

# RULE OF LAW

INSTITUTE OF AUSTRALIA

27 January 2011

Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

*By email to: legcon.sen@aph.gov.au*

Dear Committee Secretary

## **Legal and Constitutional References Committee inquiry into Australian Law Reform Commission**

The Rule of Law Institute of Australia (RoLIA) has prepared a submission addressing the above inquiry.

The terms of the inquiry ask that the submissions consider the following features of the ALRC:

- a) its role, governance arrangements and statutory responsibilities;
- b) the adequacy of its staffing and resources to meet its objectives;
- c) best practice examples of like organisations interstate and overseas;
- d) the appropriate allocation of functions between the ALRC and other statutory agencies; and
- e) other related matters.

## RoLIA

RoLIA is an independent non-profit association formed to uphold the rule of law in Australia.

RoLIA was established in September 2009 with the following objectives:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

Sir Ninian Stephen identified four of the principles which are embodied in the spirit of the rule of law when he said:

“The first of the four principles is that government should be under law, that the law should apply to and be observed by government and its agencies, those given power in the community, just as it applies to the ordinary citizen; the second is that those who play their part in administering the law, judges and solicitors and barristers alike, should be independent and uninfluenced by government in their respective role so as to ensure that the rule of law is and remains a working reality and not a mere catch phrase; the third is closely associated with the second, it is that there should be ready access to the courts of law for those who seek legal remedy and relief; the fourth is that the law of the land, which rules us, should be certain, general and equal in its operation.” *(Source: 1999 Annual Lawyers Lecture St James Ethics Centre)*

The Hon Justice J J Spigelman, Chief Justice of the NSW Supreme Court, and also Patron of RoLIA, said of the rule of law:

“A State cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influences, including inducements and pressures, are inconsistent with each of these objectives.

Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and an outcome. Predictability requires a process by which the outcome is directly related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome.

Improper influence, whether political pressure or bias or corruption, distorts all of these objectives. So, of course, does incompetence and inefficiency.” (Source: Address at International Legal Services Advisory Council Conference 20 March 2003)

## a. The ALRC role, governance arrangements and statutory responsibilities

### The Australian Law Reform Commission

In 1957 the then Chief Justice of Australia, Sir Owen Dixon, suggested that Parliament should establish a national law reform body. At the Tenth Legal Convention of the Law Council of Australia held in Melbourne that year the Chief Justice said:

“Is it not possible to place law reform on an Australia wide basis? Might not there be a Federal Committee for Law Reform? In spite of the absence of constitutional power to enact the reforms as law, it is open to the federal legislature to authorise the formation of a body for inquiry into law reform. Such a body might prepare and promulgate draft reforms which would merely await adoption.”

Past president the Honourable Michael Kirby AM CMG has described the ALRC thus:

“Since its creation, the ALRC has been, and remains, a sensitive barometer of injustice and inefficiency in the law.”<sup>1</sup>

The *Law Reform Commission Act 1973* which created the ALRC was passed with the unanimous support of all parties and both Houses of Parliament. The ALRC began operations in 1975 and is now operating under the *Australian Law Reform Commission Act 1996* (Cth) (“ALRC Act”).

Its past presidents have included such distinguished legal figures as the Honourable Michael Kirby AM CMG, the Honourable Murray Wilcox AO QC, the Honourable Xavier Connor AO QC, the Honourable Elizabeth Evatt AO, Mr Alan Rose AO and Emeritus Professor David Weisbrot AM.

The Attorney-General gives references on particular areas of law to the ALRC and as per section 21 of the ALRC Act, the ALRC advises on reform to those areas. Except for receiving references, the ALRC performs independently of the Attorney-General. Recommendations are made not only, and sometimes not at all, for changes to legislation, but in a comprehensive way covering multiple agencies and players that affect the area of law.

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<sup>1</sup> Kirby, M., ‘The ALRC – A Winning Formula’ (2003) 82 *Reform* 58.

## The practical case for Why Law Reform?

### ***Laws not only come at a monetary cost, they have the potential to curtail individual rights and liberties***

- Bad laws both waste resources and can adversely impact individual freedom.
- For example, laws that are unclear can give rise to expensive litigation.
- If the meaning of a law is not clear, those affected and those required to enforce the law waste individual energy, time and money in efforts to clarify the meaning.
- Or those affected don't do things out of caution - which the Parliament or courts never intended to prohibit. The cost is a loss of opportunity and possibly liberty and freedoms.
- Laws might have been good when enacted or decided, but because of changing circumstances become outdated and thus bad.
- Other laws were always bad from the beginning - poorly thought out legislation and badly decided cases.
- Unnecessary complexity is another evil. Some statutes and court decisions are so complex that it takes effort to unravel them or are ignored because of the effort needed to penetrate them. Complexity also increases the risks of mistakes.
- There is likely to be substantial economic gain to the community by having good laws - laws that are not unnecessarily restrictive, laws that are easy to understand and clear in their application, and laws that are kept up to date.
- In recent years, we have seen court cases that cost monumental sums of money and take what seems to be an inordinate length of time. Whether in criminal proceedings, litigation or in governmental activities, there is always scope to take a radical look at the way things are done, to see if there is scope to improve efficiency without reducing justice.
- A society in which disputes can be dealt with expeditiously, economically and efficiently is likely to be a society with less frustration which does not resort to non-legal or outright illegal activity.

### ***The rule of law and law reform***

Under the rule of law, it is important that law reform keep pace with changing community behaviour expectations and standards. If the law falls behind changes which are occurring in

the community, confidence in the legal system will be undermined and there may develop disrespect for legal institutions and laws of Australia.

The record of the ALRC in conducting inquiries and reporting on law reform in a diverse range of inquiries is testament to the need for sound law reform. The ALRC's reports include, for example: *Secrecy Laws and Open Government in Australia* (2010), *Privilege in Perspective: Client Legal Privilege In Federal Investigations* (2008), *Fighting Words: A Review of Seditious Laws in Australia* (2006), *Same Crime, Same Time: Sentencing of Federal Offenders* (2006), *Uniform Evidence Law* (2006), *Genes and Ingenuity: Gene Patenting and Human Health* (2004), *Seen and heard: priority for Children in the legal process* (1997), and *Collective Investments: Superannuation* (1992).

The varied reports are relevant for all Australians, and the ALRC as an independent body is in a unique place to investigate issues such as secrecy in government, judicial behaviour and the court process. Australians are free to make submissions and know that their views will be heard and will be considered impartially. The continued existence of the strong ALRC is imperative to a fair and decent society in Australia.

### **What have been the ingredients for the success of the ALRC?**

It is generally agreed that the ALRC has been a first rate institution for many years and one which is capable of developing quality solutions to legal, social and economic problems which are in need for law reform. The ALRC works on an international scale to ensure the best options for law reform are considered. For example, during most of his tenure, Professor Weisbrot was not only President of the ALRC, but also President or Vice-President of the Commonwealth Association of Law Reform Agencies (CALRAs) – the peak international association of law reform agencies, comprised of the 60 law reform bodies in the Commonwealth world, and a few outside the Commonwealth (such as Ireland).

It is worth citing the reasons for the ALRC's success, among which are that it:

- is a body created out of bi-partisan politics;
- has sound legislative footing which is designed to ensure that it does its job with due diligence – removed from the executive government, the Courts and the Parliament – its independence and impartiality has never been brought into question;
- has been led by quality Presidents and Commissioners, traditionally well-resourced and supported by able and dedicated research staff;
- has been given meaningful and useful references which have assisted the laws and the Australian community;
- has developed a modus operandi which has inspired community confidence in the ALRC and its reports. In this regard the process of developing discussion papers, draft

and final reports, accompanied by intense community consultation has served as a model for other inquiries both in Australia and offshore. It has been a rare event for an ALRC report or draft report to become politicised – this has been so because the Commission has made every endeavour to reach out to those individuals and groupings who might be impacted by its reports and recommendations; and

- has successfully educated the community on its work and reports. In this regard it has fostered links with tertiary legal educators and encouraged state and territory governments to give secondary school students access to courses in legal studies.

### Implementation of ALRC reports:

The ALRC publishes information about the implementation of its reports in its Annual Reports. The implementation rate is very high at 90%, but that is the total percentage for every report since the beginning of the ALRC.

To examine how soon recommendations become law, reports from the last ten years are considered. Only reports up until Report 108 were reported on in the 2009-2010 Annual report, and of those 14 reports published from 1998-2008, only 5 were substantially implemented, 7 were partially implemented and 2 were under consideration. Overall, it appears that either some of the report recommendations are not found to be worth implementing or the ALRC's important law reform recommendations are taking a lengthy period to be implemented, and considering the length of inquiries, that important law reform is a long time in the making. There is certainly not a 90% rate for the ten year period, and given the high overall rate over the life of the ALRC, indicating the usefulness of the ALRC recommendations, the latter situation is suggested.

RoLIA believes that there needs to be greater transparency in government in relation to consideration of ALRC reports, including the timing of such consideration, in order to avoid the wastage of scarce law reform resources.

For example, Freedom of Information reforms suggested together with the Administrative Review Council in 1995 were only recently implemented in 2010. Those changes have been much celebrated as improving the openness and transparency of government. The recommendations in the 2006 ALRC report *Fighting Words* were only made law in 2010.

Accordingly, RoLIA recommends the Attorney-General be required to table a list of those ALRC recommendations, which have not been implemented, to Parliament each year, as has been introduced for the United Kingdom Law Reform Commission, and detailed later in this submission.

## Governance and Number of Commissioners

Currently, the Commission comprises one full-time president and four part time commissioners. The Governor-General appoints commissioners of the ALRC.<sup>2</sup> The President must be a full-time commissioner.<sup>3</sup>

In October 2010 at the Senate Estimates Hearings Legal & Constitutional Affairs Committee examination of the Attorney-General's Department, the ALRC representative admitted the effective impact of the budget cuts is the ability to maintain only a single full-time commissioner (being the President). Part-time commissioners who are sitting Judges are not paid for their services, so there are no practical fiscal limitations on appointing additional part time commissioners. In the past there have generally been three full time commissioners and three part time commissioners.

### ***Current Commissioners:***

<b>Name</b>	<b>Position</b>	<b>Term</b>	<b>Term ends</b>	<b>Prior terms</b>
Rosalind Croucher	President (Full time)	5 years	December 2014	3 years as full time commissioner (completed approx 2 years 10 months)
Justice Berna Collier	Part-time Commissioner	3 years	October 2013	3 years
Justice Arthur Emmett	Part-time Commissioner	6 months	April 2011	-
Justice Bruce Lander	Part-time Commissioner	6 months	April 2011	-
Justice Susan Kenny	Part-time Commissioner	3 years	July 2012	Two 3 year appointments

RoLIA contends that if the spirit of the ALRC's foundation Act were that the Commission be comprised of more than one full time member then that should be the state of affairs until the Parliament otherwise determines. RoLIA makes the following points in relation to this matter:

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<sup>2</sup> ALRC Act, s 7.

<sup>3</sup> Ibid.

- It is important that a key law reform body have dedicated full time staff (appointed under terms of engagement applicable to federal court judges, except as to the time period of their appointment) who are in a position to liaise on law reform issues to ensure that ALRC inquiries maintain integrity and quality).
- A multi member commission provides checks and balances on decision making and staffing appointments.
- Full time commissioners manage administrative and financial decisions that are not the responsibility of part-time commissioners.
- The President is now responsible for managing all references, when references deserve at least one full time commissioner dedicated solely to them.
- A multi-member commission assists with strong leadership and management when the chair is unable to perform duties or is on leave.
- Most comparable law reform bodies have more than one full time commissioner.

The main law reform commissions of the following countries & Australian states full time members:

New Zealand	5
Hong Kong	0
United Kingdom	5
Ireland	2
South Africa	1
NSW	2
VIC	1
QLD	1

Since the resignation of then Deputy President, Professor Brian Opeskin, on 22 September 2006 the Deputy's position has remained vacant. The Deputy President can act in the position of President and must be a full time member.<sup>4</sup> If the President or Deputy President

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<sup>4</sup> ALRC Act, s 8(1).

is absent the Attorney-General can appoint a full-time commissioner to act in their place.<sup>5</sup> As there is currently only one full-time commissioner - who is the President - there is no-one who can be appointed to act in the place of President or in her absence on leave, or when overseas.

As per section 6(1) of the ALRC Act there must be a president full time, a deputy president full time and at least 4 other members. Section 6(2) states that the performances of the Commission's functions, and the exercise of its powers, are not affected merely because of one or more vacancies in its membership. The *Financial Framework Legislation Amendment Act 2010*(Cth), Sch 2 amends the make-up of the ALRC by removing the requirement for a deputy president<sup>6</sup> and limiting the ALRC to six members and a President.<sup>7</sup> These new provisions will be in force from July 2011 onwards, six months from when this submission will be made. RoLIA sees no reason to remove the deputy president and limit the ALRC members.

Currently there is no limit to full-time and part-time commissioners. In the past there have generally been three full-time commissioners and three part-time commissioners.

Mr Russell Stewart (formerly a partner specialising in corporate and trust law at Minter Ellison) has prepared the following opinion on the matter of the legality of the number of Commissioners and Board of Management, a matter which was raised by Senator Barnett during Senate Estimates 2010:

## **Rule of Law Institute of Australia**

### ***Consideration of issues relating to the Australian Law Reform Commission ('Commission')***

#### **Constitution of the Commission**

The Commission consists of a President, Deputy President and at least 4 other members (ss.6(1) Australian Law Reform Commission Act 1996 ('Act').

'The performance of the Commission's functions, and the exercise of its powers, are not affected merely because of 1 or more vacancies in its membership.' (ss. 6(2) of the Act).

'There is a Board of Management of the Commission ... ' (section.27 of the Act).

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<sup>5</sup> ALRC Act, s 13.

<sup>6</sup> *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2.

<sup>7</sup> *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 11.

'The Board has power to do everything necessary or convenient to be done for, or in connection with, the performance of its functions.' (ss. 28(2) of the Act).

'Anything done by the Board in the Commission's name, or on its behalf, is taken to have been done by the Commission.' (ss. 28(3) of the Act).

The Board consists of the President, Deputy President and the other full time members of the Commission (s.29 of the Act).

Provision is made for conduct of meetings of the Board (sections 30 and 31).

### **Current Position of the Commission**

At various times since the Commission was established in 1996, there has always been a President, but not always Deputy President and 4 other members.

It appears that currently, Professor Croucher is President and is the sole full time Commissioner.

Recently, Justices Arthur Emmett and Bruce Lander have been appointed as part time Commissioners.

This means that Professor Croucher is also the sole member of the Board.

### ***Compliance with the Act***

Senate Legal and Constitutional Affairs Committee of 18 October 2010 discussed the legal implications of the Commission having no full time Commissioners other than the President.

Senator Barnett asked whether the Commission was 'improperly constituted'.

At a meeting of the Committee on 24 May 2010, Mr Wilkins, indicated that the Commission was not 'improperly constituted'. In effect, (referred to Section 6(2)) he implied that the vacancies did not legally invalidate the constitution of the Commission, so the Commission was validly constituted.

### **Analysis**

Mr Wilkins seems to be correct, that the Commission remains validly constituted even if the full complement falls below the full team envisaged by ss 6(1).

That is because the intention of ss 6(2) seems clear, that one or more vacancies does not cause the Commission to cease to be validly constituted.

For the Commission to cease to be validly constituted would have highly undesirable consequences - for example, for the employment of staff, for current arrangements for occupancy and other contractual arrangements to which the Commission is a party.

However a more problematic area is compliance with the provisions for operation of the Commission through the Board.

For a lone full time Commissioner to be able to carry on, you have to be able to read ss 6(2) as meaning that the Commissioner can on her own carry out all the functions and powers of the Commission as a Board in accordance with sections 30 and 31 of the Act.

We don't know how Professor Croucher goes about complying with the requirements for the operation of a Board under sections 30 and 31 of the Act. If it were to be found that ss 6(2) is not sufficient to authorize Professor Croucher's actions in exercise of the powers and functions of the Commission, acting on her own as the Board, her position could be in serious difficulties.

There is an analogous distinction between the legal existence of a company and the exercise of the company's powers and functions by its board of directors - a matter discussed in case law. An incorporated body can be constituted validly, but you have to consider as a separate question, how actions of the incorporated body can be effective as a matter of law.

### **Conclusion**

For the Commission to have a full time Commissioner as President, but no Deputy President and no other full time members, in my opinion, does not result in the Commission ceasing to exist as a matter of law.

However I do suggest that for the Commission to have a lone full time Commissioner as President, but no Deputy President and no other full time members, leaves uncertainty about whether the President acting alone, purporting to act as a Board, can properly satisfy the requirements of sections 30 and 31 in exercising the Commission's powers and performance of its functions.

Appointment of an additional full time Commissioner would cure the problem, as would legislative amendment to clarify the position.

Russell Stewart

5 December 2010

### **Board of Management**

The ALRC Board of Management consists of the President, Deputy President and full-time commissioners.<sup>8</sup> It participates in general oversight of the ALRC operations including budget and policies. As discussed in Mr Russell Stewart's opinion, in 2010 there were no full-time commissioners other than the President engaged at the ALRC, so Professor Croucher was the only person in attendance at the 2010 Board of Management meeting. With the current membership of the Commission, Professor Croucher will be the only person attending the 2011 meetings.

A 1994 House of Representatives Committee Report recommended part-time commissioners to have a separate role and not participate in Board of Management decisions as it was regarded inappropriate.<sup>9</sup>

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<sup>8</sup> ALRC Act, s 29.

<sup>9</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, 'Law Reform: the challenge continues', May 1994, xxi (Recommendation 18).

A Board of Management consisting of only one person can best be described as a unique arrangement with quite serious corporate governance implications. It does not sit well with Section 30 of the ALRC Act, which regulates board meetings and requires majority voting for questions. A quorum is the majority of the Board.<sup>10</sup> However, more importantly, it has no checks and balances of accountability inherent in a multi-person board.

The 2009 Board meeting had three persons attending as at the time there were two full time commissioners and one president.

RoLIA recommends that more full-time commissioners are appointed. We note the changes to the ALRC's governance, which are discussed below, affect the Board of Management.

### **New Management provisions - Financial Framework Legislation Amendment Act 2010**

The new provisions for the ALRC, which commence on 1 July 2011, abolish the Board of Management and substitute it with the President as Chief Executive Officer who will manage the ALRC with the assistance of an Attorney-General appointed advisory committee. RoLIA is concerned that the independence of the ALRC will be compromised with this model as the Attorney-General can dissolve the advisory committee at any time so now has much control over the ALRC. The Attorney-General can appoint part-time Commission members under the Act which represents further control. Further, the following section has been added:

“26(2A) In the capacity of CEO of the Commission, the President must act in accordance with any policies determined, and comply with any directions given, in writing by the Attorney-General.”

Although the above section, according to the Explanatory Memorandum, is to relate to administrative matters only and not compromise the independence of the ALRC in undertaking inquiries, it is still an extension of executive control over the ALRC.<sup>11</sup>

Put simply, post 1 July 2011, the ALRC will be led by a single full-time Commissioner, the President, and advised by a committee nominated by the Attorney General and who hold their post at his pleasure. It is therefore impossible to conclude that this arrangement will assist the on-going independence of the ALRC as was envisaged in its original Act. The Commission structure will be 'bottom heavy' on a day to day basis with a highly paid leader not having access to any practical high level expert leadership support and advice, other

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<sup>10</sup> ALRC Act, ss 30(6).

<sup>11</sup>Financial Framework Legislation Amendment Bill 2010, Explanatory Memorandum, 16; <sup>11</sup> Financial Framework Legislation Amendment Bill 2010, Revised Explanatory Memorandum, 17.

than that which emanates from the Attorney General's office or the Department. It is important that the Government appoint at least one additional full time commissioner. The ALRC should have a governance model at least in some way reflecting the commission structures at other key Commonwealth agencies such as the Productivity Commission, ASIC, APRA, and ASIC, otherwise its future as an independent agency developing best practice law reform will be endangered.

It seems that the ALRC has lost independence from the the executive and is being absorbed into becoming just another small section or office of the Attorney-General's Department. RoLIA recommends the Committee consider the prospective downgrading in the level of independence and whether this is consistent with the spirit of the ALRC's charter.

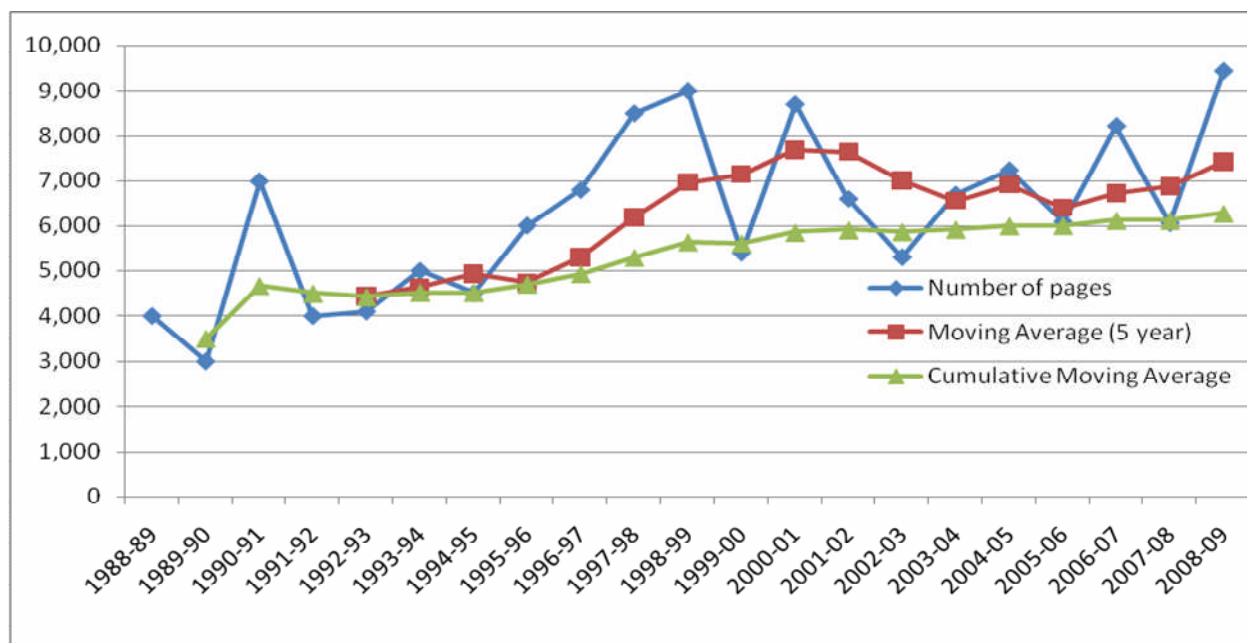
## **b. The adequacy of its staffing and resources to meet its objectives**

The adequacy of staffing and resources for the ALRC needs to be first considered from a demand side perspective. Few would disagree with the proposition that that there is a strong demand for modern, efficient laws and other non-legislative solutions.

The demand for law reform is best measured by examining the yearly production of laws by page for Bills introduced into the Australian Parliament. According to OPC data in the past two decades the demand for new laws has increased by approximately 100 per cent. Some of the new law could be classified as being standard machinery of government provisions, but a closer examination of the Bills passed in the period in question would clearly show that major reforms to our laws are a characteristic of all governments.

The ever growing stream of Commonwealth legislation, therefore, is at odds with apparent decline in funding and human resourcing of the nation's premier law reform agency (other than the Parliament of course).

## Number of pages of Commonwealth Bills introduced into Commonwealth Parliament in financial years 1988-89 to 2008-09



(Source: OPC Annual Reports)

### Supply indicators and issues

RoLIA notes that there are a number of identifiable indicators and factors on the supply side of the law reform equation – timeliness of reports and indications from the ALRC on perceived capacity, budgetary allocations, the number of commissioners, staff numbers and quality all impact the supply of quality law reform.

#### Timeliness

In relation to timeliness, ALRC has required time extensions for the final reports on five out of its last eight inquiries. RoLIA recommends the inquiry discover why. Only the Royal Commissions inquiry (2009) and the Uniform Evidence Law inquiry (2005) have been on time without requiring extension. Inability to meet deadlines could be an outcome caused by insufficient staff resources and RoLIA commends this matter to the inquiry. Another reason might be the tight deadlines imposed on the Commission by each reference.

Assisting in the timeliness domain is the statutory requirement that the the Attorney-General must table each report and interim report of the ALRC in each House of Parliament within 15 sitting days of that House after the Attorney-General receives the report.<sup>12</sup> RoLIA recommends the inquiry examine how long it takes the Government to respond to each report and the reasons for delays.

<sup>12</sup> ALRC Act s 23.

With there being no requirement for the government to reply officially to ALRC reports, RoLIA strongly recommends a legislative requirement be considered to ensure the reports reach parliament much faster and be subject to an official reply. As can be seen by the table below, it can be months before parliament sees the crucial reform recommendations, and considering the lengthy amount of time before implementation occurs, time is of the essence.

<i><b>Inquiry</b></i>	<i><b>ALRC Report No.</b></i>	<i><b>Original due date</b></i>	<i><b>Transmission date</b></i>	<i><b>Tabled in House of Representatives</b></i>	<i><b>Tabled in Senate</b></i>
<b>Family Violence – A National Legal Response</b>	114	31 Jul 2010	8 Oct 2010	15 Nov 2010	15 Nov 2010
<b>Secrecy Laws and Open Government in Australia</b>	112	31 Oct 2009	11 Dec 2009	11 Mar 2010	16 Mar 2010
<b>Making inquiries – A new statutory framework (Royal Commissions)</b>	111	30 Oct 2009	30 Oct 2009	2 Feb 2010	23 Feb 2010
<b>For Your Information: Australian Privacy Law &amp; Practice</b>	108	31 Mar 2008	30 May 2008	26 Aug 2008	26 Aug 2008
<b>Privilege in Perspective: Client Legal Privilege in Federal Investigations</b>	107	3 Dec 2007	21 Dec 2007	13 Feb 2008	13 Feb 2008
<b>Fighting Words: a Review of Sedition Laws in Australia</b>	104	30 May 2006	31 Jul 2006	13 Sept 2006	13 Sept 2006
<b>Same Crime, Same Time: Sentencing of Federal Offenders</b>	103	31 Jan 2006	28 Apr 2006	22 Aug 2006	8 Aug 2006
<b>Uniform Evidence Law</b>	102	5 Dec 2006	5 Dec 2005	8 Feb 2006	8 Feb 2006

## Number of inquiries

ALRC representatives have stated at estimates hearings that they prefer to have two inquiries running concurrently. Again this is a matter which the Committee should raise with the ALRC and Government during hearings

The ALRC cannot do own-motion referrals; only suggest topics to the Attorney-General. Emeritus Professor David Weisbrot, the immediate past President had listed those references on his 'wish list'<sup>13</sup> which he hoped the Attorney-General would refer to the ALRC. Those wish-list issues of model juries law, cartel criminalisation, human tissue Acts, anti-discrimination and law as it relates to ageing were never referred to the ALRC.

It is also worth noting that if the ALRC had sufficient resources and/or an inclination on the part of government to make additional referrals it could have examined a number of subjects which have needed constructive law reform. For example, compensation for investors impacted by the GFC is one critical topic. Another example is reforms to laws governing the provision of financial advice.

In December 2010 it was announced by SCAG that the ALRC will conduct an inquiry into Australia's censorship and the National Classification Scheme.<sup>14</sup> With the two current inquiries, this brings the question of whether the ALRC will have the capacity to handle the workload. Again this is a matter which the Committee should seek the advice of ARLC.

As an example of a cost of an inquiry, the Secrecy Inquiry cost \$812,226.17 with the contribution in terms of staffing being \$757,016.03 for 5 full-time staff at 1911 hours.<sup>15</sup>

RoLIA recommends the Committee urgently consider more funding for extra staff to ensure the workload can be handled. The ALRC noted in their background submission to this inquiry that they have failed to fill open positions, requiring staff to take an increased workload that will likely reduce job enjoyment and work-life balance.

## Budget

The savage cuts to the ALRC Budget allocations need to be addressed if the ALRC is to be an effective law reform body. Over a period of eight years (2004-2012) in money terms its budget has been cut by 20 per cent, whereas during the same period the size of Commonwealth outlays has grown by 60 per cent. The Attorney-General's Department revenue from Government has grown from \$152,391,000 in 2003-2004 to \$236,312,000 in

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<sup>13</sup> October 2008 Estimates Hearing.

<sup>14</sup> SCAG Communiqué December 2010.

<sup>15</sup> Answer to Question No 8, asked at hearing 24 May 2010, Legal & Constitutional Committee Estimates Hearing.

2009-2010, a 55% increase. Whilst the ALRC has had its historic levels of staffing cut by about 25 per cent, during the period 2004 to 2009 the Department increased staffing numbers by about 100 per cent from 760 to 1550.

In real dollar terms the ALRC budget cuts are more substantial as the Commission is human resource based entity and during that time the salaries budget would have escalated by between two and four percent. In this environment, it is therefore not surprising that the ALRC is unable to employ an additional full time Commissioner and/or advertise and hold on to staff. Consequently, the last 12 months has seen staff turnover at the ALRC of more than 100 per cent. This level of turnover is simply unacceptable for a body charged with law reform. It compares with turnover in the public sector of less than 10 per cent, with the Attorney-General's department being at 13.5 per cent in 2009-2010, and private sector turnover of between 20 and 25 per cent annually. RoLIA calls on this inquiry to determine the exact level of turnover, its causes and test whether the budget cuts are responsible.

Emeritus Professor David Weisbrot, the immediate past president, commented in the 2009 June Senate Estimates hearings that the ALRC operating expenses were expected to remain static through to 2012-13. Yet the budget has been slashed by \$242,000 in 2010 (from budget of 3.39million) and \$495,000 in 2011 (from budget of 3.15million).

The ALRC Background submission to this inquiry described serious complications of the budget cuts, from requiring staff to take on the responsibilities of roles which cannot be filled due to the cuts. The ALRC has been failing to appoint full-time commissioners because of the cuts, leaving them without the financial and administrative guidance a full time commissioner provides as well as a sadly lacking Board of Management. RoLIA agrees with the ALRC assessment that the requirement to pay for hard copies of reports will reduce access for the public to these important reports. The production of the two preliminary papers on issues and discussion, described by the ALRC as 'substantive works in their own right',<sup>16</sup> assists the public to make submissions and the budget-saving reduction down to one large document may also adversely affect the quality of the document and therefore the assistance to those wishing to contribute to the legal reform process by making submissions, especially the non-legally trained. The ALRC savings measures are severely affecting their work and likely the applicants for positions at the ALRC. With the coming budget cuts, it is impossible to see how they can continue as is without cutting more staff as has been foreshadowed.

In October 2010 the ALRC had approximately \$900,000 in accumulated reserves which were being used to cover budget shortfalls. The ALRC also has been forced to cut travel costs to keep staff, but admitted in their June 2008 submission to the Joint Committee of Public Accounts and Audit Committee *Impact of efficiency dividends on small agencies* inquiry that

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<sup>16</sup> ALRC Background Paper, submitted to this inquiry, 22.

the ALRC is required to travel within Australia in order to ensure effective consultation on law reform issues, and travel expenses constitute only around 2% of total ALRC expenditure. Therefore a 20 per cent saving in travel expenses would only reduce total expenditure by 0.4%. The Honourable Michael Kirby has said in his speech “ALRC – the winning formula” that for the ALRC it was essential to get out into the field and to discover how the law actually operated and affected ordinary Australians. Cutting travel could seriously compromise the ALRC and RoLIA calls on the Committee to consider recommending a budget increase for travel.

Budget cuts have resulted in the ALRC being forced to look for new premises in 2012, the earliest point in time it is feasible to relocate. The current premises are centrally located in King St, Sydney, in the Sydney ‘legal district’, which provides ready access to the many judges, barristers, solicitors, legal academics, law students and public servants that provide advice and assistance to the ALRC on a pro bono basis. Rent in 2007-2008 was \$506,142,<sup>17</sup> with the ALRC negotiating a cost effective lease below the normal CBD rents and well below the levels of other federal agencies in the vicinity, such as ASIC and the ACCC. This was 14.3% of the ALRC total budget. Under the lease rent increases occur at 4% per annum.. The ALRC depends on the government for 95% of its budget and its only other source of funds is publications. It has said it would be inconsistent with its functions to find revenue elsewhere.<sup>18</sup> They have described their position:

“In relation to office rental expenses, the ALRC has significantly less bargaining power than a large agency in rent negotiations. (In fact, the ALRC is aware that a large private sector tenant is paying approximately 7% less per square metre for its extensive lettings in the same building as the ALRC.) In relation to other general operating expenses and supplies, the ALRC has little market power, and few opportunities to achieve economies of scale.”<sup>19</sup>

The Parliamentary Committee on efficiency dividends recommended ALRC be quarantined from efficiency dividends.<sup>20</sup>

RoLIA recommends the budget be increased for the ALRC as a priority.

The graph below shows the approximate deterioration in funding of the ALRC over the next few years.

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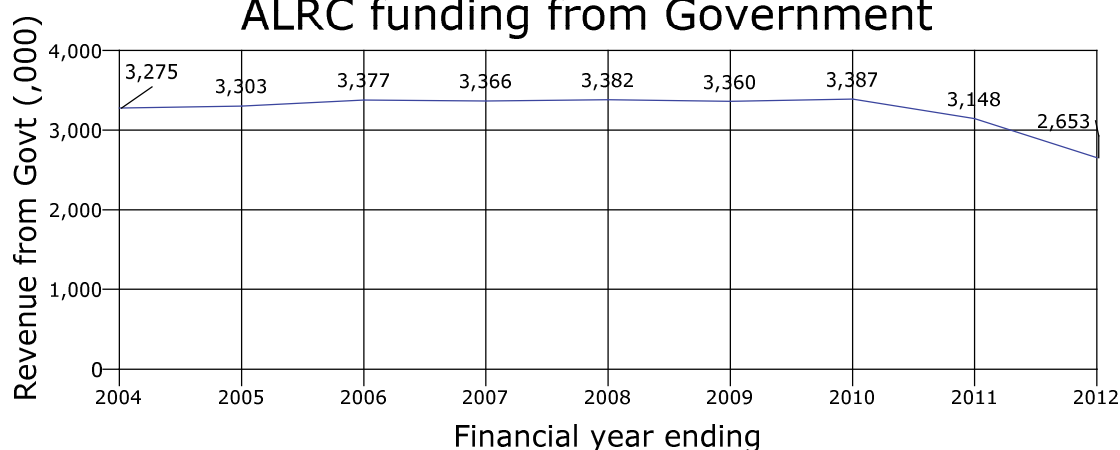
<sup>17</sup> ALRC Submission—Impact of efficiency dividends on small agencies—June 2008, 2.

<sup>18</sup> Ibid, 1

<sup>19</sup> ALRC Submission—Impact of efficiency dividends on small agencies—June 2008, 2.

<sup>20</sup> Recommendation 8, Report on Impact of efficiency dividends on small agencies.

## ALRC funding from Government



Revenue from Government ('000)	
2004	3,275
2005	3,303
2006	3,377
2007	3,366
2008	3,382
2009	3,360
2010	3,387
2011	3,148
2012	2,653

### Staff

In October 2010 there were 19 full time equivalent staff. This comprised the President, Executive Director, senior legal officers and legal officers, librarian, research director and project assistant. Law students and recent Law graduates often participate as unpaid legal interns.

There are no longer any legislative drafters on staff. The Office of Parliamentary Counsel, if they have the resources, can second drafters to the ALRC. It is crucial that the ALRC be able to draft legislation in order to best address its recommendations for changes to legislation.

The ALRC has admitted that as a small agency, it has limited bargaining power. It needs to compete with larger public sector agencies to attract and retain skilled staff by offering similar salaries.<sup>21</sup> With the reduction in budget it is feasible that the ALRC will have difficulty offering competitive salaries to compete with large law firms and larger public sector agencies.

Maintaining a necessary higher salary offering results in a decreased capacity to employ the numbers of staff required. This has been noted to impact the ALRC's capacity to conduct law reform inquiries, by making it difficult to undertake two significant inquiries. Lower staff numbers will result in higher workloads, lower morale and in turn increased turnover.

<sup>21</sup> ALRC Submission—Impact of efficiency dividends on small agencies—June 2008, 2.

RoLIA by reference to annual reports and inquiry final reports have compiled two tables of staff numbers:

Table 1.1 presents a table showing how many staff members worked on each inquiry over the years. This graphic indicates the decline in Commissioners as well as supporting staff. It is important to remember that lengthy inquiries will have staff turnover so the numbers reported are those when the highest number of staff were allocated to the inquiry, not the total staff working on the inquiry.

Table 1.2 presents data on the support staff including legal officers over the last several years. This table has been included to show which members of staff are declining and where cuts have been made.

**Table 1.1 Comparison of Staff on selection of ALRC inquiries**

*NB: as staff members are continually leaving and being replaced, the numbers represent the point in time where the maximum staff were working on the inquiry.*

	2011 Discovery <b>(In progress)</b>	2010 Family Violence ( <i>Assisted by NSW Law Reform Commission</i> )	2009 Secrecy laws and open government in Australia	2009 Making inquiries: a new Statutory Framework	2007 Privilege in Perspective	2004 Gene Patenting	2001 Review of the Judiciary Act 1903	2000 Managing Justice	1994 Equality before the law: Justice For Women	1991 Censorship Procedure	1989 Product Liability ( <i>Assisted by Victorian Law Reform Commission</i> )	1986 Insolvency and Debt Recovery
President	1	1	1	1	1	1	1	1	1	1	1	1
Deputy-President	0	0	0	0	0	0	1	1	1	1	1	1
Full-time Commissioners	0	0	2	2	2	3	2	1 (and a 2 <sup>nd</sup> for a few months.)	6	1	5	10
Part-time Commissioners	4	1	2	2	3	2	2	3	(Those acting part time are not noted separately)	(Those acting part time are not noted separately)	(Those acting part time are not noted separately)	(Those acting part time are not noted separately)
Legal Specialists/Consultants	0	2	1	0	0	1	2	5	2	0		0
Senior Law Reform Officers/Team Leaders	1	4	3	2	2	3	1	2	2	1	0	1
Law Reform Officers	4	9	3	3	0	2	2	10	5	0	4	1
Researchers/Research Manager	0	1	1	1	1	0	0	4	1	1	1	2
Project Assistants	1	1	1	1	1	1	1	2	3	1	1	0
Legal Interns	3	11	16	6	6	9	10	35	0	0	0	0
Librarians	1	1	1	1	1	0	1	3	3	2	3	3
Typsetting	0	0	0	0	0	0	1	1	1	1	1	4
Advisory/Working Groups	12	0	16	15	14	22	21	106	0	12	32	26
Other								• Information		• Executive Officer	• Executive Officer • Legislative drafter	• Executive Officer

								Technology		• Legislative drafter	(2)	• Legislative drafter
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**Table 1.2 Staff per year**

	2009-2010	2008-2009	2007-2008	2006-2007	2005-2006
<b>Executive Director</b>	1 F/T	1 F/T	1	1	1
<b>Finance Manager</b>	1 F/T	1 F/T	1 (on leave till 4 Feb 2008)	1 (on leave from 20 March 2007)	1
<b>Finance Assistant</b>	1 P/T	1 P/T	1	1	1
<b>Payroll Officer</b>	1 P/T	1 P/T	1	1	1
<b>Receptionist</b>	-	-	1	1	1
<b>Executive/Project Assistant</b>	1 F/T 1 P/T (resigned Aug 09)	1 F/T 1 P/T	2	2	2
<b>Office Services Co-ordinator</b>	1 F/T	1 P/T	-	-	-
<b>Administrative Assistant</b>	1 P/T	1 P/T	1	1	1
<b>Website Manager</b>	1 F/T	-	-	-	
<b>Communications Manager</b>	-	1 P/T	1	1	1
<b>Communications Officer</b>	1 P/T	1 P/T	2 (one on leave)	3 (one resigned 8 Sept 2006)	2
<b>Special Projects Officer</b>	1 P/T (resigned Nov 09)	1 P/T	-	-	-
<b>Research Manager</b>	1 F/T (resigned May 10)	1 F/T	1	1	1
<b>Librarian</b>	1 F/T	1 F/T	1	1	1
<b>Senior Legal Officer</b>	2 F/T 2 P/T	3 F/T (1 resigned May 09) 1 P/T	5	5	5
<b>Legal Officer</b>	9 F/T (2 resigned 2010) 1 P/T (resigned May 2010)	5 F/T 1 P/T	7 (with 4 resigned by end financial year)	6 (with one on leave and 1 resigned by end financial year)	6 (2 resigned by end financial year)
<b>Total employed during 2009-2010</b>	18 F/T 9 P/T	13 F/T 10 P/T	25	25	24
<b>Total at end FY* Based on additions of figures above – Annual report totals sometimes differed.</b>	15 F/T 6 P/T	12 P/T 10 P/T	11 F/T 10P/T	12 FT 8 P/T	12 /T 10 P/T

### c. Best practice examples of like organisations interstate and overseas

As many organisations around the world are very similar to the ALRC, the differences are highlighted as options the committee may consider as useful ideas for enhancing the ALRC. Some organisations' current inquiries are shown to display potential topics for the ALRC as well as allow comparisons to be drawn of the ALRC and other organisations regarding the number of inquiries and the number of commissioners those organisations employ.

#### New Zealand Law Commission:

The New Zealand Law Commission is similar to the ALRC in that it is a statutory, government funded independent organisation which reviews areas of law which need reforming, updating or developing. It conducts inquiries and makes recommendations to Parliament. The Commission currently consists of a President, Deputy President and three commissioners, all of whom are employed full time. There are 21 other staff members. It describes itself as having strong links with other organisations.

Important points:

- It can ask government agencies and organisations for help and information, as well as be asked for help by those organisations: section 8 *Law Commission Act 1985*.
- It specifically takes into account Maori traditions.
- It has the power to initiate its own investigations via section 6 of the *Law Commission Act 1985*.
- Its membership is minimum of 3 and maximum of 6 commissioners, while the President must be a Judge or retired Judge of the Court of Appeal or the High Court, or a barrister or solicitor of the High Court of not less than 7 years' practice.
- Members of the commission are the members of the board and the president is the chairperson.

Currently the NZLC is working on the following projects:

1. Alternative models for prosecuting and trying criminal cases
2. Compensation for Victims of Crime
3. Criminal Defences (Insanity)
4. Law relating to Civil Penalties
5. Monitoring of the Evidence Act
6. Public Safety and Security
7. Review of Civil List Act 1979

8. Review of Maximum Penalties
9. Review of Misuse of Drugs Act 1975
10. Review of Official Information Act 1982
11. Review of Privacy
12. Review of Regulatory Gaps and New Media
13. Review of the Burial and Cremations Act 1964
14. Review of the Credit (Repossession) Act 1997
15. Review of the Incorporated Societies Act 1908
16. Review of the Judicature Act 1908 and Consolidation of Courts
17. Review of the Law of Trusts
18. Search and Surveillance Powers
19. Simplification of Criminal Procedure (including Name Suppression)

Though it appears the New Zealand Law Commission carries many inquiries, most of the projects are ongoing and there were only two references received from the Government in 2010. Most of their inquiries arose from legal issues discovered at other inquiries they had already conducted and were of commenced of the commission's own volition.

### **The Law Commission of England & Wales**

The Law Commission has a Chairman who is High Court or Appeal Court judge. The four other commissioners are experienced judges, barristers, solicitors or teachers of law. All five commissioners are employed full-time.

The newly introduced *Law Commission Act 2009* requires the Lord Chancellor to lay before parliament a document showing which Commission proposals have and have not been implemented at end of each reporting year. This initiative is designed to increase the rate at which proposals are implemented.

The Lord Chancellor and Commission work together to set protocols of work in a method somewhat different from that used for the ALRC. The Law Commission is required to prepare and submit to the Lord Chancellor programmes for the examination of different branches of the law with a view to reform.

The programme of law reform is a long process which includes general consultation over a period of several months. Government departments, Parliamentary Committees, the judiciary, the academic community, other interested bodies and specialist organisations, and the general public are encouraged to submit areas in need of reform. Commissioners consider the proposals and submit a list of potential projects to the Lord Chancellor, who will decide which projects will be conducted. The Law Commission expects to receive their latest programme, the eleventh, in early summer 2011.

The Law Commission has an extensive support team, with the Chief Executive of the Commission and about 20 other members of the Government Legal Service, four or five

Parliamentary Counsel (who draft the Bills to reform and consolidate the law), and about 15 research assistants (usually recently qualified law graduates), as well as a librarian and the Corporate Services Team.

The policies for research projects are documented online, with comprehensive criteria as well as the general stages of a research project clearly set out. A very detailed business plan for each financial year is also published.

Current inquiries open for consultations:

- Insurance Contract Law: The Requirement for a Formal Marine Policy – Should Section 22 be Repealed (closing 17.1.2011)
- Unfitness to Plead (closing 27.1.2011)
- Benevolent Institutions (closing 31.12.2010)
- Public Services Ombudsmen (closing 3.12.2010)

The commission's rate of publishing is quite impressive with 4 reports in 2010, 5 in 2009, 3 in 2008, 2 in 2007, 7 in 2006 and 3 in 2005.

The cost of the commission for these financial years:<sup>22</sup>

- 2007/2008 £ 4 121 000
- 2008/2009 £ 4 387 300
- 2009/2010 £ 4 385 300

### **The Law Reform Commission of Hong Kong**

The Law Reform Commission of Hong Kong was established in January 1980. The Commission considers for reform those aspects of the laws of Hong Kong which are referred to it by the Secretary for Justice or the Chief Justice. These will normally be chosen from suggestions made by members of the Commission itself, the legal profession, the public at large, or the Administration.

The Secretary for Justice (who chairs the Commission), the Chief Justice and the Law Draftsman are ex officio members of the Commission. In addition, the Chief Executive appoints a number of other members, one of whom is usually a Judge of the High Court or the Court of Final Appeal. The remaining members include not only academics and

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<sup>22</sup> Appendix B to Annual Report 2009-2010 'The Cost of the Commission', 69 [http://www.lawcom.gov.uk/docs/apb\\_expanded.pdf](http://www.lawcom.gov.uk/docs/apb_expanded.pdf) viewed 13.12.2010.

practising lawyers, but also prominent non-lawyer members of the community. More than 70 individuals have served as members of the Commission since its establishment in 1980.

In 2010 there were 12 members including law draftsman and chairman. All members are part-time.

Current projects:

- Double Jeopardy
- Sexual offences
- Adverse possession
- Causing or allowing the death of a child
- Class actions
- Enduring powers of attorney

The publishing rate is around 1-2 reports per year. After a report is published, the Administration publishes a response or plan of implementation (general statement of what recommendations will be introduced as law and when) for recommendations of each report.

### **South African Law Reform Commission**

The SALRC currently consists of one chairperson, one vice-chairperson and seven members. The chairperson must be a judge of the Constitutional Court, the Supreme Court of Appeal or the High Court. The chairperson is responsible for appointing the members (not more than eight, however the chairperson can appoint more members for particular inquiries) and selects a vice-chairman. A maximum of three members can serve full time.<sup>23</sup>

The commission is required from time to time to draw up programmes of suggested law reform issues for the minister. The minister will then select which issues are further investigated.

The SALRC's budget for the financial year 1 April 2008 to 31 March 2009 was R16 076 000.

### **Law Reform Commission of Ireland**

The LRCol was formed under the *Law Reform Commission Act 1975*. It currently consists of one president (retired judge), one full time commissioner (lawyer) and three part time commissioners (one Supreme Court judge, two academics). The government is responsible

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<sup>23</sup> *South African Law Reform Commission Act 19 of 1973, s 3.*

for appointing commissioners, the maximum of which is one president and four commissioners.

The commission may submit programmes, which are very similar to those used by the United Kingdom Law Commission and are subject to input from the public, Government departments, the legal profession and other organisations. 200 submissions were put forward for the third programme. The 37 projects identified in the third programme are currently being undertaken, although not all at the same time. The Attorney-General can also refer legal issues other than those in the programme for the commission to consider.

The legal researchers are extremely qualified, with currently 9 legal researchers employed and all but one has obtained a Masters of Laws degree as well as undergraduate law degrees. A maximum of 15 researchers can be taken on at one time.

A very comprehensive 'Produce strategy statement' for 2009-2011 has been produced by the Commission.

Current projects:

1. The Legal System and Public Law
2. The Law of Evidence
3. Criminal Law
4. Land, Conveyancing and Trust Law
5. Family Law
6. Specific Groups in a Changing Society
7. Technology, Innovation and the Individual
8. Commercial Law and the Law of Obligations

### **Australian state law reform commissions**

***The Victorian Law Reform Commission provides an excellent summary of Australian State law reform commission history, as follows:***

Australia's first law reform commission was established in New South Wales in 1967. This was followed by Queensland in 1968, the Australian Capital Territory (1971), Western Australia (1972), Tasmania (1974), Australia (1975) and Victoria (1984).

Reflecting the international trend, several Australian law reform commissions were abolished or restructured during the 1980s and early 1990s:

- The Australian Capital Territory Law Reform Commission was abolished in 1976.
- The South Australian Law Reform Committee was abolished in 1987.
- The Tasmanian Law Reform Commission was replaced by a single Commissioner working part-time in 1988.
- The Law Reform Commission of Victoria was abolished in 1992.

- The Western Australia Law Reform Commission was reviewed and restructured in 1995.
- The Australian Law Reform Commission was reviewed by a federal parliamentary committee in 1994.
- The Queensland Government reviewed the Queensland Law Reform Commission in 1997.

Many states have since re-introduced or retained their law reform organisations but often in altered form:

The Western Australian Law Reform Commission now functions as a part-time organisation which contracts out the research and writing of its publications.

- The Australian Law Reform Commission was retained.
- The Queensland Law Reform Commission was retained.
- The Australian Law Reform Commission was responsible for the ACT until 1990.
- A Victorian law reform commission was re-established in 2000

### ***New South Wales***

The NSW Law Reform Commission currently is composed of one Chairperson, one full-time commissioner and seven part-time commissioners.

Current projects:

- Review of compensation to relatives
- Security for costs and associated costs orders
- Penalty notice offences
- Complicity in criminal cases
- People with cognitive and mental health impairments in the criminal justice system
- Jury directions in criminal trials
- Privacy

### ***Tasmanian Law Reform Institute***

The Institute was established in 2001 by agreement between the State Government, the University of Tasmania and the Law Society.

The Institute describes that it may receive proposals for law reform or research projects from a wide range of sources, including the judiciary, the Attorney-General, the Legal Aid Commission, government departments, the Parliament, the legal profession, members of the community and community groups.

The appointment of the board members who assist the Director is the most contrasting difference to that of the ALRC's appointment of commissioners with the following persons appointed by different bodies/persons:

- Professor Kate Warner Director of the Institute, appointed by the Vice-Chancellor of the University of Tasmania
- Professor Margaret Otlowski Dean of the Faculty of Law at the University of Tasmania, appointed by the Vice-Chancellor of the University of Tasmania
- The Honourable Justice AM Blow OAM appointed by the Honourable Chief Justice of Tasmania Lisa Hutton appointed by the Attorney-General
- Terese Henning appointed by the Council of the University
- Craig Mackie nominated by the Tasmanian Bar Association
- Philip Jackson appointed by the Law Society
- Ann Hughes appointed as community representative.

Currently conducting:

1. Racial Vilification and Racially Motivated Offences
2. Tendency and coincidence evidence and *Hoch's* case
3. Non-therapeutic male circumcision
4. Consolidation of Arrest Laws in Tasmania

The Institute's latest reports were published in November 2010, March 2010, June 2008, October 2007 and December 2006.

### ***Victorian Law Reform Commission***

The Commission currently consists of one full time Chairperson and six part time commissioners. Full time commissioners may be appointed to particular projects. The Governor in Council makes appointments although the Attorney-General can appoint a chairperson for less than six months duration in certain circumstances.<sup>24</sup>

The Commission's major responsibility is to research issues the Attorney-General refers to it, but it also has the power to recommend minor changes to the law without a reference.

The Commission is established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

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<sup>24</sup> *Victorian Law Refor Commission Act 2000*, s 7.

In 2009-2010 there was \$1,310,500 funding from the Department of Justice and \$1,700,000 from the Legal Services Board which together with income received on Trust Account funds gave the Law Reform Commission \$3,027,485. In 2008-2009 the Department of Justice provided \$940,641 and the Legal Services Board \$1,300,000 which amounted to \$2,240,641.

Current references:

- Guardianship
- Property
- Serious bullying

### ***Queensland Law Reform Commission***

The Commission currently consists of one Chairperson (they are currently without a Deputy Chairperson)<sup>25</sup> and four part time commissioners. The *Law Reform Commission Act 1968*, section 3 requires the commission to consist of at least 3 members, which can be part or full time. The Attorney-General is responsible for giving references.

Current references:

- Jury Selection
- A review of Queensland guardianship laws
- A review of the law in relation to the final disposal of a dead body

#### **d. The appropriate allocation of functions between the ALRC and other statutory agencies**

Former ALRC President David Weisbrot has described that “Law reform projects are now also routinely undertaken by parliamentary committees; royal commissions of inquiry; departmental and interdepartmental committees, task forces and working parties; specialist agencies (such as the Administrative Review Council and the Family Law Council); and even by private consultants engaged by public authorities-and most of these adopt at least some of the techniques pioneered by the ALRC to stimulate public debate, canvass community opinion and elicit submissions from interested individuals and organisations.”<sup>26</sup>

Whilst there may have been sound reasons for allocating other agencies it needs to be remembered that the ALRC has a proven track record in the following positive qualities:

1. Independence and impartiality
2. Iterative and transparent data gathering and ideas formulation

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<sup>25</sup> *Law Reform Commission Act 1968*, s 5.

<sup>26</sup> Weisbrot, David, ‘The role of the ALRC in influencing legal change’ *Legaldate* 19(1) March 2007.

3. Ability to bring the best minds onto a particular subject
4. Ability to embrace wider community and to cause catalytic convergence of ideas.

It is possible that the ALRC has been deprived of inquiries it could have been best-placed to conduct. In the following paragraphs RoLIA highlights some of the areas of reform on which ALRC input could have been sought.

For example the COAG inquiry into National Legal Profession Reform, an inquiry into consolidating state laws covering the legal profession, could have been performed by the ALRC. The ALRC's functions under section 21 of the ALRC Act include considering proposals for uniformity between state and territory laws so the national legal profession inquiry fits their functions.

The Standing Committee of Attorneys General (SCAG) has no current consultations, but previously it has considered topics such as harmonisation of criminal appeals legislation and Statutory Declaration Regulation. Harmonisation of laws is part of the ALRC functions so they would have been well-placed to conduct these inquiries.

The Productivity Commission examines many issues which could have potentially been ALRC inquiries (or indeed joint ventures so that best economic and legal skills were combined) such as Disability Care and Support, and the review of Regulatory Burdens on Business.

Senate Committee Legal & Constitutional References Committee is conducting an inquiry into the Australian Film & Literature Classification Scheme. Whilst this might appear to conflict with the planned ALRC inquiry into censorship during the life of the ALRC there have been concurrent inquiries and there have been quite useful exchanges between the ALRC and the respective Senate inquiry.

The Senate Committee Legal & Constitutional References Committee is also conducting an inquiry into the area of donor conception in Australia. The terms of reference require the References Committee to consider regulation and legislation across federal and state jurisdictions & conduct of clinics.

The ALRC admitted at estimates it was not consulted on the Government National Security Legislation Discussion paper.<sup>27</sup>

The ALRC has worked with numerous bodies in the past, so it is feasible it could have worked on the abovementioned inquiries if the ALRC did not have the specialist resources to complete an entire inquiry alone. For example the Family violence inquiry was completed in conjunction with the NSW Law Reform Commission. The ALRC has also worked with the

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<sup>27</sup> Senate Estimates Hearing, Legal & Constitutional Committee, 19 October 2009.

Administrative Review Council, the Victorian Law Reform Commission and many other commissions on inquiries, and the NHMC in relation to its gene technology inquiry report, *Essentially Yours*.

### **The Family Law Council**

RoLIA is also concerned for the future of two organisations that the ALRC has worked with in the past, namely the Family Law Council and the Administrative Review Council.

The Family Law Council (FLC) was established under the *Family Law Act 1975* to provide advice to the Attorney-General. The ALRC and its President Professor Croucher have observer status over the FLC. Over the past few years the budget of the FLC has been reduced from \$80,000 to approx \$30,000. In all probability this has meant that research staff cannot be engaged, and the members consisting of judges, counsellors, child support officers, directors of social welfare agencies and state legal aid officers, who give their time without remuneration, have gone unsupported in their efforts to conduct inquiries.

The FLC has previously worked in conjunction with the ALRC, and the demise of either or both organisations will affect any future projects.

### **The Administrative Review Council**

The Administrative Review Council (ARC) has operated from October 2009 to 20 May 2010 without a President, and has no current projects. The President of the ALRC is an ex officio member of the ARC.

The last report on an ARC inquiry was published in November 2008. Currently, the body does not have the benefit of a dedicated secretariat, which had existed up until early 2009.<sup>28</sup> The ARC's important publication *Admin Review* had not been produced for several years until one issue in May 2010. The ARC provided one letter of advice in 2008-2009 compared with six in 2007-2008.

The former ARC President, Jillian Segal, described the ARC as follows:

“Because of its independent statutory remit and collective expertise, the Administrative Review Council is in a unique position not only to chart this evolution [of administrative law] but also to comment, through reports, advice and articles, on it so that the changes in administrative law do not remain unnoticed and unconsidered.”

It is imperative the ARC is able to continue its work. RoLIA feels it is a crucial body and cannot be left in its current and depleted state.

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<sup>28</sup> Administrative Review Council Annual Report 2008-2009, 9.

If other bodies of law reform are not funded adequately they cannot support the ALRC in joint projects. RoLIA strongly recommends the the Committee make its own conclusions on whether these two bodies need additional resourcing.

## e. Other related matters

### Educational outreach program

As noted in the 2010 October Estimates, the outreach program has been cut by scrapping the ALRC-produced *Reform* journal to save funds. The last edition of *Reform* was published 25 September 2009 and was on the topic of 'Housing' with articles provided by distinguished members of the legal profession. Prior topics have included 'Juries', 'Native Title', 'Water' and 'Animals'. The journal collects articles on a large area of law together resulting in an excellent update on the state of that law. Former High Court Justice Kirby has described *Reform* as vital reading for the modern lawyer.<sup>29</sup> The ALRC had published approximately two editions per year since 1976.

In 2009-2010 the actual expenses of the educational outreach program were \$208,000.<sup>30</sup> *Reform* was a subscription journal so brought the only other source of income in for the ALRC other than Government funding. *Reform* was the means to save money in the reserve fund and as the reserve fund is currently being spent, the ALRC is left with reduced independence from the government.

The 2009-2010 Annual Report indicated an online newsletter format would be introduced in August 2010 as the ALRC focus was shifted to inquiries and while there have been monthly newsletters giving updates on the inquiries; there has been nothing with new legal articles comparable to *Reform*.

RoLIA believes the *Reform* journal is an important part of the ALRC's work and recommends funding should be increased so as to allow the journal to be revived.

### Kirby Cup

The ALRC is the sponsor and organiser of the Kirby Cup, a competition open to all students enrolled in a tertiary law course. Students may participate in teams or individually to prepare a written paper on a topic of law reform.

Prior to 2010, the Kirby Cup was held as an event involving written and oral advocacy components at the annual Australian Law Students Association conference. In 2010 only the written component was required, submitted to the ALRC directly.

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<sup>29</sup> The Hon Michael Kirby AC CMG, Launch of *Reform*, Autumn Edition 1998 – Issue 72, Tuesday 7 April 1998, Sydney.

<sup>30</sup> ALRC Annual Report 2009-2010.

RoLIA questions whether the reduction in funds has meant this important competition has had to be downgraded, and if it will be held at all in 2011. RoLIA recommends the Committee investigate this issue and recommend a funding increase if necessary.

### RoLIA Recommendations:

- The Attorney-General be required to table annually in both Houses a document which outlines the status of Government responses to ALRC reports.
- There be a more stringent requirements on time frames for the tabling of ALRC reports and government responses in both Houses.
- A programme of law reform modelled on the UK and Ireland versions be undertaken with public consultation, provided for in the ALRC Act. Alternately, the ALRC should be statutorily required to publish in their annual report a list of law reform issues on which the Attorney-General must respond via a report to Parliament.
- There be additional full time members appointed, with an amendment to the ALRC Act creating statutory minimum of at least one full-time member other than the President.
- There be a new selection process considered for commissioners including advertising of positions.
- The level of independence of the ALRC from the Attorney-General and his Department should be examined having regard to the recent changes which have resulted in the establishment of an advisory body.
- There be additional government funding so that the future of the ARLC can be sustained.
- *Reform* journal should be restarted as a priority with dedicated funding, along with a revenue retention facility created independent of the Law Reform Special Account to contain income from the sale of the journal.
- The Committee consider the Kirby Cup competition and investigate whether the lack of funding means the competition cannot continue and if so, recommend more funding so it can be continued in the future.
- The Committee consider similar inquiries to the current ALRC inquiry into the Family Law Council and the Administrative Review Council.

- There be a statutory requirement for the consideration of Indigenous traditions in all inquiries (as the New Zealand Law Commission has for Maori law) and continuation of the Indigenous consultation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'R Gilbert', written in a cursive style.

**Richard Gilbert**  
Chief Executive Officer