The Practice of Independence for Law Reform Agencies

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1.0 Introduction

The concept behind democratic governance is that the supreme power of Government is vested in the people of the State and is exercised by them directly or through their elected representatives. The objective of such a government is to serve the best interests of the people having regard to human rights, living standards and quality of life.

One of the main features of a democratic government is the system of checks and balances which ensures that political power is dispersed and decentralized. The checks and balances system means, for one thing, that there is a separation of powers between the executive, legislature and the judiciary. Separation of powers means that different organs of state are allocated different specific functions, duties and responsibilities. However, despite there being a separation of powers, the branches of government are accountable to each other.

Considering that change is a constant, law reform becomes the process by which existing laws are examined, modified and developed with the aim of filling gaps which existing legislation or a framework of legislation is unable to meet and also to reflect the changes in and of society. This process prevents the law from stagnating and it enables the state to address changing values and concerns within society.

The process of law reform, which tends to be a gradual one, is often a function exercised by a department or agency of the Government and is increasingly vested in specially established commissions. Other than these specialized agencies, the function of law reform is exercised by the department responsible for justice or is performed under the Attorney General.

Wherever this function is exercised, it is imperative that those performing this function should be independent of interference and direction of any other person or body so that the law they propose remains untainted with authority. Where they exist at institutional level, law reform agencies are independent and are set up in accordance with relevant legislation. The establishment of these bodies as independent bodies acts as a safeguard against interference by other organs of State and ensures that the best interests of society remain paramount throughout the reform process.

2.0 Independence

Law reform is increasingly vital to legal systems and nations.[1] Independent law reform has significant benefits.[2] In that regard, independent Law Reform Agencies (LRAs) have been established in many jurisdictions, mostly in the Commonwealth

[1] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' p. 1. Meeting of Commonwealth Law Ministers and Senior Officials: Accra, Ghana, 17-20 October 2005. Available at http://www.calras.org/Other/secretariat_paper.rtf Accessed 20 February, 2015.

[2] As above.

and often with success.[3] The Commonwealth Secretariat asserts that key features of LRAs include independence, expertise, focus on law reform and continuity.[4]

2.1 What is independence and what forms of it exist?

Independence is "the state or condition of being free from dependence, subjection, or control."[5] The definition further states that "political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any exterior power."[6] The Kenya Law Reform Commission exemplifies forms of independence by stating that internally, independence refers to the Commission‟s intellectual independence, that is, the willingness to make findings and offer non-partisan advice and recommendations to government without fear or favour.[7] Without this essential quality, it is observed, a Commission would be no different from a ministerial office or Government department operating under political direction, or a consultancy contracted to deliver a desired result.[8]

In Malawi, section 136 of the Constitution provides for independence of the Law Commission. It states that "the Law Commission shall exercise its functions and powers independent of the direction or interference of any other person or authority." Neither the Constitution nor the General Interpretation Act[9] define „independence‟. Even though the enabling statute of the Law Commission in Malawi, the Law Commission Act[10], does not define „independence‟, it refers to "independence and impartiality of the Commission" under the proviso to section 14 of the Act in relation to donations that it may receive. As such, contribution of resources whether financial or otherwise does not subject the Commission to the control, direction or authority of the donor or contributor.

The Commonwealth Secretariat observes that "an essential feature and a key advantage of an LRA is its independence, especially from Government but also from all others."[11] Further, the Commonwealth Secretariat notes that this independence has a particular value as it demonstrates that views of LRAs are objective and impartial and are not dependent on views of others.[12] It is rightly observed that the Executive and the Legislature frequently need and value specialist advice in the planning and formulation of law reform and that such advice is best provided by an

[3] As above.
[4] As above.
[5] Henry C. Black, *Black's Law Dictionary* (6th ed., West Publishing Co. 1990).
[6] As above.
[7] Kenya Law Reform Commission. Available at http://www.klrc.go.ke/index.php/about-klrc/mission-and-vision Accessed 20 February, 2015.
[8] As above.
[9] (Cap. 1:01) of the Laws of Malawi.
[10] (Cap. 3:09) of the Laws of Malawi.
[11] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 5.
[12] As above.

independent body.[13]

An LRA may also exercise independence in the recommendations it makes on the reform of any particular area of law, and should have no preconceptions and no in-built bias.[14] LRAs are bodies that have nothing to fear from expressing [any] views, after a sound law reform process.[15] It is therefore, important that they be independent in order to fully exercise their functions and meet public expectations. The independence of an LRA, together with its practice of wide public consultation, enhances the credibility of its work with everyone, including politicians of all parties.[16] Consequently, independence sets an LRA apart and enables it to be more vibrant, innovative and authoritative.[17]In that regard, the Commonwealth Secretariat asserts intellectual independence of the LRA as an important aspect of independence as follows:

> „the willingness to make findings and offer advice and recommendations to Government without fear or favour …… [The LRA must] be, and must be perceived to be, scrupulously free of political partisanship or association with private or special interests. It also means that the culture must be sufficiently robust to weather strong criticism at times, at all stages of the process. Few other institutions in our society are as accustomed as [LRAs] to sharing openly their work in progress …… Sadly, our immature media and political cultures make it very difficult for Governments to formulate and refine policy in this way…… Institutional law reform provides an outlet for this more considered policy development process, without attracting so much heat."[18]

However, the Commonwealth Secretariat states that the independence of LRAs is subject to checks and balances in certain areas since work programmes of LRAs are generally agreed between the LRA and the Government.[19] Further, LRAs are publicly accountable, in reporting to the Minister at least annually, in having all their reports and programmes of work placed before Parliament and published, and in complying with public sector requirements regarding, for example, openness, management and finances.[20] Besides, LRAs only make recommendations as to the reform of the law but, rightly, it is only Parliament that can change the statute law.[21]

2.2 Can public institutions truly be independent?

In view of the foregoing, the question arises as to where the line should be drawn between dependence and independence of LRAs especially when it comes to Government. LRAs are Government agencies; advisory in nature and function; and survive on Government budget. The importance of their independence cannot be

[13] As above.
[14] As above.
[15] As above.
[16] As above.
[17] As above.
[18] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 5-6. **Per** Weisbrot, p 38).
[19] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 6.
[20] As above.
[21] As above.

overemphasized. What then could be the nature of their independence? Intellectual independence may be easier for public institutions to attain. However, other forms of independence are more challenging because of institutional and functional setup. In the circumstances, arrangements pertaining to financial provisions, recruitment of officers, deciding programmes, reporting and accountability, among others, may or may not enhance true independence of any public institution, including LRAs. For many public institutions, Government is the source of funding, appointing authority for certain officers and recipient of reports from the institutions.

Further, Rees notes that, "Often we use the term independence as a shorthand description of the attributes or values which we hope will accompany autonomy from those with the greatest power."[22] Rees considers independence as a means of ensuring an assumed, or unstated, end.[23] He therefore compares judicial independence and independence in LRAs and concludes as follows:

> "Law reform commissions have leaders appointed by the Executive branch of Government for limited periods of time, the Executive usually determines most or all of the work to be undertaken by the Commission and decides what resources will be allocated to it, the Executive often holds much of the information needed by the Commission to complete its work and, finally, the Executive determines whether to accept and implement the Commission"s recommendations. Judicial-style independence is not really feasible in these circumstances."

Consequently, even if the Government may not interfere in any way with operations of public institutions, the perception that public institutions are not truly independent could be severe as a result of the highlighted arrangements.

2.3 Is independence a matter of fiction?

With so much reliance on „government", the question is whether independence of those performing the law reform function is actual or a figment of imagination. The Victorian Law Reform Commission (VLRC) states that it is a particular challenge for LRAs to convince the community and the Government of the continuing value of independent law reform bodies.[24] It is argued that LRAs will only be effective in enhancing deliberative democracy if they are and are seen to be separate from Government and if their advice is insulated from the political process.[25]

In order for the independence of LRAs to be actual, statements from the

[22] Neil Rees, 'The Birth and Rebirth of Law Reform Agencies' p. 12 Australasian Law Reform Agencies Conference 2008, Vanuatu, 10-12 September 2008. Available at http://www.lawreform.vic.gov.au/sites/default/files/ALRAC%2BPaper%2B_NeilRees.pdf Accessed 20 February, 2015.

[23] As above.

[24] Victorian Law Reform Commission, 'Law Reform in the Age of Managerialism'. Paper presented by Professor Marcia Neave at Australasian Law Reform Agencies Conference, 20 June 2002. Available at http://www.lawreform.vic.gov.au/publications-and-media/speeches/law-reform-age-managerialism Accessed 20 February, 2015.

[25] As above.

Commonwealth Secretariat might be illuminating: key ways in which Governments have to honour independence include:

(a) ensuring that appointments of Commissioners are non-political and free from conflicts of interest;
(b) that terms of reference for law reform projects are not designed to produce any particular outcomes; and
(c) that there is no improper Governmental or other external pressure upon the LRA to produce any particular recommendations.[26]

A great majority of LRAs are established by statute hence apart from the stability and stature that this tends to provide, the statute often ensures that the LRA has a separate existence from Government.[27]

Independence of LRAs may be perceived as fictitious because of particular arrangements. To illustrate this, in Australia, the VLRC made a submission to the Public Accounts and Estimates Committee of the Victorian Parliament about governance structures to underpin independence.[28] The submission argued that independence requires consideration of the following issues:

(a) *Procedures for the appointment and removal of the head of the body and of board members:* The VLRC suggested that independence requires, at the minimum, a provision preventing removal of the head of the body except for specified reasons. Further, the VLRC understood that the Government may abolish the body, but in that case, it would be politically accountable[29];
(b) *Mechanisms for the employment of staff:* The VLRC was of the view that staff should be employed by the Commission, rather than by a Government department[30];
(c) *Funding arrangements:* LRAs in Australia get their funding in different ways. In the State of Victoria, funding is channelled through the Department of Justice, which is arguably inconsistent with both the reality and the perception of independence. Among other alternatives, the VLRC suggested that funding and agreed performance should be negotiated between the Attorney-General and the Chairperson of the Commission, as is the practice in New Zealand[31];

[26] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 6.
[27] As above.
[28] Victorian Law Reform Commission, 'Law Reform in the Age of Managerialism' (n 24).
[29] As above. In Malawi, section 134 (1) of the Constitution provides for removal of the Law Commissioner and states that "the President may remove the Law Commissioner or other person appointed to the Law Commission on the recommendation of the Judicial Service Commission if the Judicial Service Commission is satisfied that the Law Commissioner or such other person appointed to the Law Commission, as the case may be, is not competent or otherwise incapacitated so as to be unable to perform the functions of his or her office."
[30] Victorian Law Reform Commission, 'Law Reform in the Age of Managerialism' (n 24).
[31] Victorian Law Reform Commission, 'Law Reform in the Age of Managerialism' (n 24).

(d) *Reporting arrangements:* Provisions which require the Attorney-General to table a Law Reform Commission Report in Parliament prevent the suppression of recommendations which the Government may find politically embarrassing. They are an important mechanism for protecting independence, which does not apply to all commissions[32];

(e) *Relationship with a central department:* a central department may provide various forms of support to the independent body. LRAs are sometimes linked to a particular Government department for administrative purposes. For instance, they may receive their budget through the department or share an information technology system. Such convenient administrative arrangements have the potential to blur the distinction between the department and the LRA. The VLRC suggested that the relationship between the bodies should be governed by clear understanding of the independent role of the public sector body, in relation to budget management, and reporting relationships. Negotiating a memorandum of understanding between the Attorney-General and the LRA may help to clarify this relationship.[33]

The submissions made by the VLRC raise valid concerns that may account for perceived fictitious independence mainly in terms of arrangements relating to recruitment, funding and relationship to a central department. It becomes difficult for LRAs to convince the public about their actual independence where the LRAs are weak and where institutional and functional arrangements seem to project the LRA as an extension of the executive arm of Government.

3.0 Functional and institutional independence

Most LRAs are functionally independent, within which category lays intellectual independence. But then who determines their business and what are the roles of various players in the functioning of an LRA?

3.1 Functional Independence

LRAs are expert, advisory law reform bodies, independent of government established to review a variety of areas of law and to recommend any changes needed.[34] Further, the programmes of work of LRAs need to be agreed with Government, and they are normally accountable to an organ of Government.[35] LRAs have lawyers of considerable ability and they are standing bodies, ready to take on

[32] As above. In Malawi, section 9 of the Law Commission Act provides for publication of reports and states that "the Minister shall publish any report he has received from the Commission in the *Gazette* or in such other manner as he shall determine with the advice of the Commission and shall do so within sixty days of the date of the report." Further, section 10 of the Act provides for laying of reports in Parliament and requires the Minister of Justice to lay any report of the Commission in Parliament during the next fourteen sitting days of Parliament after publication of the report.

[33] Victorian Law Reform Commission, 'Law Reform in the Age of Managerialism' (n 24).

[34] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 4.

[35] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 4.

new work quickly.[36] The work of LRAs has been summed up as follows:

> "Some areas of law are relatively standard or core subjects for law reformers. They include substantive law in areas such as criminal law, civil law, family law, commercial law, and public and administrative law. In fact, LRAs frequently review key areas of law which affect large sections of society. The criminal law is clearly central in any country, providing justice as well as seeking to safeguard victims. LRAs are also accustomed to investigating the law which covers all "life events", ranging through birth, marriage, children and death."[37]

However, different jurisdictions use different methods for identifying topics for review by LRAs.[38] In that regard, it is therefore important for LRAs to have a role in identifying them, often with Government.[39] In some jurisdictions, LRAs take the major part in identifying and deciding about their work.[40] In Malawi, section 7 (1) (a) of the Law Commission Act provides to the effect that the Commission shall, from time to time, prepare programmes of its work for any specified period not exceeding a calendar year setting out, in order of priority, matters for its consideration and shall publish a notice of any such programme in the *Gazette*. In view of the foregoing, LRAs are to a greater extent functionally independent. However, there is remarkable variation in who determines the business of LRAs. Whereas some LRAs, like the Law Commission in Malawi may determine their own business, other LRAs can only do so by involving Government, albeit with the LRAs taking the major role.

Suggestions for new reform projects may come from different sources in different jurisdictions, apart from the LRA and Government.[41] For example, courts, the legal profession, academic lawyers and professional associations may from time to time comment, with varying degrees of vigour, that particular areas of law merit review by LRAs.[42] Many LRAs therefore consult widely before settling on their programmes of work.[43] Further to this, the Commonwealth Secretariat asserts that when there is a mature and public balance between independence and accountability, an LRA

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[36] As above.
[37] As above.
[38] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 5.
[39] As above.
[40] As above.
[41] As above.
[42] As above.
[43] As above. In Malawi, section 7 (1) (b) – (e) of the Law Commission Act provides insofar as material that in pursuance of its powers and functions under the Constitution and this Act, the Commission:

> "(b) may invite the Attorney General, on behalf of the Government, or any Minister to refer to the Commission any matter for inclusion in its programme to be prepared and published under paragraph (a);
>
> (c) may conduct a public inquiry into any matter relating to law reform or development and, for the purposes of such inquiry, the Commission shall have the same powers as commissioners appointed under the Commissions of Inquiry Act; Cap. 18:01
>
> (d) may invite or receive from any person or body proposals or submissions pertaining to any matter relating to law reform or development for its consideration;
>
> (e) may, for purposes of considering any matter relating to law reform or development, consult any person or body or conduct public or national consultation whether by circulation of working papers setting forth preliminary views on the matter or otherwise".

should establish strong, constructive and open links with others, including the media, non-governmental organizations and other groups and individuals with an interest in law reform and in the particular areas of law under review at a particular time.[44] The role of various players in the functioning of LRAs, therefore, is to provide comments or make submissions that will add value to the work of LRAs. Apart from this, the various players may play other roles.

3.2 Institutional Independence

LRAs are public bodies that operate, are financed, whose officers are recruited and conduct day to day business within the public sphere. Within the Commonwealth, LRAs generally operate along similar lines, although there are no set rules on the documents produced or the procedure followed.[45] Key elements of the standard process are as follows:

(a) *Research:* When carrying out legal reform studies, personnel of the LRA or outside researchers initially analyze the present situation domestically. They conduct preliminary research to determine if the same problem has been dealt with in a comparable State. They also examine any relevant legislation, court decisions, academic literature and other sources of specialized information. Sometimes empirical research or surveys will be undertaken, and there may be discussions with specialists or with interested members of the public[46];

(b) *Discussion or working paper:* This describes the present law and its perceived shortcomings, and usually contains a number of possible options for reform. The discussion or working paper indicates preliminary preferred choices of the LRA and seek comment through consultation[47];

(c) *Consultation:* An effective consultation process is done to let all interested parties express their views on the reform process. The necessity for consultation arises from the very nature of an LRA, which is neither a law-making authority nor a judicial body appointed to resolve legal issues. Its role is to provide advice and recommendations to Government (the Executive) on what the law should be and how it can better reflect values of society[48];

(d) *Analysis of responses and further research:* Comments gathered through the consultation process are analyzed. Further revisions and research may be undertaken to ensure that the report reflects, or at least considers, relevant observations received[49];

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[44] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 6.

[45] Gavin Murphy, 'Law Reform Agencies' p. 54. The International Cooperation Group, Department of Justice of Canada, 2004. Available at http://www.justice.gc.ca/eng/abt-apd/icg-gci/lr-rd/lr-rd.pdf Accessed 20 February, 2015.

[46] As above.

[47] As above.

[48] Gavin Murphy (n 45).

[49] Gavin Murphy (n 45) 56.

(e) *Final report:* Once the final report has been drafted and approved by all Commissioners, it is submitted to Parliament through the designated Minister for consideration. The value of the final report depends to a large extent on the quality of research and appropriateness of its recommendations.[50]

In terms of financial resources, the level of funding provided to a law reform body naturally affects its overall activities.[51] In the United Kingdom, the Government funds the totality of operations of the Law Commission for England and Wales.[52] The Law Commission of Canada receives all it"s funding from the Federal Government in Ottawa.[53] The New Zealand Law Commission is entirely funded by the Central Government.[54] In Australia, the Federal Parliament fully funds the Australian Law Reform Commission.[55] In Malawi, section 14 of the Law Commission Act provides for funding of the Commission and states the following:

> "(1) The Government shall adequately fund the Commission to enable it to exercise its powers and perform its duties and functions, and so as to ensure its independence and impartiality.
> (2) The Commission may receive any donations of funds, materials and any other form of assistance for the purposes of its duties and functions:
> Provided that no such donation shall jeopardize or compromise the independence and impartiality of the Commission."

In general, therefore, LRAs receive their funding from Government. However, some LRAs receive funds from other sources apart from Government. For instance, apart from funding by the Provincial Government out of general revenues, the Law Reform Commission in the Canadian province of Manitoba functions with the help of grants from the provincial Department of Justice and the Manitoba Law Foundation.[56] Similarly, in view of section 14 (2) of the Law Commission Act, the Law Commission in Malawi is allowed to receive donations of funds from other institutions or organizations apart from Government. However, the provision makes it clear that such donations shall not compromise its independence.

Corollary to the issue of independence is staff of the LRAs with respect to recruitment. LRA officers are indispensable and execute the bulk of the work of the LRA. Among Commonwealth LRAs, opinion varies widely on the question of whether Commissioners should be full-time or part-time.[57] However, Murphy argues that "it seems reasonable to suggest that, other things being equal, an agency with full-time members, or at least some full-time representation, is likely to be a more efficient instrument for law reform than one that depends exclusively on part-time

[50] Gavin Murphy (n 45) 57.
[51] Gavin Murphy (n 45) 28.
[52] As above.
[53] As above.
[54] As above.
[55] As above.
[56] Gavin Murphy (n 45) 30-31.
[57] Gavin Murphy (n 45) 34.

representation."[58] In Canada, it has been suggested that the membership of LRAs should only consist of legally trained full-time members.[59] Another view is that the chairperson of an LRA should be a superior court judge on leave from judicial duties to guarantee that the LRA will not be afraid to make recommendations that may be critical of the government.[60] In comparison, section 133 of the Constitution of the Republic of Malawi provides that the Law Commission shall consist of:

> "(a) a salaried Law Commissioner who shall be appointed by the President on the recommendation of the Judicial Service Commission and who shall be a legal practitioner or a person qualified to be a judge; and
> (b) such number of other persons as the Law Commissioner in consultation with the Judicial Service Commission may appoint from time to time and for such time as they are required on account of their expert knowledge of a matter of law being then under review by the Law Commissioner, or on account of their expert knowledge of other matters relating to a legal issue being then under review."

The appointment of non-legal commissioners to LRAs in Canada is considered important to achieving a good balance of views.[61] There are arguments that contentious issues are designated as policy matters not appropriate for legal treatment.[62] However, lawyers are concerned with law and legal matters only, hence they do not take positions on fundamental value questions, nor do they speculate.[63] Lawyers, therefore, draw on expertise in an objective area of decision where logic applied to settled doctrine produces legal answers.[64] In the circumstances, the view is that when it comes to law reform, there are no experts. There are various complementary skills and experience that are necessary to the process, and the critical question is how these attributes should be fused to get the best results.[65]

In contrast, exclusive appointment of commissioners with a legal background finds favour in the United Kingdom.[66] The five full-time commissioners of the Law Commission for England and Wales must be legally trained, while all five members of the Scottish Law Commission also come from the legal community.[67] However, not all Scottish commissioners serve on a full-time basis.[68]

In the final analysis, Murphy argues that of fundamental importance is the proper mix of talent and skill necessary to ensure a positive law reform environment.[69] In that regard, it has been remarked that, "[N]o legislative body is going to act upon the

[58] As above.
[59] As above.
[60] As above.
[61] Gavin Murphy (n 45) 36.
[62] As above.
[63] As above.
[64] As above.
[65] Gavin Murphy (n 45) 36.
[66] Gavin Murphy (n 45) 37.
[67] As above.
[68] As above.
[69] As above.

suggestion of any research body unless the credentials of that body for disinterestedness, competence and public interest are beyond question."[70] Further, a British observer suggested that Law Commissioners should have the following attributes: an inquiring mind; awareness of the possible consequences of any proposed changes in the law; and possession of a sound understanding of the attitudes of the society they serve.[71]

Apart from Commissioners, LRAs need other personnel, including research personnel. In Malawi, section 4 of the Law Commission Act provides for the appointment of other professional or specialized staff of the Commission who "shall be employed in the service of the Commission, subordinate to the Law Commissioner, … as the Commission shall consider necessary for the performance and exercise of the functions, duties and powers of the Commission, and who shall be officers in the public service appointed by the Commission". The staff is employed or appointed on terms and conditions of service as approved by Parliament, from time to time.

It is important that the appointment process of officers of an LRA should not compromise the intellectual independence of an LRA. In order for LRAs to exercise greater independence, the Commonwealth Secretariat states that an LRA should be composed of Commissioners and staff who do not have strong allegiances, who have open minds and who are sufficiently resilient not to be persuaded by any pressure other than sound argument.[72] These would therefore be critical factors to consider in making appointments and in recruitment in LRAs.

Other than on the issue of effectiveness, it appears that whether commissioners or staff are permanent or whether commissioners or staff are legally trained, this is unlikely to affect the independence of an LRA.

4.0 Why should LRAs be independent?

LRAs are governance institutions that contribute towards a participatory process of governance. In some countries, this function is undertaken under a department of Government whereas in others, by a separate body. These scenarios beg the question whether the location of an LRA can and does ensure its independence.

Rees notes that the strongest criticism made of the former Law Reform Commission of Victoria by those who abolished it was that it lacked independence from the executive branch of Government.[73] He further states that whether this criticism was valid or fair is ultimately beside the point.[74] However, Rees argues that there was

[70] As above.
[71] As above.
[72] Commonwealth Secretariat, 'Law Reform Agencies: Their Role and Effectiveness' (n 1) 5.
[73] Neil Rees (n 22) 12.
[74] As above.

sufficient evidence, most notably in the area of senior staff cross-overs, to permit the allegation that „[m]any who have studied the record of the Commission in recent years believe that it has been at least as eager to provide the right answer for the Attorney-General on a variety of references as it has been to fearlessly advance the cause of independent law reform".[75]

In considering an appropriate level of independence for an LRA, Rees is of the view that much of the emphasis must be upon what Justice Kirby referred to as „product differentiation": the need to distinguish that which is produced by the Commission from that which could be produced by the relevant Government department, or by a consultant appointed to undertake a nominated inquiry.[76] Rees asserts that it is also important for LRAs not to participate in debate about the correctness or otherwise of their recommendations.[77] Once a report is finalized, it is necessary, in his view, to withdraw from the stage and to allow others to debate what the response of Government should be.[78] That, it is submitted, would be consistent with the view that LRAs must be, and be seen to be, independent.[79] It is, therefore, very important that an LRA, whether it falls under a department of Government or is a separate body, should be independent.

5.0 Conclusion

The importance of independence of LRAs is beyond discussion. It is an ingredient of law reform that must be provided for, nurtured and guarded jealously. In essence, independence of an LRA must be real and demonstrable. Generally, greater independence of LRAs would also ensure sufficient resilience against persuasion by any pressure other than sound argument.

Although intellectual independence must be fiercely guarded, as public agencies, LRAs are accountable and must operate within boundaries defined by their constitutive legislation. Arrangements pertaining to financial provisions, recruitment of officers, deciding programmes, reporting and accountability, among others, have a probability of influencing the independence of LRAs and other public institutions. However, if strict adherence is given to constitutive legislation, whether an LRA falls under a department of Government or is a separate body, such arrangements can be managed in favour of independence so that LRAs should not only substantively be, but also be seen, to be independent.

[75] As above.
[76] As above.
[77] As above.
[78] As above.
[79] As above. Analogously, in *R v. Sussex Justices ex p McCarthy* [1924] 1 KB 256, 259 Lord Hewart CJ stated that, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

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