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# Inquiry into the Australian Law Reform Commission

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## **Senate Standing Committee on Legal and Constitutional Affairs**

**28 January 2011**



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## Introduction

1. The Law Council welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Role of the Australian Law Reform Commission (ALRC).
2. The Law Council considers that the ALRC provides an outstanding contribution to Federal law reform in Australia. The ALRC consistently conducts comprehensive inquiries and produces informative, well researched and well written reports. The ALRC's recommendations to government are generally sound and reasonably appropriate to the issues identified by the inquiry.
3. The Law Council makes the following general comments:
  - (a) The Law Council unequivocally supports the ongoing need for the ALRC given its invaluable contribution to law reform and legal development in this country.
  - (b) The ALRC must be given sufficient resources to perform its functions effectively. The ALRC is a unique and valuable institution amongst Australia's allied democracies and its capacity to contribute to the discourse over law reform must not be undermined by the concerning tendency of successive governments to reduce its funding, both in real and actual terms.
  - (c) Consideration should be given to whether the Government should have a statutory duty to table a formal response to ALRC reports in Parliament within a certain timeframe.

### History of Law Council Involvement in ALRC inquiries

4. The Law Council, through its secretariat, expert committees and specialist sections, has made submissions to the ALRC on over 30 topics since 1985, ranging from broad based inquiries into the adversarial system to more specific submissions on costs orders in family law proceedings.
5. In 1993, the Law Council responded to the House of Representatives Standing Committee on Legal and Constitutional Affairs' Inquiry into the Role and Function of the ALRC.<sup>1</sup> In its submission, the Law Council supported the ALRC's ongoing role as a permanent and separate law reform commission at the federal level. In support of this conclusion, it noted:
  - (a) the desirability of a permanent law reform commission established by its own Act of Parliament as this ensured transparency of the role and function of the ALRC and its accountability to the Executive and to Parliament;
  - (b) that if such a permanent body did not exist, a plethora of specialist bodies would have to be established which could give rise to concerns about accountability, quality and the question of overall coordination of law reform projects at the federal level;
  - (c) that a permanent ALRC also facilitates better coordination of law reform initiatives by all the Commonwealth and State and Territory Law Reform Commissions; and

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<sup>1</sup> Law Council of Australia, *Submission on the Inquiry into the Role and Function of the Australian Law Reform Commission*, 4 November 1993 [available on request].

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- (d) the sound case for the establishment of separate law reform bodies in addition to the ALRC, in limited discrete areas where this was justified by an ongoing work program,<sup>2</sup> provided that their work was coordinated with the ALRC's and that appropriate accountability rules applied.

## The Role of the ALRC

### Role of the ALRC for Law Reform

6. The Australian Law Reform Commission is a federal agency, which is independent of government. It was established in 1975 and operates under the *Australian Law Reform Commission Act 1996* (Cth) (the ALRC Act).
7. The ALRC carries out inquiries at the request of the Attorney-General of Australia into possible law reform initiatives at the Federal level.<sup>3</sup> In order to fulfil this purpose, the ALRC undertakes research and consults widely with stakeholders, including the courts, industry bodies, professional associations, governments and the general public.
8. In the course of its inquiries, the ALRC identifies areas where Australian laws are inconsistent or out of date, defective, overly complex or poorly administered. The ALRC examines how these areas of law may be improved and makes recommendations to the Parliament so that government can make informed decisions about whether law reform is necessary or appropriate.
9. The reports and recommendations of the ALRC have a strong rate of implementation, with the majority of its reports and recommendations being either substantially or partially implemented.

### Value of the ALRC for the Improvement of Law

#### General Law Council Comments

10. ALRC inquiries provide an opportunity to discuss legal or social issues in detail. They also serve an important purpose to summarise the current law and the arguments for and against change – and can be later used as a valuable resource in future relevant debates.
11. Section 21 of the ALRC Act lists as one of the ALRC's functions removing defects in the law and simplifying the law. Many of the ALRC's reports include recommendations for achieving these goals in specific legislation.
12. The Law Council has often cited ALRC papers and reports such as those relating to privacy, sentencing, client legal privilege and proceeds of crime laws in subsequent work, including submissions to Parliamentary Inquiries and in correspondence to Ministers. For example, the ALRC's inquiry into sedition laws has been an important body of work that, although did not immediately result in legal change, has contributed to the Law Council's continued advocacy for reform, and has now been acted upon at least in part in the *National Security Legislation Amendment Act 2010*.

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<sup>2</sup> The submission cited the Family Law Council and Administrative Review Council as two bodies which undertook such discrete work.

<sup>3</sup> *Australian Law Reform Commission Act 1996* (Cth), s 20.

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13. The ALRC reports also provide an opportunity for the Law Council and others to obtain the views of Government Departments and other officials, for example, by examining views or proposals made by the Federal Police or the Australian Crime Commission to the ALRC that are not otherwise publically available. The views expressed by these agencies about secrecy laws in the Secrecy Inquiry provide an example of this.
  14. When utilizing these reports in its advocacy, the Law Council finds the use of Executive Summaries and Lists of Recommendations in lengthy ALRC reports particularly helpful.
  15. Section 38 of the ALRC Act empowers the ALRC to inform itself in any way it thinks fit. The use of alternative opportunities to obtain information by the ALRC, such as community forums, meetings with Commissioners or ALRC staff, have been attended by the Law Council and many other organisations and assist the Council to prioritise and streamline its responses to inquiries.

#### Implementation of Commission Reports

16. The rate of implementation of the reports and recommendations of the ALRC by government and other bodies is one measure of its effectiveness, particularly as there is no statutory requirement for the Australian Government to formally respond to ALRC reports.
17. The ALRC considers a report to be substantially implemented when the majority of the report's recommendations, including key recommendations, have been implemented by those to whom the recommendations are directed. The ALRC considers a report to be partially implemented when at least some of the report's recommendations have been implemented by those to whom the recommendations are directed. The ALRC also distinguishes those reports that have received a positive response from those to whom the recommendations are directed but which are still awaiting implementation and to those that have been completed within the past two years and are yet to receive a formal response.<sup>4</sup>
18. The ALRC Annual Report 2009-2010 (Report 113) provides a number of important statistics that can be used in assessing the value of the role the ALRC plays in relation to law reform.
19. Of the 77 ALRC reports produced over the 2009-2010 financial year:
  - (a) 61% of reports were substantially implemented;
  - (b) 29% of reports were partially implemented;
  - (c) 5% of reports without any implementation to date were currently under consideration; and
  - (d) only 5% of reports had not been implemented.<sup>5</sup>
20. Accordingly, 90% of ALRC reports produced over the 2009-2010 year were either substantially or partially implemented, which represents an increase of 8% from the

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<sup>4</sup> ALRC Annual Report 2009-2010 (ALRC Report 113), Program 1.1 Key performance indicators, URL: <http://www.alrc.gov.au/publications/program11-key-performance-indicators>, accessed 21/12/10.

<sup>5</sup> Ibid.

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2008-2009 financial year, for which 82% of reports were wholly or partially implemented.<sup>6</sup>

#### Citations or References to ALRC Reports

21. Another indication of the ALRC's influence is the number of citations or references to ALRC reports and recommendations in Parliamentary debates, Australian court and tribunal decisions and academic articles and other publications.
22. There were over 64 references to ALRC reports in decisions of major courts and tribunals over the 2009-2010 year, including:
  - (a) 2 references from the High Court of Australia;
  - (b) 12 references from the Federal Court of Australia; and
  - (c) 38 references from state and territory Supreme Courts or Courts of Appealin addition to decisions of other major courts and tribunals.<sup>7</sup>
23. The number of total references to ALRC reports over the 2009-2010 year represents an increase of 49% (21 judgments) from the number calculated for the 2008-2009 year.<sup>8</sup>

#### Media Reports

24. The number of mentions of the ALRC in media reports is a third measure of success. The ALRC monitors and records mentions of the ALRC and its work in print, online, radio and television, in addition to other sources such as journal articles and Hansard.
25. The ALRC recorded 393 mentions of its work (both past and present) during the 2009-2010 year.<sup>9</sup>

#### Consultation

26. Consultation is a key element of the ALRC's inquiry process. Its consultations with stakeholders and the number of submissions it receives can serve to provide an additional measure of the public's engagement with its work.
27. Over the 2009-2010 year, the ALRC:
  - (a) distributed 977 hard copies of final reports;
  - (b) distributed 832 hard copies of consultation papers;
  - (c) received a total of 273 submissions for inquiries; and
  - (d) conducted a total of 136 consultations around the countryfor its Secrecy,<sup>10</sup> Royal Commissions<sup>11</sup> and Family Violence<sup>12</sup> Inquiries.

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> ALRC Final Report: *Secrecy Laws and Open Government in Australia* (Report 112, 2009).

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28. The Law Council regards these figures as a clear indication of the continuing effectiveness of the work of the ALRC.
  29. Further Law Council comments on the effective mechanisms employed by the ALRC as part of its consultations are included below.

## Resources and Staffing

### Members and Staff

30. The ALRC Annual Report 2009-2010 notes that, at the close of the reporting period on 30 June 2010, there were four members of the ALRC: one full-time Commissioner (being the current President) and three part-time Commissioners. On 30 June 2010, the ALRC's full-time equivalent staffing level was 19.99 (not including Commissioners).<sup>13</sup> This figure includes staff members from the legal, research, communications and corporate support teams.
31. Despite the practice in previous years, the ALRC did not employ any consultants during 2009-2010.<sup>14</sup>

### Changes to Resourcing over Previous Years

32. The 2009-2010 Annual Report reflects upon changes over past years to the ALRC structure, inquiry timetables, resources and available technology that have presented challenges to the work and operation of the ALRC.
33. For example, the ALRC's release of the landmark report, *Managing Justice—A Review of the Federal Justice System* (Report 89, 2000) represented a considerable law reform undertaking spanning over a five-year inquiry period which involved the President, a Deputy President, a full-time Commissioner, three part-time Commissioners, two team leaders, two legal specialists, at least five legal officers, a number of researchers, two project assistants, 35 legal interns, two information technology staff, one typesetter, three consultants and two library staff (in addition to a host of advisory and working groups). Six issues papers, six background papers, and a discussion paper were released during the inquiry. The quality of the work is demonstrated by the substantial implementation of the report in the subsequent years.<sup>15</sup>
34. Another example includes the report, *Censorship Procedure* (Report 55, 1991) which spanned a 12-month timeframe and included a team consisting of the President, Deputy President, Commissioner, a Director of Research, one legal officer, one legislative drafter, two library staff, one project assistant and one typesetter (in addition to 12 consultants as nominees of state and territory governments). This is another report which has been substantially implemented.<sup>16</sup>
35. The ALRC's inquiry into Privacy Law and Practice provides a more recent example of the consultations and team associated with a high complexity inquiry.<sup>17</sup> The

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<sup>11</sup> ALRC Final Report: *Making Inquiries: A New Statutory Framework* (Report 111, 2009).

<sup>12</sup> ALRC Final Report: *Family Violence—A National Legal Response* (Report 114, 2010).

<sup>13</sup> ALRC Annual Report 2009-2010 (ALRC Report 113), p 46.

<sup>14</sup> *Ibid*, p 68.

<sup>15</sup> *Ibid*, p 7.

<sup>16</sup> *Ibid*.

<sup>17</sup> ALRC Final Report: *For Your Information* (Report 108, 2008).



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ALRC's submission to this inquiry<sup>18</sup> notes the 28 month Privacy Law and Practice inquiry involved a team consisting of the President, a full-time Commissioner, four senior legal officers, five legal officers and a complementary inquiry team including the Executive Director, Project Coordinators, Website Manager, Librarian, Research Manager and finance team. Two issues papers, a discussion paper and final report were released during the inquiry.

36. The 2009-2010 Annual Report continues, that ALRC teams no longer include legislative drafters or three full-time Commissioners, but rather a librarian and a project assistant who manages the two inquiries that are often running at a time. In instances of reports with tighter timelines and/or very wide Terms of Reference, the ALRC approach involves developing strong, although smaller, teams of junior and senior legal officers under the Commissioner and/or President, supported by an Advisory Committee of leading experts in the fields of the inquiries and part-time Commissioners.<sup>19</sup>
37. A review of the ALRC Annual Reports from 1999-2000 to 2009-2010 demonstrates that revenue from government sources has remained relatively static over the last ten years at around \$3.3 million annually. The failure to increase this funding in line with inflation and the rate of the Consumer Price Index represents a steady decrease in real funding over time.
38. The full time equivalent average staffing level has also remained relatively stable throughout this period of time. It is noted that failure to index funding levels against movements in inflation affects the capacity of an organisation to offer wage increases in line with consumer price index changes and improvements in productivity, threatening morale and the capacity to recruit and retain experienced staff members.

## **Forthcoming Changes to Resourcing**

39. The 2009-2010 Annual Report notes that the ALRC received notice of a substantial financial budget reduction, whereby the ALRC's actual funding will be contracted by 15% over the next three years.<sup>20</sup> The ALRC is expected to modify its inquiry processes in order to function with substantially fewer resources.
40. It may be useful to contrast this with the Efficiency Dividend, the main mechanism used to drive performance improvements across the Australian Public Service (APS) as a whole, which annually reduces the amount of resources consumed for the same level of output. Most APS departments face only a 2% efficiency dividend. The ALRC notes in its submission to this inquiry that a major challenge facing it over the current budget and forward estimates period is to align its expenditure with the significant budget reductions noted above, which are *in addition to* the efficiency dividend.<sup>21</sup>
41. In its submission to the Joint Committee of Public Accounts and Audit inquiry into the effect of the efficiency dividend on small agencies, the ALRC stressed its

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<sup>18</sup> ALRC Background Submission to the Senate Legal & Constitutional Affairs Committee, URL: [http://aph.gov.au/Senate/committee/legcon\\_ctte/law\\_reform\\_commission/submissions.htm](http://aph.gov.au/Senate/committee/legcon_ctte/law_reform_commission/submissions.htm), accessed 25/1/11, p 33.

<sup>19</sup> ALRC Annual Report 2009-2010 (ALRC Report 113), p 7.

<sup>20</sup> Ibid, p 57.

<sup>21</sup> ALRC Background Submission to the Senate Legal & Constitutional Affairs Committee, URL: [http://aph.gov.au/Senate/committee/legcon\\_ctte/law\\_reform\\_commission/submissions.htm](http://aph.gov.au/Senate/committee/legcon_ctte/law_reform_commission/submissions.htm), accessed 25/1/11, p 26.

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dependence on budget appropriations and its reduced expenditure on salaries in order to accommodate reductions in the real value of appropriations over time.<sup>22</sup>

42. One immediate consequence of the ALRC budget reduction is that the Attorney-General has not appointed any new full-time Commissioners, but is trialling the appointment of inquiry-specific part-time Commissioners who are able to bring a particular expertise to the ALRC's current inquiry work.<sup>23</sup>
43. These changes to resourcing will presumably result in further pressures on existing staff members to carry out the workload of the ALRC.
44. The 2009-2010 Annual Report notes that the ALRC will also streamline its operations, for example by producing one consultation document where possible (as opposed to two)<sup>24</sup>.
45. Due to the reduction in funding, the 2009-2010 Annual Report also notes that the ALRC has been forced to streamline its operations by reducing its programs from two to one; that is, while its predominant Conducting Inquiries program remains, its Information and Education Services program has been cut.<sup>25</sup>

## Implications of Resource Constraints

46. The Law Council is concerned that this substantial budget reduction is a constraint in resources that may limit the capacity of the ALRC to meet all of its objectives and to provide timely, thorough and sound advice to government.
47. The Law Council is concerned that insufficient resources may impact upon the ability of the ALRC to adequately consult with key stakeholders. This in turn has the potential to limit the scope and depth of ALRC Reports.
48. The Law Council considers that in order for the ALRC to maintain the high quality of its output, the Government should ensure that the ALRC has the resources required to meet its objectives.

## Experiences of the Law Council of Australia

### Positive Aspects

#### ALRC's consultation mechanisms

49. Pursuant to section 38 of the ALRC Act, the ALRC has a statutory responsibility in relation to references to inform itself in any way it sees fit. The Law Council commends the ALRC for the effective mechanisms it has used to consult public stakeholders as part of its inquiries. For example:
  - (a) In the ALRC's Discovery in Federal Courts Inquiry, the ALRC consulted with the Law Council and its constituent bodies, Law Council Sections and Law Council Committees throughout the process of the Discovery in Federal

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<sup>22</sup> ALRC Submission on the Effect of the Efficiency Dividend on Small Agencies to the Joint Committee of Public Accounts and Audit inquiry, 30 June 2008, URL:

<http://www.aph.gov.au/house/committee/jcpaa/efficdiv/subs/sub3.pdf>, pp 1-3.

<sup>23</sup> ALRC Annual Report 2009-2010 (ALRC Report 113), p 57.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid, p 58.

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Courts Inquiry. Representatives were contacted well in advance of the consultation paper being released and invited to private consultations with ALRC staff, including the ALRC's President. ALRC staff were highly flexible and considerate to the schedules of private practitioners who provided comments. Private consultation was used effectively as a form of consultation in the Discovery in Federal Courts Inquiry. Contributions could be made to the Discovery in Federal Courts Inquiry using multiple means. While the Law Council provided a written submission, other web based technology, such as blogs, online submission forms and Twitter are useful means by which to receive submissions from a broader audience, particularly smaller stakeholders.

- (b) The Family Violence Inquiry conducted in 2009 also included podcasts, e-newsletters, twitter contributions and updates, RSS feeds and on line forums – coordinated through a comprehensive, easily accessible website that also contained electronic copies of all relevant reports and links to other relevant information. A useful time table of key dates was also provided.
50. The Law Council is supportive of the multiple mediums through which the ALRC has sought feedback in its consultations and encourages the ongoing use of such technology in future inquiries.
51. Forums like those described in the above examples<sup>26</sup> make it easy for the Law Council and its Sections and Committees to stay up-to-date with all relevant developments relating to the inquiry and to exchange ideas with other organisations and individuals and make contributions to complement the more conventional written submissions.
52. These kinds of forums also appear to encourage other individuals or groups within the community to interact with the ALRC, who may not have done so otherwise, such as young people, people in regional or remote locations or those not affiliated with a particular advocacy group. Enhancing the reach of ALRC consultations in this way should be commended, particularly when the inquiry covers topics of broad community concern and interest, such as family violence.
53. The Law Council has a particular interest in the recruitment and retention of lawyers in rural, regional and remote areas and strongly supports the use of such technologies to assist such lawyers to keep up to date with law reform issues, reduce isolation and allow them to contribute to law reform.

## Negative Aspects

### ALRC Discovery Inquiry

54. The Law Council expresses concerns with the deadlines placed upon the ALRC to conduct the Discovery in Federal Courts Inquiry. The typical approach of an issues paper, a Discussion or Consultation paper, and a final report has worked consistently well, leading to the ongoing development of debate on particular issues. It also enables stakeholders multiple opportunities to contribute and evolve their views with contributions from other stakeholders.

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<sup>26</sup> Other examples include the Law Council's National Criminal Law Liaison Committee's and Family Law Section's engagement with the 2010 ALRC Family Violence Inquiry.

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55. The approach taken with the Discovery of the Federal Courts Inquiry to only issue a single consultation paper is not preferable from the perspective of the Law Council. Many subjects of inquiry by the ALRC are complex, requiring staged consideration. Allowing stakeholders only one opportunity to provide contributions limits the capacity for engaged and informed consultation and discussion.
  56. The provision of multiple papers during consultation is a valuable part of the inquiry process, given the changes in viewpoints that can develop over time and throughout the consultation period. The Law Council is concerned that changes in this process due to a lack of support may affect the capacity of the ALRC to provide the best possible advice regarding law reform.

## **Suggestions for Improvement**

### **Substantive Responses to ALRC Inquiries**

57. While as stated above, the ALRC's reports are usually at least partially implemented by Government, this is not always the case and timeframes between the ALRC's report and the Government response can be lengthy. For example, the Government is yet to respond to the ALRC's recommendations made in February 2010 regarding its inquiry into the operation of the provisions of the *Royal Commissions Act 1902* (Cth), and alternative forms of Commonwealth executive inquiry,<sup>27</sup> as well as the 2007/08 inquiry into Client Legal Privilege in Federal Investigations.<sup>28</sup>
58. The ability of the ALRC's reports and recommendations to effect legislative change and address weaknesses or deficiencies in the law is dependent upon those reports and recommendations being considered and acted upon by the Commonwealth Government in a timely fashion. Currently, the ALRC Act does not specifically require the Commonwealth Government to make a formal response to its reports. The Law Council would support a strengthening of the ALRC Act in this regard, for example by requiring that the Attorney-General make a formal response to a report of the ALRC within a reasonable time. This could be strengthened by the requirement that reasons be provided as to why the Government has not accepted certain recommendations.

### **Timeframes**

59. The Law Council urges the Attorney-General to give careful consideration to the time frames imposed under terms of reference. Insufficient time impedes the work of the ALRC and stakeholders involved in consultation.
60. The Law Council recommends that where possible and appropriate, the ALRC undertakes a staged consultation, involving the use of an issues paper, a discussion or consultation paper, and a final report. The Attorney-General should ensure that when considering the ALRC's budget or setting terms of reference, due consideration is had to such concerns.

### **Referrals and Alternative Forms of Inquiry**

61. Pursuant to section 20 of the ALRC Act, the ALRC has a statutory responsibility to inquire into matters referred to it by the Attorney General on his or her own initiative

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<sup>27</sup> *Making Inquiries: A New Statutory Framework* (ALRC Report 111), 10 February 2010, available at <http://www.alrc.gov.au/report-111>.

<sup>28</sup> *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC Report 107), 27 February 2008, available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/107/>.

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or at the suggestion of the ALRC. When conducting these inquiries, the ALRC often draws upon and consolidates the work of other review or inquiry bodies, including, for example the work of State Law Reform Commissions, or findings of the Commonwealth Ombudsman or Parliamentary Committees. This provides a very useful resource for organisations such as the Law Council.

62. There may be a need, however, for other forms of public inquiry which do not rely upon a reference from the Attorney-General, perhaps because of their political nature or because of the type of information that needs to be obtained, for example, reviews of the content and operation of national security laws or the inquiry into the handling of the case of Dr Muhamed Haneef. In such cases, consideration may need to be given to whether alternative forms of inquiry should be established, for example statutory based public inquiries. The issue of whether there currently exist appropriate mechanisms to conduct public inquiries at the federal level was considered by the ALRC in its inquiry into the Royal Commissions Act,<sup>29</sup> and the Law Council in its submission to this inquiry.<sup>30</sup>

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<sup>29</sup> *Making Inquiries: A New Statutory Framework (ALRC Report 111)*, 10 February 2010, URL: <http://www.alrc.gov.au/report-111>.

<sup>30</sup> Available at URL: [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=FD6382C1-1E4F-17FA-D221-A25A1C20D9DD&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=FD6382C1-1E4F-17FA-D221-A25A1C20D9DD&siteName=lca).

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.