



**Australian Government**

**Australian Law Reform Commission**

# **The ALRC and the Challenge of Law Reform**

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**Legal Studies Association, 30 March 2006**

# The 1970s transformative project

Law seen as a powerful (perhaps *the most?*) means of achieving social transformation.

For example, in Australia →

- Massive increase in legal aid; community legal centres movement; Aboriginal Legal Services
- Human Rights Commission established and Optional Protocol to ICJ signed
- Checks on Government: Administrative Law, Merits Review Tribunals, Ombudsman's offices, FOI laws etc
- Test case litigation and 'cause lawyering'



# ALRC Acts 1975 & 1996

- **Systematically develop and reform law, by:**
  - Adapting the law to current conditions, needs
  - Removing defects, and obsolete or unnecessary laws
  - Simplifying the law
  - Adopting new or more effective methods of administering the law and dispensing justice
  - Improving access to justice
  - Consolidating, harmonising federal, state & terr laws
- **While having regard to:**
  - Personal rights and liberties, the ICCPR, Australia's international obligations
  - The costs of gaining access to, and dispensing, justice



# Across the Commonwealth ...

- England and Wales (1965), Scotland, Northern Ireland, Ireland
- NSW, Vic (1973-92, 1999-), WA, Qld, ACT, NT, TasLRI
- NZ, PNG, Fiji, Vanuatu
- Canada (federally + most provinces); the Caribbean
- India, Pakistan, Sri Lanka, Hong Kong
- South Africa, Namibia, Malawi, Lesotho, Kenya, Uganda, Tanzania, Botswana



# Transformative?

Probably not, ... but *relatively* successful:

- Major rationalisation projects
  - Uniform Evidence Acts, Admiralty, Civil/admin penalties
- Modernisation, ‘over-the-horizon’ projects
  - Human Tissue Acts; Genetic privacy and discrimination
- Open Government projects
  - FOI; Complaints against police; Archives; CSSI
- Access to justice projects
  - Managing Justice; Costs shifting; Judiciary Act; Pro bono

Cf, social justice projects

- Aboriginal customary law; Rights of the child;  
Gender equality; Multiculturalism → less implementation



# Now more of a ‘think tank’?

- ALRC → the Australian Government’s ‘think tank’ for major legal and policy issues:
  - **technical** (marine insurance, rules of evidence);
  - **socio-legal** (Aboriginal custom, multiculturalism, women and the law, ageing population); and
  - **‘over the horizon’** issues (genetic privacy and discrimination, gene patenting)
- Annual Budget c\$ 3.2M
  - plus stimulating an enormous voluntary effort



# An increasingly crowded field

- Parliamentary committees
- Ministerial councils (COAG, SCAG, AHMAC &c)
- Government departments, Interdepartmental C'ees
  - **Treasury** → 'anything economic' (tax; CLERP; intergenerational equity)
- Other statutory authorities
  - HREOC, Privacy, Productivity Commission, ARC
- Royal commissions, other ad hoc committees
- Private (think tanks, consultants, interest groups, peak associations, NGOs)



# Sawer's four attributes, 1970

The 'new principle of law reform' involves a body with four attributes:

- permanent;
- full-time;
- independent; and
- authoritative.

[NB Rationalising and codifying came much earlier to European civil law systems]



# Permanence

- Establishment of LRCs in 1960s/70s by legislation, well-resourced
- 1990s → closures (Canada, Victoria) and threats (ALRC, NSWLRC)
- But hard to kill! LRCs re-emerge
- Parallel ‘Law Institute’ initiatives
  - (BC, Alberta, Tasmania)



# Full time

Many different models:

- ALRC (3 FT, 3 PT, large staff); ~VLRC
  - NSWLRC (PT Chair, 1 FT Comm'r & 14 PT)
  - LRCWA (all P/T, small staff, outsource)
- \* Key: Need time for contemplation, to design and drive quality research; critical mass of staff; internal consistency; corporate memory, records.



# Independent

- **Most critical attribute** – intellectual freedom to make findings and recommendations without fear or favour, or co-optation, or trying to second guess what the Government ‘wants’
- Pre-requisite to ensuring full and frank community participation and the (pro bono) cooperation of leading experts
- But must be accountable for public funds



# Authoritative

- Reform must proceed from a platform of outstanding, meticulous scholarship
- A Report should have independent and enduring value as an authoritative text, beyond the specific recommendations
  - Eg ALRC reports on Evidence, Admiralty
- ALRC website figures highlight demand: *Recognition of Aboriginal Customary Laws* (1986) still the 3rd most heavily requested



# Attributes of a 21stC LRC

To survive and thrive, a modern LRC must now *also* be:

- generalist;
- interdisciplinary;
- consultative; and
- implementation-minded.



# Generalist

- Should be prepared to work in *any* area of law or procedure
  - including (especially?) outside of the comfort zone, and pull in specialist expertise.
- Particularly well placed to:
  - monitor dispersed reform activity;
  - provide some coherence to the general project of law reform;
  - promote harmonisation, complementarity;
  - transcend specialist categories.



# Interdisciplinary

- International and comparative approaches
- Work on complex issues at the intersection of law and social policy
- Manage sophisticated empirical and multidisciplinary research
  - something courts (eg) cannot do

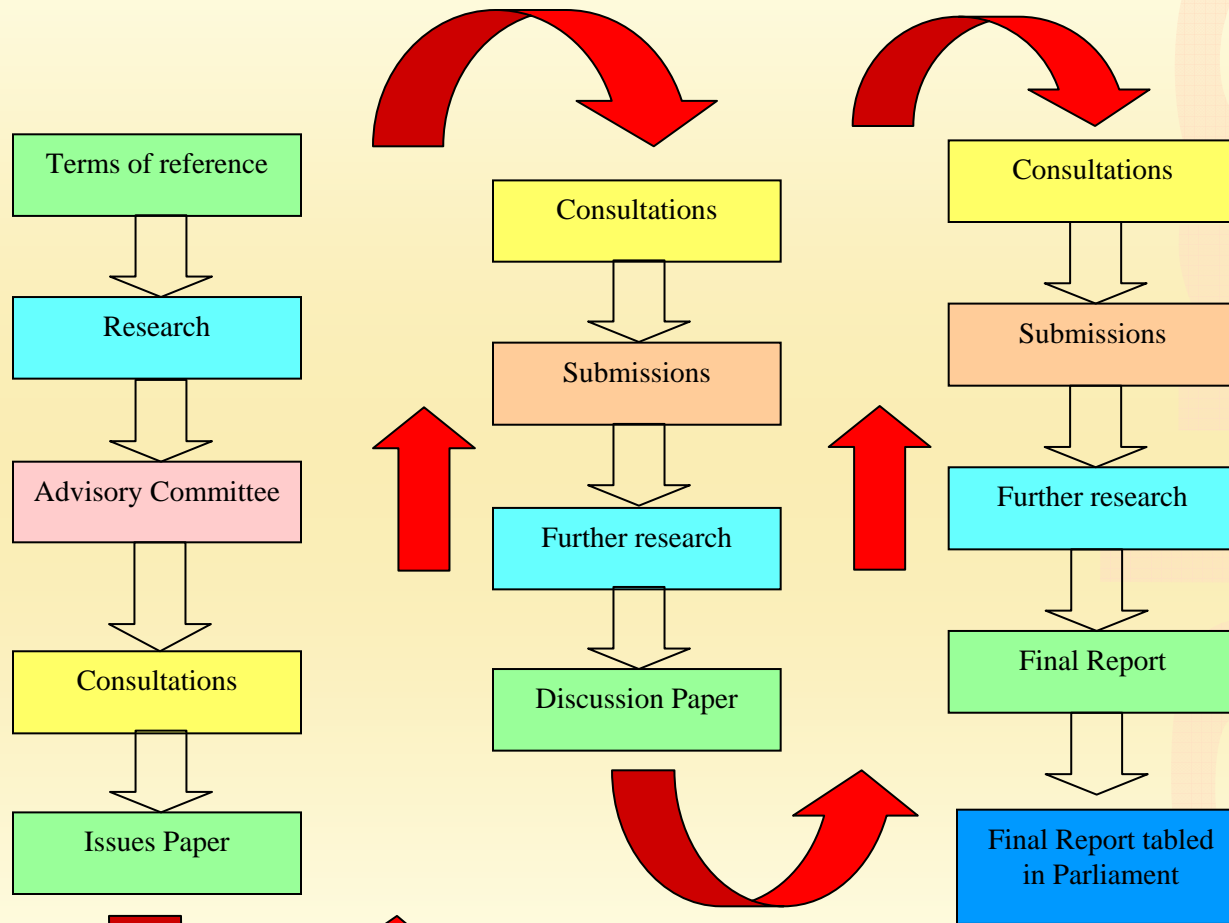


# Consultative

- Deep commitment to public consultation = the essential and distinguishing feature
- Challenge in designing effective consultation
- Properly done, confers benefits:
  - for those consulted;
  - for the process of law reform; and
  - enhanced effectiveness and acceptability of the law once reformed.



# 'Patented' Law Reform Process

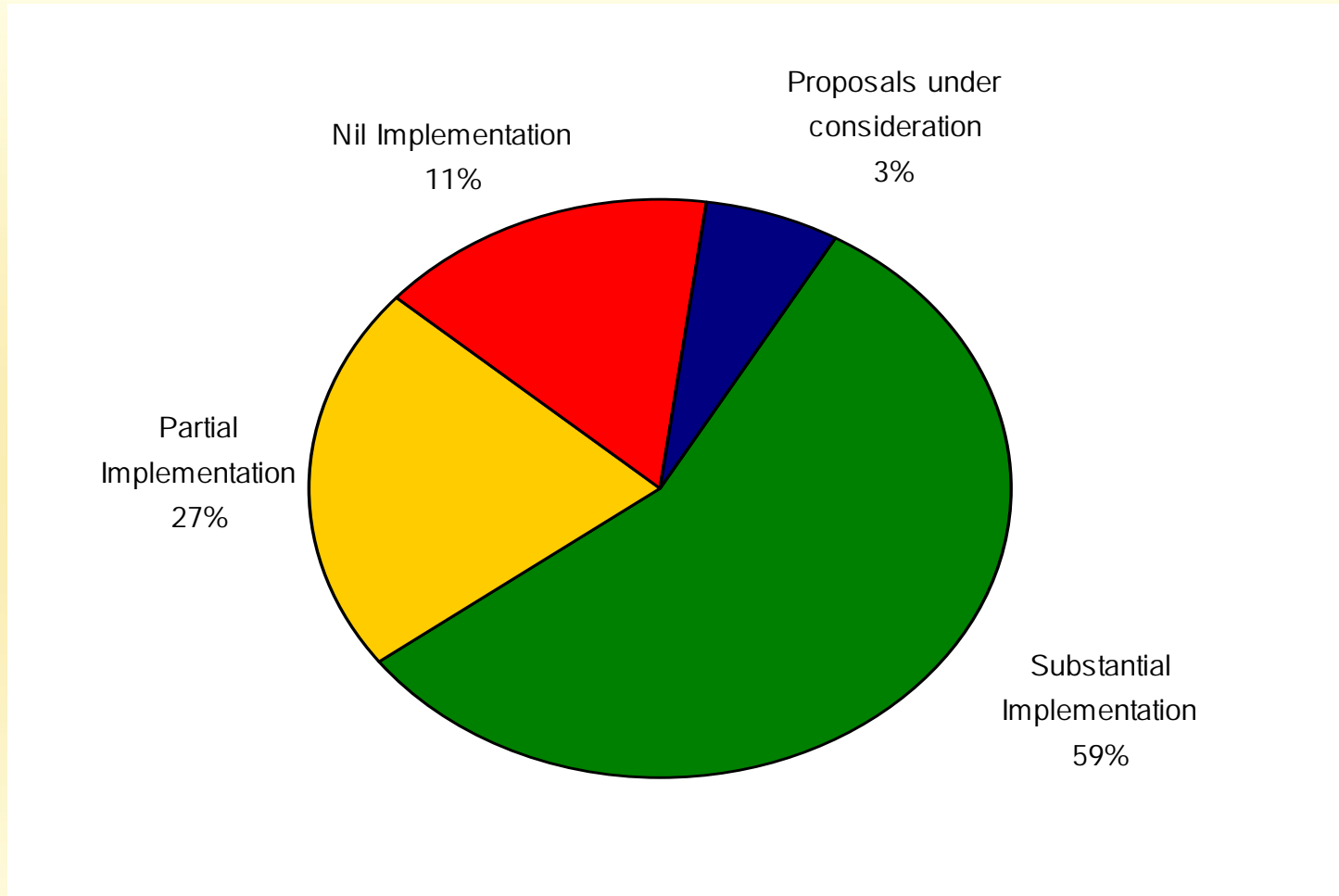


# Implementation-minded

- *But not obsessed*: useful benchmarking, but not the only measure of quality
  - Also: extent of use as leading text; judicial and academic citations; influence elsewhere etc
- LRCs must have ‘a clear sense of both the possibilities and the limitations of law reform’
- produce recommendations that are practical and susceptible to ready implementation
- Not always ‘Big Law’: utilise mix of strategies and approaches (including education), reflecting the more complex regulatory environment



# ALRC implementation rates\*



**\* Plus the Hawthorne Effect**



# The 'post-modern' sensibility

- questioning the 'traditional certainties', authorities and institutions;
- greater appreciation of the complexity of social institutions and problems, and of competing interests;
- power seen to be much more diffused, and not entirely invested in the formal organs of government;
- not all issues and disputes are 'legal'; and
- increasing desire for direct participation in civil society and in public policy-making.
- **... should especially suit institutional law reform**

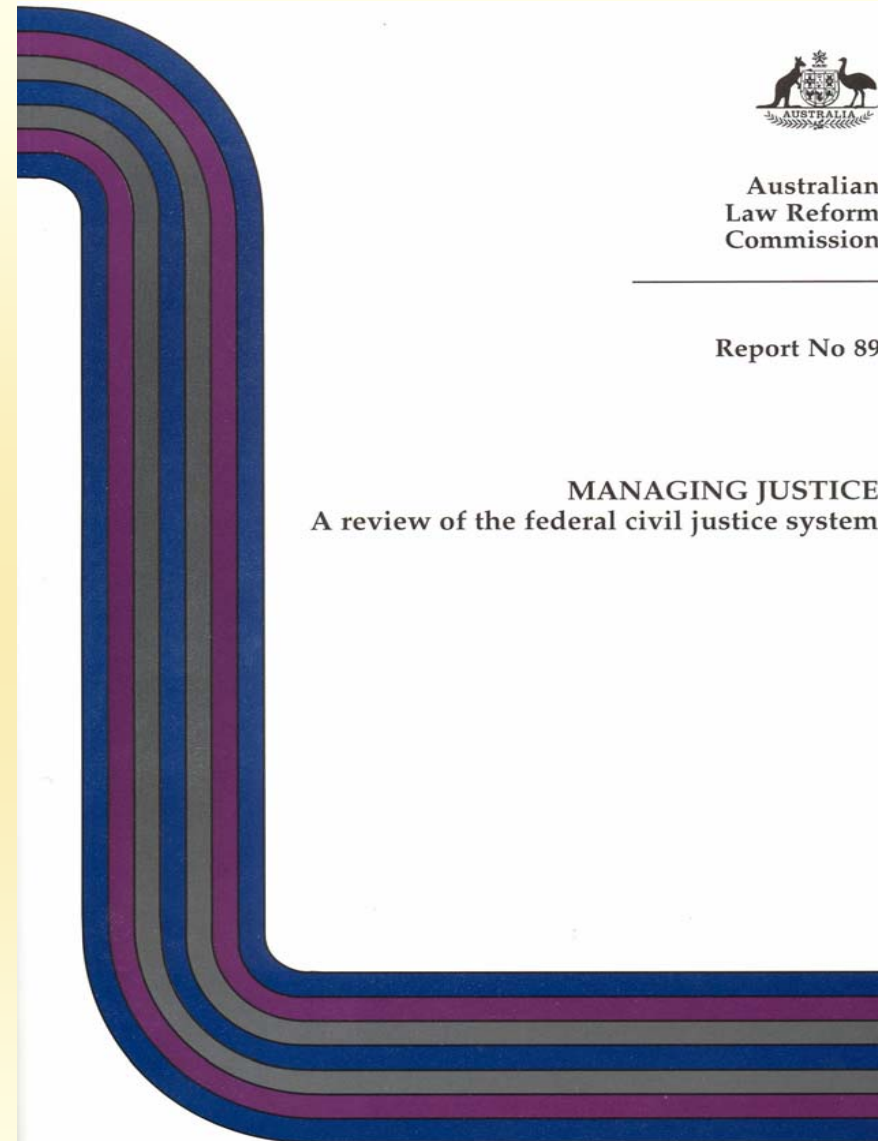


# *Managing Justice*

- 4-year review of the federal civil justice system, completed January 2000
- **Empirical analysis** of over 4000 case files plus follow-up interviews with lawyers and parties
- 400 written submissions
- 800pp, 144 reform recommendations
- Positive Government response in 2004



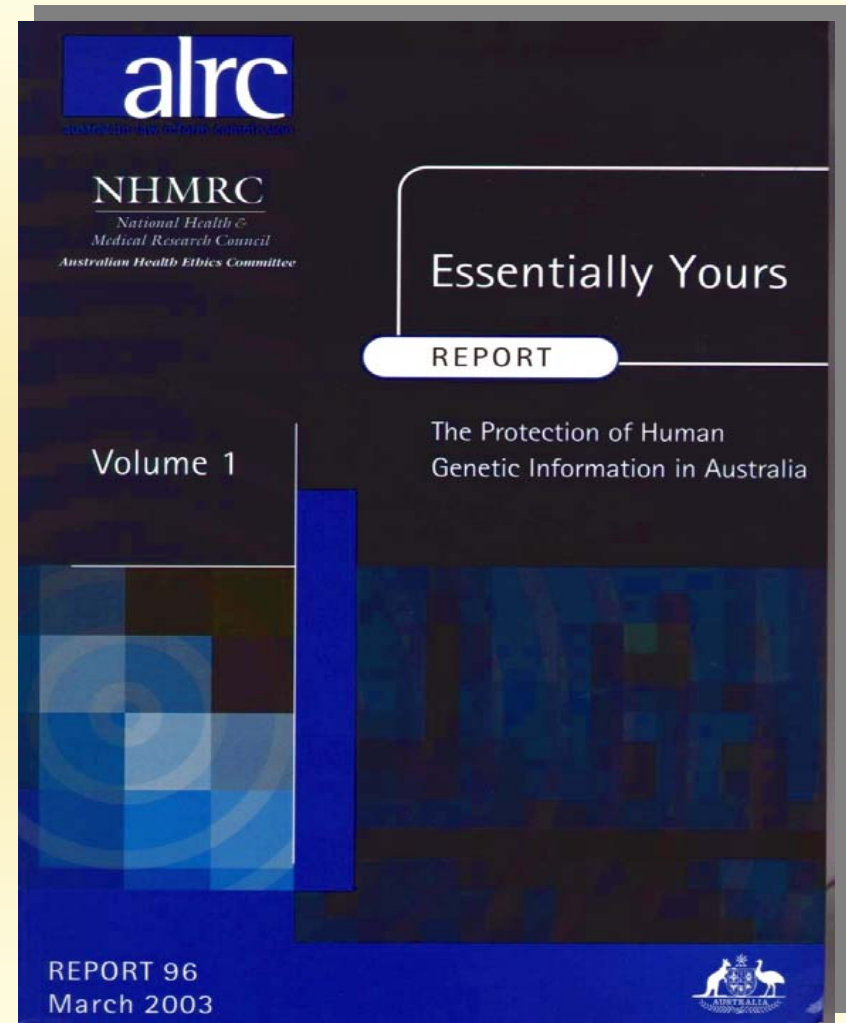
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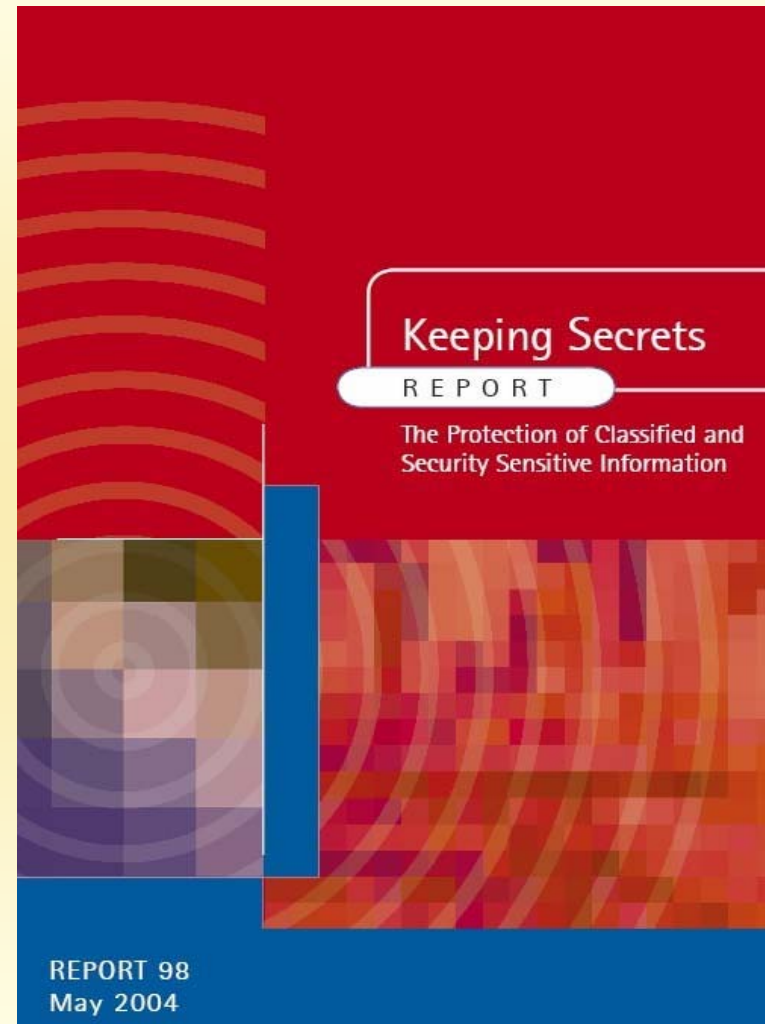
# Essentially Yours – ALRC 96

- With Australian Health Ethics Committee (NHMRC), 2001-2003
- 2 vol, 1200 pp report, with 144 recommendations (directed to 31 diff bodies)
- **Dr Francis Collins (HGP): ‘a truly phenomenal job ... placing Australia ahead of what the rest of the world is doing’.**
- **Govt response 9.12.05**



# Keeping Secrets – ALRC 98

- *The Protection of Classified and Security Sensitive Information*
- 572 pp report, May 2004
- 80 recommendations for reform of law, practice and procedure
- *National Security Information Acts 2004-5* (Cth) (criminal and civil)



# Genes & Ingenuity – ALRC 99

- *Gene Patenting and Human Health* (2004)
- IP issues identified as a major inter/national concern in ALRC 96
- Balance encouraging innovation/investment with cost of public health
- 700 pp Report with 50 Recommendations
- Influential overseas (AAAS, OECD, UNESCO)



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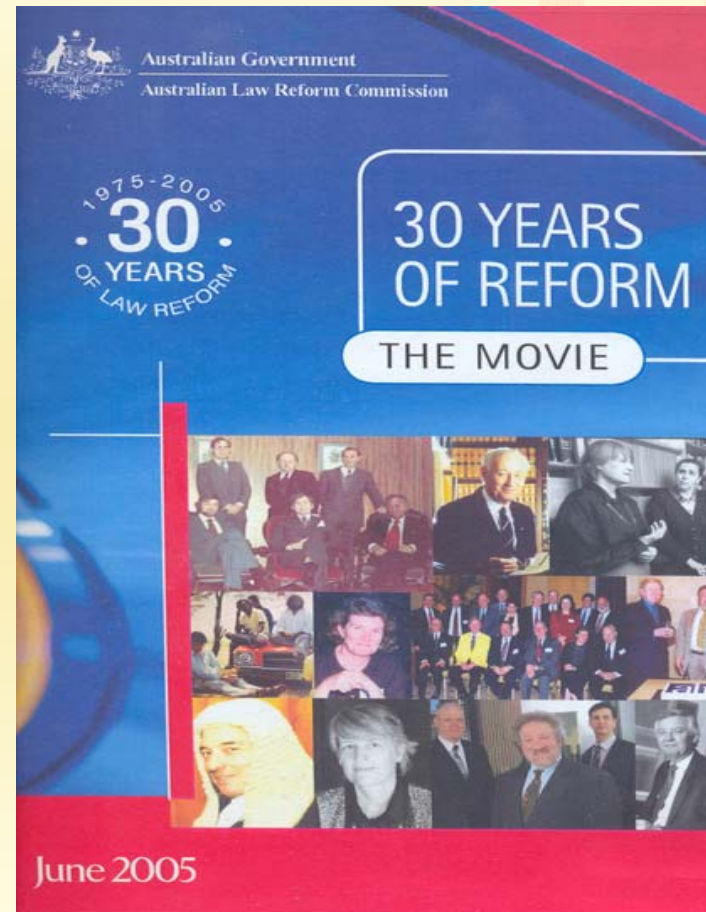
# Review of seditious laws

- ToR received 2 March
- Review federal provisions on sedition, unlawful associations and related matters
- IP30 released on 20 March – asks 24 QQ
- DP and report to come (due 30 May)



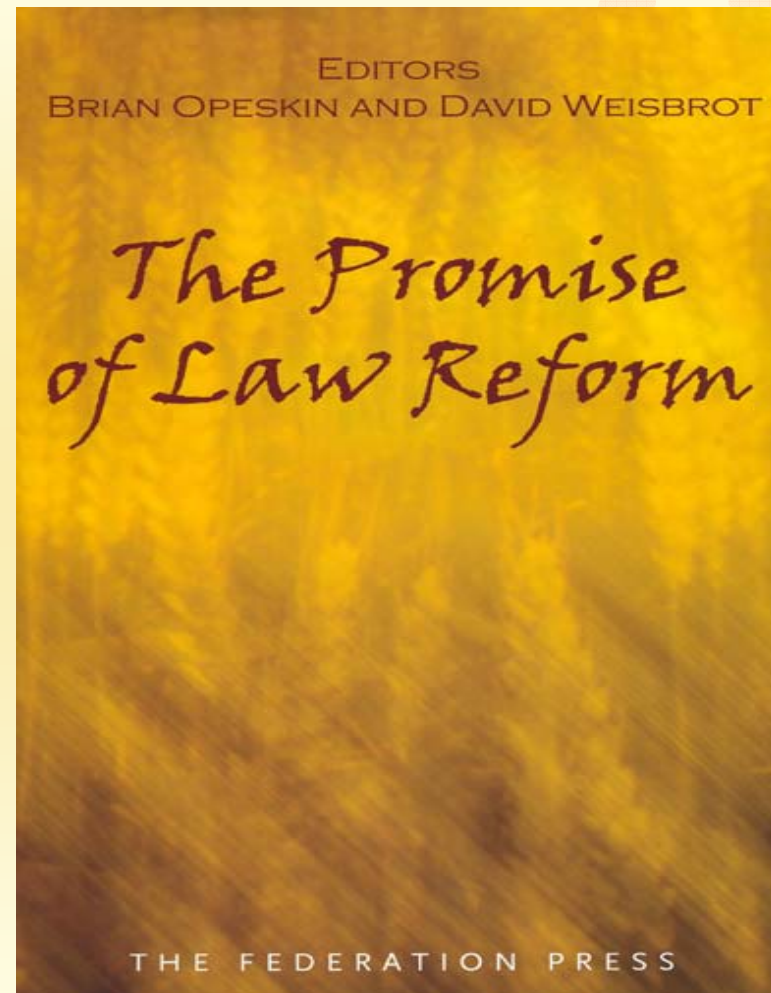
# 30 years of reform: the movie

- Interviews with the six ALRC Presidents (Kirby, Connor, Wilcox, Evatt, Rose and Weisbrot)
- Plus archival footage, photos and materials



# The Promise of Law Reform

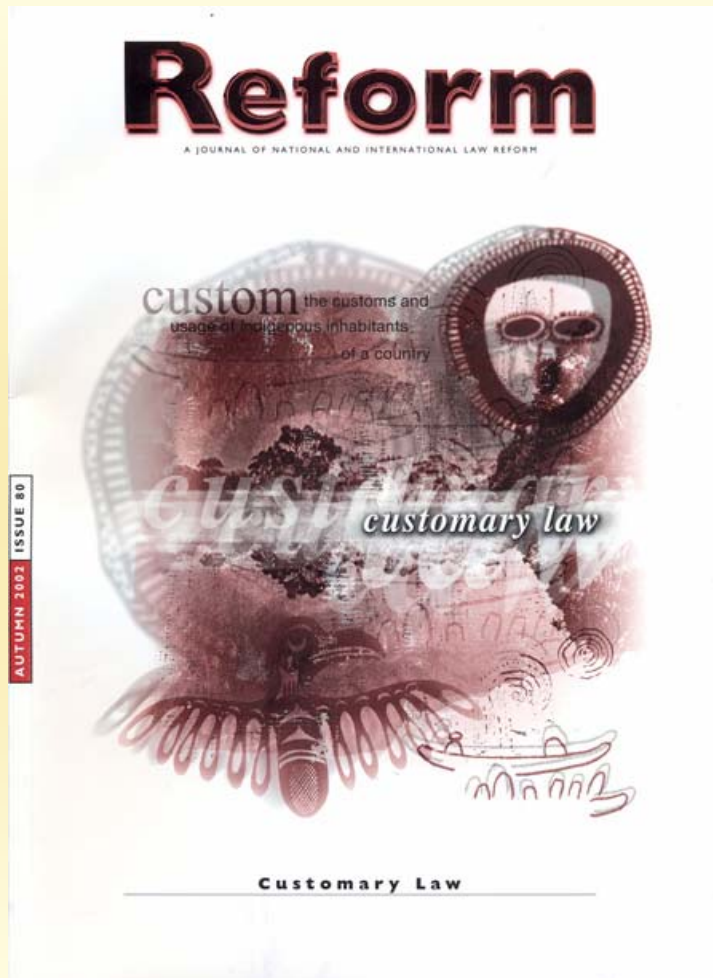
- Federation Press, published 2005
- ALRC 30th anniversary project
- 30 chapters on all aspects of law reform by leading Australian and international figures



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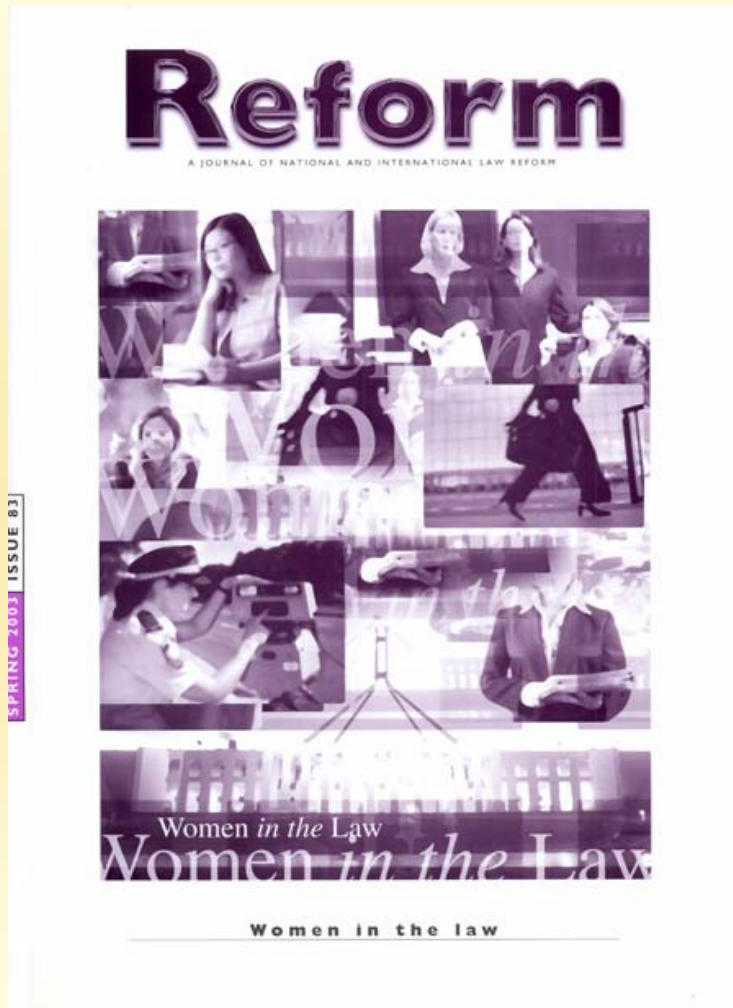
# Reform journal



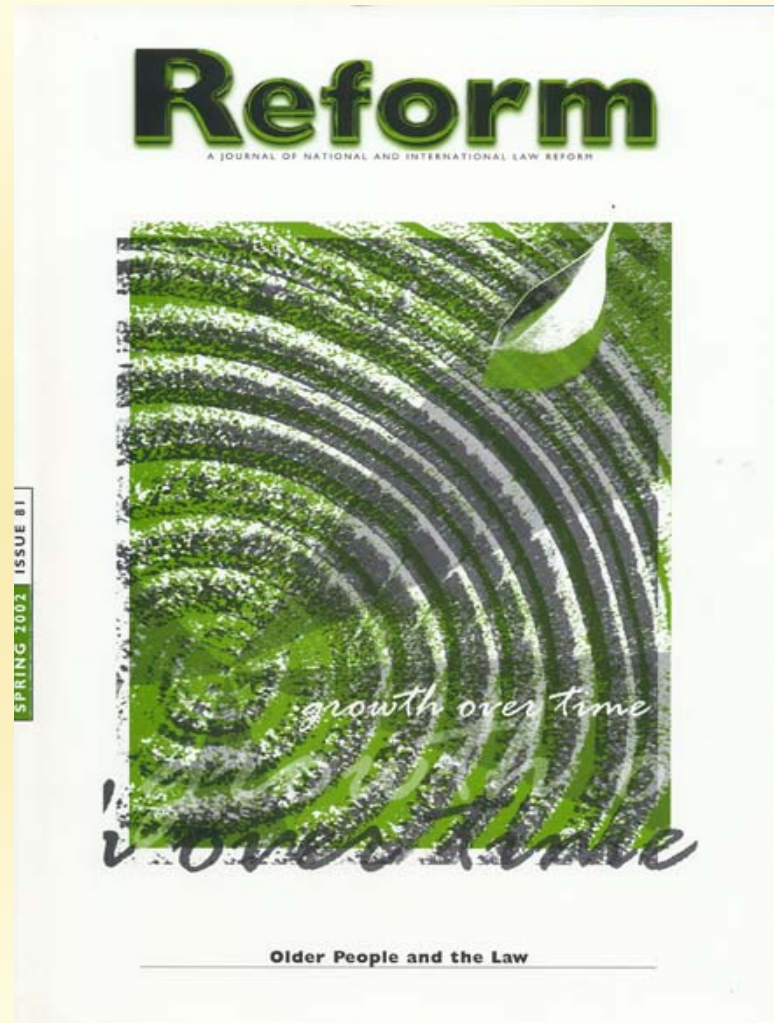
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# For further information

- ALRC website – all papers, reports available online (free):

**[www.alrc.gov.au](http://www.alrc.gov.au)**

- Email: **[info@alrc.gov.au](mailto:info@alrc.gov.au)**
- GPO Box 3708, Sydney 2001

