Law Reform and the Executive

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Abstract

This article comments on the process of law reform in Australia from the perspective of a legislative drafter. After a description of the Australian political and parliamentary system and a discussion of the role of the legislative drafter, a brief summary of the formal law reform processes in Australia is provided, including a discussion of how legislative drafting offices participate in the law reform process. Participation includes the drafting of Bills giving effect to law reform proposals based on drafting instructions approved by Cabinet, providing for the undertaking of statutory reviews, as well as the remaking of legislation. It is the role of the legislative drafter to assist the government by turning policy into legislation, so the focus here is on the practical implementation of law reform rather than the independence of law reform bodies.

Keywords: law reform, parliamentary counsel, legislative drafting, Australia, Victoria.

A Introduction

The purpose of this article is to comment on the process of law reform, and, in particular, the themes of implementation and independence, from my perspective as a lawyer who works as a legislative drafter. After describing the Australian political and parliamentary system and discussing the role of the legislative drafter, I provide a brief summary of the formal law reform processes in Australia, describing the functions of the primary law reform bodies across the various jurisdictions that make up the Commonwealth of Australia.

I then discuss how, in practice, legislative drafting offices respond to and implement the recommendations of law reform bodies. I also comment on some of the other 'alternative' ways in which law reform could be said to practically occur in Australia. By this I mean the various processes of closely considering aspects of the law and proposing legislative change, other than those provided by formal law reform bodies. Working within these alternative processes is very much part of my role as a legislative drafter, and describing them here might,

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hopefully, shed some light on both the breadth and the practicalities of law reform.

While every common law jurisdiction is, of course, different, let alone each jurisdiction within Australia, in my experience it is common enough to find that government policy is not fully settled by the time approval is given to draft a Bill. This should not necessarily be regarded as undesirable, as it is often difficult to anticipate every legislative change required to give effect to policy before a Bill is drafted. However, it is the practical advice given by a legislative drafter that can assist in giving effect to law reform. My focus, therefore, is on implementation rather than independence, although I do flag issues of transparency that touch upon the important issue of independence.

B The Australian Political and Parliamentary System

I work as a parliamentary counsel, or legislative drafter, for the State Government of Victoria in Australia, and, more specifically, the Office of the Chief Parliamentary Counsel (OCPC) within the Department of Premier and Cabinet. The thinking goes that we are housed within the central agency of government because our focus is to deliver the legislative program of the government of the day.[1] This means we form part of the executive branch of government, as distinct from the legislature. However, we do undertake work for non-government Members of Parliament, such as the drafting of Private Members' Bills, and even drafting non-government house amendments to Government Bills.[2]

The State of Victoria consists of about six million people, the majority of whom live in the City of Melbourne. The broader Commonwealth of Australia includes the State of Victoria and five other States, along with a few Territories, and, of course, one Federal Government, which is often referred to simply as 'the Commonwealth'. The Australian Constitution sets out the different heads of power, or areas of responsibility, conferred on the State and Federal Governments. The States deal with most criminal laws, the law of property, and so on, while the Commonwealth makes laws in relation to things like taxation and immigration, which are often controversial. Determining the line between the responsibilities of the States, and those of the Commonwealth, has been a con-

1 Alternatively, some offices of parliamentary counsel may be housed more specifically within the relevant justice department. The Australian Office of Parliamentary Counsel, for example, forms part of the Attorney-General's Department: P. Quiggin and L. Finucane, 'Legislative Drafting in Australia', *in* F. Uhlmann and S. Höfler (Eds.), *Professional Legislative Drafters. Status, Roles, Education*, Zurich, 2016, pp. 123-136, at 126.

2 For an exemplary discussion on some of the ethical dilemmas facing legislative drafters, including the avoidance of conflicts of interest, *see* I. Brown, 'Sleeping Better: Ethics for Drafters', *The Loophole*, May 2016, pp. 4-22.

stant task of the High Court of Australia since federation more than a century ago.[3]

As a former British colony, Australia naturally adopts a Westminster system of government. It is generally the case across Australia that every Bill introduced into a Parliament, and every set of proposed regulations presented to an executive branch for making, is drafted or at least settled by an 'office of parliamentary counsel'. For present purposes, but admittedly at the risk of oversimplification, I think I can use Victoria as being representative of the States, and discuss its relationship with the Federal Government, in turn, as representative of the so-called 'Federal Pact' more generally.

C The Legislative Drafter in Australia

Legislative drafters in Australia generally have two primary functions. The first is to draft Bills for introduction into one of the State Parliaments, or the Australian Parliament, on the instruction of Ministers through their Government Departments. If a Bill passes both Houses of Parliament and is given the Royal Assent, it becomes an Act of Parliament or a statute, also described as primary legislation. The second function is to settle, but often substantially draft, proposed regulations prepared by Departments for making by the executive.

In Victoria, for example, proposed regulations are made by the Governor in Council, meaning the Governor of Victoria, acting on the advice of the Executive Council, essentially the Cabinet. And yes, the Governor is still a person appointed as Her Majesty the Queen's representative as Head of State in Victoria. Regulations and other types of 'subordinate instrument'[4] are also described as secondary legislation or subordinate legislation because they are made pursuant to express powers in authorizing enactments that provide for the delegation of certain areas of responsibility.

My professional responsibilities are shared equally between the drafting of Bills and the settling of regulations. I strongly believe there are distinct advantages to drafting a Bill in anticipation of the fact that, shortly after the successful passage of the Bill, the making of regulations will be necessary to give full effect to the new legislative scheme. Drafting Bills as well as settling regulations has impressed upon me the importance and potential complexities of the relationship

3 The Australian Constitution does not strictly separate heads of power into Commonwealth powers and State powers. However, in respect of the legislative powers conferred on the Australian Parliament by s 51 of the Constitution, being the majority of the powers expressly set out in the Constitution, both the Commonwealth and the States may make laws, but State laws will be invalid to the extent of any inconsistency. *See* the Australian Constitution, ss 51, 52 and 109, in particular.

4 In Victoria, *e.g.*, a subordinate instrument is defined quite broadly to encompass regulations as well as various other instruments that are made under Acts of Parliament: Interpretation of Legislation Act 1984 (Victoria), s 38.I have previously discussed the particular category of subordinate instrument known as a 'legislative instrument' in the Victorian context: A. Bushby, 'Role of Legislative Counsel in Making Subordinate Legislative Instruments in Victoria', *The Loophole*, October 2015, pp. 30-41.

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between primary legislation and subordinate legislation. Performing both functions at the same time promotes dialogue within that relationship. The identification of a lack of necessary regulation-making power in a particular Act, for instance, may lead directly to the amendment of that Act in the future.

This also raises the more general issue as to what should be placed in a Bill before the Parliament, and what may alternatively be provided for elsewhere in a proposed set of regulations considered by the executive, or even other types of subordinate instrument such as those to be made by way of Ministerial order or direction. This issue is fundamentally important to legislative drafters, both practically when drafting primary legislation in order to create the necessary powers to give effect to any future delegation, but also conceptually when considering the appropriate level of public notice and transparency for the whole suite of changes required to give effect to any new scheme. Significant matters that affect individual rights and liberties, for example, should be included in primary legislation, while the more detailed aspects of a legislative scheme that require amendment more frequently, such as forms and fees, are typically found in subordinate legislation. However, the 'dividing line' is not always so apparent.

D Australian Law Reform Bodies

The peak law reform body in Australia is the Australian Law Reform Commission (the ALRC).Recent inquiries of the ALRC include the critical examination of Federal laws that encroach on traditional rights and freedoms recognized by common law.[5] All of the States have their own law reform bodies.[6] In Victoria it is the Victorian Law Reform Commission (the VLRC).An example of the functions performed by the VLRC is the review of Victoria's property laws.[7] Each law reform commission is typically constituted by a president or chairperson, along with other members or commissioners.

I must acknowledge the extensive work already undertaken on Australian law reform by experts such as Jeffrey Barnes[8] of La Trobe University, and barrister and former law reform commissioner Kathryn Cronin.[9] It is unnecessary to repeat their carefully researched, highly detailed and closely considered articles here, but it is worth noting some aspects of their recent commentary.

5 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, ALRC Report 129, 2016.

6 The Law Reform Commission of Western Australia (Western Australia), the New South Wales Law Reform Commission (New South Wales) and the Queensland Law Reform Commission (Queensland).The law reform 'institutes' of South Australia and Tasmania perform similar functions but are constituted differently from the law reform commissions of the other States. These institutes are discussed further below. *See also*, Barnes, 2018, n 8, pp. 197-198.

7 Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20, 2010.

8 J. Barnes, 'On the Ground and on Tap – Law Reform, Australian Style', *The Theory and Practice of Legislation*, Vol. 6, No. 2, 2018. *See also*, J. Barnes, 'The Life Cycle of Law Reform', *Flinders Journal of Law Reform*, Vol. 9, No. 2, 2006, pp. 227-249.

9 K. Cronin, 'Law Reform in a Federal System. The Australian Example', *The European Journal of Law Reform*, No. 1, 2019.

Both authors describe the 'crowded field' of law reform in Australia.[10] This is most certainly true, and even though mostly all law reform bodies are established by statute, or to some extent guided by it, they take on myriad forms in terms of power and scope. Barnes demonstrates this by distinguishing the 'generalist law reform bodies', namely law reform commissions, from various 'specialist advisory bodies' at both the State and Federal levels, such as the Small Business Commission of Victoria and the Family Law Council of Australia.[11] The wider functions of specialist advisory bodies mean they are not concerned exclusively or even primarily with law reform, but nevertheless actively participate in the law reform process.

Cronin points out that in addition to permanent or semi-permanent bodies such as these, law reform may be conducted under more specific ad hoc commissions, committees or inquiries.[12] These are, to some extent, amorphous when viewed as a whole, but are very common. One of the earliest projects I assisted with as a legislative drafter, for instance, was a Bill repealing various redundant laws following the publication of a report by the Scrutiny of Acts and Regulations Committee of the Victorian Parliament.[13] Perhaps owing to the technical subject matter and the bipartisan nature of the committee, I assisted a colleague in providing feedback to the committee during the preparation of the report, as well as drafting of the Bill.

Cronin also observes how the responsibility for certain areas of law reform can remain unclear within the federal context, potentially leading to inaction on important issues where consensus between the States and the Commonwealth is required but the political will is lacking.[14] And even where there is agreement, I would add, a further significant decision must be made as to which legislative model to adopt. A cooperative or uniform legislative scheme could adopt 'mirror legislation'[15] or 'applied legislation'[16] or require the referral of legislative power from the States to the Commonwealth.[17] The decision as to which model is preferred may in turn add time to the law reform process, as the passing of all the relevant legislation is dependent on the will of all of the Parliaments.

With that in mind, the functions of the different law reform commissions are clearly set out in the respective Acts of Parliament under which each body is

10 As noted by both Barnes and Cronin, the term 'crowded field' comes from D. Weisbrot, 'The Future for Institutional Law Reform', *in* D. Opeskin and D. Weisbrot (Eds.), *The Promise of Law Reform*, 2005, pp. 18-39.

11 Barnes, 2018, n 8.

12 Cronin, 2019, n 9. A detailed list of the various bodies that form part of the crowded field can be found in Barnes, 2018, n 8, pp. 197-198.

13 Scrutiny of Acts and Regulations Committee of the Victorian Parliament, *Report on the Redundant Corporations Laws*, December 2008.

14 Cronin, 2019, n 9.

15 *See* the Evidence Act 1995 (Commonwealth) and, for example, the Evidence Act 2008 (Victoria).

16 The Competition and Consumer Act 2010 (Commonwealth) and the Australian Consumer Law and Fair Trading Act 2012 (Victoria).

17 The National Consumer Credit Protection Act 2009 (Commonwealth) and the Credit (Commonwealth Powers) Act 2010 (Victoria).

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established. Section 21(1)(a) of the Australian Law Reform Commission Act 1996 (Commonwealth), for example, provides that –

> 1 The Commission has the following functions in relation to matters referred to it by the Attorney-General—
>
> a to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by—
>
> i bringing the law into line with current conditions and ensuring that it meets current needs; and
>
> ii removing defects in the law; and
>
> iii simplifying the law; and
>
> iv adopting new or more effective methods for administering the law and dispensing justice; and
>
> v providing improved access to justice;

The broadest purpose of law reform to modernize the law is strongly emphasized by the use of terms such as 'current', 'simple', 'new' and 'effective'. Interestingly, of the remaining functions, two expressly address the relationship between the Commonwealth and the States. Subsection (1)(d) empowers the ALRC "to consider proposals for uniformity between State and Territory laws about those matters", while subsection (1)(e) confers power "to consider proposals for Commonwealth, State and Territory laws about those matters".

Although equivalent functions set out in the Victorian Law Reform Commission Act 2000 (Victoria) are decidedly less florid, the general functions of the VLRC appear to be broadly similar. Section 5(1)(a) of the Act, for example, provides that—

> 1 The functions of the Commission are—
>
> a to examine, report and make recommendations to the Attorney-General on any proposal or matter relating to law reform in Victoria that is referred to the Commission by the Attorney-General;

However, as can be seen in the above provisions, a common thread tying together the ALRC and the VLRC is the particular relationship shared with their respective Attorneys-General. That is, the first law officer of the Crown in right of the Federal Government, or of the State. Essentially, these law reform commissions do not appear to perform their primary functions on their own volition. It is an Attorney-General, representing the government of the day, who refers a matter to a commission for examination under specific terms of reference.

It is true that commissions are conferred with other powers, but these powers appear to be framed in such a manner as to necessarily be secondary to their obligation to act on an initial reference. The VLRC, for example, may make its own recommendation to the Attorney-General, but it must be for "any matter that the Commission considers raises relatively minor legal issues that are of general com-

munity concern".[18] An exception to law reform 'commissions' are the law reform 'institutes' of South Australia and Tasmania.[19] These institutes are not established as independent statutory bodies but are formed by agreement between the universities at which they are based and the relevant Attorneys-General and law societies.[20] The institutes may accept proposals for law reform projects from the Attorney-General, as well as other persons and bodies, and then decide whether to undertake the project.[21]

A 'condition precedent' to act upon a reference from the Attorney-General has, or at least appears to have, the potential to touch upon the question of independence. However, this does not mean that the work undertaken by law reform bodies is subject to the control and direction of the government. On the contrary, the fact that so many recommendations of law reform bodies are not acted upon by government is a strong indicator of their independence. The politician and lawyer John Hannaford has, moreover, described how matters referred to law reform bodies are typically controversial, suggesting that it is the very independence of these bodies that is utilized by government.[22] Hannaford suggests that controversial matters are referred to law reform bodies "because government is able to dissociate itself more easily from the actions of independent law reform agencies if it does not like the agency's processes or the outcomes".[23]

Cronin points to some of the nuances in how referrals are positively dealt with by law reform bodies, stating that the ALRC is "closely involved in discussions with the Attorney-General concerning possible references and in practice the choice and design of references is a shared endeavour".[24] However, the way in which referrals are first made by government and how government responds to subsequent recommendations are, I suspect, the main issues affecting the proper categorization of law reform bodies.

E Drafting Legislation in Response to Recommendations for Law Reform

Provided an Attorney-General refers a matter to a law reform commission, the commission then proceeds to conduct inquiries and receive submissions, and ultimately publishes recommendations. The ALRC, for example, may also make an interim report before making its final report on a reference, the final report being

18 Victorian Law Reform Commission Act 2000 (Victoria), s 5(1)(b).
19 The South Australian Law Reform Institute and the Tasmania Law Reform Institute.
20 The University of Adelaide and the University of Tasmania, respectively.
21 *See* https://law.adelaide.edu.au/research/south-australian-law-reform-institute and www.utas.edu.au/law-reform (last accessed 31 March 2019). Barnes also describes how some of the so-called specialist advisory bodies can act on their own initiative, even if the full extent of their power to do so is not entirely clear: Barnes, 2018, n 8, p. 205.
22 J. Hannaford, 'Implementation', *in* D. Opeskin and D. Weisbrot (Eds.), *The Promise of Law Reform*, 2005, pp. 222-229.
23 Hannaford, 2005, n 23, p. 225.
24 Cronin, 2019.

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the report that includes any recommendations the ALRC wants to make.[25] However, proceeding from the 'recommendation stage' to the 'Bill stage' can be difficult, and not just for the political reasons previously mentioned.

One of the cardinal rules applying to my role as a legislative drafter is to commence the drafting of a Bill only when Cabinet has given its approval to do so. As part of the formal endorsement of a particular policy by Cabinet, a specific set of drafting instructions is approved, and it is these approved instructions upon which a Bill is drafted. As drafting progresses and issues arise, both the instructing officer and the legislative drafter are able to check whether the content of the Bill remains within the 'scope' of Cabinet approval. This process helps make clear the intention of the government and, accordingly, my responsibilities in serving the government. And while I cannot speak from experience elsewhere, I understand that the level of detail required across the various offices of parliamentary counsel may vary.[26]

This means that if a Bill is to be drafted in response to the recommendations of a law reform body, those recommendations must first be cast into formal drafting instructions. It is possible that a particular recommendation is so straightforward that it does not require any further detailed instructions, such as a recommendation to repeal a particular enactment. More typically, however, a process of 'translation' is required, in which recommendations are translated into instructions by a Department, and instructions are then translated by a legislative drafter into the specific clauses of a Bill for introduction into the Parliament. In the event that something is 'lost in translation', as it were, it is possible that a court could go back to the recommendations of a law reform body to determine the scope of the new legislative provisions.[27]

This type of approach appears to be different from that taken by other law reform bodies that have the power to prepare draft Bills where suitable, such as the Law Commission of England and Wales.[28] The preparation of draft Bills seems to make perfect sense in suitable circumstances, and could avoid some of the problems in translating the recommendations of a law reform body into drafting instructions. Some of the arguments for draft Bills by law reform bodies in other jurisdictions have been canvassed elsewhere.[29] And while the actual task of putting a recommendation into legislative form is something that invariably tests

25 Australian Law Reform Commission Act 1996 (Commonwealth), s 22(1).The VLRC may also make interim reports: Victorian Law Reform Commission Act 2000 (Victoria), s 21.

26 I was very fortunate to attend a talk given by former First Parliamentary Counsel of the United Kingdom, Sir Stephen Laws, who described how sufficient instruction to commence the drafting of a Bill could be achieved by way of synopsis rather than detailed instruction where suitable: Sir Stephen Laws, Institute of Advanced Legal Studies, London, 29 June 2018.

27 Dennis Pearce and Robert Geddes describe how Australian case law permits courts to consider extrinsic materials, including the reports and recommendations of law reform bodies, even if the relevant legislation provides only for the use of other extrinsic materials as an aid to statutory interpretation: D. Pearce and R. Geddes, *Statutory Interpretation in Australia*, 2014, pp. 92-94.

28 Law Commissions Act 1965 (United Kingdom), s 3.

29 *See*, *e.g.*, Y. Le Bouthillier, 'The Former Law Commission of Canada; The Road Less Travelled', *in* M. Dyson, J. Lee & S. Wilson Stark (Eds.), *Fifty Years of the Law Commissions. The Dynamics of Law Reform*, 2016, p. 100.

and refines policy and intent, the preparation of draft Bills or even specific clauses, to my mind at least, is not something that could be adopted in every situation.

For example, in its final report on the review of Victoria's property laws, the VLRC stated that the definition of 'land' in section 3(1) the Property Law Act 1958 (Victoria) "should be simplified and modernised without change in substance".[30] Translating this recommendation into an instruction to the legislative drafter would not necessarily be easy. The definition does not appear to have been amended since its enactment and is merely inclusive, not exhaustive. Moreover, a number of different definitions of the same term appear across the statute book. Simplifying and modernizing the definition of land as recommended would normally be achieved through the iterative drafting process itself, under which the legislative drafter can draw from the expertise and experience of the instructing officer, who is also in a position to share confidential corporate knowledge. Furthermore, the preparation of a draft Bill does not necessarily mean that law reform is achieved more quickly.[31]

F Alternative Law Reform Processes

As for law reform processes other than those provided by permanent or semi-permanent law reform bodies, there are a few examples in recent legislation where a requirement to review a particular piece of legislation is set out within that legislation. For example, the Climate Change Act 2010 (Victoria) as originally enacted provided for an 'independent review' of the Act to be completed within five years of its commencement.[32] The review was completed on time, tabled in Parliament in accordance with the Act and formed the basis for the repeal and re-enactment, with amendments, of that Act.[33] A similar process took place under the Charter of Human Rights and Responsibilities Act 2006 (Victoria), with one review after four years of operation and another after eight years.[34] While these 'statutory reviews' are not strictly necessary, they appear to promote transparency in the everyday operations of government. Alternatively, the adequacy of the statute book is something that should be continuously considered as a matter of principle.[35]

30 Victorian Law Reform Commission, n 8, p. 125.

31 In Victoria, from time to time, a Bill is released for public comment in the form of an 'exposure draft'.The government may respond by incorporating some additional changes to the Bill before introducing it into the Parliament. However an exposure draft is still prepared by OCPC, not the VLRC. Interposing an additional period of public consultation necessarily adds time to the legislative process.

32 Climate Change Act 2010 (Victoria), s. 18.

33 Climate Change Act 2017 (Victoria).

34 Charter of Human Rights and Responsibilities Act 2006 (Victoria), ss 44 and 45.

35 For a brief description of review provisions more generally, *see* H. Xanthaki, *Thornton's Legislative Drafting*, 5th ed., 2013, pp. 264-266.

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It is also worth considering the practice of consolidating, re-enacting and remaking both primary legislation and subordinate legislation.[36] The former senior public servant Laurie Glanfield has suggested that instead of confining law reform to primary legislation, it is more suitable to consider the actions and decisions made under broader 'policy', namely subordinate legislation and administrative policies.[37] An example of 'everyday' law reform in my own jurisdiction is the compulsory revocation and remaking of regulations every ten years.[38] While the 'sunset' process can sometimes be time-consuming, it almost always improves the quality of subordinate legislation. It provides an opportunity for Departments to closely consider and re-evaluate the adequacy of a whole set of regulations, or at the very least update any superseded cross-references. As I understand it, not all common law jurisdictions adopt this practice.[39] While sunset provisions might impose a strain on government resources, leading authors such as Dennis Pearce and Stephen Argument have pointed out the benefits of the 'staged repeal' of delegated legislation.[40]

A good example of the sunset process working in practice is the remaking of regulations in light of the introduction of human rights legislation. The Charter of Human Rights and Responsibilities Act 2006 (Victoria) came into operation in 2007, and in the case of regulations that commenced before 2007 but were required to be remade after 2007, additional work was undertaken to amend regulations where possible to promote consistency with the new human rights scheme, as the legislation included an additional requirement to prepare a human rights certificate in respect of a proposed set of regulations.[41] Although human rights certificates are prepared by Departments, the task of improving new regulations rests largely with the legislative drafters responsible for settling them.

G Conclusion

I hope to have given some indication of the diversity of law reform processes in Australia from my perspective as a legislative drafter and to have shown how drafters can provide for and assist in giving effect to law reform, including through the use of so-called alternative law reform processes. The sheer practicalities of implementing law reform are always worth considering alongside the many complex issues of legal effectiveness, constitutionality and, of course, politics. While the federal context in Australia can pose challenges for law reform, it also offers an opportunity for cooperation and harmonization. I believe that the

36 These terms can mean different things in different places. For the United Kingdom context, *e.g.*, *see* E. Caldwell, 'A Vision of Tidiness: Codes, Consolidations and Statute Law Revision', *in* D. Opeskin and D. Weisbrot (Eds.), *The Promise of Law Reform*, 2005, pp. 40-52.

37 L. Glanfield, 'Law Reform through the Executive', *in* D. Opeskin and D. Weisbrot (Eds.), *The Promise of Law Reform*, 2005, pp. 288-301, p. 288.

38 Subordinate Legislation Act 1994 (Victoria), s 5.

39 'Statutory instruments' generally do not sunset in the United Kingdom, for example.

40 D. Pearce and S. Argument, *Delegated Legislation in Australia*, 2012, p. 165.

41 Subordinate Legislation Act 1994 (Victoria), s 12A.

very particular skills held by legislative drafters are of great benefit to any government wishing to give effect to law reform.

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