CITATION PRACTICES OF THE AUSTRALIAN LAW REFORM COMMISSION IN FINAL REPORTS 1992–2012

KIERAN TRANTER*

I INTRODUCTION

For 40 years, the Australian Law Reform Commission ('ALRC') has been a highly visible feature of the Australian legal landscape. It has endured through changing governments, and changing social and political contexts, and has forged a national and international reputation as a leading institutional law reform agency.[1] While the ALRC and other institutional law reform agencies do many things, their primary activity, and the one that they are most judged on, are their reports, particularly final reports.[2]

This article sets out a study into the citation practices within ALRC final reports from 1992 to 2012. The study found that submissions were the most frequently cited source. This finding supports an argument that the ALRC has believed the best way to influence the executive is to locate recommendations within what can loosely be called the 'community'. Another finding was that the ALRC did not extensively reference academic sources. Within the literature on institutional law reform there has been suggested two different approaches for how law reform commissions should operate. One has been the 'research

* BSc, LLB (Hons), PhD, Senior Lecturer, Griffith Law School, Griffith University.
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1 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Law Reform – The Challenge Continues: A Report of the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Australian Law Reform Commission* (2011) 9–10; Laura Barnett, 'The Process of Law Reform: Conditions for Success' (2011) 39 *Federal Law Review* 161, 163; Lyria Bennett Moses, 'Agents of Change: How the Law "Copes" with Technological Change' (2011) 20 *Griffith Law Review* 763, 770–4.

2 Lani Blackman, 'Products of Law Reform Agencies' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 187, 188.

institute' approach where recommendations are generated by experts analysing relevant data and academic literature. The other has been the 'community engagement' approach where recommendations are located as having emerged from a process of community consultation. These are not either-or alternatives; rather they are poles of a continuum with agencies adopting a blend of both approaches. In finding that submissions were the most frequent cited source and academic research the least frequent, it can be argued that the ALRC has been committed more towards a community engagement rather than a research institute approach. Having found this, a question can be raised as to how this approach meets current expectations for 'evidence-based' reform. It is argued that the 'success' of a more research institute approach by the Productivity Commission indicates that the ALRC might adopt more of this approach in the future.

This article is in four Parts. Part II locates this study within two literatures: literature on institutional law reform and literature on citation patterns. By providing an empirical insight into the working of a specific law reform commission, it extends the literature on institutional law reform. It also extends the scope of citation analysis from the judiciary and academia to another significant legal institution. Part III introduces the ALRC and particularly the 21 years between 1992 and 2012 that is the focus of this study. Part IV details the key findings. Part V discusses these findings in the context of literature on institutional law reform. It is suggested that the findings reveal that the ALRC has had a strong commitment to the community engagement model. This exposes the ALRC to criticisms of the community engagement approach. This Part concludes with a comparison with the Productivity Commission to suggest that current expectations of law reform might involve a greater emphasis on the research institute approach.

II LITERATURE: INSTITUTIONAL LAW REFORM AND CITATION ANALYSIS

This Part locates this study within two distinct literatures. The first is the literature on institutional law reform. The second is the much more substantial literature on citation analysis of legal texts. Concerning the first literature it is argued that much of the writing about law reform commissions has been either advocacy – that is advocating for institutional law reform – or technical, explaining how specific institutional law reform activities should take place. There has been only a limited critical discourse that has questioned institutional law reform. This study contributes to a more critical discourse concerning institutional law reform through a detailed examination of what a law reform commission has actually done, namely produced final reports recommending to the executive that laws should be changed. Concerning the second it is argued that the extensive literature that has analysed the citation practices within law reports and law journals provides the template and tools for similar analysis of other legal texts. This study does

just this, taking up the concepts and methods developed in citation analysis and applying them to a sample of ALRC final reports.

A Institutional Law Reform

Over the past 50 years there has emerged in British Commonwealth jurisdictions a dedicated literature concerned with institutional law reform. By institutional law reform what is meant is the locating of law reform activity within an identifiable entity that is neither the courts nor the formal element of the executive responsible for law and courts (for example, the Attorney-General's Department or Department of Justice).[3] The paradigm examples of institutional law reform are law reform commissions. Three strands can be identified within this literature.

The first strand can be seen as the literature that advocates for institutional law reforms. This 'advocacy' literature encompasses several dimensions. The first are the articles that argue for the establishment (or re-establishment) of institutional law reform agencies within specific jurisdictions.[4] The second are reviews documenting the histories and successes of law reform commissions.[5] The third are accounts of specific

3 Peter Handford, 'The Changing Face of Law Reform' (1999) 73 *Australian Law Journal* 503, 504–5.

4 Gerald Gardiner and Andrew Martin, 'The Machinery of Law Reform' in Gerald Gardiner and Andrew Martin (eds), *Law Reform Now* (Gollancz, 1963) 1, 1–14.

5 Leslie Scarman, *Law Reform; The New Pattern* (Routledge & Kegan Paul, 1968); Sir Leslie Scarman, 'Law Reform – Lessons from English Experience' (1968) 3 *Manitoba Law Journal* 47; Justice Scarman, 'The Work of the Law Commission for England and Wales' (1969) 8 *University of Western Ontario Law Review* 33; L C B Gower, 'Reflections on Law Reform' (1973) 23 *University of Toronto Law Journal* 257; John H Farrar, *Law Reform and the Law Commission* (Sweet and Maxwell, 1974); Sir Samuel Cooke, 'The Law Commission: The First Ten Years' (1975) 125 *New Law Journal* 1036; A L Diamond, 'Law Reform and the Legal Profession' (1977) 51 *Australian Law Journal* 396; Michael Kerr, 'Law Reform in Changing Times' (1980) 96 *Law Quarterly Review* 515; P M North, 'The Law Commission: Methods and Stresses' (1981) 3(1) *Liverpool Law Review* 5; Michael Kirby, 'Law Reform as "Ministering to Justice"' in A R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (Butterworths, 1983) 201; Ronald Sackville, 'Law Reform – Limitations and Possibilites' in A R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (Butterworths, 1983) 223; Stephen Cretney, 'The Politics of Law Reform – A View from the Inside' (1985) 48 *Modern Law Review* 493; William H Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, 1986); M D Kirby, 'The Politics of Achieving Law Reform' (1988) 11 *Adelaide Law Review* 315; Handford, above n 3; Michael Kirby, 'The Law Reform Commission and the Essence of Australia' (2000) 77 *Australian Law Reform Commission Reform Journal* 60; Michael Kirby, 'The ALRC – A Winning Formula' (2003) 82 *Australian Law Reform Commission Reform Journal* 58; Anne Finlay, 'The Role of the Australian Law Reform Commission' (2004) 16(2) *Legaldate* 1; Marcia Neave, 'Institutional Law Reform in Australia: The Past and the Future' (2005) 23 *Windsor Yearbook of Access to Justice* 343; Michael Tilbury, 'A History of Law Reform in Australia' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 3; Michael Tilbury, 'Why Law Reform Commissions? A Deconstruction and Stakeholder Analysis from an Australian Perspective' (2005) 23 *Windsor Yearbook of Access to Justice* 313; David Weisbrot, 'The Future for Institutional Law Reform' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 18; Sir Geoffrey Palmer, 'Law Reform and the Law Commission in New Zealand after 20 Years – We Need to Try a Little Harder' (Occassional Paper No 18, New Zealand Centre for Public Law, 30 March 2006).

inquiries and reports by a law reform commission.[6] There are two features that tie the advocacy literature together. The first is that they are often authored by persons connected to law reform commissions, particularly Commissioners or employed commission staff. The second is that they are generally positive about institutional law reform.

The second strand focuses on the technical aspects of managing commissions and conducting inquiries.[7] Again the authors of this literature tend to be internal to law reform commissions, and criticism, where present, is directed outwards, towards a wider context which is regarded as making it more difficult for commissions to do their job.

The third strand comprises the limited literature that is critical towards law reform commissions by expressing doubts and anxieties about institutional law reform. The doubts relate to concerns about what is meant by 'law' and 'reform' and how a lack of precision in defining these terms affects the approaches used by institutional law reform. Geoffrey Sawer's writing in the 1970s identified that legal practice and established jurisprudence do not provide a theory of law reform. As such he suggested that law reform commissions did not have a robust set of values to guide the reform process. He determined that the guiding values were the strongest concerning procedure but on substance tended to be 'subjective intuitions and hunches' about what is fair or economical.[8] Sawer identified an essential pragmatism

6 Justice M D Kirby, 'Looking into Privacy: A Progressive Report' (1977) 2 *Legal Service Bulletin* 182; David Weisbrot, 'Mad Science or Modern Miracles' (2001) 79 *Australian Law Reform Commission Reform Journal* 5; Don Chalmers, 'Science, Medicine and Health and the Work of the Australian Law Reform Commission' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 374; Hilary Astor and Rosalind Croucher, 'Fractured Families, Fragmented Responsibilities – Responding to Family Violence in a Federal System' (2010) 33 *University of New South Wales Law Journal* 854; Amanda Alford and Rosalind Croucher, 'Focus on Family Violence' (2012) 86 *Law Institute Journal* 79; Jill McKeough, 'Adapting to the Digital Economy' (2013) 87 *Law Institute Journal* 74.

7 Martin Partington, 'The Relationship between Law Reform and Access to Justice: A Case Study – *The Renting Homes Project*' (2005) 23 *Windsor Yearbook of Access to Justice* 375; Sir Edward Caldwell, 'A Vision of Tidiness: Codes, Consolidations and Statute Law Revision' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 40; Kate Warner, 'Institutional Architecture' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 55; Peter Hennessy, 'Independence and Accountability of Law Reform Agencies' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 72; J Bruce Robertson, 'Initiation and Selection of Projects' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 102; Anna Rees, 'Strategic and Project Planning' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 119; Martin Partington, 'Research' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 134; Ian Davis, 'Targeted Consultations' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 148; Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160; Brian Opeskin, 'Measuring Success' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 202; Marie-Claire Muir, 'Public Participation in Law Reform' (2013) 25(1) *Legaldate* 2.

8 Geoffrey Sawer, 'The Legal Theory of Law Reform' (1970) 20 *University of Toronto Law Journal* 183, 188.

about law reform that has continued to bedevil thinking about institutional law reform. For some writers such as Patricia Hughes, this pragmatic core represents an opportunity for clearer articulation. For her, the activities of institutional law reform commissions can be both better explained and be placed on a more substantive footing if commissions adopt as their lodestar 'access to justice'.[9]

For Roderick MacDonald, President of the Law Commission of Canada ('LCC') in 1997–2000, the changing fortunes of institutional law reform in Canada [10] should give pause to thinking about the methods and appropriateness of institutional law reform. Specifically, MacDonald locates institutional law reform within changing historical contexts. He makes a distinction between the research institute approach and the community engagement approach. The research institute approach regards law reform as an elite activity conducted by experts.[11] Evidence of a research institute approach would be the writing of detailed, technical final reports that make findings based on independent research and recourse to secondary academic literature. The community engagement approach regards law reform as a process that needs to engage with the public. Evidence of a community engagement approach would be the writing of less-technical, more broadly accessible final reports that locate and justify findings in terms of values and ideas derived from a process of consultation.[12] MacDonald regards the two approaches as historically connected. He argues that the community consultation approach grew out of criticisms of the research institute approach during the 1970s.[13] Having historicised each approach, he questions their contemporary appropriateness, warning that institutional law reform should not to be too concerned with the continuity of specific institutional forms; and that by becoming institutionalised, what he regards as an essential 'creativity' might become stifled.[14]

A more pointed criticism of law reform commissions has been articulated by Reg Graycar and Jenny Morgan, both of whom have been Commissioners of the ALRC. Echoing some of the criticisms of MacDonald, they suggest

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9 Patricia Hughes, 'Law Commissions and Access to Justice: What Justice Should We Be Talking about?' (2008) 46 *Osgoode Hall Law Journal* 773.

10 At the federal level, the Law Reform Commission of Canada was established in 1971 and disbanded in 1993. An alternative LCC was established in 1997 and abolished in 2006. On the births and deaths of institutional law reform in Canada, see Roderick A MacDonald, 'Jamais deux sans trois ... Once Reform, Twice Commission, Thrice Law' (2007) 22 *Canadian Journal of Law and Society* 117; Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' (Paper presented at the Australasian Law Reform Agencies Conference 2008, Vanuatu, 10–12 September 2008).

11 Roderick A MacDonald, 'Recommissioning Law Reform' (1997) 35 *Alberta Law Review* 831, 839–47.

12 Ibid 869–75.

13 Ibid 843.

14 MacDonald, above n 10, 139–40. See also Roderick Macdonald, 'Continuity, Discontinuity, Stasis and Innovation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 87.

that institutionalisation has not inherently been a victory for women.[15] They identified a range of structural problems with law reform commissions that reduce their responsiveness to women, ranging from a tendency to operate within traditional doctrinal divisions of law, to the prioritising of legislative change as the only panacea to social problems.[16] In particular, they focused on the sources of data used by law reform commissions, and raised concerns with the process of consultation adopted by commissions under the community engagement model. They identified that consultation with 'stakeholders' tended to produce standard responses from vested, usually male-dominated interests.[17] Further, the time and resources that a participant needs to devote to a public submission would often exclude women.[18] This exposes law reform commission to the phenomenon that Reg Graycar has repeatedly identified as 'law reform by frozen chook'.[19] She has written of situations in family law reform where vocal and media-savvy minorities have been able to influence the legislative process resulting in legal change.[20] The successful strategy has been to support claims for reform with anecdotal stories. For example, the claim that men suffer domestic violence from women was buttressed in the media by a statement that an ex-partner 'once chucked a frozen chook at me'.[21] Graycar argues that law reform in this context was influenced by these anecdotal stories rather than by contemporary comprehensive reliable data concerning domestic violence patterns, child and women poverty, and the actual share of childcare within relationships gathered by researchers.[22] It is this generation and use of empirical data that Graycar and Morgan find mostly absent within institutional law reform; and when it is used by law reform commissions, they suggest it has been used inappropriately.[23]

Graycar and Morgan reveal an obvious gap in the literature on institutional law reform: that there has been little external research that looks

15 Reg Graycar and Jenny Morgan, 'Law Reform: What's in It for Women?' (2005) 23 *Windsor Yearbook of Access to Justice* 393.

16 Ibid 398–405.

17 Ibid 406. This concern with the 'representative' nature of submitters to a law reform process was earlier articulated by Cretney, above n 5, 505.

18 Graycar and Morgan, above n 15, 407.

19 Reg Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' (2000) 24 *Melbourne University Law Review* 737, 750. 'Chook' is Australian slang for chicken.

20 Ibid 746.

21 Ibid 745, citing Miriam Cosic, 'Uncivil War', *The Australian Magazine* (Sydney), 21–2 August 1999, 15, 20.

22 Graycar, above n 19, 753. Graycar has identified that family law reform by frozen chook continued through the 2000s. She identified that the key changes in 2006 were a victory for 'men's rights' groups and their strategy of vocal anecdotal stories over empirical data. See Reg Graycar, 'Family Law Reform in Australia, or Frozen Chooks Revisited Again?' (2012) 13 *Theoretical Inquiries in Law* 241, 261–7; John Dewar, 'Can the Centre Hold? Reflections on Two Decades of Family Law Reform in Australia' (2010) 25 *Australian Journal of Family Law* 139, 142; Reg Graycar, 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in Rosemary Hunter and Mary Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (Ashgate, 2005) 49.

23 Graycar and Morgan, above n 15, 417–18.

at what law reform commissions actually do. Their article, although advocating for more empirically driven law reform, is ironically based on general structural criticisms, data drawn from experiences and specific examples – the sort of analogical approach that is susceptible to the anecdotal stories that they criticise law reform commissions are using. Nevertheless, they do establish a research agenda. First, their article poses the question as to how law reform commissions present the authority of their recommendations (based on 'research' or 'community'); and second, their article suggests that investigation of how commissions present authority should be based on empirical examination of law reform commission activity. It is this agenda that frames this study.

The only study that has come close to this study was a comparison by Angela Melville of the contrasting approaches to law reform evident from reports by the New Zealand Law Commission ('NZLC') and the LCC.[24] In examining the reports she found significant differences between the NZLC's narrow approach with 'top down consultation' and little transparency as to its methods compared to the LCC's more socially inclusive approach and provision of methodological detail.[25] Melville's study is significant in that she examined the two reports to determine how each commission actually did the processes of law reform. This study extends in a more structured manner Melville's reconstruction approach to law reform from the text of the reports. A criticism of Melville could be that her own process of reading, extraction and analysis from the reports is not disclosed. Like Graycar and Morgan, Melville's affirmation for transparent empirically based law reform is not grounded in a transparent empirically based analysis of law reform commission activity. It is the lacuna that this study fills through application of citation analysis to a sample of ALRC reports.

B Citation Analysis

In North America there has developed a sizable body of literature devoted to recording and analysing citation practices in law. The primary focus has been the examination of the citation practices of the judiciary through

24 Angela Melville, 'Conducting Law Reform Research: A Comparative Perspective' (2007) 28 *Zeitschrift für Rechtssoziologie* [Journal of the Sociology of Law] 153.

25 Ibid 161.

surveying the citations in law reports.[26] Within this, a strongly explored question has been: which law reviews and academics have been cited by the judiciary?[27] A parallel field has been the focus on law reviews to determine the most cited author, article and journal.[28] In Australia, the citation practices of the judiciary has been comprehensively explored by Russell Smyth who has examined the citation practices of the Federal[29] and the state Supreme

26 John Henry Merryman, 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970' (1977) 50 *Southern California Law Review* 381; Lawrence M Friedman et al, 'State Supreme Courts: A Century of Style and Citation' (1980) 33 *Stanford Law Review* 773; Charles A Johnson, 'Citations to Authority in Supreme Court Opinions' (1985) 7 *Law and Policy* 509; Peter Harris, 'Ecology and Culture in the Communication of Precedent among State Supreme Courts, 1870–1970' (1985) 19 *Law and Society Review* 449; Robert Schriek, 'Most-Cited US Courts of Appeals Cases from 1932 until the Late 1980s' (1991) 83 *Law Library Journal* 317; Louis J Sirico Jr and Beth A Drew, 'The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis' (1991) 45 *University of Miami Law Review* 1051; William H Manz, 'The Citation Practices of the New York Court of Appeals, 1850–1993' (1995) 43 *Buffalo Law Review* 121; Peter McCormick and Tammy Praskach, 'Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba' (1996) 24 *Manitoba Law Journal* 335; Peter McCormick, 'The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989–1993' (1995) 33 *Osgoode Hall Law Journal* 453; Peter J McCormick, 'Judicial Citation, the Supreme Court of Canada, and the Lower Courts: The Case of Alberta' (1996) 34 *Alberta Law Review* 870; Richard G Kopf, 'Do Judges Read the *Review*? A Citation-Counting Study of the *Nebraska Law Review* and the Nebraska Supreme Court, 1972–1996' (1997) 76 *Nebraska Law Review* 708; William H Manz, 'The Citation Practices of the New York Court of Appeals: A Millennium Update' (2001) 49 *Buffalo Law Review* 1273; Michael Beaird, 'Citations to Authority by the Arkansas Appellate Courts, 1950–2000' (2003) 25 *University of Arkansas at Little Rock Law Review* 301; Dragomir Cosanici and Chris Evin Long, 'Recent Citation Practices of the Indiana Supreme Court and the Indiana Court of Appeals' (2005) 24 *Legal Reference Services Quarterly* 103.

27 Douglas B Maggs, 'Concerning the Extent to Which the Law Review Contributes to the Development of the Law' (1930) 3 *Southern California Law Review* 181; Neil N Bernstein, 'The Supreme Court and Secondary Source Material: 1965 Term' (1968) 57 *Georgetown Law Journal* 55; Wes Daniels, '"Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940, and 1978' (1983) 76 *Law Library Journal* 1; Deborah J Merritt and Melanie Putnam, 'Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?' (1996) 71 *Chicago-Kent Law Review* 871; Michael D McClintock, 'The Declining Use of Legal Scholarship by Courts: An Empirical Study' (1998) 51 *Oklahoma Law Review* 659; Louis J Sirico Jr, 'The Citing of Law Reviews by the Supreme Court: 1971–1999 ' (2000) 75 *Indiana Law Journal* 1009; Michelle M Harner and Jason A Cantone, 'Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases' (2011) 19 *University of Miami Business Law Review* 1.

28 Olavi Maru, 'Measuring the Impact of Legal Periodicals' (1976) 1 *American Bar Foundation Research Journal* 227; Fred R Shapiro, 'The Most-Cited Law Review Articles' (1985) 73 *California Law Review* 1540; Fred R Shapiro, 'The Most-Cited Articles from *The Yale Law Journal*' (1991) 100 *Yale Law Journal* 1449; Fred R Shapiro, 'The Most-Cited Law Review Articles Revisited' (1996) 71 *Chicago-Kent Law Review* 751; William M Landes and Richard A Posner, 'Heavily Cited Articles in Law' (1995) 71 *Chicago-Kent Law Review* 825; Tracey E George and Chris Guthrie, 'An Empirical Evaluation of Specialized Law Reviews' (1999) 26 *Florida State University Law Review* 813.

29 Russell Smyth, 'Who Gets Cited? An Empirical Study of Judicial Prestige in the High Court' (2000) 21 *University of Queensland Law Journal* 7; Russell Smyth, 'Judicial Prestige: A Citation Analysis of Federal Court Judges' (2001) 6 *Deakin Law Review* 120.

Courts[30] and particularly the Australian judiciary's recourse to secondary literature.[31] Also there has been a series of studies focusing on the citations and authors within Australian law reviews.[32]

This research tends to produce ranking tables with lists of most frequently cited judges, courts, decisions, academics or journals from the examined sample. However, in themselves rankings say very little. Citation analysis literature takes on wider meaning through two assumptions about citation patterns. The first is that when an author, judge or academic cites, it is a public declaration that the author has read and been influenced by the cited text.[33] The second is that citing is a strategy of communicating authority. The author uses citations to locate their text within a web of other texts making their writing more persuasive because of its cited connections and specifically through the citing of 'prestigious' authors or texts.[34] To cite tells a reader that the proposition that is accompanied by a citation has authority, not just because the author is saying it, but that others have

30 Russell Smyth, 'What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian State Supreme Courts' (1999) 21 *Adelaide Law Review* 51; Russell Smyth, 'What Do Judges Cite? An Empirical Study of the "Authority of Authority" in the Supreme Court of Victoria' (1999) 25 *Monash University Law Review* 29; Russell Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30 *University of Western Australia Law Review* 1; Dietrich Fausten et al, 'A Century of Citation Practice on the Supreme Court of Victoria' (2007) 31 *Melbourne University Law Review* 733; Russell Smyth, 'The Citation Practices of the Supreme Court of Tasmania, 1905–2005' (2007) 26 *University of Tasmania Law Review* 34; Russell Smyth, 'A Century of Citation: Case-Law and Secondary Authority in the Supreme Court of Western Australia' (2008) 34 *University of Western Australia Law Review* 145; Ingrid Nielsen and Russell Smyth, 'One Hundred Years of Citation of Authority on the Supreme Court of New South Wales' (2008) 31 *University of New South Wales Law Journal* 189; Russell Smyth and Dietrich Fausten, 'Coordinate Citations between Australian State Supreme Courts over the 20th Century' (2008) 34 *Monash University Law Review* 53; Russell Smyth, 'Citation to Authority on the Supreme Court of South Australia: Evidence from a Hundred Years of Data' (2008) 29 *Adelaide Law Review* 113; Russell Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland over the Course of the Twentieth Century' (2009) 28 *University of Queensland Law Journal* 39.

31 Russell Smyth, 'Other than "Accepted Sources of Law"?: A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22 *University of New South Wales Law Journal* 19; Russell Smyth, 'Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court' (1999) 17 *University of Tasmania Law Review* 164; Russell Smyth, 'The Authority of Secondary Authority: A Quantitative Study of Secondary Source Citations in the Federal Court' (2000) 9 *Griffith Law Review* 25; Russell Smyth, 'Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges' (2002) 2 *Queensland University of Technology Law and Justice Journal* 198; Russell Smyth, 'Citing Outside the Law Reports: Citations of Secondary Authorities on the Australian Supreme Courts over the Twentieth Century' (2009) 18 *Griffith Law Review* 692. Others have also looked at citation practices of Australian courts, see Paul E von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901–1987' (1992) 14 *Adelaide Law Review* 181.

32 See, eg, Ian Ramsay and G P Stapledon, 'A Citation Analysis of Australia Law Journals' (1997) 21 *Melbourne University Law Review* 676; Tania Voon and Andrew D Mitchell, 'Professors, Footnotes and the Internet: A Critical Examination of Australian Law Reviews' (1998) 9 *Legal Education Review* 1; Russell Smyth, 'Who Publishes in Australia's Top Law Journals?' (2012) 35 *University of New South Wales Law Journal* 201.

33 Ramsay and Stapledon, above n 32, 677; Maru, above n 28, 230.

34 Smyth, 'Who Gets Cited?', above n 29; Smyth, 'Judicial Prestige', above n 29.

said it.[35] There is a danger of misinterpretation when considering the results of a citation analysis. It provides metrics of citation rates. It does not necessarily provide any qualitative detail about how the author used any specific citation or category of citations. Material in citations can be referenced as authority for a point made in the text, or disagreed with by the text, or referenced as an aside to the text. Just because an author cites repeatedly from a source, it does not mean the author approves of the source. However, this does not restrict interpretation of citation analysis data. The fact that an author has felt compelled to reference a text – irrespective whether it is in the positive, negative or as an aside – is a claim by the author that the material in the citation is important. It is a representation by the author to the reader that the cited material is relevant and enriches what the author is trying to say. Furthermore, it can be suggested that citation analysis can be a form of archaeology whereby the processes of shaping a given text can be uncovered through examining the citations. What is cited and what is not cited gives an insight into the text's formation. This is what Melville did with the NZLC and LCC reports. She identified that in its report the LCC directly cited submissions it had received and also referenced empirical research while the NZLC did not.[36] From this evidence she made conclusions about each commission's different approach to law reform.[37]

This study extends Melville's approach by drawing upon the tools developed by citation analysis to rigorously determine and record the sources cited by the ALRC within a sample of final reports. In doing this, it also extends the citation analysis literature by applying it to a new set of texts. As this is the first study to apply citation analysis to law reform commission reports, it adopts the methods used by the survey studies that examined the citation practices of the judiciary.[38] The precise methods used to code the sample are explained in Part IV below. However, before the details of the analysis and findings can be discussed, the sample of the study, the final reports by the ALRC from 1992 to 2012, requires introduction.

III SAMPLE: FINAL REPORTS OF THE ALRC 1992–2012

This Part introduces the sample of the study: the 42 final reports completed by the ALRC between 1992 and 2012. In doing so the wider context of the ALRC over this period requires discussion. It will be seen that over the 21 years, the ALRC has been consistently producing final reports based on references from the Attorney-General. It will also been seen that the ALRC has maintained its outputs in a context of decreasing budgets and staffing size.

35 Becky Batagol and Melissa Castan, 'Did You Know … Citations, Sources and References' (2012) 37 *Alternative Law Journal* 50.

36 Melville, above n 24, 157–60.

37 Ibid 161.

38 Merryman, above n 26.

The ALRC was established in 1975 as one of the last reforms introduced by the Whitlam Labor Government.[39] The model for the ALRC was the Law Commission of England and Wales established in 1965.[40] The ALRC was not the first law reform commission in Australia. New South Wales established a law reform commission along the English model in 1966.[41] The ALRC was established with a mandate to provide the Attorney-General with reports on law reform.[42] Unlike the NZLC or the Law Commission of England and Wales, the ALRC cannot self-initiate an inquiry.[43] It has been and remains dependent on references from the Attorney-General.[44]

The 1970s and early 1980s have been identified as the 'golden age' of law reform commissions and of the ALRC in particular.[45] Under the leadership of Michael Kirby it was an era of increasing budgets, cross-party support and successful implementation of recommendations.[46] However, notwithstanding confident statements in 1983 that institutional law reform was 'in full flower',[47] the blooms did not last. In Australia, law reform commissions in South Australia, Tasmania and Victoria were abolished during the late 1980s and early 1990s.[48] It is precisely this troubling time – the silver, or possibly bronze age of law reform – that is the period for this study.

The period 1992–2012 is more than half of the ALRC's duration. Over this time the ALRC has undergone many changes. It experienced a name change in 1996, changing from the Law Reform Commission to the current title of the Australian Law Reform Commission.[49] It has endured through two changes of government, four prime ministers, six attorney-generals and been headed by five presidents.

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39 Weisbrot, above n 5, 19.

40 Neave, above n 5, 345–7. On the establishment of the Law Commission of England and Wales, see Hurlburt, above n 5, 51–4; Scarman, 'Law Reform – Lessons from English Experience', above n 5, 47.

41 This Commission was established in 1966 and given legislative backing in 1967: see *Law Reform Commission Act 1967* (NSW).

42 *Law Reform Commission Act 1973* (Cth) s 6(1); *Australian Law Reform Commission Act 1996* (Cth) s 21(2). The 1996 Act modernised and updated the language of the 1973 Act following a recommendation from the House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 1. The general powers and structure of the ALRC remained unchanged.

43 *Law Commissions Act 1965* (UK) c 22, s 3(1); *Law Commission Act 1985* (NZ) s 6(2)(a); Neave, above n 5, 348.

44 *Law Reform Commission Act 1973* (Cth) s 6(1); *Australian Law Reform Commission Act 1996* (Cth) s 20. This is a feature that the ALRC shares with other Australian state law reform commissions. See, eg, *Law Reform Commission Act 1967* (NSW) s 10(1); *Law Reform Commission Act 1968* (Qld) s 10(3); *Victorian Law Reform Commission Act 2000* (Vic) s 5(1).

45 Tilbury, 'A History of Law Reform in Australia', above n 5, 15.

46 Law Reform Commission, *Annual Report 1984–1985*, Report No 29 (1985) 28–31.

47 Michael Kirby, *Reform the Law: Essays on the Renewal of the Australian Legal System* (Oxford University Press, 1983) 30.

48 Handford, above n 3, 511–13.

49 A change made by the *Australian Law Reform Commission Act 1996* (Cth). For consistency, the Commission is referred to throughout the sample period as the ALRC.

Table 1: Presidents of the ALRC[50]

President	Tenure
Professor Rosalind Croucher	December 2009 – Present
Emeritus Professor David Weisbrot	June 1999 – November 2009
Alan Rose AO	May 1994 – May 1999
Sue Tongue (acting)	November 1993 – May 1994
Hon Elizabeth Evatt AO	January 1988 – November 1993
Justice Xavier Connor AO	May 1985 – December 1987
Hon Justice Murray Wilcox	September 1984 – April 1985
Hon Justice Michael Kirby AC CMG	February 1975 – August 1984

The budget and staffing profile of the ALRC has changed considerably between 1992 and 2012. Figure 1 provides the budget of the ALRC over the past 21 years in nominal amounts and amounts adjusted for inflation.[51] The nominal amount of the appropriation has remained consistent at around $3 million a year. However, when adjusted for inflation, the budget in real terms has shrunk from $5.35 million in 1992 to $2.9 million in 2012. The staffing profile of the ALRC has similarly diminished. Figure 2 provides the staffing of the ALRC from 1992 to 2012. In 1992, the ALRC had an equivalent full-time staff profile of 35.7. In 2012, this had fallen to 14.4. The decreases in budget and staffing show that the ALRC in 2012 was a considerably smaller organisation than it was in 1992.

50 Law Reform Commission, *Twenty Years of Law Reform Volume 1: The History* (Law Reform Commission, 1995) 9–14; Australian Law Reform Commission, *Annual Report 2009–2010*, Report No 113 (2010) 3.

51 The adjustment was made using the Reserve Bank of Australia's inflation calculator, see Reserve Bank of Australia, *Inflation Calculator* <http://www.rba.gov.au/calculator/>.

Figure 1: ALRC Budget by Year

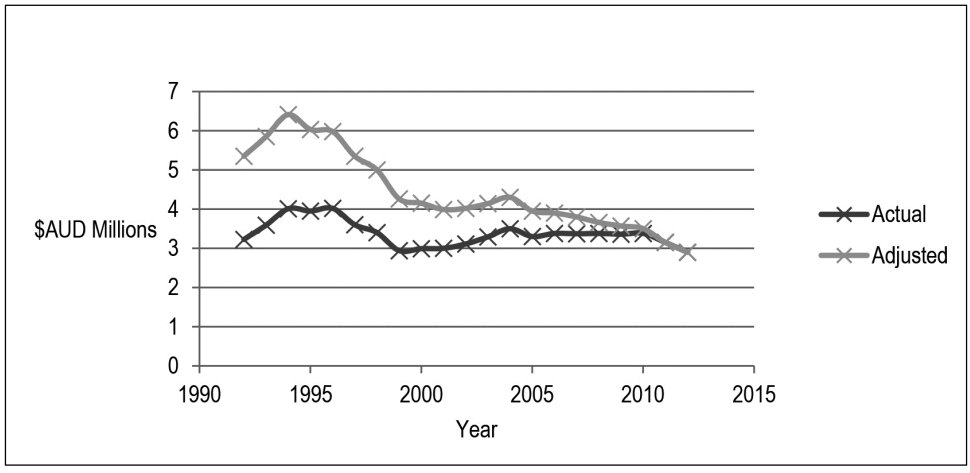
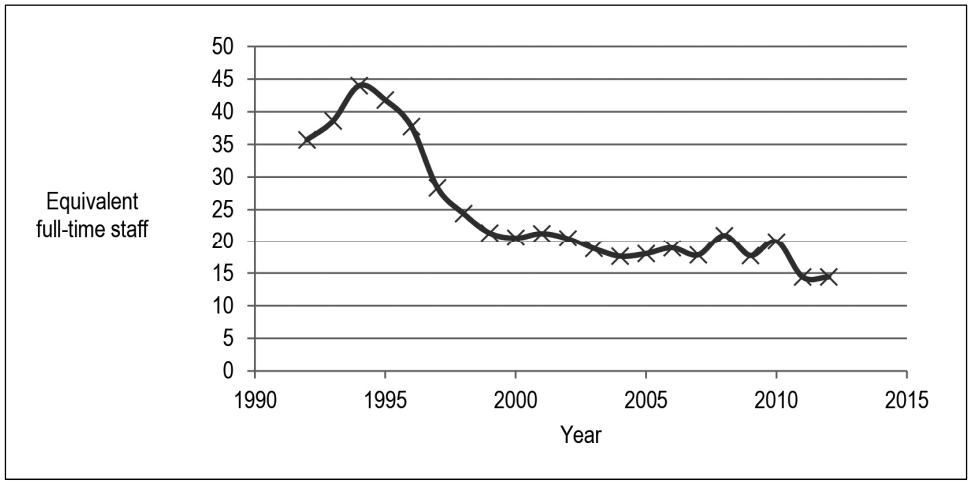


Figure 2: ALRC Staffing by Year

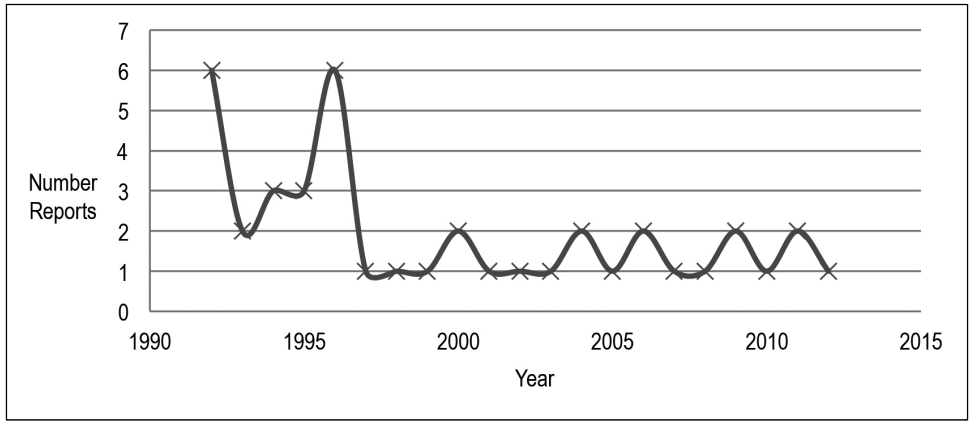


Throughout this institutional change the productive work of the ALRC has remained consistent. In response to references it has undertaken research, conducted consultations, released issues and discussion papers, received submissions and completed the process by providing the Attorney-General with final reports containing recommendations. Between 1992 and 2012 the ALRC

produced 42 final reports.[52] The detail of each of these reports is in Table 2 in the Appendix.

Between 1992 and 2012 the ALRC finalised on average two reports per year. This figure is distorted by outrider completion rates in 1992 and 1996 of six reports in those years. For the period 1997–2012, 21 reports were completed, representing an average of 1.31 reports a year. This is consistent with the first 10 years of the ALRC (1975–85) where there was an average of 1.5 reports per annum.[53] Report completion by year is provided in Figure 3. A feature of Figure 3 is that since 2003 the ALRC has settled into a pattern of alternating one report a year and then two reports the following year.

Figure 3: Reports by Year



Another measure is the timeliness of the ALRC in producing final reports. A criticism of law reform commissions has been that they can take too long to produce a final report, by which time the political will for reform has dissipated.[54] Between 1992 and 2012, the ALRC took on average 21.1 months to complete a reference.[55] The longest was *For the Sake of the Kids: Complex*

52 For purposes of this research, the two-volume *Equality before the Law* (1994) is treated as two separate reports. Each volume was released at different times and each has a distinct focus. Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69 (1995) vol 1 focused on justice and access to justice. Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69 (1995) vol 2 focused on justice. Further, unlike the later multi-volume reports which were a single, consecutively numbered document split between volumes, each of the *Equality before the Law* reports stands alone as a document, complete with individual pagination, indexes and preliminary matter.

53 A full list of reports (which does not include annual reports) is provided in Australian Law Reform Commission, *Annual Report 2011–12*, Report No 119 (2012) 199.

54 See the comments of the 'Beale Review' disclosed in Senate Legal and Constitutional Affairs References Committee, above n 1, 19. See also some of the concerns by the executive regarding the lack of timeliness of ALRC reports in the early days: A J Brown, *Michael Kirby: Paradoxes and Principles* (Federation Press, 2011) 132–3.

55 See Appendix, Table 2.

Contact Cases and the Family Court (1995) which took 53 months from reference to report.[56] The shortest were *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987* (1999)[57] and *Fighting Words: A Review of Sedition Laws in Australia* (2006)[58] that both took four months. As a general pattern the ALRC is getting quicker at completing inquiries with average time decreasing from 24.8 months in 1992–95 to 12.8 months in 2009–12.[59]

However, not all reports are equal in length. While the average length of a report was 528 pages, there was a range from 32 pages for *Children's Evidence: Closed Circuit TV* (1992)[60] to the 2693-page three-volume behemoth, *For Your Information: Australian Privacy Law and Practice* (2008).[61] In the literature on institutional law reform, a distinction has been made between 'lawyers'' or 'technical' law reform and 'social' or 'significant' law reform.[62] The first relates to technical reforms to the mechanics of law. These are reforms that are of interest to legal practitioners in specific fields but might not excite the wider community. Between 1992 and 2012, the ALRC had few references that could be characterised as 'technical law reform'.[63] An explanation for this can be seen in the federal jurisdiction of the ALRC.[64] 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[65] or time limits on loans payable on demand.[66] As such, most of the references to the ALRC involve broader social, political and economic considerations.[67]

Indeed, between 1992 and 2012, the ALRC has been asked to grapple with complex law reform, including wholesale reviews of the federal courts,[68] rights-driven law reform for women,[69] children[70] and the disabled,[71] private

56 Law Reform Commission, *For the Sake of the Kids: Complex Contact Cases and the Family Court*, Report No 73 (1995).

57 Australian Law Reform Commission, *Confiscation That Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87 (1999).

58 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia,* Report No 104 (2006).

59 See Appendix, Table 2.

60 Law Reform Commission, *Children's Evidence: Closed Circuit TV,* Report No 63 (1992).

61 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vols 1–3.

62 Sawer, above n 8, 192; Hurlburt, above n 5, 9–14; Bennett Moses, above n 1, 772.

63 Three 'lawyers' law reform' reports were: Law Reform Commission*, Choice of Law*, Report No 58 (1992); Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994); Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, Report No 115 (2011).

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

65 Queensland Law Reform Commission, *Vicarious Liability,* Report No 56 (2001).

66 New South Wales Law Reform Commission, *Time Limits on Loans Payable on Demand,* Report No 105 (2004).

67 Neave, above n 5, 350.

68 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

69 Law Reform Commission, *Equality before the Law*, above n 52, vols 1–2.

international law,[72] law reform in response to technological-driven change,[73] and legal responses to family violence.[74] Common to all these references was a requirement that the ALRC understand law and the process of law reform 'in context', explaining, at one level, why the average report length is 528 pages. Another indication of the complexity of the references that the ALRC has reported on is the average number of recommendations, which is 99.5 recommendations per report.[75]

What preliminary stories emerge from this overview of the ALRC and the sample? The first is that it seems that the ALRC underwent a significant change in fortune with the election of the Howard Coalition government in 1996. Between 1994 and 1999 the ALRC's budget fell by $2.15 million adjusted and staffing declined by 22.6 equivalent full-time positions.[76] This decline can also be seen in the number of reports the ALRC completed each year. After 1997, the ALRC's workload changed from an average of four reports per year for 1992–96 to 1.3 reports per year for 1997–2012.[77] From this it can be seen that the ALRC was given less budget and fewer references by the Howard Coalition Government than by the previous Keating Labor Government. The second is that the election of the Rudd/Gillard Labor government in 2007 had no noticeable change to the general declining pattern to the ALRC's budget and staffing. Since 2008, the budget has declined $0.66 million adjusted and 6.6 equivalent full-time positions have been lost.[78] In response to this continual decline, the Senate Legal and Constitutional Affairs References Committee conducted an inquiry which reported in April 2011. While the Committee recommended an immediate reversal of the ALRC budget decline,[79] the government senators in a dissenting report[80] and the government in response argued that in an environment of fiscal

70 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997).

71 Australian Law Reform Commission, *Making Rights Count: Services for People with a Disability – New Disability Services Legislation for the Commonwealth – Review of Legislation Administered by the Department of Health and Family Services*, Report No 79 (1996).

72 Australian Law Reform Commission, *Review of Marine Insurance Act 1909*, Report No 91 (2001).

73 Australian Law Reform Commission and Australian Health Ethics Committee of the National Health and Medical Research Council, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) vols 1–2; Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, Report No 99 (2004); Australian Law Reform Commission, above n 61; Australian Law Reform Commission, *Classification – Content Regulation and Convergent Media*, Report No 118 (2012).

74 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No 117 (2011); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Report No 114 (2010).

75 See Appendix, Table 2 below.

76 See Figures 1 and 2 above.

77 See Figure 3 above.

78 See Figures 1 and 2 above.

79 Senate Legal and Constitutional Affairs References Committee, above n 1, 58.

80 Ibid 62.

constraint the ALRC's budget was adequate.[81] Notwithstanding these declines in resources, the ALRC has continued to receive and report on 1.4 references year since 2008.

What is shown is that the ALRC has become a much more productive organisation able to maintain outcomes with declining resources. For the years 1997 and 1998, the ALRC produced two reports of a combined size of 1201 pages[82] with an adjusted average budget of $5.17 million and an average 26.4 equivalent full-time staff. For the years 2011 and 2012, the ALRC produced three reports of a combined size of 1357 pages[83] with an adjusted average budget of $3.25 million and an average of 18.9 equivalent full-time staff. An indication of the productivity increase can be seen in the changes in the cost per page and staffing per page ratios between these two periods. In 1997–98, a page cost $4304 and involved 0.029 equivalent full-time staff. In 2011–12, a page in the report cost $2395 and involved 0.0139 equivalent full-time staff. This reveals a productivity increase of 55.6 per cent for cost per page and 63.4 per cent for staffing per page. These are highly artificial measures which fail to consider the specific workload demands of certain references[84] and also suggest that the sole and only proper use of the ALRC budget and staff time is the production of final reports.[85] Nevertheless, as broad longitudinal measures, these figures suggest that the ALRC over the period of the sample has been doing more with less.

It can also be seen that, for the period 1992–2012, the ALRC has settled into a pattern of 1.5 final reports per year. This suggests continuity and stability. The final reports from this period, although diverse in terms of subject matter, generally fell within the category of social law reform and were weighty documents running to hundreds of pages making on average about 100 recommendations. However, the period discloses significant change for the ALRC with a steady decline in budgets and staffing. However, this decline does not appear evident on the face of the reports. Although formatting and referencing guides used by the ALRC changed during the sample, a report like *Designs* in 1996 in its overall structure, chapter layout and page setting out is similar to recent reports such as *Managing Discovery: Discovery of Documents*

81 Robert McClelland, Attorney-General (Cth), *Government Response to the Senate Standing Committee on Legal and Constitutional Affairs Report on Its Inquiry into the Australian Law Reform Commission* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/lawreformcommission/~/media/wopapub/senate/committee/legcon_ctte/completed_inquiries/2010-13/law_reform_commission/govt_response.ashx> 2.

82 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 70; Australian Law Reform Commission, *Australia's Federal Record: A Review of Archives Act 1983*, Report No 85 (1998).

83 Australian Law Reform Commission, *Managing Discovery*, above n 63; Australian Law Reform Commission, above n 74; Australian Law Reform Commission, *Classification – Content Regulation*, above n 73.

84 Eg, the *Classification – Content Regulation and Convergent Media* reference received 2445 submissions which the ALRC had to manage compared to the average of 248.5 submissions per reference across the sample: Australian Law Reform Commission, *Classification– Content Regulation*, above n 73. See Appendix, Table 5 below.

85 See Opeskin, above n 7, 211.

in Federal Courts in 2011.[86] It is what is on each page that is most similar. The writing style conforms to the standards of academic writing; technical terms are explained and used, but the overall expected level of readership competency is high.[87] Sentences can run across multiple lines, large paragraphs take up much of each page; there are headings, along with introductory, summary and linking sentences and paragraphs.

An obvious feature reinforcing this assessment of the style of writing used by the ALRC is the significant numbers of citations. Indeed, a very clear feature of the reports in the sample is that there is rarely a page that does not have citations. While the formatting of citations used by the ALRC changed from footnotes to endnotes and then back to footnotes over the years, the practice of presenting reports with many superscript numerals on each page was a strong consistent. A further feature was that within those citations there were multiple references to different texts. In writing its reports this way, the ALRC can be seen presenting a theory of law reform that involves connecting, supporting and locating what the ALRC is saying with other texts. The next question is: what texts did the ALRC cite?

IV FINDINGS: CITATION PATTERNS WITHIN ALRC REPORTS 1992–2012

This Part sets out the findings of a citation analysis of the 42 final reports completed by the ALRC from 1992 to 2012. Following the methods used in the citation analysis of judicial decisions, a series of broad categories were identified; and within each category, more specific detail about an individual citation was recorded. Also following the practice within the citation analysis literature, every reference was recorded.[88] If a citation had multiple references, each was recorded individually. A note with three citations – to a case, a submission and a journal article – provided three counts.

The analysis adopted six general categories into which the citations were organised: 'Submissions', 'Government Material', 'Primary Law', 'Books', 'Journals' and 'Other'. These categories differ from the general categories of case law or other distinction used in the citation analysis of judicial decisions. These categories were developed based on two considerations. First, a cursory glance at the ALRC final reports in the sample reveals that the ALRC cites a more diverse set of texts than the superior court judges that the usual citation analysis examines. Case law is nowhere near as prominent yet submissions and

86 See Law Reform Commission, *Designs*, Report No 74 (1995); Australian Law Reform Commission, *Managing Discovery*, above n 63.

87 Ken Hyland, *Disciplinary Discourses: Social Interactions in Academic Writing* (University of Michigan Press, 2004) 11.

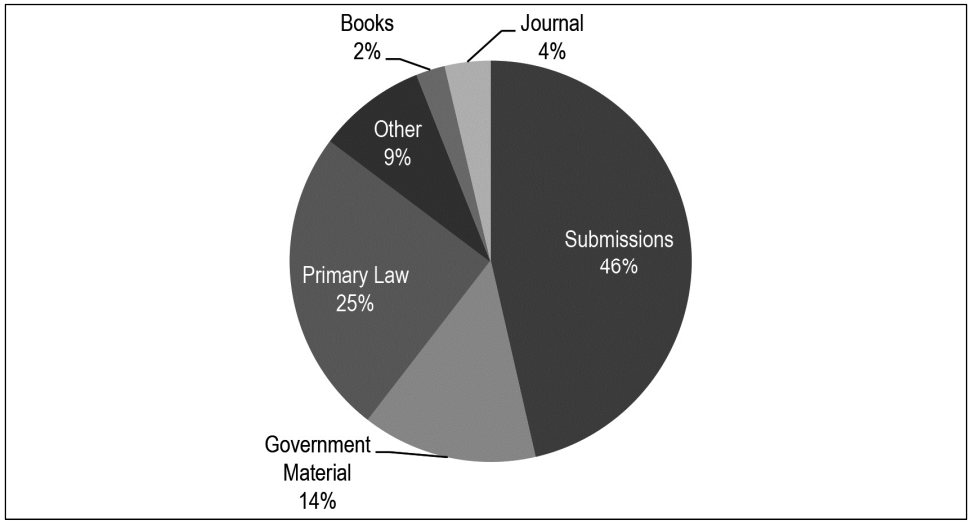
88 See Merryman, above n 26; Fausten et al, above n 30; Smyth, 'The Citation Practices of the Supreme Court of Tasmania', above n 30; Smyth, 'A Century of Citation', above n 30; Smyth, 'Trends in the Citation Practice of the Supreme Court of Queensland', above n 30.

material authored by governments are much more evident. Second, in operationalising the identified distinction between 'community' and 'research' based law reform there was a particular focus on identifying submissions and consultations on the one hand and academic secondary material on the other.

The category 'Submissions' covered all the material that the ALRC had received that specifically responded to the reference. This included written statements received in response to a formal invitation for submissions, consultations conducted by the ALRC where the ALRC had engaged with stakeholders, and correspondence received by the ALRC. The category 'Government Material' related to sources cited by the ALRC that was authored by governments. This included annual reports of departments and agencies, past ALRC reports or other reports from law reform commissions, parliamentary committees and ad hoc inquiries. It also included administrative policies, guidelines, websites and community education material prepared by government entities. The 'Primary Law' category included cases, Acts of Parliament, Bills and delegated legislative instruments. It also caught citations to international law sources and the Hansard. The 'Book' category caught law textbooks, chapters in edited volumes and monographs from known presses. Self-published resources, especially from non-government organisations ('NGOs') were coded in the 'Other' category. The 'Journal' category included, but was not limited to, scholarly journals. Also included in this category were citations to papers from conferences or occasional papers from research entities. The last category 'Other' was a catch-all category for any citation that did not fall within the substantive categories. Citations in this category were generally to self-published materials from NGOs and newspapers.

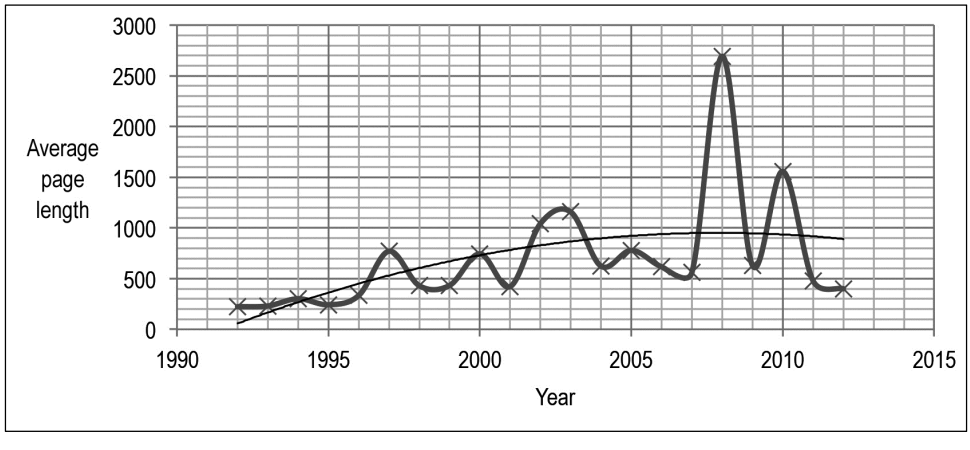
The complete data is provided in Table 3 in the Appendix. It is summarised in Figure 4. Figure 4 shows the totals for each category as a percentage of the total count of citations. It shows that 46 per cent of citations (55 837 out of 120 310) were to submissions made to the ALRC as part of the reference, or information provided to the ALRC as part of a consultation or correspondence within the reference. Figure 4 also shows that 25 per cent of all citations (29 796 out of 120 310) were to 'Primary Law' sources and 14 per cent (16 930 out of 120 310) to material produced by government. Also Figure 4 shows the limited recourse that the ALRC had to the academic literature. 'Books' and 'Journals' combined were 6 per cent (7245 out of 120 310). This percentage further diminishes when just focusing on refereed material. Within the citations categorised as 'Journals', 661 were non-refereed conference papers or occasional papers. This left 3764 or 3.1 per cent of the total citations to a recognised academic journal.

Figure 4: Categories by Percentage of Total Citations



Before some broad conclusions can be drawn from Figure 4, some observations about the changes in formatting and style across the 42 reports are required. For the reports tabled in 1992, the average length was 224 pages. In 2011, the average length was 478.5 pages. However, in 2006, the average was 617. Figure 5 sets out the average report length by year. It tracks an increase in page numbers per report with a possible high-watermark with the 2008 *For Your Information: Australian Privacy Law and Practice* report and the beginning of a decline.

Figure 5: Average Page Length by Year



This pattern is not entirely explained by suggesting that the smaller page counts from 1992–96 were due to a higher concentration of technical law reform type reports. Instead, the change can be explained by looking at what the ALRC included in its reports. The content of the reports ballooned during the late 1990s and 2000s. In the 1992 *Customs and Excise* report, the ALRC received 368 written submissions but only 36 were referenced in the body of the report.[89] In the 2000 *Managing Justice: A Review of the Federal Civil Justice System* report, 272 submissions were received[90] and these were referenced 1056 times in the report. The raw number of citations per report increased over the sample period. In 1992–96, the average number of citations was 1571 per report. Recently, in 2009–12, the average number of citations was 4501 per report. However, in 1997–2008, the average number of citations per report was 9964.[91] Seemingly the reports got bigger because the ALRC began to put more and more content, which it cited, into the reports.

One explanation for the increase in content could be that the period 1997–2008 corresponds with the period where extensive changes in information and communications technology ('ICT') decreased the cost of information gathering and increased the volume of information available. The internet, the movement of legal, governmental and academic resources online, and the ability for consultations to be conducted digitally gave the ALRC significantly greater capacity to share, store and organise material.[92] There also were the efficiencies associated with word processing and digital publishing. In part these efficiencies underpinned the observed productivity increases over this period. Furthermore, it also potentially explains the ballooning of report sizes in 1997–2008 as evidence of the ALRC coping with ICT change. These reports can be seen as an institution grappling with the increase in information, the capacity to organise that information, and the decreases in the cost of research and writing that have come with the digital revolution. From this perspective, the comparatively slimmer recent reports could be understood as a maturing of the ALRC's approach: from an attempt to capture and reproduce all the information gathered during a reference to greater confidence in deciding and prioritising significance.

Nevertheless, as a whole, there are several conclusions that can be drawn from Figure 4. The first, reflecting the data on page length, numbers of recommendation and the changes in the content of reports, is that there is some diversity between the reports concerning what the ALRC cited and in what frequency. In some reports over 80 per cent of the citations were to material coded as 'Submissions',[93] while in other reports this category comprised less than

89 Law Reform Commission, *Customs and Excise*, Report No 60 (1992) vol 2, 209–21; see Appendix, Table 3.

90 Australian Law Reform Commission, *Managing Justice*, above n 68.

91 These figures are derived from the data in Appendix, Table 3.

92 See Rees, above n 7, 128–31; Partington, above n 7, 141–3.

93 See, eg, Law Reform Commission, *Child Care for Kids: Review of Legislation Administered by Department of Human Services and Health*, Report No 70 (1994) (93.5 per cent); Law Reform Commission, *The Coming of Age – New Aged Care Legislation for the Commonwealth*, Report No 72 (1995) (89.9 per cent); Australian Law Reform Commission, above n 71 (82 per cent).

20 per cent of the total citations.[94] At the other end of the scale there are four reports in which citations to the 'Journal' category represents more than 10 per cent of the total citations;[95] while there are five reports that do not cite any academic journal articles or conference papers.[96] In some reports more than 50 per cent of the citations were to primary legal material,[97] while 32.1 per cent of the citations in the 2009 *Making Inquiries* report and 25.9 per cent of the citations in the 2009 *Secrecy Laws and Open Government* report were to 'Government Material'.[98] Many of the reports that had over 50 per cent of the citations as 'Submissions' can be categorised as concerning human rights,[99] while the reports where 'Submissions' comprised less than 20 per cent of the citations can be seen as more towards the technical law reform end of the reference spectrum with reports on evidence law, marine insurance, international transactions and choice of law having less than average citation to submissions.[100]

The second finding is that, notwithstanding this diversity, the reports reveal that the ALRC has significantly cited from legal and government sources. While submissions and consultations are particularly significant, the ALRC can be seen as drawing from other sources, especially primary law materials and material produced by government. Together these three sources account for 85 per cent of all the citations. This finding is not surprising. It would be expected that the ALRC would author reports that draw heavily on material provided to it as part of the inquiry process ('Submissions'), reference legislation, bills, regulations, cases, international instruments and Hansard ('Primary Law'), and policies,

94 See, eg, Law Reform Commission, above n 89; Australian Law Reform Commission, *Legal Risk in International Transactions*, Report No 80 (1996) (12.2 per cent); Australian Law Reform Commission, above n 72 (16.9 per cent).

95 Australian Law Reform Commission, *Managing Justice*, above n 68 (12.6 per cent); Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) (11.3 per cent); Australian Law Reform Commission, *Genes and Ingenuity*, above 73 (10.9 per cent); Australian Law Reform Commission, above n 74 (10 per cent).

96 Law Reform Commission, *Administrative Penalties in Customs and Excise*, Report No 61 (1992); Law Reform Commission, *Child Care for Kids*, above n 93; Australian Law Reform Commission, *Children's Evidence*, above n 60; Law Reform Commission, *The Coming of Age*, above n 93; Law Reform Commission, above n 89.

97 Law Reform Commission, above n 89 (71.1 per cent); Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 70 (60.3 per cent); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) (55.2 per cent).

98 Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009); Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

99 In addition to the reports at above n 93, other reports with over 50 per cent of the citations to submissions were Law Reform Commission, above n 57 (66.1 per cent); Australian Law Reform Commission, above n 61 (63 per cent).

100 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, above n 97 (19.5 per cent); Australian Law Reform Commission, above n 72 (16.8 per cent); Australian Law Reform Commission, *Legal Risk in International Transactions,* above n 94 (7.8 per cent); Law Reform Commission, *Choice of Law*, above n 63 (15.5 per cent).

guidelines, memos and materials produced by government departments and agencies ('Governmental Material').

A third finding is the relatively low, compared to the other sources (6 per cent), citation rate to secondary academic material in the form of books, journal articles or conference proceedings. These traditional forums for the dissemination of research represented less than 10 per cent of all citations. This did not mean that academics were marginal players. In a number of reports, a submission made by an academic was frequently cited. For example, in *Family Violence: A National Legal Response* (2010), 81 citations were made to the submissions by Patricia Easteal,[101] while in the less referenced *Classification – Content Regulation and Convergent Media* (2012), Lyria Bennett Moses' submission was cited six times.[102] In some reports secondary academic material was cited frequently. In *Genes and Ingenuity: Gene Patenting and Human Health* (2004),[103] the published work of Dianne Nicol was referenced 164 times, representing 40 per cent (164 out of 410) of the 'Journal' citations and 3.4 per cent (164 out of 4813) of the total citations in that report.[104] A feature in the referencing of Nicol was that 85 per cent (139 out of 164) of the citations were to a non-peer reviewed publication, an occasional paper from her affiliated research centre.[105] This shows the ALRC cites academic material that has entered the public domain outside of the traditional journal and book formats. In *Review of the Marine Insurance Act 1909* (2001), 13.2 per cent (24 out of 182) of the entries in the 'Journal' category (and 1.6 per cent (24 out of 1447) of all references) were to a PhD thesis.[106] This is not to suggest that the ALRC did not in specific reports cite orthodox peer reviewed material but the actual numbers of citations to peer reviewed material was less than the 6 per cent.

In some reports, a specific article or book was cited relatively frequently. In the *Review of Marine Insurance Act 1909* (2000), Howard Bennett's *The Law of Marine Insurance* (1996)[107] was cited 27 times. This accounted for 19.7 per cent (27 out of 137) of the Books cited and 1.9 per cent (27 out of 1 447) of the total citations in that report. In the *Secrecy Laws and Open Government in Australia*

101 Australian Law Reform Commission and New South Wales Law Reform Commission, above 74, 210, 271, 325, 579, 641, 783, 785, 832, 1100–1, 1149, 1156.

102 Australian Law Reform Commission, *Classification – Content Regulation*, above n 73. The ALRC discussed Bennett Moses submission in-text: at 95, 275.

103 Australian Law Reform Commission, *Genes and Ingenuity*, above 73.

104 An explanation for the high frequency of Nicol's work in that report could be that she was a consultant for the ALRC on that referral.

105 Dianne Nicol and Jane Nielsen, 'Patents and Medical Biotechnology: An Empirical Analysis of Issues Facing the Australian Industry' (Occasional Paper No 6, Centre for Law and Genetics, 2003). The Nicol and Nielsen report does acknowledge that parts of it draw upon material that had been peer reviewed: Dianne Nicol and Jane Nielsen, 'The Australian Medical Biotechnology Industry and Access to Intellectual Property: Issues for Patent Law Development' (2001) 23 *Sydney Law Review* 347.

106 Australian Law Reform Commission, above n 72; Sarah C Derrington, *The Law Relating to Non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance: A Case for Reform* (PhD Thesis, University of Queensland, 1999).

107 Howard Bennett, *The Law of Marine Insurance* (Clarendon Press, 1st ed, 1996).

(2009),[108] an article by John McGinness[109] was cited 12 times and an article by Leo Tsaknis[110] was cited seven times. Combined, these represented 59.3 per cent (19 out of 32) of the entries in the 'Journal' category, although only 0.5 per cent (19 out of 3348) of the total citations. This detail reinforces the overarching suggestion that material from academic sources has been used infrequently by the ALRC and when it has been used it has been highly selective.

Continuing with the citation to articles from law reviews, Table 4 lists the top 30 ranked entries in the 'Journal' category. With the growing emphasis on metrics and impact measurements in assessing legal scholarship, who reads and cites from which journals has become an important consideration for legal scholars and university administrators.[111] While secondary academic sources appear to have a low impact, in terms of frequency of citation, in ALRC final reports and members of the Australian legal academy appear to be able to contribute to ALRC inquiries more directly by making submissions, it is of interest to see which journals the ALRC has frequently cited.

Table 4: Frequency of Sources within Journal Category

Rank	Title	Frequency	ERA 2010 Rank[112]	Peer Reviewed	Origin
1	Australian Law Journal	153	B	Yes	Australia
2	Criminal Law Journal	143	A	Yes	Australia
3	Centre for Law and Genetics Occasional Paper, University of Tasmania	139	N/A	No	Australia
4	Melbourne University Law Review	114	A*	Yes	Australia
5	Federal Law Review	92	A*	Yes	Australia
	Sydney Law Review	92	A*	Yes	Australia
7	University of New South Wales Law Journal	83	A*	Yes	Australia
8	Alternative Law Journal/Legal	66	B	Yes	Australia

108 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, above n 98.

109 John McGinness, 'Secrecy Provisions in Commonwealth Legislation' (1990) 19 *Federal Law Review* 49.

110 Leo Tsaknis, 'Commonwealth Secrecy Provisions: Time for Reform?' (1994) 18 *Criminal Law Journal* 245

111 See Smyth, above n 32, 202–4; Kevin Campbell, Alan Goodacre and Gavin Little, 'Ranking of United Kingdom Law Journals: An Analysis of the Research Assessment Exercise 2001 Submissions and Results' (2006) 33 *Journal of Law and Society* 335.

112 The ranking was provided by the Australian Research Council ('ARC') ERA2010 ranking of journals. The ARC has withdrawn the list from public availability: ARC, *Ranked Outlets* (2013) <http://www.arc.gov.au/era/era_2010/archive/era_journal_list.htm#1>. A copy of the list is available from the author.

Rank	Title	Frequency	ERA 2010 Rank[112]	Peer Reviewed	Origin
	Services Bulletin				
9	Penalties: Policy, Principles & Practice in Government Regulation Conference Sydney Australian Law Reform Commission 9 June 2001	62	N/A	No	Australia
10	Insurance Law Journal	57	C	Yes	Australia
11	Law Institute Journal	51	C	Yes	Australia
12	Law Society Journal	46	Not Ranked	No	Australia
13	Journal of Judicial Administration	44	B	Yes	Australia
14	Law Quarterly Review	43	A*	Yes	UK
15	Australian Journal of Family Law	42	A	Yes	Australia
16	Adelaide Law Review	41	B	Yes	Australia
17	PhD Thesis[113]	37	Not Ranked	Yes	Australia[114]
18	Journal of Law and Medicine	36	A	Yes	Australia
	Privacy Law and Policy Reporter	36	Not Ranked	No	Australia
20	Monash University Law Review	35	A	Yes	Australia
21	Current Issues in Criminal Justice	34	B	Yes	Australia
	Yale Law Journal	34	A*	Yes	USA
23	Australian Bar Review	33	C	Yes	Australia
	European Intellectual Property Review	33	B	Yes	UK
25	Australian Journal of Administrative Law	31	B	Yes	Australia
26	Company and Securities Law Journal	29	B	Yes	Australia
	Modern Law Review	29	A*	Yes	UK
28	Australian Institute of Administrative Law Forum	24	Not Ranked	No	Australia

113 PhD theses were counted within the journal category because the examination process is similar to peer review.

114 The two PhD theses that were cited were from the University of Queensland and the University of Sydney.

Rank	Title	Frequency	ERA 2010 Rank[112]	Peer Reviewed	Origin
	Medical Law Review	24	A	Yes	UK
30	Canadian Bar Review	23	B	No	Canada
TOTAL		1706			

There are four conclusions that seem to be suggested by Table 4. The first is that when the ALRC does cite an academic journal it most frequently does so from an Australian journal. The *Australian Law Journal* is at rank 1 with 153 citations. Indeed the top 14 ranked sources were Australian, with the highest ranked non-Australian journal the *Law Quarterly Review* at rank 14. Second, it is articles from *law* journals that the ALRC is citing. According to the codes used by the ARC, most of the journals in Table 4 were coded as belonging to the law 'field of research' ('FoR1801'). The highest ranked non-1801 journal was *Science* at rank 40 with 18 citations.

The third finding reinforces the discrete nature of each report. The top 30 entries represent 38.5 per cent (1706 out of 4428) of all the entries in the 'Journal' category. The remaining 61.5 per cent of entries were to sources cited fewer than 23 times. This means that there were high numbers of unique sources; that is, citation to an article from a journal or conference paper only once. There were 373 unique sources, 151 with two citations and 77 with three citations. This suggests that the ALRC uses topic-specific sources for individual reports that were not used for other reports. Another example of this can be seen with the third ranking with 139 citations to the University of Tasmania Centre for Law and Genetics Occasional Paper. This ranking was achieved solely by Dianne Nicol's and Jane Nielsen's 'Patents and Medical Biotechnology: An Empirical Analysis of Issues Facing the Australian Industry'[115] and only referenced in one report, *Genes and Ingenuity: Gene Patenting and Human Health* (2004).[116] The *Insurance Law Journal* (rank 9, with 57 citations) was only cited by the ALRC in *Review of Marine Insurance Act 1909* (2001),[117] while the *Privacy Law and Policy Reporter* (rank 17, with 36 citations) was only cited in two volumes of *For Your Information: Australian Privacy Law and Practice* (2008).[118]

A final observation is the perceived 'quality' of the journals that the ALRC cited. A controversial part of the ARC's Excellence for Research in Australia exercise in 2010 ('ERA2010') was the generation of a ranked list of academic journals.[119] Through a process of discipline consultation, the ARC ranked journals into a four-tier list. The highest quality journals were ranked A*, the

115 Nicol and Nielsen, 'Patents and Medical Biotechnology', above n 105.
116 Australian Law Reform Commission, *Genes and Ingenuity*, above 73.
117 Australian Law Reform Commission, above n 72.
118 Australian Law Reform Commission, above n 61, vols 1–2.
119 See Smyth, above n 32, 204–8; Dan Svantesson and Paul White, 'Entering an Era of Research Ranking – Will Innovation and Diversity Survive?' (2009) 21 *Bond Law Review* 173.

next tier A and the final tiers B and C. An A* journal was recognised as 'one of the best in its field … [with] very high quality [papers]' while a C journal was considered of low quality and held in low esteem by the research community and more likely to be a regional, professional or 'trade' journal.[120] While not too much emphasis should be given to the ERA2010 rank – given that the ARC moved away from it for subsequent ERA exercises – it does provide a public standard for considering the 'quality' of law journals. The ALRC's citation to journals reveals an interesting mix. Four Australian A* journals from ERA2010 come in at rank 4–7. However, also within the top 15 are journals that the ARC in ERA2010 regarded as possessing less scholarly quality. The *Australian Law Journal* (rank 1), *Alternative Law Journal* (rank 8) and the *Journal of Judicial Administration* (rank 13) were Tier B journals, while the *Insurance Law Journal* (rank 10) and the *Law Institute Journal* (rank 11) were Tier C journals. A feature of all these last mentioned journals is that they publish smaller length articles of a topical or technical nature. This is further reflected in the use of non-peered reviewed sources. Within the top 30 ranked sources, 6 are non-peered reviewed. This suggests that the ALRC's use of journals has been pragmatically informed; the ALRC has accessed and cited from what it has seen as relevant material without too much regard to the 'academic quality' of the source as indicated by peer reviewing or rankings on tables of journals.

The findings of the citation analysis suggest that the ALRC final reports are made up of many strands. That is not to say that the reports are uniform. What is cited depends on the reference, its breadth and whether the ALRC received a high number of submissions. Some general patterns can be identified. Submissions at 46 per cent of the total citations seem to be very significant to the ALRC. Further, this significance of submissions runs across the reports. Only in 31 per cent (13 out of 42) of reports were submissions not the most cited category.[121] At the other end of the scale citations to secondary academic material in the form of books, journal articles and conference papers were quite low at only 6 per cent of the total citations. It is these findings, particularly relating to the high submission count and the low academic material count that inform the analysis in Part V.

120 See the ALRC's description of the ranks at Australian Research Council, *Tiers for Australian Rankings of Journals* (2009) <http://www.arc.gov.au/era/tiers_ranking.htm>.

121 Law Reform Commission, *Choice of Law*, above n 63; Law Reform Commission, above n 89; Australian Law Reform Commission, above n 57; Australian Law Reform Commission, *Legal Risk in International Transactions,* above n 94; Australian Law Reform Commission, above n 72; Australian Law Reform Commission, *Managing Justice*, above n 68; Australian Law Reform Commission, *The Judicial Power of the Commonwelath*, above n 68; Australian Law Reform Commission, *Principled Regulation*, above n 95; Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, above n 97; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006); Australian Law Reform Commission, *Making Inquiries*, above n 98; Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, above n 98.

V ANALYSIS: LAW REFORM AS COMMUNITY OR RESEARCH?

This Part discusses the findings from Part IV and articulates them in the context of the literature concerning institutional law reform. The findings suggest that the ALRC has had a strong commitment to the community engagement approach. However, within the literature on institutional law reform, there has been criticism of over-reliance on the community engagement approach. An alternative strategy can be seen in the Productivity Commission which appears to strike a different balance from the findings suggest that the ALRC does between the community engagement and the research institute approaches. This Part concludes by suggesting that the contemporary expectations for 'evidence based' reform might push the ALRC more towards the research institution approach.

A Community Engagement

The two key findings from the citation analysis – that 46 per cent of references within final reports are to submissions and that at most 6 per cent are to academic material – strongly suggest that the ALRC does law reform through a community engagement model. This should not come as a surprise. The ALRC, with Justice Kirby chairing community meetings in the 1970s,[122] was one of the pioneers of this approach to institutional law reform;[123] and over its history, there have been regular statements by ALRC commissioners advocating for a community engagement approach.[124] This past emphasis is continued in contemporary public statements by the ALRC. In its graphic of the law reform process reproduced on its website and in recent annual reports, community engagement in the form of consultations and call for public submissions are presented as the core deliberative stage for the law reform process.[125] The finding that 46 per cent of references within final reports are to sources that were coded as 'Submissions' suggests that these public statements are not puffery. Within the final reports, nearly half of the references are to material derived from the ALRC's direct engagement with the community. As noted in Part II when introducing citation analysis, this data does not prove that the ALRC cited submissions in a wholly positive and approving way. What it does suggest is that the ALRC has gone to great lengths to represent to its readers that behind the reports there was a process of community engagement and that the recommendations should be implemented because of this engagement.

122 Brown, above n 54, 117.

123 Tilbury, 'A History of Law Reform in Australia', above n 5, 14.

124 Kirby, above n 47, 56–61; Sackville, above n 5, 226; Brian Opeskin, 'Engaging the Public – Community Participation in the Genetic Information Inquiry' (2002) 80 *Australian Law Reform Commission Reform Journal* 53; Weisbrot, above n 5, 32.

125 Australian Law Reform Commission, *Law Reform Process* (2014) <http://www.alrc.gov.au/law-reform-process>; Australian Law Reform Commission, *Annual Report 2012–2013*, Report No 121 (2013) 17; Australian Law Reform Commission, above n 53, 19.

This finding immediately suggests a further question concerned with the identity of the entities in the community that the ALRC engaged with. Table 5 summarises from the sample the entities that have provided a submission to the ALRC or which the ALRC has listed as an entity that they consulted in a reference.[126]

Table 5: Submitters and Consultants Listed in ALRC Reports 1992–2012[127]

Sector	Type of Entity	Totals	Percentage	Sector Percentage
Government	Federal/State and Local Departments, Agencies and Entities	1257	12	**12**
Law	Law Societies	161	1.6	
	Community Legal Centres	166	1.6	
	Legal Aid Commissions	77	0.70	
	Law Firms	113	1.1	
	Judges	204	2	
	Courts	84	0.8	**7.8**
Corporate/ Non-Law Professional	Peak/Representative Industry Bodies	508	4.9	
	Professional Organisation	200	2	
	Corporations	553	5.3	**12.2**
Community	Non-Government Organisations	1185	11.3	
	Religious Organisations	62	0.6	**11.9**

126 In general, the term 'submitters' refers to a person or organisation that made a submission to the ALRC in response to a formal public submission process, while a 'consultant' refers to a person or organisation whose opinion or views the ALRC actively sought. However, there was inconsistency across the samples in how these were recorded. Some reports provided separate lists for consultants and for submitters, while in others they were combined.

127 This data was derived from the submissions and consultations listed in the final report. An exception was the recent *Content* inquiry which received a combined 2445 submissions and consultations. To determine the submissions and consultations for this inquiry, recourse was had to the list of consultations in the final report (Australian Law Reform Commission, *Classification – Content Regulation*, above n 73, 371–7), the links to the non-confidential submissions (available at <http://www.alrc.gov.au/inquiries/classification/submissions-received-alrc#IP>) and the statement that 819 submissions are confidential and not available through the ALRC website: Terry Flew, *Responses to ALRC National Classification Scheme Review Issues Paper (IP40) – Graphical Representation of Submissions*, Issues Paper No 40 (2011).

Research	Research and Teaching Institutions	118	1.1	
	Academics	166	1.6	**2.7**
Public	Confidential	1447	13.8	
	Individuals	4137	39.6	**53.4**
Total		**10 438**	**100**	**100**

From Table 5 it can be seen that the ALRC has received submissions from a range of stakeholders. Like the citation analysis, care needs to be taken when interpreting this data. The unique nature of each report, whether the report excited the wider public and the time and resources that the ALRC had for consultations, influenced who made submissions and in what quantity.[128] For example, the *Making Inquiries: A New Statutory Framework* (2009) report had a combined consultation and submission count of 84. This comprised 13 per cent government (11 out of 84), 6 per cent peak bodies (5 out of 84), 17 per cent NGOs (14 out of 84), 3.5 per cent law societies and legal aid commissions (3 out of 84), 20 per cent judges (17 out of 84), 6 per cent academics (5 out of 84) and 34.5 per cent members of the public (29 out of 84).[129] In contrast, *Classification: Content Regulation and Convergent Media* (2012) had a combined consultation and submission count of 2445. This comprised 1.64 per cent government (40 out of 2445), 1.43 per cent peak bodies (35 out of 2445), 1.47 per cent NGOs (36 out of 2445) 0.08 per cent community legal centres and law firms (2 out of 2445), 1.5 per cent corporations (37 out of 2445), 0.33 per cent religious organisations (8 out of 2445), 0.65 per cent research institutions and academics (16 out of 2445), 33.5 per cent confidential (819 out of 2445) and 59.4 per cent individuals (1452 out of 2445).[130]

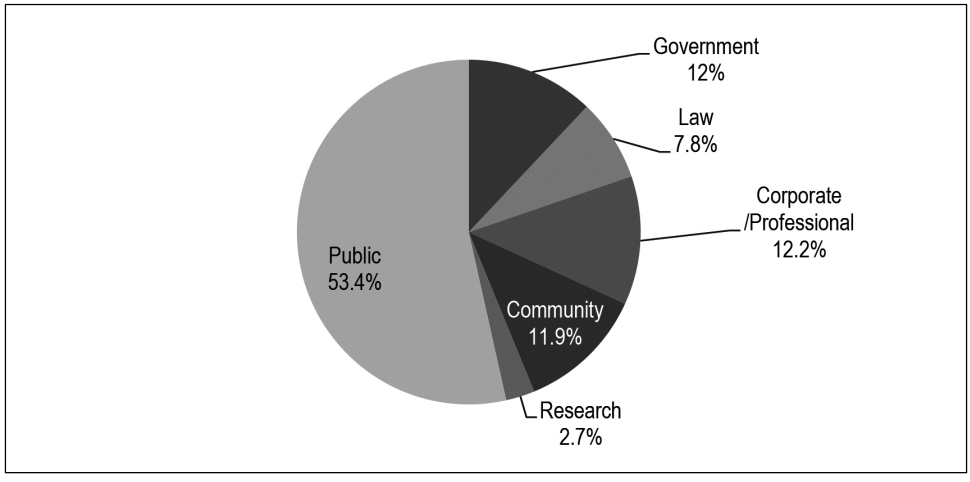
Figure 6 sets out the submission by sector. From Figure 6 it can be seen that the highest source of submissions and consultations were from the 'public' at 53.4 per cent; comprising 13.8 per cent (1447 out of 10 438) confidential and 39.6 per cent named individuals. By 'public' the contributor was an individual in their private capacity. The next rank was occupied by a three-way tie of government with 12 per cent, corporate and non-law professional bodies with 12.2 per cent and 'community organisations' with 11.9 per cent. The legal sector at 7.8 per cent and the research sector at 2.7 per cent filled the bottom ranks. These rankings remain unchanged even if the outlying data provided by the *Classification: Content Regulation and Convergent Media* (2012) is excluded. Without that report, the public remains the highest source of submissions and consultations at 33.6 per cent (2685 out of 7993).

128 Weisbrot, above n 5, 32.

129 Australian Law Reform Commission, *Making Inquiries*, above n 98, 561–7.

130 See above n 127 concerning how this count for this reference was determined.

Figure 6: Submission by Sector



The data provided in Table 5 and Figure 6 concerns the bare listing of entities that the ALRC acknowledged to have contributed to an inquiry. It is not an analysis of which submissions the ALRC cited in its reports. So while the question of influence is not answerable by this data, what it does provide is that the ALRC reports from 1992 to 2012 record engagement with entities from the government, corporate, law, community and research sectors. It also has records that 53.4 per cent of the submissions that it has received has been from individuals in their private capacity. This is not to suggest that the final reports are simple conduits for stakeholder perspectives. The reports are arranged by chapters that reflect an issue or a cluster of issues and 54 per cent of all the references are to texts other than submissions. Nevertheless, the weight of text given by the ALRC to submissions in its reports – on average there has been 2.5 citations (55 837 out of 22 176) to submissions on every page – is significant evidence substantiating the ALRC's longstanding claim that its approach to law reform is through community consultation.

B Concerns with Community Engagement

As has been identified within the secondary literature on institutional law reform, there are some concerns with the community engagement approach. An immediate criticism concerns the 'community-ness' of the entities that the ALRC has engaged with. Within the advocacy literature on institutional law reform, community engagement has been framed in terms ranging from the instrumental ensuring 'law remains relevant and useful to people'[131] to 'a form of civic

131 Atkinson, above n 7, 164.

conversation'[132] inspired by '[d]eliberative [d]emocracy'.[133] The focus of these justifications concern law reform connecting with law's human subjects and the discussion within the literature often moves onto strategies for engaging marginal and under-represented individuals.[134] Table 5 reveals that the ALRC engages significantly with organisations. Governments, corporations, the non-profit sector, representative and peak bodies make up 46.4 per cent of the consulted 'community'. On the whole, for the sample period, the ALRC engagement strategies can be seen as relatively passive; targeted consultations with identified stakeholders followed by the public releasing of issues and discussion papers and then receiving submissions.[135] While during the sample period the ALRC did start to adopt social media technologies and organised some public forums,[136] there was little evidence of proactive processes in gathering opinions and perspectives directly from marginal and under-represented individuals.[137] Graycar's concern that the established passive methods of community engagement used by law reform commissions tends to select mainstream and established interests, who are recognised as 'stakeholders' and who have the resources and expertise to draft submissions, does seem to be valid looking at the sample.

This finding supports Graycar's concern of law reform by frozen chook. In so heavily relying on submissions within its final reports and in having nearly 46.6 per cent of the submissions that it receives drawn from organisations, it could be suggested that the ALRC's law reform activities involve the channelling of vested and mainstream opinions. In looking at these figures, the ALRC does run the risk of giving the appearance of a particular version of agency capture. The Hon Michael Kirby wrote that law reform commissions needed to be mindful of 'one-sided lobbying'.[138] The spectre of frozen chooks is that the community engagement approach can be compromised, or give the impression of being compromised, by vocal stakeholders. Over the nearly 40 years of the ALRC, business, community and other groups have become much more sophisticated in their marketing, media profiles and abilities to mobilise resources and make submissions. Indeed, there have emerged organisations, which have as a purpose to interface with the sort of community engagement opportunities that the ALRC

132 Marcia Neave, 'Law Reform and Social Justice' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 358, 366.

133 Neave, above n 5, 365; Hughes, above n 9, 799.

134 Neave, above n 132; Davis, above n 7.

135 See, eg, Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* Report No 107 (2007) 40–4; Australian Law Reform Commission, *Genes and Ingenuity*, above 73, 48–50; Australian Law Reform Commission and New South Wales Law Reform Commission, above n 74, 104–8; Australian Law Reform Commission, above n 89, 5–6.

136 Muir, above n 7.

137 The ALRC could be contrasted with the LCC which did undertake more proactive polling and community conferencing in an effort to engage more broadly and widely. See MacDonald, above n 10, 139. A record of the LCC's innovation in community engagement is available online at Law Commission of Canada, *Home* (3 November 2006) <http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/default-en.asp>.

138 Kirby, 'Law Reform as "Ministering to Justice"', above n 5, 211.

offers.[139] The entities listed in Table 5 suggest that many of these organisations are engaging with the ALRC.

This study neither dispels the criticism that the ALRC does law reform by frozen chook nor confirms it. In no report within the sample could it be seen that the ALRC was particularly relying on a single submission or cluster of related submissions. Further, there is evidence from the sample that suggests that the ALRC does not simply adopt the perspective of vocal and well-organised interests. The majority of the submissions to *Classification: Content Regulation and Convergent Media* (2012) were from individual gamers demanding restriction-free computer games, however that was not the ALRC's recommendation.[140] This possibly tells a deeper story. The overall findings of this study substantiate the ALRC's claim to undertake law reform through community engagement. Yet in an inquiry that did generated significant interest from a usually under-represented group from the community – computer gamers[141] – their perspective, while acknowledged, was not adopted. While this is evidence of the ALRC's independence from some of its submitters, it also suggests that the 'community' to which it listens seriously are mainstream organisations.

For Graycar, the corrective of law reform by frozen chook is not more or better consultation but independent scholarly research.[142] In the terminology of the literature on institutional law reform she can be seen as arguing more for a research institute approach that draws its findings from independent research and rigorous scholarship into the issues. An expected hallmark of this approach would be detailed engagement with scholarly literature, which would be clearly identified in a citation analysis. The findings of this study that only 6 per cent of the total citations were to academic sources reveals that the ALRC has not overtly balanced its community consultation approach with recourse to published research and scholarship.

There might be a simple explanation for the imbalance between submissions and secondary academic citation rates. In the ALRC's defence it could be argued that for many of the references there was not a wide or deep relevant body of secondary academic literature. This could be an explanation for the reports in the sample from the early 1990s such as *Administrative Penalties in Customs and Excise* (1992)[143] and *Child Care for Kids* (1994)[144] where no secondary academic

139 See, eg, Mark Sheehan and Peter Sekuless, *The Influence Seekers: Political Lobbying in Australia* (Australian Scholarly Publishing, 2012); Philip Mendes, *Australia's Welfare Wars Revisited: The Players, the Politics and the Ideologies* (University of New South Wales Press, 2008); Patrick Hodder, 'Lobby Groups and Front Groups: Industry Tactics in the Climate Change Debate' (2010) 34 *Melbourne Journal of Politics* 45.

140 Australian Law Reform Commission, *Classification – Content Regulation*, above n 73, 2–6.

141 While critics emphasise the diversity of demographic that play computer games, this is usually done with reference to a core understanding that computer gamers tend to be young males. See Adrienne Shaw, 'What Is Video Game Culture? Cultural Studies and Game Studies' (2010) 5 *Games and Culture* 403.

142 Graycar, 'Frozen Chooks Revisited', above n 22, 67–9.

143 Law Reform Commission, *Administrative Penalties in Customs and Excise*, above n 96.

144 Law Reform Commission, *Child Care for Kids*, above n 93.

sources were cited.[145] However, this does not explain the differences between citation of submissions and secondary academic material in more contemporary reports. The recent family violence reports, *Family Violence: A National Legal Response* (2010)[146] and *Family Violence and Commonwealth Laws: Improving Legal Frameworks* (2011),[147] were set against a backdrop of a sizable and dynamic secondary academic literature on the legal, social and economic contexts of domestic violence in Australia. However, in these reports the citations were still dominated by references to submissions. For *Family Violence: A National Legal Response* (2010), 54.5 per cent (7283 out of 13 361) of the citations were submissions with only 4.5 per cent (610 out of 13 361) to secondary academic sources; and for *Family Violence and Commonwealth Laws: Improving Legal Frameworks* (2011), 59 per cent (2149 out of 3660) of the citations were to submission and only 2.8 per cent (104 out of 3660) to secondary academic sources. While academics have been active within the ALRC, as presidents, commissioners, consultants and submitters, when it comes to final reports, the ALRC gives priority to the texts generated by the 'community' in the inquiry process.

C Alternative Balance of Doing Institutional Law Reform

The ALRC is not the only entity engaged in law reform at the Commonwealth level. There exists, in the words of past President of the ALRC David Weisbrot, a 'crowded field'.[148] Since 1975, there have emerged many permanent, semi-permanent and ad hoc commissions, committees and inquiries into Commonwealth laws. There also has been much greater ALRC-like law reform activity from parliamentary standing committees,[149] and royal and non-royal commissions of inquiry into Commonwealth law and administration have been regularly established.[150] Some of the most controversial and wide-ranging reforms to Commonwealth law over the past decades have not been from ALRC reports. The establishment and review of the national scheme to regulate human cloning and embryonic stem cell research has been achieved through a series of inquiries and reports; one by the National Health and Medical Research

145 See Appendix, Table 3 below. Although this defence seems implausible, the politics and economics of customs and excise had long been examined in academic scholarship and by 1994 there had been detailed social scientific, political and economic studies into child care. On the latter, see, eg, specific Australian based research by Barbara Ann Hocking, 'Creating Care for Children' (1992) 17 *Alternative Law Journal* 27; Stella R Quah (ed), *The Family as an Asset: An International Perspective on Marriage, Parenthood and Social Policy* (Times Academic Press, 1990); Deborah Brennan, 'Childcare' (1993) (44–5) *Refractory Girl: A Women's Studies Journal* 108; Dale Raneberg and Terence Daubney, 'The Forgotten Consumer: The Distorted Delivery of Child-Care Services' (1991) 7 *Policy* 30; Gay Ochiltree and Evelyn Greenblat, 'Mothers in the Workforce: Coping with Young Sick Children' (1991) 28 *Family Matters* 18; Eve Voysey, 'Sole Parents and Domestic Barriers to Employment' (1986) 58 *Australian Quarterly* 398.

146 Australian Law Reform Commission and New South Wales Law Reform Commission, above n 74.

147 Australian Law Reform Commission, above n 74.

148 Weisbrot, above n 5, 20.

149 Barnett, above n 1, 166–70.

150 The ALRC has provided a list of these ad hoc inquiries in Australian Law Reform Commission, *Making Inquiries*, above n 98, 577–99.

Council,[151] three separate parliamentary committees,[152] and two ad hoc Legislation Review Committees.[153] Similarly, the recognition of same-sex relationships by the Commonwealth[154] followed an Australian Human Rights and Equal Opportunity Commission report.[155] This is notwithstanding the ALRC history and track record in health and bioscience law reform[156] and rights-based law reform.[157]

However, the most prominent 'law reform' entity in recent times has been the Productivity Commission. As can be seen in Table 6 the Productivity Commission dwarfs the ALRC.

Table 6: Comparison between Productivity Commission and ALRC for 2011/12

Indicator	**Productivity Commission**[158]	**ALRC**[159]
Budget	$37.96 million	$2.9 million
Budget Trend from 2011	+0.677 million	-0.225 million
Staffing	197 equivalent fulltime	14.5 equivalent fulltime
Completed Reports	17 (9 public inquiries and 8 research studies)	2
Ongoing Inquiries	7	0 (2 were completed and 2 new referenced received in 2011/12)
New References	10	2

151 Australian Health Ethics Committee, National Health and Medical Research Council, *Scientific, Ethical and Regulatory Considerations Relevant to Cloning of Human Beings* (1998).

152 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Human Cloning: Scientific, Ethical and Regulatory Aspects of Human Cloning and Stem Cell Research* (2001); Senate Community Affairs Legislation Committee, Parliament of Australia, *Provisions of the Research Involving Embryos and Prohibition of Human Cloning Bill 2002* (2002); Senate Standing Committee on Community Affairs, Parliament of Australia, *Legislative Responses to Recommendations of the Lockhart Review* (2006).

153 Legislation Review Committee, Parliament of Australia, *Legislation Review: Prohibition of Human Cloning Act 2002 and* Research Involving Human Embryos Act 2002 (2005); Legislation Review Committee, Parliament of Australia, *Legislation Review: Prohibition of Human Cloning Act 2002* and *Research Involving Human Embryos Act 2002* (2011).

154 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth).

155 Human Rights and Equal Opportunity Commission, *Same-Sex: Same Entitlements – National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007).

156 Law Reform Commission, *Human Tissue Transplants*, Report No 7 (1977); Australian Law Reform Commission, *Genes and Ingenuity*, above 73.

157 Australian Law Reform Commission, *Equality before the Law*, above n 52; Australian Law Reform Commission, above n 72; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 70.

158 Productivity Commission, *Annual Report 2011–12*, Annual Report Series (Productivity Commission, 2012) 33, 60, 199.

159 Australian Law Reform Commission, above n 53, 19–20, 52, 71.

If size, budget trend and workload denote success then there is an argument that the Productivity Commission is more successful than the ALRC. However this is not entirely fair. The Productivity Commission has a general remit to report 'about matters relating to industry, industry development and productivity'[160] which is potentially a wider jurisdiction than the law and legal system focus that is set out for the ALRC in its Act.[161] These statutory differences reflect the departmental alignment of the Productivity Commission and the ALRC. The Productivity Commission operates under the auspice of the Treasury and its general ambit reflects the whole of the economy and whole-of-government focus of the Treasury, while the ALRC's relationship with the Attorney-General means that the ALRC tends to only receive references that fall within the Attorney-General's Department's specific responsibilities. While the Keating Labor Government did give the ALRC references concerning legislation administered by other departments,[162] this can be seen as unusual. For the period 1992 to 2012, most reports related directly to core responsibilities of the Attorney-General's Department, such as federal courts and their processes, crime and violence in the community and regulating information in the contexts of privacy and censorship.[163] In contrast, the Productivity Commission's reports range from gambling[164] to disability care and support,[165] international trade[166] and climate change.[167] The size, scope and activity between the two commissions can be explained in terms of their aligned departments.

But it also could be explained in terms of their approaches. At one level, the Productivity Commission and the ALRC can be seen as adopting very similar approaches. Both involve consultation and submission processes and the production of issues papers and draft reports in accordance with the community engagement approach. Both end with a substantial final report containing a list of recommendations. However, there are some clear differences between the final reports. The Productivity Commission produces and analyses its own data. The appendixes to its reports contain economic modelling supporting the recommendations. This sort of data crunching is absent from the ALRC reports. Indeed, economics, even law and economic journals, are rarely cited by the

160 *Productivity Commission Act 1998* (Cth) s 6(1)(a).

161 *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(a).

162 Law Reform Commission, *Child Care for Kids*, above n 93; Law Reform Commission, *The Coming of Age*, above n 93; Australian Law Reform Commission, above n 71.

163 See Appendix, Table 2 for a list of reports. See the Attorney-General's Department's website for its areas of responsibility: Attorney-General's Department (Cth), *Attorney-General's Department* <http://www.ag.gov.au/Pages/default.aspx>. This is not entirely the case. The 2004 *Essentially Yours* report covered legislation administrated by the Department of Health and Aging. This report was a joint reference between the ALRC and the Department of Health and Aging's independent policy advice entity, the National Health and Medical Research Council.

164 Productivity Commission, *Gambling*, Inquiry Report No 50 (2010).

165 Productivity Commission, *Disability Care and Support*, Inquiry Report No 54 (2011).

166 Australian Productivity Commission and New Zealand Productivity Commission, *Strengthening Trans-Tasman Economic Relations* (2012).

167 Productivity Commission, *Barriers to Effective Climate Change Adaptation*, Inquiry Report No 59 (2012).

ALRC, comprising 0.15 per cent (7 out of 4428) of the total citations to journals or conference proceedings.[168] This analysis of data continues to how the Productivity Commission deals with submissions and consultations. As this study has identified, the ALRC uses submissions in its final reports as texts to be referenced. This is the ALRC taking seriously its community engagement model. By citing the stakeholder's submission, the ALRC feels that it is respecting the submitter through showing that its submission has been read and considered. The zenith of this approach can be seen in the family violence reports. For example, in *Family Violence – A National Legal Response* (2010), the proposal that harm to animals should be included in the understanding of 'family violence' was explained as:

> supported by the great majority of stakeholders, including victims of family violence who recounted personal stories of having pets threatened, stolen and tortured; and legal service providers who reported cases of violence against pets as a form of violence against their clients.[169]

This statement was footnoted, and in the footnote, 22 different submissions were cited. In contrast, the Productivity Commission in its final reports can be seen to cite submissions differently. For example, in the *Paid Parental Leave: Support for Parents with Newborn Children* (2009) report,[170] it received over 400 submissions, over 500 feedback emails and conducted extensive consultations and public hearings.[171] However, the report is not presented as constructed from these texts. Absent are the lengthy footnotes citing separate submissions that have been a characteristic of the ALRC reports. Instead, the Productivity Commission analyses and summarises submissions as a discrete data set. In its own words, its report 'seeks to assess the public submissions and the relevant literature for insights and evidence, to see what they tell us about good rationales and achievable objectives'.[172] Generally 'submissions' are written about in the plural with one or two specific submissions cited as exemplars.[173] The report presents that there has been analysis of all submissions received by the Commission and what has been identified are themes. When submissions are

168 The *Cambridge Journal of Economics* is cited twice in Australian Law Reform Commission, *Classification – Content Regulation*, above n 73, 65. The *American Law and Economics Review* is cited twice in Australian Law Reform Commission, *Same Crime, Same Time*, above 121, 135. The *Journal of Law, Economics and Organization* is cited twice in Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, Report No 75 (1995) 34; and the *Journal of Law and Economics* is cited once in Law Reform Commission, *Collective Investments: Superannuation*, Report No 59 (1992) 171.

169 Australian Law Reform Commission and New South Wales Law Reform Commission, above n 74, 225 [5.132].

170 On the report and subsequent legislative scheme, see Marian Baird and Gillian Whitehouse, 'Paid Parental Leave: First Birthday Policy Review' (2012) 38 *Australian Bulletin of Labour* 184; Graeme Orr, 'Paid Parental Leave: Welfare or Workplace Right?' (2011) 18 *Australian Journal of Administrative Law* 193.

171 Productivity Commission, *Paid Parental Leave: Support for Parents with Newborn Children*, Inquiry No 47 (2009) 1.11, Appendix A.

172 Ibid 1.23.

173 Ibid 2.55, 3.15, 4.14, 4.16, 4.19, 4.32, 4.46, 6.11, 6.12, 6.15, 6.16, 7.3, 7.15, 8.14, 8.23, 8.35.

cited, they are not direct authorities for a point; rather, they are authorities for an issue that is then examined using other data.

For example, in the *Paid Parental Leave: Support for Parents with Newborn Children* (2009) report, the Productivity Commission used submissions to identify a theme concerning the risks to health and wellbeing of mothers and infants when a mother returns to work.[174] Several of these submissions were summarised in an in-text box.[175] However, having identified the concern, the Commission then discussed it using statistics concerning return to work rates and examined Australia, UK and USA from secondary academic sources on the time it takes new mothers to recover from the birth and newborn period, the productivity of women returning to work after different maternity leave periods and the health and wellbeing of mothers and infants from different maternity leave periods. It concluded:

> the evidence suggests that recovery from pregnancy and childbirth and the return to full functionality can be prolonged. There also appears to be a positive relationship between the length of maternity leave in the short term and maternal health and wellbeing.[176]

What is suggested by this examination of a Productivity Commission report is that on the gradient of approaches to institutional law reform, the Productivity Commission is more towards the research institute model and the ALRC towards the community engagement approach.

While MacDonald identified the community engagement model as emerging from criticisms of the research institute approach in the 1970s, the Productivity Commission's prominence as a source of Commonwealth-level law reform does suggest that in the 2010s there has been a restoration of faith in rationality and 'human artifice [in] … improving the material conditions of society.'[177] It can be seen that the Productivity Commission reports generate authority through discussion of the 'evidence', the production and analysis of data and the provision of numbers and graphs. Its 'success' cannot just be explained in terms of alignment with a larger and more dominate department, but that its reports seem more in tune with an era of 'evidence-based policy-making'.[178] Although not without its own critical literature,[179] the Productivity Commission's approach

174 Ibid 4.11.

175 Ibid 4.12, Box 4.3.

176 Ibid 4.15.

177 MacDonald, above n 11, 843.

178 On 'evidence-based policy, see Adrian Kay, 'Evidence-Based Policy-Making: The Elusive Search for Rational Public Administration' (2011) 70 *Australian Journal of Public Administration* 236, 236; Adrian Cherney and Brian Head, 'Evidence-Based Policy and Practice: Key Challenges for Improvement' (2010) 45 *Australian Journal of Social Issues* 509; Gary Banks, 'Evidence-Based Policy-Making: What Is It? How Do We Get It?' (Paper presented at the ANZSOG/ANU Public Lecture Series 2009, Canberra, 4 February 2009); Ray Pawson, *Evidence-Based Policy: A Realist Perspective* (Sage, 2006).

179 See Helen Silver, 'Getting the Best out of Federalism – The Role of the Productivity Commission and the Limits of National Approaches' (2010) 69 *Australian Journal of Public Administration* 326; Judith Sloan, 'How Useful Is the Productivity Commission?' (2011) 27 *Policy* 31.

does seem to strike a different balance between the community engagement and the research institute approach.

The ALRC can be seen to be making steps in this direction. In the recent *Classification – Content Regulation and Convergent Media* (2012) reference, the ALRC undertook two activities that are more consistent with a research institute approach. First, it undertook a qualitative thematic analysis of the submissions it received.[180] Secondly, it commissioned social scientific research into community attitudes to 'higher level media content'.[181] What these undertakings allowed was the final report to be more focused and streamlined. The ALRC was able to refer to the findings from those studies as evidence of contemporary community attitudes towards challenging media content.[182] This was only a small step towards the research institute approach, for the bulk of that report still evidenced the in-text sifting through of individual submissions with an above average of 54 per cent (910 out of 1684) of the citations in that report to submissions. However, what it does show is the ALRC incorporating, to a much greater degree than in the other reports in the sample, a more research institute approach.

VI CONCLUSION

This article reports a study into the citation patterns of the ALRC in its final reports from 1992 to 2012. It found that in its final reports the sources that the ALRC most cited were submissions and consultations. This finding substantiates the ALRC's claim that its approach to law reform is through community engagement. However, this approach also has its risks. The study also found that a low citation count to secondary academic material. The challenge for the community engagement model is the problem of the anecdotal becoming prioritised over representative data. In an era of 'evidence-based policy', the Productivity Commission's more research institute approach demonstrated by more engagement with secondary academic material in the final reports and its own data gathering and analysis activities suggests an alternative balance between 'community' and 'research' for law reform.

180 Flew, above n 127.

181 Urbis, 'Community Attitudes to Higher Level Media Content: Community and Reference Group Forums Conducted for the Australian Law Reform Commission' (Final Report, 7 December 2011).

182 Australian Law Reform Commission, *Classification – Content Regulation*, above n 73, 60, 86, 94, 104, 269, 277–8.

APPENDIX A

Table 2: ALRC Final Reports 1992–2012

Report Title	Year	Date of Reference	Date of Report	Months	Pages	Number of Recommendations	Degree of Implementation as of Sep-12*
Multiculturalism and the Law	1992	Aug 1989	Mar 1992	31	348	56	Substantial
Choice of Law	1992	Dec 1988	Mar 1992	39	218	44	Partial
Collective Investments: Superannuation	1992	May 1991	Mar 1992	10	337	173	Substantial
Customs and Excise	1992	Sep 1989	Apr 1992	31	342	215	Partial
Administrative Penalties in Customs and Excise	1992	Nov 1991	Jul 1992	8	66	1	Nil
Children's Evidence: Closed Circuit TV	1992	Oct 1988	Dec 1992	50	32	11	Substantial
Personal Property Securities	1993	Jun 1990	Jan 1993	31	233	58	Substantial
Collective Investments: Other People's Money	1993	May 1991	May 1993	24	228	185	Substantial
Compliance with Trade Practices Act	1994	Dec 1992	Apr 1994	16	194	57	Partial
Equality Before the Law Volume 1: Justice for Women	1994	Feb 1993	Apr 1994	14	367	45	Substantial
Equality Before the Law Volume 2: Women's Equality	1994	Feb 1993	Oct 1994	20	440	70	Substantial
Child Care For Kids: Review of Legislation Administered by Department of Human Services and Health	1994	Aug 1992	Aug 1994	24	206	67	Partial
The Coming of Age: New Aged Care Legislation for the Commonwealth	1995	Aug 1992	Feb 1995	30	291	82	Substantial
For the Sake of the Kids: Complex Contact Cases and the Family Court	1995	Nov 1990	Apr 1995	53	179	44	Substantial
Designs	1996	Aug 1992	Jun 1995	34	482	188	Substantial
Costs Shifting: Who Pays for Litigation	1995	Jun 1994	Aug 1995	14	257	66	Partial

Report Title	Year	Date of Reference	Date of Report	Months	Pages	Number of Recommendations	Degree of Implementation as of Sep-12*
Open Government: A Review of the Federal *Freedom of Information Act 1982*	1996	Jul 1994	Jan 1996	18	270	106	Substantial
Beyond the Door-Keeper: Standing to Sue for Public Remedies	1996	May 1995	Feb 1996	9	119	19	Nil
Making Rights Count: Services for People with a Disability	1996	Aug 1995	Jul 1996	11	377	101	Partial
Legal Risk in International Transactions	1996	Jul 1995	May 1996	10	305	36	Partial
Integrity: But Not by Trust Alone – AFP & NCA Complaints and Disciplinary Systems	1996	Mar 1995	Nov 1996	20	449	163	Substantial
Seen and Heard: Priority for Children in the Legal Process	1997	Aug 1995	Oct 1997	26	771	286	Partial
Australia's Federal Record: A Review of *Archives Act 1983*	1998	Aug 1996	May 1998	21	430	223	Partial
Confiscation That Counts: A Review of the *Proceeds of Crime Act 1987*	1999	Dec 1997	Apr 1998	4	433	93	Substantial
Managing Justice: A Review of the Federal Civil Justice System	2000	Nov 1995	Jan 2000	50	743	138	Substantial
Review of the *Marine Insurance Act 1909*	2001	Jan 2000	Apr 2001	15	422	44	Partial
The Judicial Power of the Commonwealth: A Review of the *Judiciary Act 1903* and Related Legislation	2000	Jan 2000	Oct 2001	21	747	125	Partial
Principled Regulation: Federal Civil and Administrative Penalties in Australia	2002	Jan 2000	Dec 2002	35	1043	114	Partial
Essentially Yours: The Protection of Human Genetic Information in Australia	2003	Feb 2001	Mar 2003	25	1158	144	Substantial
Keeping Secrets: The Protection of Classified and Security Sensitive Information	2004	Mar 2003	May 2004	14	568	80	Substantial
Genes and Ingenuity: Gene Patenting and Human Health	2004	Dec 2002	Jun 2004	18	678	50	Substantial
Uniform Evidence Law	2005	Jul 2004	Dec 2005	17	779	60	Substantial

Report Title	Year	Date of Reference	Date of Report	Months	Pages	Number of Recommendations	Degree of Implementation as of Sep-12*
Same Crime, Same Time: Sentencing of Federal Offenders	2006	Jul 2004	Apr 2006	21	924	147	Partial
Fighting Words: A Review of Sedition Laws in Australia	2006	Mar 2006	Jul 2006	4	310	28	Partial
Privilege in Perspective: Client Legal Privileged in Federal Investigations	2007	Nov 2006	Dec 2007	13	561	45	Under consideration
For Your Information: Australian Privacy Law and Practice	2008	Jan 2006	May 2008	28	2693	295	Partial
Making Inquiries: A New Statutory Framework	2009	Jan 2009	Oct 2009	9	623	82	Under consideration
Secrecy Laws and Open Government in Australia	2009	Aug 2008	Dec 2009	16	637	61	Under consideration
Family Violence: A National Legal Response	2010	Jul 2009	Oct 2010	15	1558	187	Partial
Managing Discovery: Discovery of Documents in Federal Courts	2011	Mar 2011	May 2010	10	380	27	Partial
Family Violence and Commonwealth Laws – Improving Legal Frameworks	2011	Jul 2010	Nov 2011	16	577	102	Under consideration
Classification – Content Regulation and Convergent Media	2012	Mar 2011	Feb 2012	11	400	57	Under consideration
Averages				21.1	528	99.5	

*Australian Law Reform Commission, above n 53, 151–62. The qualitative terms 'Partial' and 'Substantial' are the ALRC's own. These qualitative assessments have been used in the ALRC's Annual Reports in recent years in preference to quantitative statements, like 62 per cent of recommendations have been implemented, to reflect that not all recommendations are equal. Many reports have a small cluster of significant recommendations that are at the core of the report with many more secondary recommendations. There could be a misleading result from a quantitative assessment where the secondary recommendations have been implemented but the core recommendations have not. It could give the impression that the report had been successful because a majority of the recommendations have been implemented when in fact the core recommendations from the report remain unimplemented. The reverse holds true too. A report can be regarded as substantially implemented where the core recommendations have been acted upon even though a majority of recommendations remain unimplemented. Email Correspondence between Kieran Tranter and Bruce Alston, Principal Legal Officer, 22 November 2012.

APPENDIX B

Table 3: Total Citation Count by Category for ALRC Final Reports 1992–2012

Report Title	Year	Total References	Submissions	Government Material	Primary Law	Books	Articles	Other
Multiculturalism and the Law	1992	1384	881	122	271	10	7	93
Choice of Law	1992	670	104	15	370	56	76	49
Collective Investments: Superannuation	1992	969	455	132	290	22	17	53
Customs and Excise	1992	419	36	81	298	2	0	2
Administrative Penalties in Customs and Excise	1992	142	88	26	20	0	0	8
Children's Evidence: Closed Circuit TV	1992	58	32	7	14	0	0	5
Personal Property Securities	1993	512	227	85	185	4	4	7
Collective Investments: Other People's Money	1993	927	520	82	298	5	9	13
Compliance with Trade Practices Act	1994	1481	984	98	353	16	25	5
Equality Before the Law Volume 1: Justice for Women	1994	1922	743	312	486	55	101	225
Equality Before the Law Volume 2: Women's Equality	1994	2523	999	372	621	124	204	203
Child Care For Kids: Review of Legislation Administered by the Department of Human Services and Health	1994	1719	1608	18	47	0	0	46
The Coming of Age: New Aged Care Legislation for the Commonwealth	1995	3991	3586	65	26	1	0	313
For the Sake of the Kids: Complex Contact Cases and the Family Court	1995	425	281	70	38	9	26	1
Designs	1996	1930	810	220	622	41	67	170
Costs Shifting: Who Pays for Litigation	1995	1605	1046	105	358	1	12	83
Open Government: A Review of the Federal Freedom of Information Act 1982	1996	1326	810	137	321	12	37	9
Beyond the Door-Keeper: Standing to Sue for Public Remedies	1996	557	254	120	162	1	9	11
Making Rights Count: Services for People with a Disability	1996	6568	4781	144	104	3	4	1532
Legal Risk in International Transactions	1996	1119	87	25	675	74	107	151
Integrity: But Not by Trust Alone AFP & NCA Complaints and Disciplinary Systems	1996	832	328	146	141	57	31	129

Report Title	Year	Total References	Submissions	Government Material	Primary Law	Books	Articles	Other
Seen and Heard: Priority for Children in the Legal Process	1997	4646	1407	1000	1098	262	277	602
Australia's Federal Record: A review of the *Archives Act 1983*	1998	1197	981	57	119	8	19	13
Confiscation That Counts: A Review of the *Proceeds of Crime Act 1987*	1999	842	355	8	437	8	19	15
Managing Justice: A Review of the Federal Civil Justice System	2000	4754	1056	1117	665	121	517	1278
Review of the *Marine Insurance Act 1909*	2001	1447	244	141	546	137	182	197
The Judicial Power of the Commonwealth: A Review of the *Judiciary Act 1903* and Related Legislation	2000	2803	342	133	1345	141	124	718
Principled Regulation: Federal Civil and Administrative Penalties in Australia	2002	4707	730	1162	1840	166	470	339
Essentially Yours: The Protection of Human Genetic Information in Australia	2003	5591	2939	468	993	110	234	847
Keeping Secrets: The Protection of Classified and Security Sensitive Information	2004	2227	385	483	979	55	93	232
Genes and Ingenuity: Gene Patenting and Human Health	2004	4813	2164	908	761	121	410	449
Uniform Evidence Law	2005	4152	792	833	1659	254	190	424
Same Crime, Same Time: Sentencing of Federal Offenders	2006	4944	1337	688	2079	115	121	604
Fighting Words: A Review of Sedition Laws in Australia	2006	1800	753	145	573	58	101	170
Privilege in Perspective: Client Legal Privileged in Federal Investigations	2007	3017	1259	517	920	83	94	144
For Your Information: Australian Privacy Law and Practice	2008	15 283	9642	2012	2892	138	268	331
Making Inquiries: A New Statutory Framework	2009	2615	441	840	1188	86	48	12
Secrecy Laws and Open Government in Australia	2009	3348	1065	866	1333	47	32	5
Family Violence: A National Legal Response	2010	13 361	7283	1744	3135	316	294	589
Managing Discovery: Discovery of Documents in Federal Courts	2011	2340	943	465	690	45	93	104
Family Violence and Commonwealth Laws – Improving Legal Frameworks	2011	3660	2 149	656	530	22	82	221
Classification – Content Regulation and Convergent Media	2012	1684	910	305	314	31	24	100
TOTALS		**120 310**	**55 837**	**16 930**	**29 796**	**2817**	**4428**	**10 502**