Law Reform in a Federal System

The Australian Example

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Abstract

The Australian law reform arrangements comprise a 'crowded field' of law reformers. These include permanent, semi-permanent and ad hoc commissions, committees and inquiries charged with examining and recommending reform of Commonwealth/federal and state laws. These are supplemented by citizen-led deliberative forums on law reform. The author's experience in her roles as a commissioner and deputy president of the Australian Law Reform Commission (ALRC) and also as counsel assigned to advise the Joint Standing Committee on Migration in the Australian Federal Parliament highlighted facets of Australian law reform – the particular role of a law commission working in a federal system and the co-option of legal expertise to scrutinize law reforms proposed within the parliamentary committee system.

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The Australian law reform arrangements comprise a 'crowded field' of law reformers.[1] These include permanent, semi-permanent and ad hoc commissions, committees and inquiries charged with examining and recommending reform of Commonwealth/federal and state laws. These are supplemented by citizen-led deliberative forums on law reform such as the Melbourne-initiated online media resource *The Conversation*, which publishes many academic law reform articles.

I played a part in this 'crowded field' – as a commissioner and deputy president of the Australian Law Reform Commission (ALRC) and also as counsel assigned to advise the Joint Standing Committee on Migration in the Australian Federal Parliament. The Joint Standing Committee had oversight and scrutiny of the drafting and implementation of Australia's immigration regulations. My experience in these two roles highlighted facets of Australian law reform – the particular role of a law commission working in a federal system and the co-option

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1 D. Weisbrot, 'The Future for Institutional Law Reform', *in* B. Opeskin & D. Weisbrot (Eds.), *The Promise of Law Reform*, Sydney, Federation Press, 2005, p. 20. *See also* R. Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field?', *Federal Judicial Scholarship*, Vol. 10, 2005. The additional law reform agencies include the National Health and Medical Research Council, ad hoc Legislation Review Committees, the Australian Human Rights and Equal Opportunity Commission and the Productivity Commission, whose law reform reports ranged from gambling, to disability care and support, to international trade and to climate change.

of legal expertise to scrutinize law reforms proposed within the parliamentary committee system. The themes of independence and implementation loomed large in discussions concerning these roles. I consider these arrangements in turn.

The ALRC was established in 1975. It was the second law commission to be established in Australia. The New South Wales Law Reform Commission began advising on laws in its state jurisdiction in 1966. In subsequent years – and for varying terms – there were law reform commissions in each of the Australian states and the Northern Territory. Today there are four state law reform commissions – in Queensland, New South Wales, Victoria and Western Australia. These state bodies are currently reviewing legal issues as disparate as the termination of pregnancy, domestic violence disclosure, expunging gay sex crimes, reviewing guardianship laws, litigation funding and group assistance, access to digital assets upon death or incapacity, the assistance rendered to victims of crime, wrongful death claims and neighbourhood tree disputes. The Law Commission of England and Wales was the model, but not the precise template, for all of these law commissions.

Justice Sackville (then of the Federal Court), when speaking at the ALRC's thirtieth anniversary symposium on 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field?',[2] noted that, apart from their shared focus on law reform, Australia's law reform agencies manifested five characteristics. They are permanent statutory bodies; they consult widely among interest groups and provide opportunities for community participation in shaping reform proposals; much of their work is carried out in public and their reports are tabled in Parliament; they are independent, in the sense that their members exercise their own judgement in weighing up policy issues and formulate recommendations free from governmental interference or direction; and, as members of the commissions are appointed and their programmes largely determined and implemented by elected governments, the commissions enjoy a degree of democratic legitimacy.

Taking the ALRC as a core example of the Australian law reform model – it was established as an independent statutory authority with a mandate to provide the federal Attorney-General (the Minister responsible for the ALRC) with reports on law reform. The ALRC's role and functions are set down in the Australian Law Reform Commission Act 1996 (Cth) (the ALRC Act), the Financial Management and Accountability Act 1997 (Cth) and the Public Service Act 1999 (Cth). The Commission is responsible to Parliament through the General. The ALRC President and full- and part-time commissioners are appointed by the Attorney-General. The candidates for these posts are generally judges, academics or senior administrators. Certain of the commissioners are chosen because of their particular expertise in the subject matter of a reference.

Unlike the Law Commission of England and Wales, the ALRC and the state commissions cannot self-initiate their own inquiries. They are dpendent on references from the Attorney-General and are only able to work on those inquiries referred to them by the Attorney-General. However, in my ALRC experience, the

2 Sackville, 2005.

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President and commissioners are closely involved in discussions with the Attorney-General concerning possible references, and in practice, the choice and design of references is a shared endeavour. While certain of the ALRC's early reports were nominated by government departments other than the Attorney-General's, this was rare, and the vast bulk of ALRC work concerns matters within the Attorney-General's ministerial brief. Once an inquiry has been assigned to the ALRC, the government has no capacity to direct the Commission on its performance, functions, findings or recommendations.

The primary function of the ALRC, as set out in section 21 of the ALRC Act, is to report to the Attorney-General on the results of any review of Commonwealth laws relevant to those matters referred by the Attorney-General for the purposes of 'systematically developing and reforming the law' and to include in the report its recommendations. The ALRC is required to undertake its review by:

- bringing the law into line with current conditions and ensuring that it meets current needs;
- removing defects in the law;
- simplifying the law;
- adopting new or more effective methods for administering the law and dispensing justice; and
- providing improved access to justice.

Once tasked with a review, the ALRC is required to consider proposals for making or consolidating Commonwealth laws in relation to the assigned legal issue and must consider proposals for the repeal of obsolete or unnecessary laws and uniformity between state and territory laws; and complementary Commonwealth, state and territory laws with reference to those matters referred to it. In the context of Australia's federal jurisdiction, the ALRC's brief requires it to work on an Australia-wide legal canvas and therefore to maintain oversight of relevant state and territory laws.

As law reform in Australia operates within the federal context, this brings a complexity to the work. The Commonwealth of Australia Constitution Act 1900 outlines specific powers given to the federal Prliament – some of which are exercised exclusively by the federal Parliament and others exercised concurrently with the states.[3] Thus the federal Parliament has power to legislate concerning, for example:

- external affairs;
- trade and commerce with other countries;
- taxation;
- postal, telegraphic, telephonic and similar services;
- marriage/divorce/matrimonial causes (including the custody and guardianship of children);
- foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- military defence;

3 Commonwealth of Australia Constitution Act 1900, §§ 51-52.

- citizenship and immigration;
- pensions;
- 'special laws' for people of any race;
- copyright, patents, and trademarks;
- banking and insurance (other than state banking and insurance); and
- the conciliation and arbitration of industrial disputes.

Where subjects are not specifically allocated as powers to the federal Parliament, these 'residual' powers lie in state jurisdiction. Thus the states retained power to make laws concerning criminal justice, education, housing, child care, child adoption, public health and social welfare issues. The Constitution Act provided that if in areas of concurrent jurisdiction the state and federal laws are inconsistent (such that it is impossible to obey both laws), the federal laws prevail over state law and, to the extent of the inconsistency, the state law is invalid.[4]

As the ALRC's brief can require consideration of state laws, much of its work involves mapping the legal landscape. Federal governments appear to use the commission to conduct a fact-finding or scoping exercise as well as a reform body. The many-layered arrangements in federal legal systems necessitate a focus on the workings of the justice system and the implementation and 'fit' of federal and state laws. This appears to be one of the key reasons why Australian governments of different political persuasions have frequently set broad socio-legal references for the ALRC rather than repeat reviews of precise legal issues or statutes. In his analysis of the 'Citation Practices of the Australian Law Reform Commission in Final Reports 1992–2012', Kieran Tranter noted that in this period the ALRC "had few references that could be characterised as 'technical law reform'"[5]. He continues:

> An explanation for this can be seen in the federal jurisdiction of the ALRC. In Australia, technical law reform tends to be a state responsibility and the state law reform commissions often produce short reports on narrow topics such as vicarious liability or time limits on loans payable on demand [...] most of the references to the ALRC involve broader social, political and economic considerations [...] Common to all these references was a requirement that the ALRC understand law and the process of law reform 'in context'.[6]

Because of the devolved jurisdictions in a federal system, federal governments may be unaware of deficits in shared administrative arrangements, or may be aware of such deficits and want to prompt a solution from all parties in shared administrative fields, or may see a need to mark out a national approach on key matters such as the response to new technology or to discriminatory practices. The Commission serves a useful purpose in collating and evaluating information on the complex federal system.

4 *Ibid.*, § 109.

5 K. Tranter, 'Citation Practices of the Australian Law Reform Commission in Final Reports 1992-2012', *University of New South Wales Law Journal*, Vol. 38, 2015, p. 323.

6 *Ibid.*, p. 337.

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These socio-legal ALRC references have focused on, for example, incarceration rates of Aboriginal and Torres Strait Islander peoples, elder abuse, older workers, women's equality, children in legal processes, persons with disabilities, family violence, serious invasions of privacy and the protection of human genetic information. These reports document social issues, problems and good practices and recommend necessary reforms. These can include changes impacting state laws and practices. There are sensitivities concerning these jurisdictional divisions. Nevertheless if the federal Attorney-General requests an ALRC study of Aboriginal incarceration or their customary laws (which include traditional punishments for community 'crimes') or of children in legal processes or elder abuse, these studies will inevitably require consideration of criminal and social care practices in the state jurisdictions. The ALRC report examining children in legal processes, featured its research on children in criminal detention centres and children excluded from schools – legal processes involving children which were in state rather than the federal jurisdiction. While the recommendations in such reports may exhort the federal government to set national standards, these reforms were ultimately directed to state agencies dealing with criminal law, child care and education. Depending on political alignments as between federal and state parliaments, some states will be receptive and others hostile to federal law commission proposals suggesting changes to their laws and practices.

A telling example of the difficulties in federal law reform is shown by the nine-year-long ALRC reference, *Recognition of Aboriginal Customary Laws*,[7] chaired by Michael Kirby (later a Justice of the High Court), who was Chair of the ALRC from 1975 until 1984. As detailed below there was then very little knowledge and understanding of Aboriginal customary law and there were strong objections voiced against the recognition and incorporation of such traditional norms. It follows that the difficulties in the implementation of this report were not wholly attributable to federal/state divisions but this feature certainly added a further complexity to this most important legal issue.

In this customary law reference, the ALRC was assigned the task of inquiring into and reporting on whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or only to those living in tribal conditions. Specifically, the terms of reference asked the ALRC to report on whether in criminal cases existing courts should be able to apply Aboriginal customary laws to Aborigines and whether Aboriginal communities should have the power to apply their customary laws in the punishment and rehabilitation of Aborigines.

After an exhaustive study, the ALRC made specific recommendations covering family and criminal laws and the laws of evidence and concerning traditional hunting, fishing and gathering rights and included drafts of legislation which might be considered in the implementation of its specific recommendations. The report described, in some detail, the dynamic and varied systems of customary law, outlined the importance of customary law to many Aboriginal people and noted that, with very limited exceptions, Aboriginal customary laws have never

7 ALRC 31 (1996).

been recognized by general Australian law. Taking the criminal law recommendations as one example, the report recommended, for example, a partial customary law defence, similar to diminished responsibility, should be introduced where an accused acted in the well-founded belief that his or her customary law required the act constituting the offence; that customary laws and traditions should be taken into account where relevant in determining criminal intent and in the exercise of sentencing discretion; and that criminal evidence laws should include specific powers to hear evidence in private, to exclude certain persons from the court or to take other steps to protect secret information about Aboriginal customary laws where this was necessary under customary law.

The ALRC addressed the question of the report's implementation in federal and state jurisdictions and advised that as the welfare of Aboriginal people in Australia is a national issue, it should be dealt with through a coherent national policy and via federal legislation wherever State or Territory laws do not establish adequate or appropriate rules responding to the special needs of Aboriginal people. The commission held that recognition of Aboriginal customary laws should be carried through by means of a federal act applicable in all States and Territories and relying on the full range of the federal constitutional powers, which powers did not preclude the operation of State and Territory laws which are capable of operating concurrently with the federal legislation. Such an approach coupled the federal parliament's responsibility for Aboriginal matters with recognition that it would largely fall to state criminal justice systems to incorporate Aboriginal customary law into their practice.

As it transpired the above commission recommendations were not implemented. The government response to the report was "uncoordinated, slow and piecemeal". The proposed legislation was not drafted.[8] A later ALRC president described the government response as "suspended somewhat as a shuttle cock ... in a game of badminton between federal and State legal and Aboriginal affairs administrations".[9] Some of the proposals on criminal investigation procedures involving Aboriginal or Torres Strait Islanders were included in amendments to the Crimes Act 1914 (Part 1C), and fishing, hunting and gathering rights were referenced in the Native Title Act 1993 (Cth) – but these and an interpreter programme to assist Aboriginal and Torres Strait islanders in criminal processes were modest implementations of the detailed report.

West Australian District Court Judge Mary Ann Yeats noted that in 2006 the then federal government, far from initiating arrangements for customary law to apply, legislated to prevent a court considering customary law or cultural practice as a reason for excusing, justifying, authorizing, requiring or lessening the seri-

8 The Aboriginal and Torres Strait Islander Commission (ATSIC), 'Recognition, Rights & Reform' report, February 1995.

9 A. Rose (then President of the ALRC), 'Recognition of Indigenous Customary Law – The Way Ahead', *Reform*, No. 68, p. 46-51.

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ousness of the criminal behaviour to which the offence relates.[10] The provision applies to federal crimes, but these are tried in state courts. In her paper to a 2007 judicial conference, Judge Yeats noted that Aboriginal customary law is considered by judges in criminal courts in Western Australia, and such judges may consult tribal elders to explain customary law and practice.[11] (Western Australia has a sizeable indigenous population, including communities living in their tribal areas.) Judge Yeats criticized the 2006 amendments that prevent consideration of customary law for federal crimes, noting that consideration of customary law did not give an unfair advantage to indigenous litigants but were personal matters affecting individual offenders such that to ignore his or her Aboriginality "would be to sentence him as someone other than himself".[12] Some Aboriginal offenders before the courts will be living their lives in compliance with their customary law, and this may be clearly relevant to their offending and sentencing.

The ALRC revisited aspects of the customary law issue in its 2015 report on native title, suggesting reforms to strengthen the internal governance capacity of native title groups, while allowing for traditional authority to be exercised. In its most recent report looking at incarceration rates for indigenous people, the Commission recommendations made no reference to customary law.

The ALRC customary law report is a useful model with which to evaluate law reform implementation, because although the precise recommendations were largely ignored and now rejected, the report remains one of the most frequently consulted and cited commission reports. The report continues to feature as a blueprint for longer-term social change for Australia's indigenous communities. It is a significant source of knowledge of Aboriginal customary law and traditions, and its analysis of customary law arrangements and the arguments for incorporation of such laws continue to inform debate.

The investigative consultation model used for this report has been largely copied in all subsequent commission reports on these large canvas legal topics. The study set out to provide, through the processes of consultation, an "institutional voice" for "the poor and the powerless",[13] to take the ideas to a wide public and to develop recommendations for reform in accord with international human

10 District Court Judge, M.A. Yeats, 'Aboriginal Customary Law and Sentencing' paper to the Judicial Conference of Australia Colloquium 2007, Sydney 5-7 October 2007 citing at p. 1. Crimes Amendment (Bail and Sentencing) Act 2006 No 171/2006 amending §16A of the Crimes Act. The paper is available at: http://jca.asn.au/wp-content/uploads/2013/11/2007-MaryAnnYeats.pdf (last accessed: May 2018).

11 *Ibid.*, p. 7.

12 *Ibid.*, notes 54-56 – citing *R v. Fuller-Cust* [2002]6VR 496 per J. Eames (dissenting) [79] and Sir Hersch Lauterpacht, *An International Bill of the Rights of Man*, 1945, p. 115; quoted in the dissenting Opinion of Tanaka J., *South West Africa Case (Second Phase)* (1966) ICJ Rep 6 (as reported in E. Lauterpacht (Ed.), *International Law Reports*, Vol. 37, 1968, Butterworths, London, p. 463).

13 M. Kirby, 'ALRC, Law Reform and Equal Justice under Law', ALRC's 25th Anniversary Dinner (2000). This address was cited by Rosalind Croucher, president of the ALRC, in the M.K. Lecture, 'Re-imagining Law Reform – Michael Kirby's Vision, Human Rights and the Australian Law Reform Commission in the 21st Century', 2015.

rights law.[14] The research was exemplary. The commission appointed a group of consultants, including Aboriginal and other experts in the relevant disciplines, who were to provide advice on the legal, social, administrative and anthropological issues. The Commission examined customary law; used interdisciplinary and field research and investigations; and had extensive discussions with anthropologists, sociologists, historians, judges, lawyers, magistrates and the police, with Aboriginal communities, many individual Aborigines and organizations such as the Aboriginal legal services, Aboriginal child care agencies and land councils and with government departments both at the state and federal level. It produced and widely distributed discussion papers and numerous field trip reports and research papers (which were translated into recordings in the Eastern Arrente, Warlpiri and Pitjantjatjara languages); made research or field trips to most parts of Australia, especially to remote areas where the more traditionally oriented Aborigines lived; and held public hearings at 32 venues in all parts of Australia. The Commission took particular care to provide an opportunity for Aboriginal people to express their views on the general legal systems and on the importance to them of their customary laws.

Thus the same empirical methodology was adopted in the ALRC's 1975 investigation into police complaints and investigation, during which Commissioners accompanied police and travelled to remote areas to observe law enforcement first-hand;[15] in the extensive case file and case cost analysis undertaken for the ALRC's *Managing Justice* inquiry into case management systems in the federal civil justice system;[16] and in the consultations with teenage detainees and schoolchildren used in the inquiry into children in the legal system.[17] The ALRC routinely arranges public and private hearings and consultations in all parts of Australia. The long list of such wide-ranging reports adopting the customary law report's empirical methodology includes the following:

- *Serious Invasions of Privacy in the Digital Era*;[18]
- *Equality, Capacity and Disability in Commonwealth Laws*;[19]
- *Access All Ages – Older Workers and Commonwealth Laws*;[20]
- *Family Violence and Commonwealth Laws – Improving Legal Frameworks*;[21]
- *Family Violence – A National Legal Response*;[22]
- *Secrecy Laws and Open Government in Australia*;[23]

14 *See* I. Freckelton & H. Selby (Eds.), *Appealing to the Future: Michael Kirby and His Legacy*, Sydney, Thomson Reuters, 2009, p. 14. In the introduction to this study marking Justice Kirby's retirement from the High Court in 2009, Freckelton said that 'law reform Kirby-style was different'. It was 'more inclusive, more energetic and with a broader vision'.

15 ALRC 2, *Criminal Investigation* (1975).

16 ALRC 89, *Managing Justice: A Review of the Federal Civil Justice System* (2000).

17 ALRC 84, *Seen and Heard: Priority for Children in the Legal Process* (1997).

18 ALRC 123 (2014).

19 ALRC 124 (2014).

20 ALRC 120 (2013).

21 ALRC 117 (2011).

22 ALRC 114 (2010).

23 ALRC 112 (2010).

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- *Genes and Ingenuity: Gene Patenting and Human Health*;[24]
- *Essentially Yours: The Protection of Human Genetic Information in Australia*;[25]
- *Principled Regulation: Federal Civil and Administrative Penalties in Australia*;[26]
- *Managing Justice: A Review of the Federal Civil Justice System*;[27]
- *Seen and Heard: Priority for Children in the Legal Process*;[28]
- *Making Rights Count: Services for People with a Disability*;[29]
- *Legal Risk in International Transactions*;[30]
- *Integrity: But not by Trust Alone*;[31]
- *Equality before the Law: Women's Equality*;[32] and
- *Multiculturalism and the Law*.[33]

ALRC references continue to engage significant numbers of individuals, professional and advocacy groups and experts who make submissions to or consult with the commission . These contributions enhance the quality of the reports and contribute to the high proportion of reports substantially or partially implemented by governments (some 88% of ALRC reports).[34] The Commissions are generally supported as entities with the capacity to influence change. Some commentators note, however, that other reform agencies such as the Australian Human Rights and Equal Opportunity Commission have been instrumental in reporting on and facilitating more radical legal reforms such as the recognition of same-sex relationships by the Commonwealth[35] or the changes in gambling, disability care and support, international trade and climate change which the Productivity Commission – funded from within the Treasury department – has produced and analysed through data and economic modelling that support its reform recommendations.[36]

A number of commentators suggest that law commissions may need to reshape their role if they are to remain viable and relevant. Community research focus may have less value now that the Internet allows for direct dialogue between government and communities. Commissions make little use of economic modelling or digital engagements in the research models, and these can be important research tools. Commissions work on the edge of the parliamentary system,

24 ALRC 99 (2004).
25 ALRC 96 (2003).
26 ALRC 95 (2003).
27 ALRC 89 (2000).
28 ALRC 84 (1997).
29 ALRC 79 (1996).
30 ALRC 80 (1996).
31 ALRC 82 (1996).
32 ALRC 69 (1994).
33 ALRC 57 (1992).
34 *Ibid.*, p. 27.
35 Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth).
36 Productivity Commission, *Gambling*, Inquiry Report 50, 2010; Productivity Commission, *Disability Care and Support*, Inquiry Report 54, 2011; Australian Productivity Commission and New Zealand Productivity Commission, *Strengthening Trans-Tasman Economic Relations*, 2012; Productivity Commission, *Barriers to Effective Climate Change Adaptation*, Inquiry Report 59, 2012.

whereas their expertise could be used closer to the parliamentary coal face where significant delegated legislation is driving change.

My experience in the controversial area of delegated immigration legislation suggests that the law most in need of scrutiny, reform and simplification is delegated legislation – the array of regulations and rules which receive limited parliamentary scrutiny and often take the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied. In Australia, as elsewhere, the array of delegated legislation includes regulations; determinations; declarations; approvals; principles and notices; ordinances of territories; plans of management, for example, for fisheries or navigation and aviation orders or directives; bylaws of statutory authorities; notices or standards, such as broadcasting service notices; and accounting standards or guidelines, such as aged care and child care guidelines. *Odgers' Australian Senate Practice* estimates that about half of the law of the Commonwealth by volume consists of delegated legislation rather than Acts of parliament.[37]

There are several roles that law commissions could undertake concerning delegated legislation. Within set and relatively short time lines – and with some minor adjustment of their functions – the Commissions could supplement Parliament's own scrutiny of disallowable instruments, the Standing Regulations and Ordinances Committee by examining proposed delegated legislation. Within their existing functions, commissions could undertake to examine particular delegated legislation or sets of delegated legislation. Frequently such legislation is drafted by departmental officers and can comprise complex provisions directly affecting the rights of individuals and entities. The disallowance or committee scrutiny arrangements do not allow consideration of such legislation in its working context. Immigration law is a telling example, showing the volume, complexity and incoherence of delegated legislation.

The Commissions could involve relevant experts and stakeholders to examine tax or social security or housing or immigration-delegated legislation. Their reporting role makes them ideal entities to undertake the scrutiny and assessment of Parliament's high volume, highly complex legislative output. There may be some resistance to such proposal from government, as delegated legislation is often seen to serve practical needs for speed of implementation and ease of amendment. However, in many instances, these claimed benefits are overridden because delegated legislation can require frequent amendment, and the regulations are left unconsolidated and may be impenetrable or inaccessible to users. Given the volume, reach and importance of such legislation, there is much to be said for crafting a role for established Law Commissions overseeing or examining such delegated legislation.

The survival of the law commission model is not assured. Their survival depends upon demonstrating the value of their legal analysis and reform skills, their ability to co-opt and build upon relevant expertise, to show these are outside

37 H. Evans (Ed.), *Odgers' Australian Senate Practice*, 12th edn., Canberra, CanPrint, 2008, ch 15.

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the functions and the skill set of a government department and that their roles can extend beyond reform of existing legislation to cover the scrutiny of proposed delegated legislation, thus reducing the need for their later amendments and reform.