Re-examining the Relationship between Parliament and the Law Reform Commissions

An Australian Perspective

Jacinta Dharmananda[*]

Abstract

In Australia, statutory law reform commissions answer to parliament, albeit through a senior government minister. But once the commission has fulfilled its obligations to parliament, what are the obligations of parliament to scrutinize, or even to consider, the commission's recommendations? Further, what are its obligations in relation to proposed legislation that contains law reform proposals? This article addresses those questions in an Australian context, with a focus on the generalist law reform commissions.

Keywords: law reform commissions, legislative process, parliamentary scrutiny, Australia.

A Introduction

Much has been written about the nature of law reform, its processes, implementation and sources. The legislative process perspective on law reform has, in Australia at least, been less frequently examined. This is curious. While it is accepted that there are, and much has been written about, mechanisms beyond legislation that achieve law reform, legislation remains a key route. According to a recent report on Commonwealth law reform, "most law reform recommendations are recommendations for legislation", and so it follows that implementation by legislation remains a primary objective of law reform agencies.[1] Perhaps this is due to its visibility, or it reflects the growing tendency of governments to use legislation as evidence that something has been 'done.' Whatever the reason, if legislation remains a key implementation tool for law reform, then it would seem that parliamentary scrutiny and mechanisms addressing or enabling law reform legislation are an important component of implementation. This article focuses on parliamentary scrutiny of 'law reform legislation' in Australia.

* Senior Lecturer, Law School, University of Western Australia; PhD Candidate, College of Law, Australian National University. The research reflected in this article is supported by an Australian Government Research Training Program (RTP) Scholarship. ORCID ID 0000-0001-5163-3340

1 Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform*, London, Commonwealth Secretariat, 2017, p. 157.

doi: 10.5553/EJLR/138723702020022002004

The term 'law reform' is "notoriously difficult to define".[2] Consequently, when we speak of parliamentary scrutiny of 'law reform' legislation, it is not immediately apparent what proposed legislation we might be referring to. In Australia, as in other legal systems, this could encompass legislation emanating from a broad range of sources – from the statutory generalist law reform commissions to specialist agencies, lobbyists, government departments or individual advocates.[3] Indeed, most legislation could be classified as some sort of 'reform'. After all, legislation by governments to change the law "is the very substance of everyday political work in democracies throughout the world".[4]

The first and most substantial portion of this article addresses parliamentary scrutiny of the output of the generalist *statutory* law reform commissions in Australia. There are three reasons for this focus.

First, these generalist statutory commissions are creatures of parliament. They are established by statute as ongoing enterprises and are responsible to the parliament that established them. Second, the relatively recent reforms to referral and parliamentary processes made in the United Kingdom for Law Reform Commission bills invites an inquiry into the scrutiny that exists for the work of similar commissions in Australia.[5] This point has particular relevance given that the Australian commissions are generally accepted to have been modelled on the statutory generalist United Kingdom commissions.[6] Third, this focus is for practical reasons. As already noted, there are numerous law reform bodies in Australia. Given that number and diversity, addressing each of them in particular would be a mammoth task beyond the scope of this article.[7]

The second, and shorter portion, addresses parliamentary scrutiny more broadly. It briefly describes the practices for non-controversial reform bills outside of the work of the law reform commissions.

B The Commissions as Creatures of Parliament – A Relationship Established

All jurisdictions in Australia, including the two Territories, have a generalist law reform body to provide advice and recommendations to the executive government of that jurisdiction. Five of these – the Commonwealth, New South Wales, Queensland, Victoria and Western Australia – currently have a *statutory* generalist commission (to be referred to as the 'commissions' in this article). This was

2 M. Tilbury, 'A History of Law Reform in Australia', in B. Opeskin and D. Weisbrot (Eds.), *The Promise of Law Reform*, Australia, The Federation Press, 2005, p. 3.

3 For a discussion of the various sources of policy advice to Australian governments, *see* S. Prasser, 'Providing Advice to Government', in *Images, Colours and Reflections: Lectures in the Senate Occasional Lecture Series 2005-2006* (Papers on Parliament 46, Department of the Senate, 2006).

4 Secretariat, 2017, p. 11.

5 For details of these reforms, *see* M. Zander, *The Law-Making Process*, 7th ed., United Kingdom, Hart Publishing, 2015, pp. 454-459.

6 Tilbury, 2005, p. 12.

7 For example, *see* the list of statutory specialist law reform agencies in J. Barnes, 'On the Ground and on Tap—Law Reform, Australian Style', *The Theory and Practice of Legislation*, Vol. 6, No. 2, 2018, Appendix, pp. 219-224.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

not always the case.[8] But following a period of "downsizing, restructuring and experimentation with new models",[9] this has been the number of statutory generalist commissions for the past two decades.[10] Where a jurisdiction does not have a generalist statutory commission, it has a *non-statutory* law reform body formed from a collaboration between the government and external bodies or individuals.

A summary of this current landscape in Australia is provided in Table 1. The jurisdictions with the commissions are in bold.

Although the commissions are established by parliament, their relationship with parliament is not bilateral. As is seen from Table 1, the executive has a key role in determining projects. This varies according to the particular commission. For the Commonwealth and New South Wales, they are the only source of referrals for projects. For Victoria, the commission may make its own recommendations on "minor legal issues that are of general community concern".[11] Some commissions encourage through their websites suggestions from the public.[12] But referrals of topics by the executive, through the Attorney-General or minister, are a major trigger for projects. And, in any event, most commission law reform programmes must be approved by the executive.[13] It has been said that there is an "active communication loop"[14] between the Attorney-General, their department and the law reform commission about appropriate law reform topics, but, ultimately, the executive is highly influential if not determinative.

This relationship between the five commissions and their parliament having been established, the role of the executive becomes pivotal in the context of commissions reporting to parliament and the subsequent developments regarding that report.

8 For a comprehensive early history of the law reform commissions in Australia, *see* P. Handford, 'The Changing Face of Law Reform', *Australian Law Journal*, Vol. 73, July 1999, pp. 503-523.

9 Tilbury, 2005, p. 16.

10 The Victorian Government re-created, following its abolition in 1992, a statutory generalist commission in 2000: Tilbury, 2005, p. 16.

11 *Victorian Law Reform Commission Act 2000* (Vic) s 5.

12 Such as the Western Australian Law Reform Commission. *See* www.lrc.justice.wa.gov.au/C/contribute_to_law_reform.aspx.

13 *See, e.g.*, Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020-25*, Report, December 2019, pp. 16-18.

14 R. Croucher, 'Law Reform Agencies and Government – Independence, Survival and Effective Law Reform,' *University of Western Australia Law Review*, Vol. 43, 2018, pp. 78-91, p. 85. *See also* K. Cronin, 'Law Reform in a Federal System,' *European Journal of Law Reform*, Vol. 21, No. 1, 2019, pp. 33-43, p. 35.

Table 1 Generalist Law Reform Bodies by Jurisdiction

Jurisdiction (in alphabetical order)	**Statutory or non-statutory body**	**Role and referrals (section citations are to establishing Act, where relevant)**
Australian Capital Territory	Non-statutory: Law Reform Advisory Council – a collaboration between ACT government and Australian National University established by ministerial authority in 2009[a]	To "provide expert advice and recommendations to the Attorney-General on terms of reference dealing with law reform matters referred to it by the [ACT] Attorney-General"[b]
Commonwealth	Statutory: established by *Australian Law Reform Commission Act 1996* (Cth) (s 5)[c]	Commonwealth Attorney-General may refer matters to commission either at the suggestion of commission or on the initiative of Attorney-General (s 20) and Commission must comply re order of dealing with references (s 26(3))
New South Wales	Statutory: established by *Law Reform Commission Act 1967* (NSW) (s 3)	Considers laws/proposals "in accordance with any reference to it made by the [NSW] Minister" (s 10)
Northern Territory	Non-statutory: The Northern Territory Law Reform Committee – non-statutory committee within the Department of the Attorney-General and Justice (NT) consisting of a variety of members, including the Attorney-General, the Secretary of the NT Attorney-General's Department, the Solicitor-General, a member of the judiciary and members of the legal profession, law academy, and police force, the ombudsman, and an Indigenous representative[d]	Can "receive and consider proposals from any source for review of the law in the Northern Territory" and, upon the request of the Attorney-General [NT], "to consider and report on the reform or review of the law or legal procedure in the Northern Territory"[e]
Queensland	Statutory: established by *Law Reform Commission Act 1968* (Qld) (s 3)	May "receive and consider any proposal for the reform of the law which may be made or referred to it" including at the request of the [Qld] minister (s 10) The Queensland Commission has a *Protocol for the Development of Proposed Programs* (October 2014)
South Australia	Non-statutory: The South Australian Law Reform Institute – formed by an agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia[f] Established in 2010[g]	Advisory Board can receive Proposals from a wide range of organizations, including the Attorney-General [SA], the University of Adelaide, the judiciary and "other representative organizations having standing in the community"[h]

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

Table 1 (continued)

Jurisdiction (in alphabetical order)	Statutory or non-statutory body	Role and referrals (section citations are to establishing Act, where relevant)
Tasmania	Non-statutory: Tasmania Law Reform Institute – established by agreement between the state government, the University of Tasmania and the Law Society of Tasmania[i] Established in 2001[j]	May "receive proposals for law reform or research projects from a wide range of sources, including the judiciary, the Attorney-General, the Legal Aid Commission, government departments, the Parliament, the legal profession, members of the community and community groups"[k]
Victoria	Statutory: established by *Victorian Law Reform Commission Act 2000* (Vic) (s 4)	Proposals referred by the Attorney-General [Vic] (commission may also suggest proposals) and proposals that the commission considers raise "relatively minor legal issues" that are of general community concern if the commission is satisfied that it will not require a significant deployment of resources (s 5)
Western Australia	Statutory: established by *Law Reform Commission Act 1972* (WA) (s 4)	May consider any proposals for the reform of the law which may be made to it "by any person", including the Attorney-General [WA] (s 11)

[a] Available at: www.justice.act.gov.au/safer-communities/law-reform-advisory-council.
[b] Law Reform Advisory Council, Terms of Reference (October 2012), cl 3. Available at: http://cdn.justice.act.gov.au/resources/uploads/LRAC_Terms_of_Reference_Oct_2012.pdf.
[c] The first national statutory law reform commission was the Law Reform Commission of Australia established under the *Law Reform Commission Act 1973* (Cth). It was reconstituted under this 1996 Act.
[d] Constitution of the Law Reform Committee of the Northern Territory, 30 November 2007, cl 3 and 4. Available at: https://justice.nt.gov.au/__data/assets/pdf_file/0004/621922/constitution-law-reform-committee.pdf. *See also* https://justice.nt.gov.au/attorney-general-and-justice/law-reform-reviews/law-reform-committee-and-contacts/nt-law-reform-committee.
[e] *Ibid.*, cl, s 2. Available at: https://justice.nt.gov.au/__data/assets/pdf_file/0004/621922/constitution-law-reform-committee.pdf.
[f] Available at: https://law.adelaide.edu.au/research/south-australian-law-reform-institute#sources-for-institutes-work.
[g] Replacing a Law Reform Committee. Available at: https://law.adelaide.edu.au/research/south-australian-law-reform-institute#history-of-law-reform-in-south-australia.
[h] Available at: https://law.adelaide.edu.au/research/south-australian-law-reform-institute#sources-for-institutes-work.
[i] Tasmanian Law Reform Institute, *Annual Progress and Financial Report 2018*, Faculty of Law, University of Tasmania, p. 1.
[j] *Ibid.*
[k] Available at: www.utas.edu.au/law-reform.

doi: 10.5553/EJLR/138723702020022002004

C The Commission's Obligations to Their Parliament

The Australian Law Reform Commission (ALRC) has described itself as "responsible to Parliament through the Attorney-General".[15] This pithily sums up the tripartite relationship for the commissions. Nowhere is this more evident than in the reporting requirements of the commissions to parliament and what may develop, or not, subsequent to that.

The commissions produce many publications, including issues papers and discussion papers, but it is the final report on an inquiry that constitutes their advice to parliament. Each commission must submit its report to the relevant minister, and then that minister has a statutory obligation to table the report to parliament within a particular time frame. Separately, each commission must prepare and submit an Annual Report, which must be tabled in parliament, again sometimes through the minister. These reporting obligations are summarized in Table 2 below.

Table 2 Parliament and the Reporting Obligations of Commissions[16]

Jurisdiction	Commission report and Annual Report	Obligations to parliament	Other statutory obligations to parliament under establishing Act
Commonwealth	Must submit report on inquiry to Attorney General (s 21(2)) Annual Report to be submitted to Parliament (*Public Governance, Performance and Accountability Act 2013* (Cth) s 46)	Attorney-General must table reports in each House of Parliament within 15 sitting days after receipt (s 23) Annual Report to be submitted to Parliament within time period (*Public Governance, Performance and Accountability Act 2013* (Cth) s46)	House of Parliament or Parliamentary Committee can require commission to give information about functions/power (s 26(1))
New South Wales	Must submit report on inquiry to minister (s 13) Must submit Annual Report to minister (s 13)	Minister must table inquiry report *and* Annual Report in each House of Parliament within 14 sitting days after receipt (s 13)[a]	

15 Australian Law Reform Commission, *Annual Report 2018-2019*, 17 September 2019, p. 4.

16 References to Act sections are to the Act establishing the commission detailed in Table 1, unless otherwise specified.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

Table 2 (continued)

Jurisdiction	Commission report and Annual Report	Obligations to parliament	Other statutory obligations to parliament under establishing Act
Queensland	Must, at the request of the minister, make a report on inquiry to the minister (s 15) Annual Report to minister (s 15)	Minister must table the report *and* Annual Report in the Legislative Assembly within 14 sitting days after its receipt by the minister (s 16)[b]	
Victoria	Must submit a report on inquiry to the Attorney-General (s 21) Annual Report to Auditor General (s 19; and *Financial Management Act 1994* (Vic) Part 7)	Attorney-General must table the report before each House of the Parliament within 14 sitting days of that House after receipt (s 21) Annual Report must be tabled to Parliament (*Financial Management Act 1994* (Vic) s 46)	Commission must comply with lawful information requirement by House of Parliament or Parliamentary Committee (s 20)
Western Australia	Must report to the Attorney General on the results of the examination of law reform (s 11(3)) Annual Report to Attorney General (s 13 and *Financial Management Act 2006* (WA) ss 61, 63)	Attorney-General must table report made by the commission to each House of Parliament as soon as practicable after they have been submitted to him/her (s 11(7)) Attorney-General must table Annual Report to parliament (*Financial Management Act 2006* (WA) ss 3, 64)	

[a] The requirement to table reports in NSW was only enacted relatively recently in 2011 by the *Courts and Other Legislation Amendment Act 2011* No. 8 (NSW) Sch 1, cl 1.5.
[b] Queensland is a unicameral parliament.

For the commissions, the provision of their final report on a law reform inquiry to parliament is where their formal involvement with parliament on that topic of inquiry ends.

The conundrum of getting Australian governments to respond to law reform reports has been widely discussed.[17] Yet this is against a background of other

17 *See, e.g.*, J. Hannaford, 'Implementation', *in* B. Opeskin and D. Weisbrot (Eds.), *The Promise of Law Reform*, Australia, The Federation Press, 2005, pp. 222-229; Sir G. Hammond, 'The Legislative Implementation of Law Reform Proposals', *in* M. Dyson, J. Lee & S. Wilson Stark (Eds.), *Fifty Years of the Law Commissions: The Dynamics of Law Reform*, United Kingdom, Hart Publishing, 2016, pp. 175-188.

jurisdictions with similar models of commissions, such as the United Kingdom and New Zealand,[18] having made reforms to strengthen the requirement of the executive to act. In Australia, it remains the case that there is no obligation for a government to respond to a report or for a report to be referred to a parliamentary committee for examination. Despite recommendations by a Commonwealth parliamentary committee as far back as 1994 for parliament to instigate more formal procedures concerning executive responses to a report,[19] this has not eventuated.

Commissions may monitor developments in relation to issues covered in their past reports.[20] But, while a report gets its moment in the sun when tabled in parliament, and so parliament can be taken to be 'aware' of that report (a privilege, it is acknowledged, that is not guaranteed for reports of other law reform agencies), the report and its author remain stuck "on the edge of the parliamentary system".[21] There is no clearly established or transparent parliamentary requirement that stipulates participation by the commission in parliamentary consideration of its recommendations, or that enables a commission to further advance or explain its report to parliament.

D Pre-legislative Scrutiny of Commission Legislative Proposals – The Beginning of the End of the Relationship?

So, after the report has been tabled in parliament, in Australia "it is for the Government to implement the recommendations in each report".[22] Its legislative recommendations therefore enter the pool of myriad matters competing for the ear and attention of the minister and their department. Even assuming that the minister does take an interest in actioning any of the recommendations, that minister in turn must compete in the even deeper pool of all other ministers and departments competing for Cabinet or other executive approval and a place on the legislative programme.[23]

Assuming that this occurs, the legislative recommendations must be transformed into a bill. In Australia, each of the Commonwealth and states have specialist parliamentary counsel offices which are part of the executive branch of government of each jurisdiction. These offices are tasked with drafting all primary legislation, and, depending on the office, all or some delegated legislation.[24]

18 For a brief summary *see* Secretariat, 2017, pp. 162-163.

19 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Law Reform-The Challenge Continues*, Parliament of the Commonwealth of Australia, May 1994, pp. xvi-xvii.

20 The ALRC says that it does so: ALRC, 2018-2019, p. 31.

21 Cronin, 2019, p. 41.

22 Croucher, 2018, p. 79.

23 *See, e.g.*, the process for a Commonwealth bill in the Department of the Prime Minister and Cabinet, *Legislation Handbook*, Commonwealth of Australia, 2017, ch. 2.

24 There have been instances of drafting of bills being outsourced by the government to private law firms, but this is not routine.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

Parliamentary counsel have been described as the "first bulwark"[25] in legislative scrutiny in Australia. They not only protect the integrity of the statute book and anticipate issues, but also assist in identifying "the logical, legal, policy and implementation implications of the detailed articulation of the policy" to be reflected in the legislation they are instructed to draft.[26]

Bills may get a 'head start' from commission reports that attach draft bills to implement their recommendations. In a study of Commonwealth jurisdictions it was noted that a number of law reform agencies "either as a matter of course or selectively, submit final reports with bills attached".[27] The practice has been inconsistent in Australia. The current ALRC president recently referred to the ALRC as having "reinstated" the practice "where appropriate".[28] Draft bills attached to the reports of the state commissions are uncommon.[29] Even where a bill is included with a report, "recommendations must first be cast into formal drafting instructions"[30] to the parliamentary counsel in any event. Ultimately, the parliamentary counsel must be involved in the drafting of a government bill.[31]

Drafting instructions implementing commission recommendations may have the benefit of the wide consultations undertaken by the commission for their inquiry.[32] But, apart from this practical input, there is very little to suggest that parliamentary counsel of any Australian jurisdiction adopt any particular approach to drafting a bill enabling a commission recommendation. There may be particular aspects considered on the basis of, for example, the subject matter[33] or whether it is national uniform legislation,[34] but a commission's law reform legislative proposals per se do not appear to be the subject of any particular procedures.

There are indications that the work of the commissions and the work of the government on draft bills are treated distinctly. For example, after the Australian government released its own exposure drafts of legislative reforms on religious

25 Stephen Argument, 'Legislative Counsel and Pre-Legislative Scrutiny', *The Loophole,* January 2010, pp. 61-73, p. 61.

26 P. Quiggin, 'Statutory Construction: How to Construct, and Construe, a Statute,' in Neil Williams (Ed.), *Key Issues in Judicial Review*, Australia, The Federation Press, 2014, pp. 78, 80.

27 Secretariat, 2017, p. 145.

28 S.C. Derrington, 'Law Reform – Future Directions', *Australian Law Journal*, Vol. 93, 2019, pp. 384-388, p. 388. *E.g.*: Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report 134, December 2018, Appendix H "Suggested Legislative Amendments".

29 A perusal of the final reports produced by the state law reform commissions since 2015 reveals that only a few have attached draft bills.

30 A. Bushby, 'Law Reform and the Executive', *European Journal of Law Reform*, Vol. 21, No. 4, 2019, pp. 592-602, p. 599.

31 *See ibid*, and P.P. Biribonwoha, 'The Role of Legislative Drafting in the Law Reform Process', *Commonwealth Law Bulletin*, Vol. 32, No. 4, 2006, pp. 601-608.

32 Biribonwoha, 2006, p. 604.

33 J. Dharmananda, 'Drafting Statues and Statutory Interpretation: Express or Assumed Rules?', *Monash University Law Review*, Vol. 45, No. 2, 2019, pp. 401-434, pp. 421-423.

34 Parliamentary Counsel's Committee, *Protocol on Drafting National Uniform Legislation*, 4th ed., 21 February 2018. Available at: www.pcc.gov.au/uniform/Uniform-drafting-protocol-4th-edition.pdf.

freedom in 2019, the Attorney General narrowed existing terms of reference which had been given to the ALRC on the same topic requesting it to "confine its inquiry to issues *not* resolved by that Bill".[35] (emphasis added)

Some parliamentary committees have the capacity for pre-legislative scrutiny of a bill. For example, the standing general purpose and legislation committees of the House of Representatives and the Senate have the power to report on pre-legislative proposals or 'exposure' draft legislation,[36] as can the Standing Scrutiny of Bills Committee[37] and the Standing Committee for the Scrutiny of Delegated Legislation.[38] Pre-legislative proposals also have the potential to be referred to select committees.[39]

Despite this capacity, and despite the relationship between the commissions and their establishing parliament, there is no established procedure, at least that is made public, for a commission draft bill (whether as drafted by the commission or by parliamentary counsel) to be referred to a parliamentary committee for scrutiny.

E Parliamentary Scrutiny – Parliament's Obligation to the Commissions

In the area of parliamentary scrutiny of law reform legislative proposals, we might expect that, given the relationship between parliament and their commissions, there would be unique procedures or other formal processes. But the short response to that proposition, in all Australian jurisdictions, is that there is not. The parliamentary scrutiny given to bills and delegated legislation incorporating law reform based on a commission's work appears to be the same as in the case of ordinary bills and delegated legislation.[40] Law reform bills are 'ordinary' bills, even those that codify law.

Following is a brief summary of the parliamentary scrutiny given to all proposed legislation, including law reform proposals. For those familiar with a Westminster style of government, the general passage of legislation will be familiar. But its examination helps to identify opportunities where scrutiny of law reform legislation might be enhanced or streamlined.

35 Attorney General of Australia, ALRC Amended Terms of Reference, 29 August 2019. Available at: www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/.

36 House of Representatives, Parliament of Australia, *House of Representatives Standing Orders*, Commonwealth of Australia, 19 September 2019, O 215(b); Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, Commonwealth of Australia, January 2020, O 25(2).

37 Senate, *ibid.*, SO 24(1).

38 Senate, *ibid.*, SO 23(5). This committee was renamed in 2019; it was formerly known as the Standing Committee on Regulations and Ordinances.

39 *See, e.g.*, House, 2019, SO 223; R. Laing (Ed.), *Odgers' Australian Senate Practice – As Revised by Harry Evans*, 14th ed., Canberra, Department of the Senate, 2016, pp. 485-486.

40 In contrast, there are variations in most jurisdictions for proposed laws appropriating money or imposing taxation.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

I Bills and Delegated Legislation

The sequence of stages for bills during the legislative process in the Commonwealth and states of Australia generally follows the Westminster structure inherited from the United Kingdom. Bills are introduced and read for a first time, usually with an explanatory statement or memorandum accompanying them. As soon as the bill is tabled, it is referred to any scrutiny committees that are relevant in that jurisdiction (see further on). Then a motion is moved for a second reading, at which time the sponsor, usually the minister responsible for the portfolio of the bill, makes the second reading speech. Parliamentary debate on the principle or policy of the bill is the next stage, although this may not occur if it is a non-controversial bill. Sometimes bills will move to a 'consideration in detail' stage, where, nominally at least, the detailed provisions of the bill are examined.[41] It is at this detail stage that amendments to the bill may be made. Finally, the bill is read a third time, and a motion agreeing to that reading is passed.

The Commonwealth and all states, with the exception of Queensland, have two elected Houses of Parliament.[42] All Houses adopt this three-stage process of enactment. If there are two Houses, both must agree to the bill in exactly the same terms for it to be enacted. The bill must be assented to by the Queen's representative, the Governor or Governor General, for it to become law.

There are variations in the details of these stages not only between jurisdictions but also between the two Houses of a jurisdiction. Where there are two Houses, the majority of government bills are introduced into the lower House.

An interesting feature of the Commonwealth Parliament is what is referred to as the 'Federation Chamber', which is regarded as a type of subordinate chamber of the House of Representatives. This was established in 1994 as a "solution to the increasing pressure of legislative business in the House"[43] by being able to consider non-controversial legislation. Its role has since been expanded to encompass private Members' business and committee and delegation business.[44]

It has been suggested that this Chamber was a factor of influence during the creation of Westminster Hall in the United Kingdom parliament, which in turn was part of the background to the fast-track 'uncontroversial' law commission bills procedure adopted in the UK in 2010.[45] Yet despite the ready availability of this Chamber, it has no particular relevance to the scrutiny of law reform bills, uncontroversial or otherwise, in Federal Parliament.

Legislation incorporating law reform proposals is not, of course, necessarily confined to primary legislation. While statutes may set the framework for law reform, delegated legislation, otherwise known as subordinate or subsidiary legislation, will often be used to fill in the detail or supplement the principal Act.

41 The name of this stage varies between Houses and jurisdictions.

42 The two territories, the Australian Capital Territory and the Northern Territory, also have only one House.

43 House of Representatives Standing Committee on Procedure, *Role of the Federation Chamber: Celebrating 20 Years of Operation*, June 2015, Commonwealth of Australia, p. 5.

44 *Ibid.*, p. 15.

45 Hammond, 2016, p. 184.

In Australia the parliamentary scrutiny of delegated legislation is limited. Typically, delegated legislation is effective before it is tabled in parliament by way of registration or publication or notice.[46] That effectiveness is withdrawn only if the legislation is 'disallowed' by a motion in parliament within a certain period of its tabling in parliament.[47] Further, not all delegated legislation is subject to disallowance.

In Australia, delegated legislation forms a substantial component of the written law. In the 2018 calendar year, the (then named) Senate Standing Committee on Regulations and Ordinances examined 1570 disallowable legislative instruments.[48] The Victorian Scrutiny of Acts and Regulations Committee examined 192 statutory rules and 59 legislative instruments in 2018.[49] In Western Australia, during 2018 the Joint Standing Committee on Delegated Legislation was referred 377 instruments, including 161 regulations and 121 local laws.[50]

Given its volume and coverage, concerns over the level of appropriateness of parliamentary scrutiny of delegated legislation has been raised by Australian commentators and has been the subject of a recent Commonwealth parliamentary committee inquiry report.[51] As noted in the House Practice Book:

> Of the hundreds of pieces of delegated legislation presented each year very few are ever formally considered, let alone disallowed, by the House.[52]

These concerns reflect similar issues raised in other Westminster systems.[53] It has been pointed out that the commissions are the "ideal entities" to have a role in contributing to enhanced scrutiny of delegated legislation.[54] No mention of the

46 Note that in some jurisdictions, not all types of delegated legislation are even required to be tabled.

47 *See, e.g., Legislation Act 2003* (Cth) s 42; *Interpretation Act 1987* (NSW) s 41; *Subordinate Legislation Act 1994* (Vic) s 23; *Statutory Instruments Act 1992* (Qld) s 50; *Interpretation Act 1984* (WA) s 42.

48 Senate Standing Committee on Regulations and Ordinances, *Annual Report 2018*, Commonwealth of Australia, 13 February 2019, p. 15; it also noted that in 2017 it scrutinized 1472 disallowable instruments. See note 51 regarding name change.

49 Scrutiny of Acts and Regulations Committee, *Annual Review 2018*, Regulations and Legislative Instruments, Parliament of Victoria, August 2019, pp. 1, 7, 18.

50 Joint Standing Committee on Delegated Legislation, *Annual Report 2018*, Report 15, Parliament of Western Australia, April 2019, pp. i, 4.

51 Senate Standing Committee on Regulations and Ordinances, *Parliamentary Scrutiny of Delegated Legislation*, Commonwealth of Australia, 3 June 2019. The Committee (now re-named the Senate Standing Committee for the Scrutiny of Delegated Legislation) announced a further inquiry in April 2020 on the exemption of federal delegated legislation from parliamentary oversight: www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Exemptfromoversight.

52 D.R. Elder (Ed.), *House of Representatives Practice*, Department of the House of Representatives, 7th ed., Commonwealth of Australia, 2018, p. 411.

53 *See* R. Fox and J. Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation*, Hansard Society, 2014, for a discussion about delegated legislation in the United Kingdom.

54 Cronin, 2019, p. 42.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

commissions was made in the Commonwealth inquiry, either as a contributor to scrutiny nor in relation to law reform delegated legislation.

II Scrutiny Committees

Of particular interest for law reform legislative proposals is the parliamentary scrutiny of proposed legislation by parliamentary committees. As these are many and varied across the jurisdictions containing the commissions, a summary of the major standing legislation scrutiny committees follows in Table 3. This summary does not refer to ad hoc references of bills or delegated legislation to a subject matter committee or select committee, that usually occurs through a specific motion of a House.

Table 3 Main Legislation Scrutiny Committees for Commission Jurisdictions

Jurisdiction	**Committees considering bills**	**Committees considering delegated legislation**
Commonwealth	House – No dedicated committee	House – Essentially relies on Senate Committee (see further on)
	Senate – Standing Scrutiny of Bills Committee – reports on all bills using five criteria contained in the Senate Standing Orders – Selection of Bills Committee (all bills except certain money bills) – reports to Senate on whether bill should be referred to one or more of the eight legislation and general purpose standing committees	Senate – Senate Standing Committee for the Scrutiny of Delegated Legislation reports on all legislative instruments subject to parliamentary disallowance using eleven criteria contained in the Senate Standing Orders[b]
	Joint – Parliamentary Joint Committee on Human Rights established by statute[a] – reports on all bills *and* legislative instruments for compatibility with "human rights" as defined in the statute	Joint – Parliamentary Joint Committee on Human Rights – see bills column
New South Wales	Legislative Assembly – no dedicated committee	Joint Legislation Review Committee – reports on regulations with respect to eight factors[e]
	Legislative Council	Legislative Council
	Selection of Bills Committee – considers all bills other than appropriation to report on whether any bill should be referred to a standing committee[c]	Regulation Committee[f] – to report on any regulation, and issues related to regulations (complements Joint Legislation Review Committee work by focusing on substantive policy issues[g])

Table 3 (continued)

Jurisdiction	Committees considering bills	Committees considering delegated legislation
	Joint Legislation Review Committee – reports on all bills and reports to both Houses using five factors[d]	
Queensland	Legislative Assembly (unicameral parliament) – With some exceptions (e.g. urgent bills), all bills referred to a portfolio committee or other committee nominated by the Member who presented the bill[h]	A portfolio committee examines subordinate legislation in its portfolio[i]
Victoria	Joint (Assembly and Council) Scrutiny of Acts and Regulations Committee – examines all bills introduced in Council or the Assembly[j]	Joint (Assembly and Council) Scrutiny of Acts and Regulations Committee – examines all 'statutory rules' including regulations and legislative instruments using stated principles[k]
Western Australia	Legislative Assembly – No dedicated committee	Joint Standing Committee on Delegated Legislation – reports on subsidiary legislation and other instruments that are published and subject to parliamentary disallowance[n]
	Legislative Council – Legislation Committee – reports on any bill referred by the Council.[l] – Committee on Uniform Legislation and Statutes Review – reports on all uniform legislation bills referred by the Council[m]	

[a] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
[b] Formerly known as the Senate Standing Committee on Regulations and Ordinances.
[c] New South Wales Legislative Council, *Resolution,* 8 May 2019. Available at: www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=253#tab-resolutionestablishingthecommittee.
[d] *Legislation Review Act 1987* (NSW) s 8A.
[e] *Legislation Review Act 1987* (NSW) s 9.
[f] First established in November 2017; reappointed in May 2019: www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=252#tab-resolutionestablishingthecommittee.
[g] New South Wales Legislative Council, Regulation Committee, *Evaluation of the Regulation Committee Trial*, Report No. 3, November 2018, p. 5.
[h] *Parliament of Queensland Act 2001*, s 93; Legislative Assembly of Queensland, *Standing Rules and Orders of the Legislative Assembly*, 1 January 2020, SO 131; *Human Rights Act 2019* (Qld) ss 39-41.
[i] *Parliament of Queensland Act 2001*, s 93; Department of the Premier and Cabinet, *The Queensland Legislation Handbook*, State of Queensland, 2019, p. 30.
[j] *Parliamentary Committees Act 2003* (Vic) s 17; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 30.
[k] *Subordinate Legislation Act 1994* (Vic) ss 21, 25A. The committee's scrutiny powers were extended to legislative instruments in July 2011, pursuant to the *Subordinate Legislation Amendment Act 2010* (Vic).
[l] Legislative Council, Western Australia, *Standing Orders*, January 2019, Schedule 1, cl 4.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

[m] *Ibid.*, SO 126, Schedule 1, cl 6.
[n] *Ibid.*, Schedule 1, cl 10.

III 'Mentions' in Parliament

Commission reports can have an impact in many ways beyond legislation. The existence of such reports promotes community debate and contributes to acceptance of the need for law reform.[55] It might operate as a future blueprint for social change[56] and be referred to by courts and tribunals, as well as academic and other commentators.[57] As well, in Australia law reform reports might have indirect influence on legislation in their use as interpretative aids where they form part of the wider context in which legislation being construed is made.[58]

The existence of Commission reports also has the potential, indirectly, to focus attention on legislative matters before parliament. Perhaps in recognition of this, in its Annual Report the ALRC has started to count 'mentions' of ALRC reports in parliament as a performance indicator as it "provides an indication of Parliament's engagement with the ALRC's work and the esteem in which it is held".[59] Reports are certainly referred to in order to bolster the policy behind a bill during a second reading speech. For example, the amendments proposed by the Native Title Legislation Amendment Bill 2019 were specifically stated to be consistent with recommendations of an ALRC report on *Connection to Country: Review of the Native Title Act 1993*.[60] But they are also mentioned in other capacities related to legislation. A search of Commonwealth Hansard for the calendar year of 2019 for 'law reform commission' had numerous results.[61] It showed that references were made to ALRC reports to highlight the work of the government in relation to a topic addressed in an ALRC report,[62] or by opposition or private members to press the government for a response on a report[63] or to question or

55 Croucher, 2018, p. 88.
56 Cronin, 2019, pp. 37-39 referring to the ALRC's report on Indigenous customary law.
57 *See, e.g.*, ALRC, 2018-2019, p. 24, which notes 306 citations or references by courts, tribunals and academic publications in that financial year. For other non-legislative ways reports can influence; *see* Secretariat, 2017, pp. 159-162.
58 This is permitted on statutory grounds under the interpretation Acts of most Australian jurisdictions (*e.g.* s 15AB of the *Acts Interpretation Act 1901* (Cth)) as well as on the basis of the common law principle of the 'wider context' from *CIC Insurance v. Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.
59 ALRC, 2018-2019, p. 26. This Report calculated 21 mentions in parliamentary debates and proceedings.
60 Commonwealth, *Parliamentary Debates*, House of Representatives, 17th October 2019, pp. 4483-4485 (Christian Porter, Attorney General).
61 A search for 'law reform commission' in Commonwealth Hansard for the period 1 January to 31 December 2019 had 77 results. The search excluded Committee Hansard (*i.e.* transcripts of parliamentary committee hearings) and Estimates Hansard (transcripts of estimates hearings which are budgetary in nature).
62 *E.g.*, Commonwealth, *Parliamentary Debates*, Senate, 2 July 2019, pp. 59-60.
63 *E.g.*, Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2019, p. 5827; Commonwealth, *Parliamentary Debates*, Senate, 15 October 2019, p. 3018.

criticize the government.[64] In this tangential way, a commission may influence legislation.

In addition, a likely, though difficult to assess, influence is where the ALRC uses the parliamentary committee system to draw to the attention of particular committees issues addressed in their reports.[65] In particular, this has been by way of the ALRC itself making submissions to a parliamentary committee conducting an inquiry on a bill.[66] As the ALRC's functions are limited to "functions in relation to matters referred to it by the Attorney-General",[67] commentary is restricted to areas on which the ALRC has worked, past or present.[68]

The practice of making submissions to parliamentary committees only seems to have been adopted by the ALRC. Publications, including Annual Reports, of each of the WA, NSW, Victoria and Queensland Commissions give no indication that submissions to parliamentary committees examining a bill, or otherwise, are an activity that the state commissions engage in.[69]

F Other 'Institutional' Law Reform in Parliament

Aside from scrutiny of bills that have their genesis in commission recommendations, there is another parliamentary practice that results in law reform legislation.

'Good' laws are not only about making substantive amendments to legislation or new legislation. An efficient, relevant and workable statute book also "requires good housekeeping by consolidation and by the removal of legislation which is obsolete or duplicative".[70] Review and consolidation have long been considered a type of law reform.[71] Such tidying up of the statute books has been a "common strand" of reform in Australia since the time of the colonies.[72]

In Australia, statutory revisions and consolidation constituted "significant early attempts" at law reform until those tasks were, notionally at least, entrusted to law reform commissions.[73] All the statutes establishing the commissions, except the Victorian one, include, to varying extents, descriptions of the commissions' functions as including "consolidating" laws, encouraging "uniformity",

64 *E.g.*, Commonwealth, *Parliamentary Debates*, Senate, 16 September 2019, p. 2287; Commonwealth, *Parliamentary Debates*, House of Representatives, 10 September 2019, p. 2367.

65 R. Croucher, 'Parliament and Law Reform – the Role of the Australian Law Reform Commission Over Forty Years', *Australasian Parliamentary Review*, Vol. 30, No. 2, 2015, p. 107.

66 *See*: www.alrc.gov.au/publications/submissions-made-alrc/.

67 *Australian Law Reform Commission 1996* (Cth) s 21(1).

68 Croucher, 2015, p. 107.

69 The author examined the Annual Reports for 2018-2019 and 2017-2018 for each of the state commissions as well as the list of publications on their respective websites for the last decade.

70 L. Toulson, 'Democracy, Law Reform and the Rule of Law', *in* M. Dyson, J. Lee & S. Wilson Stark (Eds.), *Fifty Years of the Law Commissions: The Dynamics of Law Reform*, United Kingdom, Hart Publishing, 2016, p. 127, p. 133.

71 Tilbury, 2005, pp. 5-6.

72 J.M. Bennett, 'Historical Trends in Australian Law Reform', *University of Western Australia Law Review*, Vol. 9, 1969-1970, p. 216.

73 Tilbury, 2005, pp. 5-6.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

identifying obsolete laws or removing anachronisms.[74] Despite this, such matters are now dealt with mainly by the commissions "only in the context of projects directed to other ends".[75]

More often, this 'everyday' law reform[76] is instigated by the executive and so must compete with all other bills for a place on the legislative programme and pass through the same legislative process (though it may be subject to less stringent policy approval requirements in the pre-legislative phase[77]). But there appears to be here an established practice, if not a requirement, for the executive and parliament to engage in this type of reform regularly.

The approach varies between jurisdictions. At the federal level, the government policy is stated to be that 'statute law revision bills', which deal with tidying up, updating and repealing obsolete provisions, will be prepared by the Commonwealth parliamentary counsel "when time permits (usually once a year)".[78] Recently, so called 'statute update' bills have emerged.[79] The difference between the two is not clear. It has been suggested that the:

> main difference [...] appears to be that statute law revision Bills are intended to contain measures that do not alter the substance of the law but rather make minor technical corrections of a purely formal nature...

whereas "statute update Bills are intended to make minor changes to the substance and legal effect of the relevant provisions subject to amendment".[80] During the passage of the Statute Update (Autumn 2018) Bill 2018, the federal minister explained:

> Statute law revision acts and statute stocktake acts have been passed on a regular basis since 1934 as a means of removing obsolete and spent provisions from the statute book and correcting mistakes in drafting. They are traditionally non-controversial and regarded as an essential means of keeping the Commonwealth statute book accurate and up-to-date.
>
> The process of statute law revision and update aims to enhance the clarity and efficient use of the statute book. These bills:
> - make improvements to legislation to take into account changes to drafting precedents and procedures

74 *See, e.g., Australian Law Reform Commission Act 1996* (Cth) s 21; *Law Reform Commission Act 1967* (NSW) s 10; *Law Reform Commission Act 1972* (WA) s 11(4); *Law Reform Commission Act 1968* (Qld) s 10(1)(3). The *Victorian Law Reform Commission Act 2000* (Vic) does not contain the same level of specificity in laying out the functions of the commission (s 5).

75 Tilbury, 2005, p. 6.

76 Bushby, 2019, p. 601.

77 *E.g.*, federal statute law revision bills may require only policy approval from the minister or First Parliamentary Counsel: Department of the Prime Minister and Cabinet, 2017, p.19.

78 *Ibid.*, p. 22.

79 There has been a statute 'revision' or statute 'update' Act each year, and sometimes twice a year, except for 2019 (which was a federal election year).

80 Parliamentary Library, *Bills Digest No 16, 2017-18, Statute Update (Winter 2017) Bill 2017*, Parliament of Australia, 14 August 2017, p. 2.

- correct technical errors in legislation that have arisen from drafting clerical mistakes; and
- repeal spent and obsolete acts and provisions of acts.[81]

State jurisdictions have similar established practices. For example, in Victoria, statute law revision bills are a "regular mechanism for updating and maintaining the accuracy of statute law in Victoria".[82] It is "usual practice" for the Chief Parliamentary Counsel to provide a letter to the Scrutiny of Acts and Regulations Committee confirming that the bill does not make any 'substantive' changes to the law of Victoria.[83] New South Wales has a long-standing 'statute law revision program' to make "minor policy changes" and to "maintain[ing] the quality of the New South Wales statute book".[84] In Western Australia these statutes are more commonly referred to as 'omnibus' bills.[85]

There appears to be an expectation of such regular 'everyday' law reform as a feature of parliamentary business. Where it has been neglected, parliament has questioned the neglect. For example, the WA government has recently been criticized for not drafting an omnibus bill since 2018. A parliamentary committee report on the statute book noted that while "some mechanisms currently used in Western Australia help to reduce obsolete legislation, they are being underutilised. Other mechanisms are not being used at all".[86]

Enactment of review clauses in the statutes themselves are another parliamentary mechanism for law reform. The use of these clauses in new statutes varies considerably across the jurisdictions.[87]

More formal mechanisms exist for delegated legislation in some jurisdictions. For example, automatic repeal of delegated legislation after a particular period is provided by Commonwealth, NSW and Queensland legislation.[88]

For the sake of completeness, another institutional mechanism for housekeeping law reform is the power granted to parliamentary counsel to make editorial amendments to legislation. The extent of these powers varies between jurisdic-

81 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 March 2018, (Mr Tehan, Minister for Social Services), p. 3021.

82 Victorian Parliament, *Parliamentary Debates*, Legislative Council, 21 February 2019 (Leader of the Government, Mr Jennings), p. 376.

83 Scrutiny of Acts and Regulations Committee, *Report on the Statute Law Revision Bill 2018*, Parliament of Victoria, March 2019, Appendix, p. 5.

84 New South Wales Legislative Assembly, Parliamentary Debates, 9 May 2019 (Mr Speakman, Attorney General), p. 1.

85 Standing Committee on Uniform Legislation and Statutes Review, *Inquiry into the Form and Content of the Statute Book*, Report No. 124, WA Parliament, November 2019, pp. 11-12.

86 *Ibid.*, p. i.

87 For an overview, *see ibid.*, Appendix 1.

88 *Legislation Act 2003* (Cth) s 50; *Subordinate Legislation Act 1989* (NSW) s 10 and *Statutory Instruments Act 1992* (Qld) s 54.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

tions. In Victoria and New South Wales, for example, they are very conservative.[89] In contrast, the Commonwealth First Parliamentary Counsel may, in preparing a compilation of an Act or legislative instrument, make numerous types of editorial changes to the text which are to be treated as if an amendment was made.[90]

G Implications from the Relationship and Concluding Comments

In a 2015 speech about law reform, Sir Geoffrey Palmer commented that the "obstacle to institutional effectiveness of a Law Commission lies within Executive and Parliaments".[91] Similar comments have been made in an Australian context. The "institutional weakness" or the lack of a "systematic" approach in Australia have been lamented in the past and in the present.[92]

Much of the discourse in Australia about this weakness has been focused on the executive, with suggestions about how to encourage a government to formally respond to or to implement reports. But this should not be a discussion focused on executive action and implementation. As Dame Arden has pointed out, in a democratic society we should not automatically be enacting such reports.[93] The issue is perhaps better framed as "how to secure governmental, legislative and official *attention* once law reform reports are produced". (emphasis added)[94]

This article has focused on *legislative* attention, whether of a report, of a bill originating from a commission or on parliamentary mechanisms to achieve reform. In Australia, it is evident that this is largely a story of absence. Apart from the housekeeping law reform legislation, as important as that is, for the commissions the story largely ends once reports are tabled in parliament. There are no obligations to review the report, for a response from the executive or parliament, and there are no particular procedures for commission bills, controversial or otherwise. Yet from a review of the parliamentary scrutiny given to legislation, it can be seen that existing scrutiny features could be used to enhance legislative attention to commission work.

Australia could learn much from the reforms to the legislative process made in the United Kingdom and, in particular, the detailed streamlined legislative process adopted for certain law reform commission bills in Scotland.[95] These reforms

89 *Interpretation of Legislation Act 1984* (Vic) s 54A, Schedule 1; *Interpretation Act 1987* (NSW) s 45E: primarily limited to style changes.

90 *Legislation Act 2003* (Cth) Chapter 2, Part 2, Division 3. A compilation is referring to a compilation of the legislation for the purposes of the Federal Register of Legislation. Similarly, in WA, the *Reprints Act 1984* (WA) gives parliamentary counsel numerous editorial powers to make certain 'editorial changes' to a law in producing a version of the law.

91 Hon. Sir G. Palmer, 'The Law Reform Enterprise: Evaluating the Past and Charting the Future', Scarman Lecture 2015, London, 24 March 2015, p. 22.

92 M. Kirby, 'Are We There Yet?', *in* B. Opeskin and D. Weisbrot (Eds.), *The Promise of Law Reform,* Australia,The Federation Press, 2005, pp. 433, 438 and Derrington, 2019, p. 388.

93 D.M. Arden, 'Introduction', *in* M. Dyson, J. Lee & S. Wilson Stark (Eds.), *Fifty Years of the Law Commissions: The Dynamics of Law Reform,* United Kingdom, Hart Publishing, 2016, p. 173.

94 Kirby, 2005, p. 445.

95 *See* summary in Secretariat, 2017, pp. 178-182.

and international commentary provide considerable material for a considered review of the ways that Australian parliamentary procedures could be reformed to enhance the attention given to commission work. Ideas include the use of a parallel chamber like the Federal Chamber in Federal Parliament for certain bills, automatic referral of commission reports or bills to a dedicated parliamentary committee, an obligation on the government to respond to a commission report in parliament, and annual reporting by the government about the steps they are taking on completed commission reports.[96] Other possibilities might be an allocation of parliamentary time in the standing orders to consider a commission report and the re-tabling of a commission report as an attachment to the explanatory material which accompanies a relevant bill at the second reading stage. Many of these suggestions could be translated to the Australian parliamentary system. To take a simple example, a parliamentary rule that the government must respond to a commission report already has precedent in Australia. Where a Senate Legislation Committee has made recommendations, the government is required to provide a formal response to the report in the Senate within three months.[97]

The potential to enhance parliamentary scrutiny of commission work in the context of our system is considerable and merits a considered analysis beyond the scope of this article. The ALRC recently stated that it was paying "close attention" to the UK developments.[98] Although this statement was made in the context of law reform programmes, it is hoped it may extend to parliamentary process reforms.

Greater focus on parliamentary scrutiny in Australia makes sense for at least two reasons.

First, a focus on attaining government attention is bound to be of limited success. Like it or not, the reality is that law reform and politics are "uneasy neighbours",[99] and law making is "nearly always an inescapably political activity."[100] Measures encouraging government action may, as Tilbury has pointed out, "be unhelpful" because the responses may be "evasive or non-committal".[101] In deciding the priority of drafting resources and parliamentary time, governments are subject to pressures and drivers beyond what might be a legitimate law reform project. It, simply, may not be a priority.

Parliament as an institution is a different beast. There is the potential for non-partisan procedures or practices to be adopted with a view to the value of law

96 See *ibid.*; Hammond, 2016, pp. 181-186 and M. Tilbury, 'Reforming Privacy Law in New South Wales: Lessons for Law Reform Agencies', *in* M. Tilbury, S.N.M. Young & L. Ng (Eds.), *Reforming Law Reform*, Hong Kong, Hong Kong University Press, 2014, pp. 252-254.

97 A practice arising from a Senate resolution: Commonwealth, *Journals of the Senate* No 8, Senate, 14 March 1973, 51.

98 Australian Law Reform Commission, 2019, p. 17.

99 E. Cooke, 'Law Reform in a Political Environment: The Work of the Law Commissions', *in* D. Feldman (Ed.), *Law in Politics, Politics in Law,* United Kingdom, Hart Publishing, 2015, pp. 141, 142.

100 D. Feldman, 'Beginning at the Beginning: The Relationships between Politics and Law', *in* D. Feldman (Ed.), *Law in Politics, Politics in Law,* United Kingdom, Hart Publishing, 2015, p. 3, p. 12.

101 Tilbury, 2014, p. 253.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002004

reform. It would be naïve to think that some of these procedures would not be born of a political agendum, but if the end is more focused attention to the work of the commissions then there is still value.

Second, and perhaps more importantly, we come back to where we started in this article. And that is that the commissions are creatures of statute. They were established by parliament to provide ongoing and independent advice about law reform. They are responsible to parliament, albeit through an executive conduit. To date this has been a one-sided relationship with the greater portion borne by the commissions. All relationship have two sides. There is a principled argument to be made that parliament owes duties to their commission for the work that it has granted the commissions the power to do. That can be manifested in the attention parliament gives to reports and law reform bills.

The citadel for the commissions may be, as Sir Geoffrey Palmer said, "Parliament and, in particular, the Executive".[102] The priorities and actions of the executive are pragmatically difficult to control. At the end of the day, in Australia, like most Westminster systems, the government controls the legislative agenda. A focus on parliament and its processes may have greater success in securing legislative attention for the work of commissions. It would also emphasize the value that is attributed to the body that parliament itself established.

102 Palmer, 2015, p. 22.