

## Benefits of an Independent Law Reform Commission<sup>1</sup>

| by Dato' Seri Mohd Hishamudin Yunus |

Law reform is very important to any legal system and to any country. For the law of a country cannot remain static but must keep abreast with the political, legal, economic and social developments of society. Invariably, there will be areas where the law is unclear, complicated or inaccessible. One of the most effective ways to bring about legal change or to improve the law is by establishing an independent law reform body. Thus, over the last 50 years or so, independent law reform bodies have been established in many countries, mostly in the Commonwealth.

### Law reform bodies

Various terms, among them Law Reform Agency, Law Reform Committee, Law Commission and Law Reform Institute, have been used when referring to law reform bodies. For present purposes, we shall refer to such a body as a "Law Reform Commission". There are about 60 Law Reform Commissions throughout the world.

The establishment of these Commissions stems from the realisation that it is virtually impossible for the legislature alone (i.e. Parliament) to monitor every area where law reform may be needed.

In order to better appreciate the purpose or what should be the function of a Law Reform Commission, it is perhaps

useful to refer to section 3 of the UK Law Commission Act 1965, which provides that the Law Reform Commission's task is:

"... to take and keep under review all the law of [England and Wales] ... with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law ..."

Some law reform bodies have been in existence for many years: for example, India (55 years); England, Wales and Scotland (40 years); Australia (30 years) and Sri Lanka and Pakistan (over 25 years). Others have been formed far more recently. For example:

- Canada (established in 1971) — abolished in 1992 and replaced by the Law Commission of Canada in 1997;
- Malawi (established in 1998);
- Northern Ireland — being established in 2007, to replace an Advisory Committee; and
- Victoria (Australia) — several different bodies have succeeded one after the other since 1974 — new Law Reform Agency established in 2001.

<sup>1</sup> Adapted from a paper delivered at the Malaysian Bar Seminar on "Creating a Law Reform Commission in Malaysia" held in Kuala Lumpur on 12 October 2016

## General characteristics

Law Reform Commissions are expert advisory bodies, independent of government. They are established to review various areas of law and to recommend changes. Some areas of law fall naturally within the scope of the work of law reform commissions. These include areas such as criminal law, civil law, family law, commercial law, and public and administrative law.

Law Reform Commissions are generally *independent* of the government that appoints them because of the general recognition of the value of independence: that law reform has far better prospects of general acceptance if it is produced independently of the government and of all particular interest groups. The establishment of law reform bodies distinct from the government apparatus is predicated on the assumption that independent thinking will produce better law.

An independent Law Reform Commission is composed of Commissioners and staff that 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. It is a body that has nothing to fear from expressing its view.

However, law reform bodies are merely advisory in nature. The task of an independent Law Reform Commission is to recommend changes in the law but implementation is a matter usually for Parliament in the form of primary legislation or occasionally for the Executive in the form of delegated legislation. This means that the Executive or Parliament has the discretion either to act or not to act on their recommendations.

## Malaysia Law Reform Committee

The establishment of the Malaysia Law Reform Committee (MLRC) in 2009 was the first move to establish a general law reform body in the country. Its primary purpose was to review and suggest changes to outdated laws. Unfortunately, it was not an independent law reform body and was headed by a minister in the Prime Minister's Department responsible for judicial and legal affairs.

The members of the MLRC are mainly legislators from the ruling party and officers from the Attorney General's Chambers, with one representative each from academia and the Bar Council. None of the members of the committee are devoted to the task full time. In terms of productivity, the LRC does not appear to have made much headway and its members of the LRC have conceded that what the country needs is a proper Law Reform Commission. In the words of Azmi Sharom, the member of the committee representing academia:<sup>2</sup>

“The MLRC also did not have any real authority and hence, if I am to be brutally honest, we were not taken particularly seriously.

“To give credit where credit is due, V K Liew (who was chairman before the last general election), was of the opinion that the MLRC was not working and what was needed was a proper Law Reform Commission.

“This was supported by the majority of the committee and the current chairman, Nancy Syukri [*sic*], also shares this view.”

2 From his “Brave New World” column in *The Star*, “Towards more open legal reform” (19 February 2014) <<http://www.thestar.com.my/opinion/columnists/brave-new-world/2014/02/19/towards-more-open-legal-reform/>>

## Aspects of independence

The independence necessary for a law commission to be effective must include not only independence from governmental control or influence, but also independence from all other external influence:

- (a) The Commission must not only be structurally independent, it must also be intellectually independent.
- (b) The appointment of its members must be made with the view to them being independent. The normal practice of appointment by the King on the advice of the Cabinet or Minister would not serve this purpose. The selection process has to be transparent. There are various models from other jurisdictions to learn from.
- (c) In terms of tenure, the Commissioners should enjoy a term of service of a reasonable length (say, of six or seven years), with opportunity for extension of service. They should not be susceptible to summary removal by the government, but should enjoy a security of tenure similar to that accorded to Federal Court judges.
- (d) The Commission should be given the power to appoint its own staff. In other words, in terms of staffing, it should be independent of the Public Services Department.
- (e) The government must give the Commission adequate funds so that it can employ high-quality staff, including lawyers and experts.
- (f) The statutory provisions on the operation of the Commission must provide for openness and for public participation. The reports of the Commission must be published and made available to all, including members of the public.

But independence cannot be absolute. The Commission has to be in the form of a statutory body and answerable to Parliament. It would have to depend on the government for funding.

The Law Reform Commission's work programmes have to be agreed between the Commission and the government. The Commission should be publicly accountable and should submit its reports to the particular Minister responsible for law reform annually. The Minister should have no power to withhold the reports but must submit them to Parliament as soon as practicable.

The Commission must be transparent in its reporting, and this means it must point out any differences of view in its reports. It is essential that the law stipulates that the Commission's reports must be tabled and discussed in Parliament. If the Commission's recommendations were to be rejected or modified, the Commission and the public should be told the reasons.

## Advantages of independence

The advantages of an independent Law Reform Commission include the following:

(i) *Quality of work*

The recommendations of an independent Commission tend towards quality when they are the product of the efforts of a non-partisan body and of independent thinking, free from political or governmental or private patronage or influence, and made without fear or favour but in accordance with what the Commission thinks is best for the society.

(ii) *Respect and confidence*

Where the Commission is seen to be independent of the government or other influence, its recommendations will be respected and trusted in the eyes of the public. Independence brings credibility.

(iii) *Will attract best brains*

An independent Commission can attract the best brains and people of good standing and reputation to be its members and staff. The Commission and its staff can take pride in their work, the product of expertise and rational thinking.

(iv) *Ensures support*

Where the Commission is independent, it will be trusted and respected, and will enjoy the support of public officials, academics, experts and members of the public alike. Any request by the Commission and any inquiry conducted by the Commission will be met with willing and full-hearted cooperation without fear or favour. They will be interested and proud to be associated with or participate in the Commission's projects or programmes.

(v) *Expertise*

Another benefit of an independent Law Reform Commission is that it builds up a fund of expertise, knowledge and specialist contacts in both the law and law reform. This is important for successful law reform. It increases the likelihood of consistently high-quality work. The Commission's reputation and independence also attract to it over the years Commissioners, staff and consultants of great ability.

(vi) *Focus*

Independence will allow a Commission to have a central focus and purpose, and saves it from the distractions, interruptions and trouble-shooting normally faced by ministries and government departments. There is substantial benefit in having Commissioners and staff

whose work is devoted to only improving the law and nothing else. Focus on the task to be done is achieved through the appointment of dedicated and independent Commissioners and tailor-made internal set-up.

(vii) *Continuity*

An independent Law Reform Commission is not an ad-hoc task force. The establishment of one is meant to be a permanent body. Continuity enables a Law Reform Commission to:

- acquire and apply its expertise long term;
- gain considerable experience in the processes that are most useful for the complex task of law reform;
- avoid transient bodies each having to re-learn the same skills; and
- boost productivity and, at the same time, provide a better opportunity to establish a sound reputation.

The Law Reform Commission as a permanent body justifies investing substantially in modern technology, accommodation and library facilities.

Finally, and importantly, continuity ensures a consistent approach to the law reform process.

**Conclusion**

Malaysia gained independence in 1957, 60 years ago. Naturally, many of our laws need to be repealed or reviewed. Yet, to date, we do not have an independent Law Reform Commission to do the work. Therefore, to establish one is a step that is long overdue. However, care must be taken to ensure that it is truly an independent body that is credible and will command public trust and respect. The mistake made with the MLRC must not be repeated. **LH-AG**

**About the author**



**Dato' Seri Mohd Hishamudin Yunus** (mhy@lh-ag.com) served 23 years on the Bench and wrote close to 750 judgments in the High Court and the Court of Appeal before retiring in 2015. He is a consultant with Lee Hishammuddin Allen & Gledhill.