



Australian Government

Australian Law Reform Commission

**The Australian Law Reform Commission's
Final Submission to the Senate Legal and
Constitutional Affairs References Committee
Inquiry into the Australian Law Reform
Commission**

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Introduction

1. In December 2010, the Australian Law Reform Commission (ALRC) made a preliminary submission to the inquiry into the ALRC by the Legal and Constitutional Affairs References Committee with the purpose of providing background information that would assist both the Committee and other interested stakeholders at the early stage of the inquiry. The ALRC indicated, at that time, that it would make a second, more comprehensive submission after the close of public submissions on 28 January 2011 and that this subsequent submission would address and identify the ALRC's policy position on all matters within the Committee's Terms of Reference and take into account views expressed in other submissions.

2. The Terms of Reference of the inquiry ask the Committee to inquire into the ALRC with particular reference to:

- (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.

3. It is not our intention here to repeat the information that was included in the ALRC's preliminary submission, but to both present additional information, clarification and some focused comment on the key issues that have emerged to date.

Role, governance arrangements and statutory responsibilities

4. The vast majority of the 23 submissions made to the inquiry, including from the Attorney-General's Department, restate and support the importance of an independent law reform body, with appropriate levels of funding to continue to produce the high quality work that has characterised the ALRC for the past 35 years.

5. The ALRC's role, governance arrangements and statutory responsibilities are set out in its enabling legislation, the *Australian Law Reform Commission Act 1996* (Cth). The ALRC's function is to inquire into and report on matters referred to it by the Attorney-General, with a view to reforming Commonwealth laws and harmonising Commonwealth, state and territory laws. The ALRC strongly believes that its historical structure, expertise, reputation and history make it ideally suited to performing this function. Support for the ALRC to conduct this function was consistently expressed in submissions to the Inquiry.

6. Many submissions also note the very high rate of implementation of ALRC recommendations—over 90% of ALRC reports have been substantially implemented as of June 2010. This is proof of both the relevance of the ALRC’s recommendations to government and the general Australian community, and the effectiveness of the processes that lead to the recommendations. The importance of the ALRC’s research has also been noted in several submissions from academics and from the Federal Court. These submissions speak to the high value provided by the evidence base of the ALRC’s research and the enduring value of its reports.

7. In its preliminary submission, the ALRC argued in favour of an independent law reform agency and the value of law reform, at arm’s length from government and party politics, and free from special interest or lobby groups. Support for independent law reform has been expressed by many of the submissions to the Inquiry.

8. In early 2010, the Attorney-General advised that, following an assessment against the recommendations of the Review of the Corporate Governance of Statutory Authorities and Officeholders (Uhrig Review) and the Government’s policy on governance arrangements for agencies, the ALRC should operate under an executive management model, subject to amendment of the *Australian Law Reform Commission Act 1996* (Cth). This involved changing the ALRC’s governance framework from the *Commonwealth Authorities & Companies Act 1997* (Cth) (CAC Act) to become a prescribed agency under the *Financial Management and Accountability Act 1997*(Cth) (FMA Act) and making it a statutory agency under the *Public Service Act 1999* (Cth). As part of this transition, the ALRC met with the Attorney-General’s Department to discuss a number of changes to the ALRC Act with specific reference to its governance arrangements and other matters.

9. This transition was effected on 17 December with the enactment of the *Financial Framework Legislation Amendment Act 2010* (Cth). Amendments to the ALRC Act are now law, and commence on 1 July 2011.

10. One significant change to the ALRC’s governance is that it will not retain its body corporate status and—instead of having its own Board of Management, currently consisting of the full-time and part-time members of the ALRC—the ALRC may be managed by a management advisory committee appointed by the Attorney-General. The ALRC argued that a management advisory committee, as envisaged in the drafting instructions, was undesirable and requested the Department seriously to reconsider this model. The ALRC considered that such a committee was unnecessary, given the small size of the organisation and its well defined roles and functions. Moreover, because the committee would be appointed by the Attorney-General, the ALRC questioned whether this would compromise the intellectual independence of the ALRC and argued that it was important not only that the ALRC is able to act independently of government, but that it is perceived to be independent. As a result of these discussions, although the

amended ALRC Act did include the management advisory committee, an express provision was added that the committee must not attempt to compromise the independence or impartiality of the ALRC in any way—ALRC Act s 27 (2).

11. The importance of the independent status of the ALRC was raised in several submissions and is fundamental to the ALRC’s ability to add value to the Government’s law reform agenda.

Adequacy of its staffing and resources to meet its objectives

12. The question that lies at the heart of this Inquiry is the appropriate level of resources for the ALRC to fulfil its functions and to maintain the very high standards of work that has been achieved in the past—and for which the ALRC is renowned. Many of the submissions to this Inquiry questioned the effect on the ALRC of the reduction in its funding. Concerns were expressed that the quality of ALRC’s work would suffer, if its tried and tested processes of law reform, consultation and research—widely acknowledged as best practice—were compromised.

13. Another key issue raised during the Inquiry is the reduction in the complement of full-time Commissioners and the effect that this may have in the future on the quality of the ALRC’s work, its governance and its reputation.

14. Many submissions to the Inquiry noted that the ALRC’s appropriation has remained relatively static over the past ten years—at around \$3m—while costs, such as staff wages and rent, have increased annually by at least 4%, and other expenses have increased in line with the Consumer Price Index (CPI). In effect, the ALRC’s budget has decreased in real terms over time. To illustrate this point, the CPI—a reasonable indicator of increases in these other expenses—has increased by an average of 3.2% per annum in the past five years to 30 June 2009. This contrasts with the ALRC’s appropriation, which increased by only 0.5% over the same period.

15. In addition, in October 2009, the ALRC was informed of the following cuts to its appropriation:

| | |
|---------|-----------|
| 2010-11 | \$242,000 |
| 2011-12 | \$495,000 |
| 2012-13 | \$495,000 |
| 2013-14 | \$495,000 |

16. These cuts were on top of the annual Efficiency Dividend to which the ALRC was also subject. On 30 June 2008, the ALRC put in a submission to the Joint Committee of Public Accounts and Audit in relation to its inquiry into the effect of the efficiency dividend on small agencies. In this submission, the ALRC argued that the blanket way in which the efficiency dividend was being applied to

all agencies—irrespective of their budget, functions or size—resulted in a disproportionate impact on small agencies, primarily because small agencies have a more limited capacity to achieve significant savings in core operating expenses, than larger agencies.

17. The ALRC is heavily dependent on its budget appropriation because it has very limited ability to generate funds from non-budget sources. The functions of the ALRC are articulated in its Act and these are not income generating activities. Because of the importance of the real and perceived independence of the ALRC, it would be inconsistent with the ALRC’s statutory functions—and would present significant potential for real and perceived conflicts of interest—to generate a significant amount of funds from non-budget sources, such as donations or grants. Salary expenditure is one of the few areas in which the ALRC is able to reduce expenditure in order to accommodate reductions in the real value of appropriations over time. The significance of this is illustrated by the reduction in the ALRC’s full time equivalent (FTE) staff over the period from 1994 to 2011. The ALRC’s staff complement has fallen as follows:

| Year | Staff (FTE) excluding Commissioners | Full-time Commissioners | Part-time Commissioners |
|-------------|--|---|--------------------------------|
| 1994 | 46 | 6 FT including: President Deputy President 4 Full-time Commissioners | 11 |
| 2000 | 22 | 4 FT including: President Deputy President 2 Full-Time Commissioners | 4 |
| 2011 | 15 | 1 FT including: President | 4 |

18. In its preliminary submission, the ALRC argued that the idea of adequacy is a complex one, linked to desired outcomes and purposes. The idea of adequacy prompts the question ‘adequacy for what?’. Whether the ALRC’s resources are adequate to meet its objectives, depends therefore on how those objectives are defined—their scope and their depth.

19. Currently the ALRC's functions are defined within its Act. The ALRC's outcome, as approved by the Attorney-General, 'is informed Government decisions about the development, reform and harmonisation of Australian laws and related processes through research, analysis, reports and community consultation and education'. It follows that the baseline for any consideration of adequacy is the production of high quality, well researched and well documented reports and the necessary staff and time to produce them and to maintain the ALRC's intellectual capital in law reform.

20. The level of resources available to the ALRC over the past 10 years to complete its inquiry load was set out in the ALRC's preliminary submission. Over the past 35 years, the make-up of the ALRC has varied significantly. In the last ten years, there has most commonly been a President, two full-time Commissioners (each overseeing one Inquiry), three part-time Commissioners, a team of legal officers and complementary administrative staff.

21. The complexity of inquiries, and the timeframe given to the ALRC to complete the inquiry work, all have an impact on the question of adequacy of resources. The ability of the ALRC to forward plan and allocate resources so as to align inquiry timeframes with the capacity of the organisation to take on the work, is also crucial to the question of adequacy.

22. The experience of inquiry work and timing in 2009–10 provides an instructive example. One of the factors contributing to the ALRC's operating loss in 2009–10 of \$130,952, was the referring of the Family Violence Inquiry to the ALRC at the same time as the ALRC was still completing two other inquiries—on Commonwealth Secrecy Laws; and on Royal Commissions. The ALRC had also begun work on another inquiry into freedom of information (FOI) and the private sector, having been assured by officers in the Attorney-General's Department that it would receive Terms of Reference for this FOI inquiry as announced by Senator Faulkner. The FOI inquiry was to have a very short timeframe and a reporting date of mid-2010. Therefore, at the time of referral of the Family Violence Inquiry to the ALRC, all the ALRC's legal officers were fully employed on these three inquiries, with the FOI inquiry adding a fourth. However, delaying work on the Family Violence Inquiry until the completion of the Secrecy and Royal Commissions inquiries was not an option for the ALRC because of the reporting date of July 2010 for the Family Violence Inquiry. If the ALRC had delayed work on this new inquiry until the other inquiries were completed, it would have had only six months to undertake and complete that inquiry. This would have been impossible given that the Terms of Reference required the ALRC to look at over 26 different legislative regimes and at laws in highly complex areas including family law, family violence law, child protection, criminal law and sexual assault. Instead of delaying work on the Family Violence Inquiry, the ALRC employed additional contract staff who could work on the Family Violence Inquiry until the ALRC's legal officers had completed their work on the Secrecy and Royal Commissions

inquiries. Bringing on these additional staff accounted for the operating loss in that year.

23. The ALRC understands that the announcement of inquiries and the setting of inquiry timeframes is the prerogative of the government and is determined by many other factors, in addition to the ALRC's requirements. However, the number and timing of inquiries has a significant impact on the ALRC's resources and, being outside the ALRC's control, can lead to difficult management decisions. In the past, the ALRC, as a CAC Act agency, was able to rely on its accumulated reserves to meet the additional costs that these situations may have caused for the ALRC in managing its budget responsibly. Whether the ALRC brought on additional staff to assist with a particular reference, therefore, did not cause any budget difficulty. For example, the operating loss of \$0.211m in 2007–08, was due to greater than expected expenditure on the ALRC's Privacy Inquiry—one of the largest and most complex inquiries undertaken by the ALRC in the last ten years. This loss was covered by the ALRC's reserves and was immaterial to the ALRC's financial stability and performance going forward. Being able to use reserves in this way allowed considerable flexibility in the ALRC's ability to respond to government priorities.

24. In the following year, 2008–09, the ALRC had a small surplus. However, as the ALRC moves from a CAC Act body to one under the FMA Act, it will lose its ability to use its cash reserves as a buffer against the ebbs and flows of inquiry work and particular resource needs. This will necessitate more careful planning by both the Government and the ALRC in the timing and scope of inquiries being referred to the ALRC given the inflexibility that the change in status will impose on the ALRC's ability to respond. Alternatively, in circumstances where Government perceives a need for the ALRC to undertake additional inquiry work the Government could consider providing additional inquiry specific project funds to cover any additional costs—including additional staff resources—that would be incurred due to the ALRC's increased workload.

25. A question that was raised during the giving of evidence in this inquiry was whether stakeholders had noticed any downgrading in the quality of the ALRC's work, as a direct result of the recent reduction in funding. Most witnesses were unable to answer this question as they had not conducted a qualitative evaluation of the ALRC's output over the past year.

26. The ALRC argues that, given that the reduction in the ALRC's financial and human resources has only been since December 2009, it is too soon to be able to provide evidence regarding the effect on the quality of ALRC's reports. However, it is possible to provide evidence of the effect of these cuts on the ALRC's operations and feedback from stakeholders. For example, the ALRC has had to shorten the time allowed for consultations and move to providing only one consultation paper, as opposed to the usual two-stage consultation process. Several stakeholders noted that this may mean that the community has less opportunity to

engage in the process of reform, and to consider the issues as they develop over a more staged process. Due to reduced staffing and timeframe, the period that the ALRC could allow for stakeholders to put in submissions, both to the Family Violence and Discovery references was very short, and many stakeholders were forced to ask the ALRC for extensions. In turn, this led to the ALRC having to request an extension of the reporting date for the Family Violence Inquiry. Reducing the time for stakeholders to develop their own thinking and submissions may have an impact on the quality and extent of these submissions in the future and limit community involvement in law reform.

27. Several stakeholders have also expressed concern that with a reduction in funding, staff and reduced timeframes, the ALRC may have to reduce the number of consultations it conducts, and in particular, may have less face-to-face meetings in regional areas. Consultation lies at the heart of ALRC processes, and is a key element contributing to the quality of our work. It is essential that the ALRC consults widely and with the diverse Australian community, in order to inform its thinking and to be fully aware of the effect of any issues or proposals on a wide range of people. The ALRC believes that if time and resources for consultation are reduced then, over time, it will affect the evidence base for, and the quality of, its work.

28. With the recent Family Violence Inquiry, the reduction in funding, staff and reduced timeframes did mean that the ALRC had a greatly reduced writing period, with a very tight turnaround from close of submissions to the final report being due—a period of 10 weeks. This was even tighter with a number of significant submissions from government departments being received well after the final submission deadline. One effect of this situation was a reduced capacity for the ALRC to reflect on its final draft and to edit the document. With more staff and time to complete the final report it may well have been reduced in page volume through a longer editing process. While the production of a Summary Report went some way to assisting stakeholders to digest the report, feedback to the ALRC is that more condensed documents are preferred.

29. Other stakeholders have commented that the new policy of now charging for ALRC Reports, as a cost recovery measure, will affect access to them. While charging for government reports may well be common practice, it has not been the case with ALRC reports. The ALRC has heard that some community organisations in particular are not able to pay for them. If stakeholders feel disengaged from ALRC processes, because they are not able to access these reports, they may not be as inclined to engage in consultations in the future.

30. There has been a significant turnover of ALRC legal staff in the past year, and the additional workload placed on staff, as resources have decreased, may have affected morale. Of course, staff turnover always occurs for a number of reasons, and the ALRC's complement of legal officers remains of an extremely high professional standard. Staff turnover nevertheless has an impact on the efficiency

of the ALRC as new staff have to be trained in the law reform process and the development. As argued below, in order to attract and retain staff who are skilled and experienced in the law reform process, the ALRC must have adequate resources so that appropriate and competitive salaries and benefits can be offered. The continuing quality of ALRC reports is dependent on access to these highly talented and committed law reformers.

The core complement

31. To be able to foster and develop the intellectual capital of a law reform commission requires a core complement of standing Commissioners and staff. Assuming an average of two inquiries referred to the ALRC at any one time, the proper level of resourcing includes the following complement of staff:

The President

1 full-time Commissioner per inquiry

1 Principal/Senior Legal Officer per inquiry

3 Legal Officers per inquiry

32. If the ALRC is to conduct two inquiries at any one time then the organisation needs a President, two Commissioners and 8–10 legal officers at different classification levels (the number allocated to each inquiry depends on the complexity of the inquiry and the timeline). The President must also retain the ability to make fixed-term appointments of legal staff should the nature and complexity of an inquiry require either additional legal researchers or the employment of people with specific expertise. Reducing the number of legal staff below this core complement will have a direct impact on the ALRC's capacity to conduct law reform inquiries, by making it difficult to undertake two significant inquiries at the same time, meet tight deadlines and ensure widespread national community consultation.

33. In addition, the complementary inquiry team and the corporate team contribute to the inquiry process and are integral to the ALRC's ability to act as an independent law reform agency.

Commissioners

34. Section 6 of the ALRC Act describes the constitution of the Commission as including a President; a Deputy President; and at least four other members. This is notwithstanding s 6(2) which states

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.

35. The ALRC argues that the spirit and intent of the Act was that the full complement of members would constitute the proper leadership of the ALRC. Section 6(2) merely provided for the ALRC to continue to discharge its functions, when vacancies in membership occurred from time to time.

36. For the proper functioning of the ALRC, it is essential that the ALRC is resourced, at the statutory appointment level, as originally envisaged. The high reputation of the ALRC, the recognised quality of the ALRC's research work, the high rate of implementation, the timeliness with which it has discharged its responsibilities—qualities lauded in most of the submissions presented to this Inquiry—are evidence of the effectiveness of this core complement of Commissioners.

37. During the recent discussions with the Attorney-General's Department regarding changes to the ALRC Act, the ALRC strongly recommended that any amendment to s 6 include a minimum core of members that must be appointed at any one time (being at least the President and one other Commissioner). The ALRC is concerned that the amended ALRC Act provides only that the ALRC must have a President and up to six other members with no minimum number stipulated.

38. Since December 2009, the ALRC has operated with a President and no other full-time members. While this is permitted under the ALRC Act, the ALRC does not believe that this is in keeping with the spirit of the Act and the membership envisaged. Having only one full-time Commissioner is not adequate.

The role of full-time and part-time Commissioners

39. The ALRC's Preliminary Submission made clear the difference between part-time Commissioners and full-time Commissioners. This is worth re-stating, because it is this issue that is most fundamental to the ongoing viability and reputation of the ALRC and the maintenance of its intellectual capital.

40. Since December 2009, the President has overseen all inquiries—as well as the governance of the ALRC—with two part-time 'standing' Commissioners, appointed for three-year terms. Since 2010, the Attorney-General has also appointed a number of short-term inquiry specific part-time Commissioners— one for the Family Violence Inquiry and two for the Discovery Inquiry—whose terms expire at the completion of the respective inquiries. As outlined in the table above, for the past 10 years, the ALRC has had a President and two full-time Commissioners to oversee and manage inquiries—recognition of the level of responsibility and engagement required to provide high calibre reports for government.

41. The role of the ALRC President is to take overall responsibility for the ALRC's governance and for the strategic development of the organisation, to facilitate the participation of part-time Commissioners, and to assist the full-time Commissioners with high level policy formulation and analysis involved in a particular inquiry. The ultimate responsibility for ALRC reports and law reform recommendations is with the President. The President is the ALRC's representative to the Parliament and to the Government, and also the key spokesperson regarding

the ALRC's work to the community, the legal profession, to industry stakeholders and to the media.

42. The role of the full-time Commissioner, in consultation with the President, is to provide leadership and direction to a legal team for a particular inquiry and to lead the formulation of the final recommendations made in the inquiry. Full-time Commissioners take responsibility for leading the scoping of the inquiry from the Terms of Reference; identifying the policy framework to inform the recommendations; using their experience to assist the President to identify and establish an inquiry expert panel (an inquiry specific Advisory Committee) with high level stakeholders and assisting the President to conduct inquiry Advisory Committee meetings; identifying stakeholders and heading up consultations; providing supervision to legal officers, overseeing their research and reviewing all written work; leading the policy discussions and formulation of proposals and recommendations for reform; and taking overall responsibility for the timely completion of all consultation documents and reports. The Commissioner will also contribute chapters and share presentation and media engagements with the President.

43. Full-time Commissioners, therefore, make a key contribution to ALRC inquiries, most importantly bringing their high level knowledge and experience to the law reform process, adding credibility to the ALRC's processes by their seniority and thereby leveraging further high level contributions and engagement, establishing influential networks, and fostering goodwill with ALRC stakeholders. In addition they have inquiry management responsibility ensuring the inquiry is completed to schedule and within allocated resources.

44. Part-time Commissioners are mainly judges of the Federal Court who, until the last year, have been appointed for periods of at least three years. These part-time Commissioners have full-time positions as judicial officers and, therefore, the amount of time that they can actually spend on ALRC work is limited. As judicial officers, they are not paid by the ALRC and their contribution is honorary. The ALRC covers only the costs of any necessary travel. The ALRC is extremely grateful for the pro-bono contribution made by its part-time Commissioners—and to the Federal Court for facilitating their involvement. However, describing the role as 'part-time' may suggest that these Commissioners are able to attend the ALRC on a regular basis and participate to a considerable extent in inquiries. In fact, the nature of their demanding judicial appointments means that their ability to work with the ALRC is usually confined to attending two Commission meetings per year, and the various inquiry Advisory Committee meetings.

45. The contribution of part-time Commissioners, while essential to the overall quality and reputation of the ALRC's work and ability to leverage further community input, does not usually go to arduous process of writing of the reports or to conducting consultations, or analysis of submissions received. Part-time Commissioners play an invaluable advisory 'sounding-board' role—but are no

substitute for full-time Commissioners or for the legal officers who undertake the bulk of the research, consultations, analysis, and writing.

Inquiry specific full-time Commissioners

46. The appointment of inquiry specific full-time Commissioners has been suggested by the Attorney-General's Department, as a way of providing high calibre oversight of ALRC inquiries while, at the same time, allowing for a more flexible appointment that can make use of subject expertise. While the appointment of a highly qualified Commissioner with special knowledge and experience in the area of a particular inquiry can provide a benefit, this specialist knowledge is already obtained by the ALRC through its established, tried and tested practice of involving subject specialists and stakeholders in inquiry specific Advisory Committees. What the ALRC needs most in a Commissioner is the ability to understand the law reform process and how this process leads to effective law reform proposals. This knowledge takes time to develop—the more inquiries a Commissioner works on, the more this knowledge and expertise develops. The ALRC's practice of having standing full-time Commissioners appointed for a period of three years, where they oversee at least two or three references, has proven to be extremely effective, building the capacity of the Commissioners through experience and practice, retaining and reinforcing the ALRC's intellectual capital in law reform.

47. Finding suitable people with high subject knowledge who are available to work at short notice solely for the period of an inquiry, with sufficient flexibility with respect to start and end dates, so as to be able to direct an inquiry from start to finish—and if necessary, to move to Sydney—may prove difficult. If the appointment is to be advertised, further time needs to be factored in (at least 3–6 months).

48. Another issue is that specialist Commissioners may bring particular perspectives on contested issues formed by previous experience. The appointment of a specialist Commissioner may be perceived by stakeholders as having pre-determined the outcome, and compromising the impartiality of the ALRC's processes—whether or not this is in fact the case. While ALRC Advisory Committees are made up of specialists or experts in the subject area of an inquiry, the ALRC balances different views and perspectives by including a range of 'experts' from different 'schools'. The members of the inquiry advisory committees do not play the directive role in an inquiry that is taken by the full-time Commissioner, and their ability to influence the outcomes of any inquiry process is contained by their advisory role and the ALRC's processes.

Standing full-time Commissioners

49. Standing full-time Commissioners give the Commission its intellectual capital in law reform and clear independence. It is the ALRC's firm view that the ongoing health and sustainability of the ALRC will be compromised without the

appointment of at least one other full-time standing Commissioner and an increase in the ALRC's appropriation so that it can afford such an ongoing appointment—in addition to the necessary complement of legal officers and complementary inquiry and corporate staff.

Legal Officers

50. The ability of the ALRC to continue to employ the high calibre of legal officers to the complement described is also a key resourcing issue. The ALRC needs to be able to offer competitive salaries so that it can attract and maintain a complement of highly qualified and experienced commissioners and legal officers who are skilled in the processes of law reform and able quickly to get on top of a particular inquiry. This ability comes with experience, people who know the processes of law reform, that have skills in using these processes and in analysing laws and their effects, and who can then develop law reform proposals that will deliver a principled policy outcome. Constantly engaging new people in the process means having to train them in these processes and that in itself takes time—and with shorter reporting timeframes, the ALRC does not have the time to constantly train up legal officers for every new inquiry. This is true of both legal staff and Commissioners. Maintaining a long-term complement of staff is a minimum resourcing requirement for best practice, efficient and responsive law reform, saving time and therefore, dollars in the longer term. Adequate resourcing is a requisite of retaining high calibre staff.

Complementary Inquiry team

51. In addition, an Inquiry team must be supported in its work by people to facilitate the administration of the inquiry, to coordinate the publishing process, to manage the web interface and the research needs. Therefore the Commission also needs a complementary inquiry team as an integral part of the Inquiry process consisting of—at an absolute minimum:

- 1 executive director
- 1 information manager
- 1 website manager (online submissions/consultation discussion forums/inquiry blogs and newsletters)
- 1 inquiry coordinator
- 1 publication support

Corporate team

52. The ALRC, as an independent CAC (and soon to be FMA) agency also requires a small corporate team, in order to meet our statutory reporting requirements and operational needs. Currently, ALRC corporate staff only account for 3 FTEs. It would be difficult—if not impossible—to operate a federal statutory agency with any fewer human resources devoted to these corporate functions.

Legislation and government reporting requirements involve considerable compliance costs, which are in no way mitigated in small agencies.

Consultations

53. The ALRC also requires an appropriate level of resources to allow it to conduct consultations nationally—including the costs of travel. While the ALRC is able to conduct many consultations via teleconference and through our online communication strategies, such as blogs and online forums, the complexity of the subject matter that is often being considered, and the nature of the stakeholders, means that these more remote consultation tools cannot always take the place of face to face consultations. For example, in the recently completed Family Violence Inquiry, it was important to consult widely with Indigenous communities and the most effective way to do this was to travel to Western Australia and the Northern Territory (to Darwin and Alice Springs) in order to meet with legal and community stakeholders—face to face. It would not have been effective to do this consultation via phone or the internet, both because of access issues, but also because effective communication often relies on building a personal connection and trust with the people you are consulting with. Much goodwill is fostered through personal connections, goodwill and trust that can be garnered in future relevant inquiries.

54. Several submissions expressed concern that reducing ALRC resources would necessarily have an impact on the ALRC's ability to consult adequately with the community, and in particular with people in regional areas, or those outside of the main east coast capital cities. Community consultation lies at the heart of ALRC processes, and the ALRC's resources must allow for continued widespread consultation around the country. Indeed many Terms of Reference issued to the ALRC include such a requirement.

Adequate resourcing—conclusion

55. The ALRC understands the current fiscal environment, the government's commitment to realise a budget surplus by 2012–13 and the increased pressure on this goal caused by recent events around the country. However, the cuts to the ALRC, and the way they were introduced, have meant that at present the ALRC is not able to afford the core complement of staff outlined above. In particular, it is not able to accommodate the appointment of a full-time Commissioner—let alone the two Commissioners (as well as the President) that are considered essential and were employed until December 2009.

56. The ALRC has had to introduce a number of budget savings that, as alluded to in several submissions, may affect the accessibility of the ALRC's work—having to reduce the number of face to face consultations per inquiry, reducing travel to regional areas and charging for reports that have been free to stakeholders up until now.

57. In order to manage the current budget cuts the ALRC has made substantial operation decisions that have reduced its expenditure, including:

- reducing programs from two to one so as to focus on our core function of conducting inquiries—the ALRC’s outreach and education program was cut;
- reducing staffing levels by leaving vacant a number of positions including Research Manager, Project Assistant, Communications Manager, Publications Coordinator and a Senior Legal Officer position;
- streamlining the inquiry processes on the Family Violence Inquiry to fit within the tight timeframe and reduced staff resources, producing one consultation document, as opposed to the usual two (an Issues Paper and Discussion Paper);
- streamlining the inquiry process for the Discovery Inquiry, producing only one Consultation Document as opposed to two, and for the first time, not producing this Consultation Document in hard copy;
- developing online consultation strategies so as to reduce our costs of consultation travel; and
- delaying the appointment of full-time Commissioners until the completion of the Family Violence Inquiry. This strategy was agreed in the short term with the Attorney-General’s Department as a budget measure, particularly as the ALRC was able to call upon the NSWLRC full-time Commissioner for the joint ALRC/NSWLRC Family Violence Inquiry. This was never intended to be an ongoing situation.

58. The ALRC is a small organisation with limited ability to find across-the-board savings. By far the biggest expense to the Commission is its inquiry staff, and we rely on this staff to undertake the current workload and to meet our deadlines. The ALRC has no further capacity to reduce expenditure if it is to be able to discharge its current workload.

Best practice examples of law reform agencies

59. Many submissions to the inquiry have described the processes of the ALRC as being of international best practice, and have noted the very high implementation rate of our reform proposals. The ALRC notes the comparative information provided by the Attorney-General’s Department in its submission, under the heading, ‘Best practice examples of like organisations interstate and overseas’. The value of comparisons with other law reform agencies is of limited utility, however, and requires careful consideration before useful conclusions are able to be drawn. In particular, information such as that presented in the Department’s submission tells only a limited story, unless information both about the complexity of the issues under review, the timeframes that each law reform commission took to complete these reports and the context within which they were working is taken into account.

60. As an illustration, the Law Commission of England and Wales, in 2009, produced 4 reports, published 1 consultation paper and 2 issues papers. Expenses for the year were £4,385,300—approximately two times the budget of the ALRC. Further analysis shows that of these reports one took fifteen years to complete, one took six years to complete, one took three years to complete, one of the consultation papers took four years to complete. The New Zealand Law Reform Commission has a larger budget than the ALRC of NZ\$4,800,000—approximately A\$3,883,764. In 2009, it is reported as having completed eight final reports, three issues papers, and one draft Bill. These took between two and four years to complete and were of varying complexity.

61. Comparing the output of various law reform agencies, in order to shed light on resourcing and output, is therefore difficult and complicated by both the time taken to complete a consultation document or final report, and the complexity of the issues and laws involved and the available resources.

62. The time taken by the ALRC to complete its reports is dictated by the Attorney-General in the Terms of Reference that are issued at the time an inquiry is referred. It is important to note that over the past ten years only two ALRC reports have taken over two years to complete—Privacy (26 months) and Human Genetic Information (24 months)—both of which were highly complex inquiries. All other inquiries during that time have taken less than 18 months to complete.

63. It is also important to note that the ALRC is only able to work on those inquiries referred to it by the Attorney-General. While a few submissions to the Inquiry questioned whether there would be value in community referrals to the ALRC, the ALRC considers that one of the factors contributing to the high rate of implementation of its recommendations is the fact that the ALRC only works on issues that are of high relevance to the government, and for which there is an appetite for parliamentary reform.

64. ALRC inquiries differ in their complexity and breadth, and while there is room for shorter more focused inquiries, the ALRC does not advocate that the ALRC should only focus on shorter, less complex inquiries, as a way of solving its current resourcing deficit. This would be a waste of the ALRC's intellectual capital and knowledge—an organisation with the capacity and experience in dealing with complex legal issues, must not lose that ability. Gene Patenting in 2002, Australian Privacy Law and Practice in 2006, and of course the recent Family Violence Inquiry are further examples of highly complex legal inquiries of which the ALRC is capable. The ALRC is unique in its ability and experience to deal with such complex legal issues that require in-depth consultation with many diverse stakeholders, the ability to find a policy pathway that is acceptable to the community and stakeholders and where there is a need to be, and to be seen to be, completely independent.

Allocation of functions between the ALRC and other agencies

65. The Inquiry asked the question as to the relationship of the ALRC with other agencies. While law reform agencies such as the ALRC are not the only bodies responsible for developing legal policy, the ALRC considers that there are key differentials that distinguish the ALRC from these agencies and organisations and demonstrate why the ALRC is a vital contributor to the health and growth of Australian law. These features answer the question ‘why law reform commissions?’ and include the ALRC’s:

- independence and arm’s length from government;
- broad generalist legal expertise;
- authority and capacity to leverage relationships with key stakeholders;
- distinguished consultative and research strategies;
- dedicated experience in best practice law reform processes.
- engagement with the international legal community.

66. Submissions to the inquiry, including that of the Attorney-General’s Department, supported the role of the ALRC as distinct from other statutory agencies. The ALRC considers that the distinct role it plays contributes to achieving a fair, equitable and accessible system of federal justice that in turn contributes to a just and secure society. The functions of the ALRC, as set out in the ALRC Act, are not being duplicated by other statutory agencies and remain best delivered by an independent, properly resourced and constituted law reform body.

Other matters

67. The ALRC notes the tabling of a document by the Attorney-General’s Department on 11 February, entitled ‘Organisational Audit of the Attorney-General’s Department’. Despite the fact that this audit concluded that there was ‘at least a prima facie case’ that the ALRC should be replaced with another body that would be brought ‘into the corporate centre’, the ALRC was not consulted as part of this ‘audit’, nor had it been shown the document, prior to its tabling.

68. The document states that:

Because of the constraints of time and budget, the Audit has consulted neither with the ALRC, nor external stakeholders. Nor has it examined ALRC reports and the action taken on them.

69. Given the absence of an appropriate evidence base supporting this report—and for the report’s recommendation to abolish the ALRC altogether—it is difficult for the ALRC to answer the issues it raises. However, with respect to one of the matters raised in the part of the document tabled, it is relevant to note that last year,

with the report on family violence, the ALRC did recognise the need for our reports to ‘talk’ to a policy-making audience. As a result, the ALRC produced a slim focused volume, a Summary Report, and also included a discussion of the policy principles or framework that provided the context and drivers informing the law reform process. The ALRC has acknowledged the importance of making our reports accessible to those who are going to be implementing them and clearly identifying the bridge between the integrity of the evidence base included in the reports and the policy-makers who have the task of implementing the ALRC’s recommendations.

70. Moreover, the assertion in this document that ‘When referrals are given the work done is of outstanding quality but slow to produce’, does not acknowledge that the ALRC’s timeframe for its inquiries is always set by the Attorney-General in the Terms of Reference, and is somewhat dictated both by the breadth and complexity of the issues to be researched. As pointed out earlier in this submission, in the past ten years there have only been two reports that have taken the ALRC longer than two years to complete and both were complex and wide-ranging references, with extremely high and diverse stakeholder interest and engagement. Therefore the assertion that the ALRC is ‘slow to produce’ reports is not supported by the actual practice of the ALRC, even more so when the ALRC’s timeframes are compared with those of other law reform commissions.

71. The suggestion that independent law reform should be brought into ‘the corporate centre of the AGD’ conflicts directly with the importance of an independent law reform process that is non-partisan and not captured by government interests. Such independence is vital to maintaining a system of law reform that is separate from the state and the interests of a particular government at any one point in time. While still being relevant to a government’s reform agenda, the actual law reform process and reform recommendations must remain at arm’s length to government, and be perceived to be at arm’s length, for the community to have faith and trust in the independence of the legal system.

72. The ALRC records its strong objection to having been excluded from that process of ‘review’, and questions the validity of any report that could provide such a radical suggestion to disband a statutory organisation of 35 years standing—that is internationally renowned and widely acknowledged as being of best practice in the field of law reform, with an implementation rate of its recommendations of over 90%—based on no actual research of the organisation, its output or consultation with its stakeholders.

3 March 2011