president. Have you got any particular views as to the role of the president in the current era as against how it might have been when you started the commission off? Do you see presidents still performing the same functions as when you were the chair?

Justice Kirby—Every person will put their own stamp on an office of that character. Each of the successive four presiding officers of the commission has been a quite different personality. I think that times have to some extent changed. The political situation has changed. Each office holder is going to respond in a different way. I must say that I think it is a pity that the commission has not always secured the same public involvement in its activities as it did in the early days, including under Justice Wilcox. I think that was a strength of the commission, not only in the development of its own ideas but in its dealings with politicians. If the commission was well-known in the community and was known to have consulted the community very thoroughly then it became more

difficult to completely ignore the commission's proposals.

I have never believed that the commission had a right to have its proposals passed into law as made. That is just not our democratic system. But I do think that we need to address the problem of how we gather attention to the report so that it is given due consideration.

CHAIRMAN—Earlier reports of the commission had draft legislation in them. There is now an argument as to whether the commission should be drafting whole pieces of legislation arising out of its reports or concentrating on specialist provisions. One argument says that, by concentrating on drafting, it can also crystallise the body of the report and focus the attention on some of the recommendations that one makes. I am interested in your views on that. The other thing I am interested in is one of the reports of the commission, on the recognition of Aboriginal customary laws. The reference was given on 9 February 1977 and it was not tabled until 12 June 1986. It was quite a substantial report but, unfortunately, it has not yet been responded to by government. Obviously, in terms of the Mabo decision of the High Court, it was very relevant in relation to the debate raging now.

What is your view in relation to the sorts of reports the commission should be concentrating on now? Should they be short, sharp reports or basically a mixture of both? Have you got any views in relation to that? There is a suggestion that if they want to influence legislation they should be short, sharp reports that are given up to government. Yet there is a criticism that sometimes there is not the necessary intellectual rigour, the scrutiny or the public participation in the reports.

Justice Kirby—First of all, in relation to draft legislation, I must say that I agree with Lord Scarman that, by drafting the legislation, you have to get your own thoughts clear. Ultimately, in most of the proposals going to the federal parliament, you have to have draft legislation. There was always a degree of territorialism relating to whether legislation should only be drafted by the parliamentary counsel's office and whether the Law Reform Commission was not seeking to move into their territory. That led to occasional resistance. We tried to overcome that by getting Mr John Ewens, first as a

consultant, then as a commissioner and then as a consultant again. He was marvellous. He was unparalleled in his experience of legislative drafting. It gave the commission a degree of clout in relation to the parliamentary counsel's office. For example, he put the final touches on the Insurance Contracts Act. It bore the stamp of somebody who had been drafting legislation since the 1930s.

CHAIRMAN—Do you see that as a way to go in the current climate?

Justice Kirby—I think it is a very important way of focusing attention, getting your own ideas right, not fudging the hard questions at the borders, which are often the really difficult issues, and delivering something which can then be implemented relatively speedily, if parliament so wishes. It may be that you could explore ways by which, in harmony with the Office of Parliamentary Counsel, the concerns—I am sure they would be proper ones—about territorialism can be mollified and solved. I think it is a useful discipline of the mind. Perhaps the relationship between the commission and the Office of Parliamentary Counsel needs attention. However, the notion of just coming up with generalities would be another step backwards from the discipline that may ensure that proposals pass into law. So far as the—

CHAIRMAN—Short, sharp reports or—

Justice Kirby—Yes, the kinds of reports. I think you need a mixture of both—the short, sharp reports, as you have described them—because attorneys-general get problems of that character. For example, the project on sovereign immunity, which moved very quickly into legislation, was one where we had a commissioner, Professor Crawford, a group of people from the Department of Foreign Affairs and Trade and Attorney-General's, and a number of academics and others who could be gathered around. They became a sort of think-tank. It was like a superdepartmental committee. Then thoughts were brought back to the generalists for their input. The proposals were put through their test and then the legislation was drafted and passed into law. You need that.

However, somebody has to look at the big questions, such as the multicultural impact on the law. If the Law Reform Commission does not do that, who will do that? Who will do it with a network of community and other groups, a facility for consulting them; and with techniques for translating the good ideas and generalities into practical legal measures? I think there is a place for both kinds of report. You need to be able to recruit commissioners who will be able to do both tasks. In my day, it was very stimulating to see the way in which a commissioner on a black letter subject, say, insurance contracts, could make very useful contributions into matters of far greater generality such as sentencing or Aboriginal customary laws.

As to the Aboriginal customary laws report, it is true that took a long time. There are particular explanations for that which I do not think it is very useful to explore. It is a commentary on the system that, despite the high profile of Mabo and the problems we have had in the political agenda in the last year, a further seven years—nearly eight—has passed since that report was tabled. It was finalised by an extremely able commissioner, Professor Crawford, who is now professor of law at Cambridge University. Yet it has not really been given attention by parliament. It is true that the commission took time in that matter but, after all, the problem had been around for 200 years.

CHAIRMAN—I am not being critical. I think it is one of the most substantial reports that the commission has produced. It amazed me, in terms of the foresight, given the Mabo decision—

Mr DUFFY—I have heard your views at length: you agree with what Justice Kirby said. I have heard you saying that it should have been implemented. Justice Kirby, were you saying that the Australian Law Reform Commission should do drafting of legislation?

Justice Kirby—Yes, I favour that.

Mr DUFFY—With the Aboriginal customary laws reference, which, as you have said, has sat there for a long time and nothing has happened to it—I suppose this is a strange time to raise it—one of the criticisms in the last three years, or one I found directed to the commission, has been the question of delay. I have a view—I may be wrong, but I have had some evidence for it—that part of that was the fact that they were drafting. I think the way to go is to work out a better relationship with the Office of Parliamentary Counsel, as you adverted to. It worries me a little if you cannot get a repor

without draft legislation, because I think it can delay it to a point that can sometimes become a real difficulty.

Justice Kirby—In the beginning, the ALRC followed the New South Wales Law Reform Commission and the English Law Commission in attaching draft legislation. The accepted wisdom was that that concentrated a mind, avoided generalities, solved the border problems and disputes, that it was more useful to parliament and more likely to be put into law. It may be that there is a need in particular references to differentiate whether you produce legislation. My general feeling is that it would generally be useful to the process of law reform to attach the legislation to the report.

I favour Attorneys-General fixing deadlines. Attorney-General Enderby did so in the very first reference we received; we were told to get our report done in six months. This was a major report on criminal investigation and complaints against the police. The complaints against police went into law very quickly. With the criminal investigation, there were a number of attempts. It has gone into law for the defence services. It has influenced the law in other areas. If it had been implemented, it would have avoided a lot of the problems that we have faced in the common law over the decade and a half since it was produced. I know that some people are resistant to time limits. But my view is that it is a good discipline for commissions, in particular projects, to be requested to produce the report by a given time.

Mr DUFFY—That has continued to apply.

Justice Kirby—Yes.

Mr DUFFY—But, as you are aware, in so many areas, and particularly in the law, you do have continual requests for extensions. I think that there were times when that drafting was a problem.

Mr SINCLAIR—But is that a subjective judgment or did you find that drafting was a problem?

Justice Kirby—Drafting takes time.

Mr SINCLAIR—It does but—

Justice Kirby—As it does with ministers.

Mr DUFFY—It is not a subjective judgment. I am certain it did.

Justice Kirby—It may be that this is something where the commission's resources are not as strong as they were in my time. John Ewens was a miracle worker. It is one of the privileges of my life to have been able to sit at a table and see this man who had been in federal drafting from 1932 until the 1980s at work: fitting this problem into the panoply of federal legislation and coming up with the solutions that we could not think of. It was a wonderful experience. It does refine ideas. If it is well done, it makes the reports much more useful to the process.

I am not aware of the current lay of the land on this issue. But when I left, John Ewens was there, Stephen Mason had a skill and had come from a background in drafting. The commissioners were adept at it and interested in it. For example, the Insurance Contracts Act was a very useful exercise because we could put the draft bill to all those consultants and they could come up with the problems. It takes a bit more time. But, I believed, at least in my experience, that it was time well spent.

CHAIRMAN—We will send you a copy of the transcript which you can look at, correct and return to us. We will send you that other material.

Mr SINCLAIR—If there should be any questions that arise from the formal paper you submitted to us, we will get in touch with you and perhaps you can correspond in some way.

Justice Kirby—Of course. I will be available to come back to the committee.

CHAIRMAN—Thank you for your attendance this morning.

Justice Kirby—Thank you for inviting me to come before the committee.