

The Senate

Legal and Constitutional Affairs
References Committee

Inquiry into the Australian Law Reform
Commission

April 2011

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ABBREVIATIONS

AGS	Australian Government Solicitor
ALRC or commission	Australian Law Reform Commission
ALRC Act	<i>Australian Law Reform Commission Act 1996</i>
Beale Review	An organisational audit of the Attorney-General's Department in 2008 led by Mr Roger Beale
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CEO	Chief Executive Officer
CIAJ	Canadian Institution for the Administration of Justice
Classification inquiry	Australian Law Reform Commission's 'Review of censorship and classification' inquiry
Department	Attorney-General's Department
Discovery inquiry	Australian Law Reform Commission's 'Discovery of documents in Federal Courts' inquiry
FFLA Act	<i>Financial Framework Legislation Amendment Act 2010</i>
FMA Act	<i>Financial Management and Accountability Act 1997</i>
LRCEW	Law Reform Commission of England and Wales
NCPP	Non-Custodial Parents Party
NSW LRC	New South Wales Law Reform Commission
NTLRC	Northern Territory Law Reform Committee
NZLC	New Zealand Law Commission
OAIC	Office of the Australian Information Commissioner
PIAC	Public Interest Advocacy Centre
RoLIA	Rule of Law Institute Australia
Uhrig Review	<i>Review of Corporate Governance of Statutory Authorities and Office Holders</i> by John Uhrig, AO,

	released in 2004.
VLRC	Victorian Law Reform Commission

RECOMMENDATIONS

Recommendation 1

6.28 The committee recommends that the Australian Government restore the ALRC's budget cuts for the period 2010-11 to 2013-14 as a matter of urgency.

Recommendation 2

6.29 The committee recommends that the ALRC Act be amended to provide for a minimum of two standing, fixed-term (not inquiry-specific), full-time commissioners.

Recommendation 3

6.30 The committee recommends that an additional full-time commissioner be appointed, for each additional inquiry referred to the ALRC, in circumstances where the ALRC already has two or more ongoing inquiries.

Recommendation 4

6.31 The committee recommends that the ALRC's public information and education services program be resumed immediately.

Recommendation 5

6.32 The committee recommends that the ALRC be provided with all necessary resources to enable it to continue to travel to undertake face-to-face consultations as part of its inquiry processes.

CHAPTER 1

Introduction

Referral of the inquiry

1.1 On 23 November 2010, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee for inquiry and report by 31 March 2011:

The Australian Law Reform Commission (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.

1.2 On 31 March 2011, the committee tabled an interim report which stated that the committee required more time to consider the issues raised in the inquiry, and that the committee intended to table its final report by 8 April 2011.

Background to the inquiry

1.3 At the Supplementary Budget Estimates hearings in October 2010, members of the Senate Legal and Constitutional Affairs Legislation Committee sought information from representatives of the ALRC about the level and impact of budget cuts on the organisation.

1.4 The committee was informed that the ALRC's budget would be reduced by \$242,000 in the financial year 2010-11. Then, for the subsequent years of the forward estimates period, the ALRC's budget would be reduced by \$495,000 per year.¹

1.5 The ALRC advised the Senate Legal and Constitutional Affairs Legislation Committee that the impact of these budget cuts would be that:

- the ALRC would continue to have only one full-time commissioner, the President, Professor Rosalind Croucher;
- the ALRC's educational outreach program, including the journal *Reform*, would be discontinued;

1 Ms Sabrina Wynn, Australian Law Reform Commission (ALRC), *Committee Hansard*, 18 October 2010, p. 41.

- the ALRC would need to draw down on some of the funds that it held in reserves; and
- travel expenditure would be reduced.

1.6 The ALRC indicated that it intended to make productivity savings in a number of areas so that it could maintain its current complement of staff, regardless of the budget cuts.² The drastic nature of the budget cuts to the ALRC and the proposed impacts of these cuts are a cause of concern to members of the Senate Legal and Constitutional Affairs References Committee.

1.7 In addition to these major budget cuts, the ALRC will undergo significant changes in its governance structure and financial management from 1 July 2011, as a result of changes introduced by the *Financial Framework Legislation Amendment Act 2010*. The impact of these organisational and financial changes was also highlighted by witnesses in the course of the inquiry.

1.8 This inquiry gives the Legal and Constitutional Affairs References Committee the opportunity to further explore the impact of the budget cuts, and the governance and financial management changes, on the ALRC.

Previous reports

1.9 The Attorney-General's Department's (Department) submission referred to a previous inquiry by the Senate Standing Committee on Constitutional and Legal Affairs in 1979. The Department's submission noted that the recommendations of that inquiry, namely that ALRC reports should include draft legislation and that legislative drafters from the Office of Parliamentary Counsel should be seconded to the ALRC for this purpose, have never been actioned.³

1.10 In May 1994, the House of Representatives Standing Committee on Legal and Constitutional Affairs tabled a report for its inquiry into the role and function of the then Law Reform Commission of Australia. The report contained 40 recommendations covering a broad range of issues, including amendments to the *Law Reform Commission Act 1973* to clarify governance arrangements and recognise the distinction between full-time and part-time commissioners.⁴

1.11 There was also a previous inquiry conducted by the Senate Legal and Constitutional Affairs Committee in 2003 into the statutory powers and functions of the ARLC. However, that committee did not present a substantive final report, instead noting that the inquiry originated from events occurring five years previously and, as

2 Ms Sabrina Wynn, Australian Law Reform Commission (ALRC), *Committee Hansard*, 18 October 2010, pp 42-3.

3 *Submission 15*, pp 17-18.

4 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Law Reform: The Challenge Continues*, May 1994.

considerable time had passed since the initial reference, the inquiry should not proceed any further.⁵

Conduct of the inquiry

1.12 The committee advertised the inquiry in *The Australian* newspaper on 8 December 2010 and wrote to over 90 organisations and individuals, inviting submissions by 28 January 2011. Details of the inquiry were placed on the committee's website.

1.13 The committee received 24 submissions from various individuals and organisations, and these are listed at Appendix 1. Submissions were placed on the committee's website.

1.14 The committee held public hearings in Canberra on 11 February and 3 March 2011. A list of witnesses who appeared at the hearings is at Appendix 2, and copies of the *Hansard* transcript are available through the Internet at <http://www.aph.gov.au/hansard>.

Acknowledgement

1.15 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Structure of the report

1.16 The committee's report is structured in the following way:

- Chapter 2 provides background information in relation to the role, structure and work of the ALRC;
- Chapter 3 discusses the changes to the governance structure of the ALRC contained in the *Financial Framework Legislation Amendment Act 2010*;
- Chapter 4 contains a discussion on the impacts of the recent significant budget cuts in terms of the appointment of full-time commissioners and staffing at the ALRC;
- Chapter 5 discusses the impacts of the budget cuts on the public information and education program and the conduct of inquiries; and
- Chapter 6 sets out the committee's views in relation to the issues raised in the course of the inquiry.

5 Senate Legal and Constitutional Affairs Committee, *Report into the Powers and Functions of the ALRC*, 20 March 2003.

Note on references

1.17 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to proof *Hansard*: page numbers may vary between the proof and the official *Hansard* transcript.

CHAPTER 2

The ALRC's role, structure and reputation

Australian Law Reform Commission (ALRC)

2.1 The ALRC was established in 1975. It is a statutory agency operating under the *Australian Law Reform Commission Act 1996* (ALRC Act). This chapter provides background information in relation to the legislation establishing the ALRC, and the ALRC's role and functions.

ALRC's role

2.2 The Attorney-General may refer a matter to the ALRC, either on the Attorney-General's own initiative or at the ALRC's suggestion.¹

2.3 Section 21 of the ALRC Act sets out the functions of the ALRC in respect of matters referred to it by the Attorney-General. Those functions include:

- (a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:
 - (i) bringing the law into line with current conditions and ensuring that it meets current needs; and
 - (ii) removing defects in the law; and
 - (iii) simplifying the law; and
 - (iv) adopting new or more effective methods for administering the law and dispensing justice; and
 - (v) providing improved access to justice;
- (b) to consider proposals for making or consolidating Commonwealth laws about those matters;
- (c) to consider proposals for the repeal of obsolete or unnecessary laws about those matters;
- (d) to consider proposals for uniformity between state and territory laws about those matters; and
- (e) to consider proposals for complementary Commonwealth, state and territory laws about those matters.

1 *Australian Law Reform Commission Act 1996* (ALRC Act), section 20.

ALRC's current structure

2.4 Under the ALRC Act, the ALRC is composed of a President, a Deputy President and at least four other members, appointed by the Governor-General. While the President and Deputy President must be full-time members, other members may be either full-time or part-time members. A vacancy in the membership does not invalidate the ALRC's actions.²

2.5 The ALRC Act provides that members of the ALRC must meet certain application criteria, namely the person must be:

- (a) a judge or justice of a Federal Court, or of the Supreme Court of a state or territory; or
- (b) is, and has been for at least five years, a legal practitioner of the High Court, or of the Supreme Court of a state or territory; or
- (c) a graduate in law of a university, with experience as a member of the academic staff of a tertiary educational institution; or
- (d) in the Governor-General's opinion, suitable for appointment because of the person's special qualifications, training or experience.³

2.6 Members may be appointed for a period not exceeding seven years, and are eligible for reappointment.⁴ Part-time commissioners may be appointed for a period or for a specific inquiry.⁵

President

2.7 The ALRC's Background Submission to this inquiry provided the following summary of the President's position:

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.⁶

2 See ALRC Act, sections 6-8.

3 ALRC Act, subsection 7(2).

4 ALRC Act, section 9.

5 Australian Law Reform Commission (ALRC), *Submission 2*, p. 12.

6 *Submission 2*, p. 11.

Commissioners

2.8 The ALRC currently has one full-time commissioner – the President, Professor Rosalind Croucher – who was appointed on 14 December 2009 for a five-year term. The office of Deputy President has been vacant for much of the last ten years, and was last occupied from December 2005 to September 2006. There are four part-time commissioners, all of whom are judges of the Federal Court of Australia.⁷

2.9 In its submission, the ALRC set out the 'distinct but complementary roles' of full-time and part-time members in terms of their contribution to inquiries:

...the standing practice is that references are managed by individual, full-time Commissioners as Commissioners in charge of particular inquiries...

The role of the full-time Commissioner, in consultation with the President, is to provide leadership, direction and day-to-day management to a legal team for a particular inquiry and to lead the formulation of the final recommendations made in the inquiry...

The principal role of a part-time Commissioner is an advisory one for ALRC inquiries. These members assist the ALRC in identifying the key issues involved in a particular inquiry, and provide advice in the research and consultation effort, and in the process of formulating final recommendations. They are generally appointed on the basis of their recognised eminence and expertise in their respective fields. In addition to their direct contributions, the standing and connections of part-time Commissioners can assist the ALRC identify and obtain access to persons and information relevant to its inquiries.

...part-time Commissioners do not have financial or administrative responsibilities, nor do they assume responsibility for direction of a reference or the day-to-day management of inquiries. The time that these members can devote to inquiry work is very limited, constrained by their employment on a full-time basis elsewhere – for example, as judges, academics and legal practitioners.⁸

Board of Management

2.10 The ALRC is a Commonwealth authority subject to the accountability and governance arrangements in the *Commonwealth Authorities and Companies Act 1997* (CAC Act).⁹

2.11 The ALRC Act provides for a Board of Management which must manage the ALRC and ensure that it performs its functions effectively and economically. The Board consists of the President, Deputy President and other full-time members. The

7 ALRC, *Submission 2*, pp 11 and 13.

8 ALRC, *Submission 2*, pp 11-12.

9 Attorney-General's Department (Department), *Submission 15*, p. 3.

President is the Chief Executive Officer (CEO) and is, under the Board, responsible for the management of the ALRC.¹⁰

2.12 Currently the President, being the only full-time member of the ALRC, is the only Board member.

ALRC's structure after 1 July 2011

2.13 The *Financial Framework Legislation Amendment Act 2010* (FFLA Act) made various changes to the ALRC's structure, which will take effect from 1 July 2011. The main purpose of the changes is to move the ALRC to governance arrangements consistent with government policy on statutory bodies, as set out in the *Governance Arrangements for Australian Government Bodies*. This policy was issued in 2005 following the *Review of Corporate Governance of Statutory Authorities and Office Holders* (Uhrig Review).

2.14 The changes will move the ALRC from operating under the CAC Act to the *Financial Management and Accountability Act 1997* (FMA Act), by replacing the existing Board of Management with an executive management model with the President as CEO. The Attorney-General will also be able to:

- establish, appoint members to and dissolve a management advisory committee to advise the President on issues relevant to the proper discharge of the ALRC's functions; and
- give written directions to the President with respect to the administration of the ALRC.¹¹

2.15 Other changes include:

- removing the office of Deputy President;
- limiting the number of members of the ALRC to seven (that is, the President and not more than six other members); and
- allowing the Attorney-General to appoint part-time commissioners (this is now done by the Governor-General).¹²

Conduct of inquiries and other work

2.16 The ALRC conducts extensive research and consultation to support any recommendations that it ultimately makes. It typically produces consultation documents as part of the inquiry process. According to submissions, thorough

10 ALRC Act, sections 27-29, and 34.

11 Revised Explanatory Memorandum for the Financial Framework Legislation Amendment Bill 2010, pp 15-16.

12 Department, *Submission 15*, p. 5; ALRC, *Submission 2*, pp 15-17.

consultation is a key factor in the high public standing of the ALRC's work.¹³ For example, in the privacy inquiry (reported August 2008), the ALRC produced two issues papers, a discussion paper and a final report, received 585 submissions and held 250 face-to-face meetings.¹⁴

2.17 Beyond its immediate inquiry-related work, the ALRC contributes to broader legal policy development and community engagement with government through:

- public outreach activities;
- collaboration with other Australian and overseas law reform bodies;
- monitoring the implementation of recommendations; and
- acting as a clearinghouse for information relating to law reform in Australia.¹⁵

ALRC's reputation

2.18 The ALRC's work is widely respected and its recommendations have a high rate of take-up by government. To 30 June 2010, the ALRC has produced 77 reference-related reports.

2.19 The majority of submissions and evidence provided to the committee praised the work of the ALRC and the manner in which it conducts inquiries. For example, the Law Council of Australia summarised the value of the ALRC's work:

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.¹⁶

2.20 Witnesses outlined to the committee the high regard in which the ALRC inquiry process is held. For example, Mr Edward Santow, CEO of the Public Interest Advocacy Centre (PIAC), explained to the committee:

I would say that we do not always agree with the ALRC. PIAC is a human rights oriented organisation. We do not feel that we get an easy ride with the ALRC. Indeed, while we agree with many of its recommendations, there are some that we very strongly disagree with. Nevertheless, we have long respected the integrity and processes that the ALRC carries out...¹⁷

13 See for example: Federation of Community Legal Centres (Vic), *Submission 4*, p. 2; Law Council of Australia, *Submission 5*, p. 7; Public Interest Advocacy Centre, *Submission 21*, p. 6.

14 ALRC, *Submission 2*, pp 32-33.

15 ALRC, *Submission 2*, p. 9.

16 *Submission 5*, p. 4.

17 *Committee Hansard*, 11 February 2011, p. 21.

2.21 Submissions also highlighted the quality of ALRC publications, noting that they are often authoritative statements on the law in specific areas. In particular, Professor Bryan Horrigan provided the committee with an extensively referenced table setting out the High Court citations of ALRC publications for the period 2007-2010.¹⁸ The submission of the Northern Territory Law Reform Committee (NTLRC) provided an example of the value of the ALRC's work to that small, voluntary organisation:

...the [NTLRC] places considerable reliance upon the work undertaken by larger, funded commissions, particularly the Australian Law Reform Commission (ALRC). The [NTLRC] has, in the past and for the foreseeable future, considered and adopted many recommendations contained in ALRC reports for the benefit of the Northern Territory. These reports are extensive and well considered, enabling the [NTLRC] to rely upon this work and apply it in the context of the Northern Territory.

A significant example is the comprehensive ALRC Uniform Evidence Law Report (ALRC 102, 2005), which [the NTLRC] believes will ultimately be adopted by all States and Territories in Australia. Indeed the Northern Territory has recently released an exposure draft Evidence (National Uniform Legislation) Bill 2010, which is based on the model bill produced by the Standing Committee of Attorneys-General following the tabling of ALRC 102. It is anticipated that the Bill will be introduced into the Northern Territory Legislative Assembly during 2011.¹⁹

2.22 Internationally, the ALRC is also held in high regard. The New Zealand Law Commission (NZLC) stated in its submission that Australia is one of the leaders in the law reform movement in the British Commonwealth and the work of the ALRC is of admirable quality.²⁰

2.23 A number of submissions also referred to the high rate of implementation of ALRC recommendations.²¹ According to the ALRC's 2009-10 Annual Report, 90 per cent of ALRC reports have been substantially or partially implemented.²² According to the ALRC, this makes the ALRC 'one of the most effective and influential agents for law reform in Australia'.²³

18 *Submission 9*, pp 41-48. See also Federal Court of Australia, *Submission 22*, p. 2, which states that the Federal Court fully accepts that the ALRC's reports may constitute appropriate sources for reference; and Macquarie Law School, *Submission 8*, p. 2 which states that the ALRC's final reports are frequently referenced in student and academic work, as well as being used as recommended course materials at Macquarie University.

19 *Submission 23*, p. 1

20 *Submission 12*, p. 5.

21 See, for example, Law Council of Australia, *Submission 5*, pp 6-7; Office of the Australian Information Commissioner, *Submission 7*, p. 3; Macquarie Law School, *Submission 8*, p. 1.

22 Australian Law Reform Commission, *Annual Report 2009-10*, pp 25-27.

23 *Submission 2*, p. 6; ALRC 2009-10 Annual Report, p. 26.

2.24 However, the work of the ALRC goes beyond its inquiry function. The ALRC also performs important education and outreach work. As the NSW Law Reform Commission noted in its submission, the ALRC has played an important role in providing support for Pacific regional law reform bodies.²⁴

2.25 The Attorney-General's Department submission highlighted the important contribution of the ALRC, and noted that the ALRC has the government's support:

The Commission has conducted over 100 thoroughly researched and comprehensive inquiries. Their highly regarded reports and recommendations have made a large contribution to the law reform landscape to Australia. The Department notes that the Attorney-General, the Hon Robert McClelland MP, has stated the Government's strong support for the Commission's work and its history of demonstrating insight, providing expert analysis and having a practical grasp of law reform.²⁵

2.26 However, the committee also received a number of submissions which were critical of the work of the ALRC. For example, the Non-Custodial Parents Party (NCP) stated in its submission that it did not support the view that the ALRC is making a positive contribution to Australian law. Citing two recent inquiries by the ALRC, *Family Violence: A National Legal Response* and *Secrecy Laws and Open Government in Australia*, the NCP's submission stated that the concerns it raised during those inquiries were 'simply noted but not acted upon' or 'glossed over'.²⁶

2.27 The committee notes these criticisms. However, the committee agrees with the comments of Professor Rosalind Croucher, President of the ALRC, that it is a 'given...that the ALRC has a high reputation for producing high quality, well researched and well documented reports [and] that what [the ALRC has] done has been done extraordinarily well'.²⁷

24 *Submission 3*, p. 2.

25 *Submission 15*, p. 1.

26 *Submission 20*, pp 1-2. See also Mr Brett Dawson, *Submission 1*; and Men's Rights Agency, *Submission 18*.

27 *Committee Hansard*, 11 February 2011, p. 48.

CHAPTER 3

Changes to the ALRC's governance arrangements

Introduction

3.1 The majority of submissions and evidence to the inquiry highlighted the excellent work that the ALRC (or commission) does. Despite the high regard in which the ALRC is held nationally and internationally, submitters and witnesses expressed grave concerns as to whether the ALRC will have the capacity to continue its role as a leading law reform agency.

3.2 These concerns focused on two main areas: the changes to the ALRC's governance arrangements from 1 July 2011 as a result of the *Financial Framework Legislation Amendment Act 2010* (FFLA Act); and the impacts of the recent budget cuts on the operations of the ALRC.

3.3 This chapter discusses the changes in the structure of the ALRC which will come into effect on 1 July 2011 as a result of the FFLA Act, and considers some of the concerns raised throughout the course of the inquiry about those changes. The impacts of the budget cuts are discussed in Chapters 4 and 5.

Changes to the ALRC's governance arrangements

3.4 As set out in Chapter 2, the main purpose of the amendments to the ALRC contained in the FFLA Act is to move the ALRC from governance arrangements under the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to become a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act) and a statutory agency for the purposes of the *Public Service Act 1999*. The Revised Explanatory Memorandum for the FFLA Act notes that the transfer of governance arrangements for the ALRC is consistent with the Australian Government's 2005 *Governance Arrangements for Australian Government Bodies* policy.¹ This policy was developed following the *Review of Corporate Governance of Statutory Authorities and Office Holders*, undertaken by Mr John Uhrig AO, and released in 2004 (Uhrig Review).²

1 Revised Explanatory Memorandum, *Financial Framework Legislation Amendment Bill 2010*, pp 8-9.

2 For more information, see Department of Finance and Deregulation, *Review of Corporate Governance of Statutory Authorities and Office Holders* at: http://www.finance.gov.au/financial-framework/governance/review_corporate_governance.html, accessed 2 March 2011.

3.5 Some of the changes to the ALRC which will take place from 1 July 2011 include:

- the abolition of the position of Deputy President of the ALRC;³
- provision for the Attorney-General to appoint part-time Commissioners;⁴
- provision for the Attorney-General to establish, appoint members to and remove members from, and dissolve, a management advisory committee to advise the President on issues relevant to the proper discharge of the functions of the ALRC;⁵
- replacing the existing Board of Management structure of the ALRC with an executive management model, with the President as the CEO.⁶

3.6 This change in governance arrangements was criticised in submissions and evidence to the inquiry. The criticisms relate to the executive management structure not being an appropriate model for the ALRC, and the manner in which the FFLA Act changes have been introduced. These issues are discussed below.

Application of the executive management structure to the ALRC

3.7 During the course of the inquiry, the Attorney-General's Department (Department) advised that the changes to the ALRC's governance arrangements implemented by the FFLA Act resulted from the Uhrig Review and had bipartisan support. Further, the changes were described as 'fairly uncontroversial in relation to bodies of the sort of the ALRC'. An officer from the Department advised the committee that it was coincidental that the changes in the ALRC's governance structure coincided with the budget cuts to the ALRC.⁷

3.8 Despite the Department's evidence that the changes to the ALRC introduced through the FFLA Act are uncontroversial, during the inquiry the committee was made aware of significant concerns by some stakeholders about the application of the FMA Act structures to the ALRC.

3.9 The committee notes that, in response to a question on notice, the Department provided a timeline of consultation with the ALRC on the legislative amendments contained in the FFLA Act. Even in the initial stages of discussions on those legislative changes, concerns were expressed by Professor David Weisbrot, then President of the ALRC, about the impact of the proposed governance changes on the

3 *Financial Framework Legislation Amendment Act 2010* (FFLA Act), Schedule 2, item 11.

4 FFLA Act, Schedule 2, item 13.

5 FFLA Act, Schedule 2, item 33.

6 FFLA Act, Schedule 2, item 34.

7 *Committee Hansard*, 11 February 2011, pp 100-1.

ALRC.⁸ At the committee's second hearing, Professor Weisbrot summarised his concerns in that regard:

In terms of the Uhrig review, that was conducted to find good governance models for very large, parastate corporations – like Medicare, the [National Health and Medical Research Council], the [Australian Broadcasting Corporation] – bodies with multi hundred-million dollar budgets and thousands of staff. I think it is a poor governance model for a very small organisation like the ALRC and especially for one that operates in the public domain...

I think the new model diminishes the real and perceived independence of the ALRC. It provides a much less effective governance model. It provides a number of serious financial inflexibilities in relation to staffing, the maintenance of reserves and good budgeting practices and it imports a lot of extra compliance work, which will have to come at the expense of reference work. So I do not think it is a good model, and the changes that were made to the ALRC Act in effect to bring it in I think is not a good change. Not every reform is a good reform.⁹

3.10 Professor Weisbrot also acknowledged that his preferred option had been to 'drag [his] feet as strongly as possible' because he thought the changes were a 'very bad thing for the commission'.¹⁰

3.11 To this end, Professor Weisbrot indicated in his evidence that he understood that the officers from the Department of Finance and Deregulation did not disagree with his concerns:

They did not disagree with any of those concerns I had about financial inflexibilities, staffing problems or management problems. As you will see from my confirming letter back to the department of finance, basically what they said was that they would find a 'patch' or a 'fix' or an exception in each of these cases, which led to the rather strange conclusion, as I said at the time, that they were determined to 'Uhrig the ALRC'. In fact, it was going to be a Clayton's Uhrig, because they were going to find an exception for the ALRC in each case. It did not seem to me to be a sensible exercise to pursue, but I understood that they were under pressure to fulfil a broad mandate that every entity would come under this Uhrig model.

...I was disappointed at the outcome that a lot of those exceptions, caveats and special pleading things that were supposed to be done for the ALRC

8 Attorney-General's Department (Department), answers to questions on notice, received 25 February 2011 (Letter from Professor David Weisbrot, President of the Australian Law Reform Commission (ALRC), to Mr Marc Mowbray-d'Arbela, Assistant Secretary, Legislative Review Branch, Financial Management Group, Department of Finance and Deregulation, dated 18 November 2008).

9 *Committee Hansard*, 3 March 2011, p. 8.

10 *Committee Hansard*, 3 March 2011, p. 9.

seem to have fallen by the wayside. All of those concerns I had actually came to fruition in the new legislation.¹¹

3.12 One of the potential impacts of the ALRC's governance changes highlighted to the committee is that the ALRC would be subject to increased control by the Attorney-General. For example, the Rule of Law Institute of Australia (RoLIA) noted the following changes as potentially compromising the independence of the ALRC:

- the powers of the Attorney-General in relation to the dissolution of the management advisory committee;
- the power of the Attorney-General to appoint part-time Commissioners; and
- the provision that the CEO of the ALRC must act in accordance with any policies determined, and comply with any directions given, in writing by the Attorney-General.¹²

3.13 In its discussion of the proposed governance changes, the ALRC's submission noted that the Revised Explanatory Memorandum addresses the issue of the independence of the ALRC and the role of the management advisory committee:

The management advisory committee will not possess executive powers or decision-making authority and may not compromise the intellectual independence or impartiality of the [ALRC]. The intent of this provision is that the management advisory committee will provide support for the President on the management of the [ALRC] in a non-binding manner, within a relationship where the committee is subordinate to the President. The [ALRC] will continue to report to the Attorney-General on the results of any reviews and to include in those reports, any recommendations it may wish to make...Additionally, the President of the [ALRC] may decide matters about the management advisory committee that are not provided for in the ALRC Act, such as the timing and conduct of meetings.¹³

3.14 Despite the explanation in the Revised Explanatory Memorandum, RoLIA stated that the relevant provision is still an extension of executive control over the ALRC.¹⁴

3.15 In evidence to the committee, Professor Croucher, President of the ALRC, stated that during consultations on the FFLA Act she had expressed concerns in relation to the advisory board. She also noted that the role of the board will need to be

11 *Committee Hansard*, 3 March 2011, p. 11.

12 *Submission 14*, p. 12. See also Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 11 February 2011, p. 14.

13 Revised Explanatory Memorandum, *Financial Framework Legislation Amendment Bill 2010*, p. 17.

14 *Submission 14*, p. 12.

clearly managed so that it 'does not in any way, shape or form jeopardise the perception of the ALRC's independence'.¹⁵

3.16 When questioned by the committee in the course of the hearings as to the ability of the ALRC to maintain its independence after 1 July 2011, Professor Croucher stated:

I am concerned that it will require confident managing to preserve the perception of the independence of the ALRC...I am confident that, in the established processes of the ALRC, as I have experienced and observed them over many years, that there is capacity to manage that. There is a lot of goodwill there to make sure that it does happen. But it could possibly be perceived as impinging upon independence. It will need a fairly confident hand to ensure that it does not do that.¹⁶

3.17 Aside from the content of the changes in the FFLA Act, a specific area of concern raised with the committee is the apparent lack of scrutiny over the amendments contained in the FFLA Act. RoLIA expressed the opinion that the FFLA Act was not subjected to adequate scrutiny when it was considered by the Parliament, particularly in light of the significant changes that it made to the ALRC:

One would have expected these changes to have occasioned heated debate in parliament, but that was not the case. Not a single member of the House of Representatives, nor any senator, commented on the changes to the ALRC in the second reading debate. There was no opposition to the amendments. Maybe that was because the name of the bill, the Financial Framework Legislation Amendment Bill 2010, gave no indication of the dramatic changes proposed to the commission structure or because the proposed changes were buried in the text of the bill and within an explanatory memorandum over 40 pages long. Maybe it was because the explanatory memorandum glossed over the changes by saying they were necessary to achieve greater flexibility. No doubt parliamentarians are very busy during sittings of parliament and the changes to the commission's structure may have been overlooked. That is unfortunate but unavoidable when so many thousands of pages of legislation are proposed and passed every year.¹⁷

3.18 Professor Weisbrot also commented that he was misled by the title of the FFLA Act and did not realise the content of the legislation:

I am embarrassed to say that I was unaware of it until this inquiry brought it to light, and there are very few closer followers of parliamentary process than myself, other than members of parliament and their staff. I think I was misled by the title and did not realise it was in the works. I did not see anything on the front page of the ALRC's website that alerted me to it. It

15 *Committee Hansard*, 11 February 2011, p. 73.

16 *Committee Hansard*, 11 February 2011, p. 74.

17 *Committee Hansard*, 11 February 2011, pp 30-1.

was only this Senate inquiry that alerted me to the fact that this had happened...¹⁸

3.19 The committee put to the Department these criticisms, particularly that the changes to the ALRC introduced by the FFLA Act were contained in the 'fine print' of the legislation. Officers of the Department reiterated on a number of occasions that the changes to the ALRC's governance arrangements brought in by the FFLA Act have been foreshadowed for many years as part of the recommendations of the Uhrig Review and, further, that the changes had bipartisan support.¹⁹

3.20 To this end, the committee is also cognisant of the evidence of Professor Croucher, who noted that the changes had been foreshadowed since 2003; however, the form in which the changes are expressed causes her some concern.²⁰

Beale Review

3.21 In the course of consideration of the changes to the ALRC's governance arrangements, the committee was also presented with evidence in relation to another matter, a review of the Department by Mr Roger Beale AO in 2008 (Beale Review), commissioned by the Secretary of the Department, which also made recommendations in relation to the ALRC.

3.22 Professor Weisbrot detailed in his submission a meeting he had with the Secretary of the Department in 2009, at which the Secretary referred to the existence of a review of the ALRC in relation to which Professor Weisbrot was not aware and had not been interviewed. Further, Professor Weisbrot has never seen the final report or recommendations from that review:

Not long after taking up his position of Secretary of the Attorney-General's Department, Mr Roger Wilkins paid me the courtesy of a brief 'meet and greet'. Curiously, Mr Wilkins said that he had previously commissioned a review, which indicated to him that the ALRC was an unaffordable 'Rolls Royce luxury operation' that should be wound up, or perhaps rolled back into the Department – but Mr Wilkins reassured me that he was not proposing to accept that advice.

I was quite perplexed, as I had not heard of any review being conducted in relation to the ALRC; had not been asked to provide any information for such a review; was never interviewed in relation to such a review; and was never shown any draft for comment or correction, nor a copy of the final report or its recommendations. (That remains the case to this day.)²¹

18 *Committee Hansard*, 3 March 2011, p. 9.

19 *Committee Hansard*, 11 February 2011, pp 92, 95 and 101.

20 *Committee Hansard*, 11 February 2011, p. 74.

21 *Submission 16*, p. 4.

3.23 During the committee's inquiry, the Secretary of the Department, Mr Roger Wilkins AO, advised that the review to which Professor Weisbrot was referring was the Beale Review – a review of the Department that the Secretary had commissioned. Mr Wilkins described the Beale Review as a report about the structural changes that may be needed within the Department, and that '[i]n passing it made some mention about the Australian Law Reform Commission' but '[i]t was hardly a central to that report'.²²

3.24 Mr Wilkins quoted from part of the Beale Review, headed 'Enlivening Law Reform', which refers to the ALRC (and was tabled by the Department at the committee's first hearing):

The [Beale Review] has been surprised by the number of comments that has been made to it about the slowness, complexity and cost of the ALRC processes. It has apparently been difficult to convince governments in recent years of the merit of referrals to the ALRC. When referrals are given the work done is of outstanding quality but slow to produce, reflective of an extended and extensive consultation process and often not easy to digest. The [Beale Review] was told that reports tend to be long and not particularly user friendly for a policy-making audience.

...If the Secretary wishes to take a strong leadership role in these areas it would be appropriate to bring them into the corporate centre ...

At the very least, it has been suggested, [the] ALRC should be given some crisper references, with tighter timelines and strong guidance on the need for producing its reports in a form that is accessible and useful for those who are vested with the responsibility for determining whether and if so how they should be actioned.

Others have suggested that a bolder solution would be to replace the ALRC as a standing independent statutory authority with permanent members and a separate staff with a principally part time statutory advisory panel – say the Australian Law Reform Council – with a charter to advise on fruitful areas for law reform, a slim secretariat and a research budget – akin perhaps to the Administrative Review Council. This would free a considerable budget...which could be used flexibly to advance the Government's law reform objectives...

Because of the constraints of time and budget, the [Beale Review] has consulted neither with the ALRC, nor with external stakeholders. Nor has it examined ALRC reports and the action taken on them. However, there is at least a prima facie case that an alternative approach is worth examining.²³

22 *Committee Hansard*, 11 February 2011, pp 92-93.

23 *Committee Hansard*, 11 February 2011, pp 93-94. This section of the Beale Review is available on the committee's website at:
http://www.aph.gov.au/senate/committee/legcon_ctte/law_reform_commission/submissions.htm.

3.25 In both evidence and in his submission, Professor Weisbrot was scathing in his criticism of the manner in which the Beale Review was conducted and its conclusions. In particular, Professor Weisbrot was aggrieved that he was not consulted in the course of the Beale Review:

Despite a lifetime of service and leadership in law reform, when the Commonwealth [Attorney-General's] Department apparently determined in 2009 that it would radically alter the composition, nature, role and resourcing of the highly successful Australian Law Reform Commission, none of these matters were ever discussed with me.

My views were never sought about how best to proceed, nor about the implications of the radical surgery conducted to the complement of Commissioners and staff. I was never asked to provide my views about the strengths of the ALRC, nor its weaknesses or missed opportunities, nor any changes I might suggest to improve the breadth or quality of its work, the efficiency of its systems or the pertinence of its advice to Government.²⁴

3.26 Professor Weisbrot indicated that he accepted it was appropriate for the Secretary to commission a review of the Department, but the review should not have canvassed issues in respect of the ALRC:

The Beale review was of the department, and it is quite appropriate for a new government coming in to have a senior experienced public servant have a look at structures and seek to amend them in a way that supports the government's agenda. What I thought was quite extraordinary, though, was that the audit concluded that there was 'at least a prima facie case' that the ALRC should be replaced with another body which would 'be brought into the corporate centre'. The evidence base for this was zero...I find that quite extraordinary – no research, no evidence, no complaints that it is starting from, no institutional or stakeholder consultation. And it is followed by a very radical recommendation that a very successful 35 year-old organisation be fundamentally changed – and I do mean 'fundamentally'.²⁵

3.27 The Secretary of the Department and Professor Weisbrot expressed differing views on the relationship between the changes introduced through the FFLA Act and the recommendations of the Beale Review. The Secretary was of the opinion that the two matters are not related, noting that he does not intend to pursue the recommendations in the Beale Review.²⁶

3.28 In contrast, Professor Weisbrot described a connection between the Beale and Uhrig Reviews in that the reviews 'moved in and out' from one another:

One of them was the Beale review, which seems to have unduly guided the attitude of the Attorney-General's Department to law reform. The other was

24 *Submission 16*, p. 4.

25 *Committee Hansard*, 3 March 2011, p. 7.

26 *Committee Hansard*, 11 February 2011, pp 92-93.

the Uhrig review, which I also believe unduly guided the department's approach to management, governance and financial management.²⁷

3.29 In its Supplementary Submission, the ALRC noted the tabling of the excerpt of the Beale Review by the Department. The ALRC reiterated that it was not consulted as part of the Beale Review, and advised that it had not seen the document prior to its tabling. Further:

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.²⁸

3.30 The ALRC set out several concerns that it has with the contents of the document tabled by the Department:

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.²⁹

27 *Committee Hansard*, 3 March 2011, p. 7.

28 *Supplementary Submission 2*, p. 17.

29 *Supplementary Submission 2*, p. 18.

CHAPTER 4

Impact of budget cuts – full-time commissioners and staffing

Introduction

4.1 In its Background Submission, the ALRC set out the cuts to its budget in recent years. In addition to the government's two per cent efficiency dividend, the ALRC has had a \$0.242 million reduction in its budget in 2010-11, and further reductions of \$0.495 million per year will be made over the forward estimates period (from 2011-12 to 2013-14). The ALRC states in its Background Submission that the \$0.495 million reduction in the budget represents a 20 per cent reduction on 2009-10 levels.¹

4.2 The ALRC noted that a reduction of this magnitude is significant for a small organisation and, as a result, the ALRC has had to reduce expenditure significantly in a budget that has little capacity for savings:

Currently 80% of the ALRC's annual expenditure is in salaries (60.31%) and accommodation (19.35%) with little room in the budget to make savings. Other operational costs such as those associated with consulting, publishing reports and other operational requirements constitute a small proportion of the total budget (14%) so that even significant savings made in these areas have little impact on the budget bottom line.²

4.3 At the committee's first public hearing, Professor Rosalind Croucher illustrated the impact of the budget cuts by reference to the Black Knight in *Monty Python and the Holy Grail*:

After he lost one arm defending his turf he said, 'Tis but a scratch'. After the other one was lopped off, 'Just a flesh wound'. After both his legs departed similarly, he still managed to say, defiantly, 'The Black Knight always triumphs'. It is ridiculous, but somehow fitting. The real reduction in the budget — not just the efficiency dividend, I am talking about the significant 20 per cent reduction in recent years — makes us feel like that poor knight.³

4.4 However, despite the difficulties in finding savings, the ALRC outlined in its Background Submission the steps that it has taken to reduce expenditure, namely:

- delaying the appointment of full-time commissioners;

1 *Submission 2*, pp 26-7.

2 *Submission 2*, p. 27.

3 *Committee Hansard*, 11 February 2011, p. 49.

- reducing the number of staff;
- removing the public information and educational services program (in particular, discontinuing the publication of the ALRC's bi-annual journal *Reform*); and
- changing the processes for the conduct of inquiries to reduce the number of consultation publications per inquiry, making resources available only in soft copy or on a cost recovery basis, and reducing the cost of consultation travel.

4.5 The impacts of these strategies were the subject of submissions and evidence to the committee. The first two strategies mentioned above are discussed in this chapter, while the remaining two are discussed in Chapter 5.

4.6 In addition, during the course of the inquiry, the committee was informed that the ALRC would be moving from its current premises to sub-licensed premises with the Australian Government Solicitor in April 2011. That cost-saving measure is discussed in Chapter 5.

Delaying appointment of full-time commissioners

4.7 One of the key measures that the ALRC has put in place in order to save money has been to delay the appointment of full-time commissioners. The ALRC's Background Submission stated that since December 2009 there has only been one full-time commissioner, the President, Professor Rosalind Croucher – as opposed to having at least two full-time commissioners, as has been the case in the past. The ALRC noted that this arrangement is a short-term strategy, reached with the agreement of the Attorney-General's Department.⁴

4.8 There are four part-time commissioners at the ALRC, who are all also full-time judges of the Federal Court of Australia. As described in Chapter 2 of the report, full-time and part-time commissioners have 'distinct but complementary roles', with full-time commissioners providing leadership, direction and day-to-day management of the legal teams for inquiries; in contrast, the principal role of part-time commissioners is advisory.⁵

4.9 Submissions and evidence to the inquiry highlighted the important role that full-time commissioners play in the law reform process. For example, Mr Warwick Soden, Registrar and Chief Executive of the Federal Court, outlined the central role of full-time commissioners in ALRC inquiries:

...There is no doubt in my mind, from my experience, that the full-time commissioner – often an expert in law reform procedure as well as an expert in the subject under reference – brings a rigour of process and a rigour of thinking to the whole exercise that is, from my perspective,

4 *Submission 2*, p. 27.

5 *Submission 2*, pp 11-13.

exponentially greater than you see where very good work is done by others but just not at the level that a full-time expert commissioner can bring to the process. It has been my experience that the full-time commissioner often attacks some of the hardest issues and the most difficult issues in a way which reflects their law reform experience – that is, the logic of law reform, or what I call the science of law reform – together with their...expertise in the field of law or the area under inquiry.⁶

4.10 Submitters and witnesses strongly advocated the need for more full-time commissioners to be appointed to the ALRC.⁷ For example, the New South Wales Law Reform Commission (NSW LRC) argued that the present structure of the ALRC, with the President simultaneously managing the organisation and leading two references inquiries, is a situation requiring at least an additional full-time commissioner.⁸ The submission of the Federal Court of Australia expressed doubts as to whether, without sufficient and adequately resourced full-time commissioners, the ALRC can 'maintain the kind of consultation on which the high quality of the published work of the ALRC depends'.⁹ The Hon. Justice Hammond of the New Zealand Law Commission (NZLC) stated that he did not think that an organisation with only one full-time commissioner constitutes a law reform commission.¹⁰

4.11 The committee questioned Professor Croucher on how she handles the workload that has been placed on her:

It is impossible to be in three places at once. If you are overseeing the inquiries as well as running the organisation, the team members are not going to get the kind of close supervision that they were able to secure and the leadership that they were able to have by having a dedicated commissioner for each inquiry.¹¹

4.12 Professor Croucher outlined her view that the ALRC requires one full-time commissioner per inquiry, in addition to the President.¹²

4.13 The committee canvassed the opinion of witnesses as to the number of full-time commissioners that are required at the ALRC. Mr Bill Rowlings of Civil Liberties Australia submitted that there should be at least two full-time

6 *Committee Hansard*, 11 February 2011, p. 4.

7 On 11 February 2011, the government announced the appointment of a second full-time commissioner for the ALRC's 'Review of censorship and classification' inquiry. This appointment is discussed later in this chapter under the heading 'Appointment of a second full-time commissioner'.

8 *Submission 3*, p. 3.

9 *Submission 22*, p. 4.

10 *Committee Hansard*, 3 March 2011, p. 3.

11 *Committee Hansard*, 11 February 2011, p. 52.

12 *Committee Hansard*, 11 February 2011, pp 50-51 and 53.

commissioners.¹³ Mr Edward Santow of the Public Interest Advocacy Centre (PIAC) believed that two full-time commissioners would be the minimum number required in order to run three concurrent inquiries. However, if the government were minded to reduce the number of inquiries to two, then Mr Santow argued that 'you [could] just about do it with one full-time commissioner'.¹⁴

Board of Management

4.14 The Rule of Law Institute of Australia raised with the committee the very serious concern that it has regarding the operation of the Board of Management of the ALRC in the situation where the President is the only full-time commissioner.

4.15 The ALRC Act provides for a Board of Management (Board) for the Commission. The function of the Board is to manage the ALRC and, in particular, to ensure that the ALRC performs its functions effectively and economically. The Board consists of the President, the Deputy President and other full-time members of the ALRC.¹⁵ A consequence of the President being the only full-time commissioner of the ALRC, is that the President is the sole member of the Board.

4.16 The committee has previously pursued the issue as to whether the ALRC is validly constituted when it has only one full-time member. The advice of the Department in relation to this matter is that the ALRC is not 'improperly constituted'.¹⁶

4.17 In its submission, RoLIA provided a copy of legal advice that it has obtained on this issue. While the legal advice concurs with the Department's assessment that the ALRC is properly constituted when it has only one member, the RoLIA's legal advice raised concerns about the operation of the Board:

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...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.¹⁷

13 *Committee Hansard*, 11 February 2011, p. 18. See also: Rule of Law Institute of Australia, *Submission 14*, p. 13, which advocated the appointment of at least one additional full-time commissioner.

14 *Committee Hansard*, 11 February 2011, p. 23.

15 ALRC Act, sections 27-29.

16 Senate Legal and Constitutional Legislation Committee, Additional Estimates Hearings, *Committee Hansard*, 18 October 2010, pp 44-45.

17 *Submission 14*, p. 11.

4.18 In evidence to the committee, Professor Croucher stated that an audit committee has been established to provide quality assurance checking of the decisions she makes when acting in her capacity as the Board. The audit committee is comprised of Professor Croucher, the executive director of the ALRC and one of the standing part-time commissioners.¹⁸

4.19 The committee sought the Department's view on this matter during the hearing. The Department stated that, while the situation would be unusual in the operation of a commercial company, the ALRC is not a commercial company.¹⁹

4.20 The committee notes that the structural changes put in place by the FFLA Act mean that, after 1 July 2011, the Board of Management will cease to exist and will be replaced by a Chief Executive Officer and an advisory board.

Impact on Senior Legal Officers

4.21 The committee notes that it is not only the President of the ALRC who has had increased responsibilities and workload in the absence of the appointment of more full-time commissioners. In its Background Submission, the ALRC noted that a direct consequence in the delay in appointing full-time commissioners has meant that the workload and level of responsibility of Senior Legal Officers at the commission has increased significantly.²⁰ Professor Les McCrimmon, a former full-time commissioner, described displacing the role of commissioners to Senior Legal Officers as 'unsatisfactory':

Senior Legal Officers generally have responsibility for researching and writing significant sections of consultation documents and reports. Their detailed and time consuming involvement in specific aspects of an inquiry makes it difficult for them to engage in the overall strategic research planning and management of teams that an inquiry requires. This, in turn, has a negative impact on the quality of ALRC reports and report recommendations.²¹

Responsibility for report recommendations

4.22 The NSW LRC expressed concerns that, in the absence of other full-time commissioners, the President is placed in a very difficult position in bearing the ultimate responsibility for signing off on report recommendations.

18 *Committee Hansard*, 11 February 2011, pp 67-8.

19 *Committee Hansard*, 11 February 2011, p. 102.

20 *Submission 2*, p. 27.

21 *Submission 19*, p. 2. See also New South Wales Law Reform Commission, *Submission 3*, p. 3, which notes that while the ALRC attracts excellent staff and has Senior Legal Officers with a great deal of experience, those officers are not sufficiently well positioned or remunerated to provide the leadership required to run references.

4.23 The ALRC Act provides for the establishment of Divisions for the purposes of a reference which must comprise at least three members. The ALRC's Background Submission provides the following information on the role of Divisions:

In addition to meetings of the full Commission, the Act permits, but does not mandate, the establishment of Divisions for the purposes of individual references – for example, as structures for the making of policy decisions about recommendations. Divisions...are subject to formal quorum requirements and deadlock resolution mechanisms for the determination of questions arising in the course of inquiries. In practice, however, members assume collegial responsibility for the findings and recommendations in all references.

...Divisions, where constituted, have responsibility for legal policy decisions relating to specific references.²²

4.24 According to the NSW LRC, previously, the President and at least one other full-time commissioner was required to sign off on recommendations of the ALRC. A third full-time commissioner was often involved or available for consultation on each reference. The NSW LRC's submission outlined its concerns that presently, with no other full-time commissioners, and part-time commissioners having an advisory role, the President is the final arbiter of recommendations made by the commission. The NSW LRC notes that this current practice, initially meant as a savings measure until other full-time commissioners could be appointed, will become embodied in the ALRC's structure with the abolition of 'Divisions' from 1 July 2011, pursuant to the FFLA Act.

4.25 The NSW LRC noted that its concerns do not reflect on the actions or abilities of the ALRC's President or staff, but rather is a concern about structural issues which places the President in a 'very difficult and exposed' position.²³

4.26 In this regard, the committee notes the information in the ALRC's Background Submission in relation to the expert advisory committees for inquiries. These committees comprise eminent persons in the relevant field of inquiry, to assist in policy analysis and the formulation of key recommendations.²⁴

Appointment of a second full-time commissioner

4.27 On 11 February 2011, the day of the committee's first hearing for this inquiry, the Attorney-General, in an opinion piece in the *Australian Financial Review*, announced the appointment of a second full-time commissioner to lead the ALRC's 'Review of censorship and classification' inquiry (Classification inquiry).²⁵

22 *Submission 2*, pp 13-14.

23 *Submission 3*, p. 3.

24 *Submission 2*, p. 20.

25 The Hon. Robert McClelland MP, Attorney-General, 'ALRC performs vital role', *Australian Financial Review*, 11 February 2011, p. 46.

4.28 In evidence to the committee, Professor Croucher expressed a preference for the appointment of a standing fixed-term commissioner.²⁶ Further, while Professor Croucher noted that the appointment of experts for specific inquiries can work extremely well, there are a number of significant caveats to this:

First, there needs to be sufficient lead-time in planning an inquiry to be able to identify the area of expertise needed, to find someone of sufficient standing who may be available for an inquiry and to have sufficient flexibility in start and end dates for them to be able to direct an inquiry from start to finish – and, if necessary, to move to Sydney. If the appointment is to be advertised, a further period of time needs to be factored in – at least three to six months.

Second, it is not just about expertise...Subject-specific people have to be trained up in the law reform processes, which usually takes a whole reference cycle at least, by which time their expertise has run out, so to speak. What standing full-time commissioners give the ALRC is intellectual capital in law reform and clear independence in our tasks.²⁷

4.29 The committee accepts these caveats, but also notes that it received a creative suggestion which may address some of the concerns in relation to the appointment of inquiry-specific full-time commissioners. Professor Bryan Horrigan suggested the possibility of appointing an academic expert identified by the ALRC as an inquiry-specific full-time commissioner through the Australian Research Council grant process. The outputs associated with any relevant inquiry would form a core part of an overall research project.²⁸

4.30 When questioned on the proposed appointment of a full-time commissioner for the Classification inquiry, Professor Croucher stated that it was 'better than nowt'.²⁹

4.31 The committee received a number of submissions highlighting the important contribution that standing full-time commissioners can make to the ALRC over the term of their appointment. For example, PIAC stated in its submission:

...with different commissioners for every reference, the ALRC loses the capacity to develop expertise in the law reform process itself, and robs the ALRC of having senior staff with the appropriate corporate memory and experience necessary to add to the learning experience of the organisation as a whole.³⁰

26 *Committee Hansard*, 11 February 2011, p. 72.

27 *Committee Hansard*, 11 February 2011, p. 50.

28 *Submission 9*, pp 24-25.

29 *Committee Hansard*, 11 February 2011, p. 72.

30 *Submission 21*, pp 8-9.

4.32 Similarly, Professor Weisbrot noted his experience with standing full-time commissioners:

It is usually the case that a new Commissioner is initially appointed because his or her expertise closely aligns with a particular current inquiry. However, in my experience, it is always the case that the Commissioner's performance in the job improves measurably over time, as they gain experience with the institutional law reform process, even if subsequent inquiries are not in their specialist field. (In fact, it may be that moving experts out of their comfort zone is almost as critical to this improvement as the experience gained with the process.)³¹

Funding

4.33 It does not appear that responsibility for funding the proposed appointment of a full-time commissioner for the Classification inquiry has been settled between the ALRC and the Attorney-General's Department. In her opening remarks to the committee, Professor Croucher indicated that the Commission did not have the financial resources for a second full-time commissioner.³² Professor Croucher stated that she has suggested to the Attorney-General that the position should not be funded out of the ALRC's budget, but emphasised that the appointment has only been discussed in general terms with the Attorney-General.³³

4.34 The Department informed the committee that a second full-time commissioner would cost \$230,000 annually – for salary and on-costs.³⁴ The Department indicated that transitional funding will be provided to the ALRC to cover the cost of the appointment of the second full-time commissioner until the ALRC is in a position to take advantage of the savings from 'rationalisation of rentals' and 'other budgetary strategies'.³⁵ The Secretary of the Department expressed confidence in the ALRC being able to fund the position of a second full-time commissioner on its reduced budget after this transitional period:

So while I appreciate that there has been some anxiety for the commission as they look at this transition, I do think that their capacity to live within their budget and to continue to have another commissioner appointment, as has been announced today by the Attorney-General, for the classification review is still completely manageable within their reduced budget.³⁶

4.35 The committee also notes that correspondence between the Attorney-General and the President of the ALRC, tabled at the Additional Estimates hearing in

31 *Submission 16*, p. 6.

32 *Committee Hansard*, 11 February 2011, p. 49.

33 *Committee Hansard*, 11 February 2011, pp 72-73.

34 *Committee Hansard*, 11 February 2011, p. 86.

35 *Committee Hansard*, 11 February 2011, pp 89-90.

36 *Committee Hansard*, 11 February 2011, p. 86.

February 2011 stated that the Attorney-General's Department 'will assist with meeting the costs of this position'.³⁷

4.36 The committee notes further that during the course of giving evidence, the Secretary of the Department expressed the opinion that there should be a minimum of two full-time commissioners into the future because 'there will be at least that many references coming through'.³⁸

Part-time commissioners

4.37 In its submission, the Department noted that it has facilitated a number of reforms to the ALRC's structure recently in an effort to support the Commission in discharging its functions up to its historically high standards, despite the pressures of the current fiscal environment. According to the Department, these reforms have included facilitating the short-term appointment of part-time Commissioners, targeted for their expert wealth of experience to provide advice on specific references.³⁹

4.38 As the ALRC pointed out in its Background Submission, the description of these positions as 'part-time' is a misnomer, as their role is principally advisory.⁴⁰ At the first public hearing, Professor Croucher outlined for the committee the difficulties in quantifying the involvement of part-time commissioners in terms of days per month:

It is a little bit difficult to pin it down like that. In preparation for a meeting they will be reading all the material. They will be participating in the meeting and they will provide follow-up comments – some more than others depending on the nature of the inquiry. I have heard many times the legal officers make the comment that the comments that part-time commissioner Justice X made had been fantastically helpful – but it is at that very focused time. They also get an opportunity to read the draft chapters of the consultation documents and the reports. The ability to contribute there is also fairly limited.⁴¹

37 Tabled document, *Letter from the Hon. Robert McClelland, Attorney-General to Professor Rosalind Croucher, President of the ALRC, dated 21 February 2011*, Senate Legal and Constitutional Legislation Committee, Additional Estimates Hearings for the Attorney-General's Department, 22 February 2011.

38 *Committee Hansard*, 11 February 2011, p. 96.

39 *Submission 15*, p. 2.

40 *Submission 2*, p. 12.

41 *Committee Hansard*, 11 February 2011, p. 56.

4.39 Professor Croucher highlighted the 'extraordinarily valuable role that part-time commissioners play'; however, the committee also notes Professor Croucher's comments as to the limits of their involvement:

...part-time commissioners do not lead the consultations, they do not lead the development of the research brief and they do not have that kind of research writing and day-to-day management and leadership role.⁴²

4.40 Mr Warwick Soden, Registrar and Chief Executive Officer of the Federal Court of Australia, explained to the committee that the Federal Court judges working as part-time commissioners often had trouble making time in their full-time judicial role for their commitments to the ALRC.⁴³ Mr Soden went on to explain that judges are not given time off from their Federal Court role to perform their duties for the ALRC:

...each of the judges is responsible for managing and disposing of all the cases allocated to them in the most efficient way that they can do that. It is up to each judge to work out how to do that, what time it takes in court, what time it takes out of court, what proportion of time needs to be taken on judgments. We leave it to the judge to work out how that judge can make time available for work related to the ALRC, and we support in principle the time they take off, if I could describe it that way, from all that other work, to do the work for the ALRC. But it is a matter for the judge to work out how to do that. We support it.⁴⁴

4.41 The committee notes that witnesses who appeared at the hearings did not believe that the appointment of part-time commissioners was a satisfactory substitute for appointing full-time commissioners. For example, Mr Edward Santow, CEO of PIAC, expressed the view that part-time commissioners could not adequately fulfil the role played by full-time commissioners:

There have always been part-time commissioners who assist the ALRC in its work. Often they are very eminent...The assistance they give on particular issues is unquestionably invaluable; however, the need for a full-time commissioner goes beyond providing assistance on particular issues. It is in carrying out the consultative process more generally, in workshopping ideas and in working through submissions. I fear that a part-time commissioner, or even several part-time commissioners, would be unable to devote the time necessary to make up for the absence of a full-time commissioner.⁴⁵

42 *Committee Hansard*, 11 February 2011, pp 55-56.

43 *Committee Hansard*, 11 February 2011, pp 3-4. See also Professor Rosalind Croucher, ALRC, *Committee Hansard*, 11 February 2011, p. 56.

44 *Committee Hansard*, 11 February 2011, p. 9. Part-time commissioners do not receive payment for their work for the ALRC; the only support they receive is payment of travel costs: see Professor Rosalind Croucher, ALRC, *Committee Hansard*, 11 February 2011, p. 56.

45 *Committee Hansard*, 11 February 2011, p. 23. See also Macquarie Law School, *Submission 8*, p. 4.

Reduction in staff numbers

4.42 The ALRC's Background Submission outlined that another of the savings measures it has taken is to reduce its complement of staff by not refilling positions as they have become vacant. The following positions have not been refilled: Legal Officer, Research Manager, Executive/Project Assistant, Communications Manager and Publications Coordinator. The submission notes that the duties of these positions have been allocated to remaining staff within the organisation, and, as a result, the workload of all staff has significantly increased.⁴⁶

4.43 The ALRC's submission outlines how staffing levels (full-time equivalents (FTE), excluding statutory members) have decreased over the last decade. In the financial year 2010–11 to date, the ALRC has had 16.2 FTE staff, a figure which has decreased from 25 in 2000–01.⁴⁷ The ALRC estimates that it will continue with 16.2 FTE staff for the financial years 2011-12 to 2013-14.⁴⁸

Staffing levels

4.44 At the hearing, Professor Croucher outlined for the committee her preferred staffing levels. These staffing levels are based on the ALRC having two concurrent inquiries (a so-called 'two inquiry model'):

The core complement, in my view, is one commissioner per inquiry, in addition to the president, and eight to 10 legal officers at different classification levels. The number allocated to each inquiry would obviously depend on the complexity of the inquiry...Obviously the president needs a certain flexibility in being able to bring on people short term on contract as needs be for inquiries, but that is on top of what I have identified as the core complement. In addition,...an inquiry team needs more than solely legal officers. We need people to facilitate the administration of the inquiry, to coordinate the publishing process and to manage the web interface – which is increasingly important in our community engagement work – and the research needs. Therefore the commissioner also needs an inquiry support team as an integral part of the inquiry process.⁴⁹

4.45 In its Supplementary Submission, the ALRC submitted that a team of five people is the 'absolute minimum' which would be required for the complementary inquiry team. This should consist of an executive director; an information manager; a

46 *Submission 2*, p. 27.

47 The number of FTE staff varies from year to year. For example, in 2001-02 there were 22 FTE staff; in 2004-05 there were 18.05 FTE staff; and in 2007-08 there were 19.37 staff. However, there is an overall downward trend in staff numbers.

48 *Submission 2*, pp 28-29.

49 *Committee Hansard*, 11 February 2011, pp 50-51.

website manager (handling online submissions, consultations, discussion forums, inquiry blogs and newsletters); an inquiry coordinator; and publication support.⁵⁰

4.46 The ALRC has three ongoing inquiries listed on its website – 'Family Violence and Commonwealth Laws'; 'Discovery of documents in Federal Courts' (Discovery inquiry) and the Classification inquiry. The ALRC's current inquiry 'Family Violence and Commonwealth Laws' follows on from an earlier ALRC inquiry into Family Violence which was finalised in November 2010. The Discovery inquiry was due to report on 31 March 2011, and the committee understands that this report has been forwarded to the Attorney-General. On 24 March 2011, the ALRC received the Terms of Reference for the Classification inquiry. Professor Croucher told the committee that, based on the current level of staffing, once the Terms of Reference were provided for the Classification inquiry, the ALRC could not commence work on that inquiry until the Discovery inquiry has reported.⁵¹ Professor Croucher noted that, on a previous occasion, the Department had also assisted in providing a senior officer to commence work on the Discovery inquiry while other staff were fully engaged in finishing another inquiry.⁵²

4.47 In its Supplementary Submission, the ALRC reiterated the point that there is no further capacity for it to reduce staff and maintain its current workload:

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.⁵³

4.48 Mr Edward Santow from PIAC expressed concern that further reductions in staff will compromise the independence of the ALRC:

...the ALRC will inevitably be more reliant on analyses from stakeholders and especially, perhaps, well-funded stakeholders, because it lacks the resources to do them internally.⁵⁴

4.49 The committee sought the view of the Department on staffing levels within the ALRC. The Secretary of the Department informed the committee that staffing levels in the ALRC have 'remained relatively constant':

Their staff complement or staff ratios have remained relatively constant, actually. The staffing levels since 2004-05 have fallen from, basically, a full-time equivalent of 18.05 to 16.2, which is not huge. Compared with what has happened in the Attorney-General's Department over the last little while, or Customs or any of those sorts of agencies, this is not a massive

50 *Supplementary Submission 2*, p. 13.

51 *Committee Hansard*, 11 February 2011, p. 54.

52 *Committee Hansard*, 11 February 2011, p. 67.

53 *Supplementary Submission 2*, p. 15.

54 *Committee Hansard*, 11 February 2011, p. 20.

decline in terms of the staffing complement. So I would have thought that, if a person could manage within that envelope, a professional public servant would be expected to manage their functions within that type of envelope.⁵⁵

4.50 The committee also questioned the Department on the observation contained in the RoLIA submission that, while the ALRC has been losing staff, there has been an increase in staff in the Department, from 760 to 1550, over the period 2004-2009.⁵⁶ The Department indicated that its staffing levels increased as it took on new responsibilities:

I am sure you would be aware that most of that succeeded the events of September 11, after which the department took on significant new responsibilities for national security. These matters were of significant concern to the previous government and continue to be for this government. Those new functions for, first, national security and then later for emergency management naturally came with resources.

...I think that the comparisons neglected to take into account that the commission has continued to have one function throughout that time, which is to do two references a year, whereas we have had significant new functions for which we have been resourced.⁵⁷

High turnover of legal officers

4.51 In relation to both the commissioner position and legal officer positions, Professor Croucher highlighted the advantages of maintaining the 'intellectual capital' of the ALRC:

The key point I would like to make is that the intellectual capital of a standing law reform commission requires a core complement of both commissioners and staff. The maintenance of that intellectual capital also generates an enormous efficiency, where the ALRC is expert at the process of law reform and, with its reputation and the standing of its commissioners, it is able to leverage enormous expertise and contributions – all honorary – informing the work and development of the recommendations for reform.⁵⁸

4.52 To this end, in addition to the issues raised in relation to the need for more full-time standing commissioners to be appointed, concerns were raised during the inquiry about the high turnover of legal officers at the commission.⁵⁹

55 *Committee Hansard*, 11 February 2011, p. 96.

56 *See Submission 14*, p. 17.

57 *Committee Hansard*, 11 February 2011, pp 103-104.

58 *Committee Hansard*, 11 February 2011, p. 48.

59 *See, for example, Rule of Law Institute of Australia (RoLIA), Submission 14*, p. 17; Professor David Weisbrot, *Submission 16*, p. 8.

4.53 Professor Croucher told the committee that only one legal officer remains from the complement of 10 legal officers who were working for the commission in December 2009.⁶⁰ In its Supplementary Submission, the ALRC explained the impact of this turnover on the organisation:

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...[I]n 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.⁶¹

4.54 Professor Croucher informed the committee that the ALRC has invested resources in providing an induction program to try and capture some corporate memory and provide new legal officers with a 'solid grounding in the processes of law reform'. However, Professor Croucher noted that, in her experience, it takes at least one reference cycle to 'really get the hang of what really works in a law reform process'.⁶²

4.55 The committee questioned Professor Croucher as to the reasons for the high turnover of staff. Professor Croucher provided the following explanation:

I will put the reasons in a bunch, if I may. The cuts in the budget and the way they were introduced and the lack of appointment of additional commissioners once we completed the [initial] family violence inquiry were destabilising factors in terms of staff. A number of staff at that point had opportunities that they took. They were for them good opportunities and for many a solid promotion, based on the experience that they had acquired at the ALRC. There are a lot of factors that feed into it. I must say that the workload last year was extraordinarily heavy in order to complete the [family violence] report...So it is a combination of destabilising and looking for opportunities, perhaps as a result of that destabilising, and the additional burden certainly played very heavily at least in one case.⁶³

4.56 The committee also heard evidence from Professor David Weisbrot, the immediate past President of the ALRC, who stated:

60 *Committee Hansard*, 11 February 2011, p. 57.

61 *Supplementary Submission 2*, pp 8-9.

62 *Committee Hansard*, 1 February 2011, p. 57.

63 *Committee Hansard*, 11 February 2011, p. 58. The ALRC's current inquiry 'Family Violence and Commonwealth Laws' follows on from an earlier ALRC inquiry into Family Violence which was finalised in November 2010.

...it has hurt me deeply that in just over a year, in the year and a bit since I left, there has been more than 100 per cent turnover of legal staff.⁶⁴

4.57 Professor Weisbrot highlighted the fact that only one legal officer remains at the ALRC with more than one year's experience, with the result that there has been an almost complete loss of institutional memory and experience.⁶⁵ Further, Professor Weisbrot described as a 'double whammy' the combination of short-term commissioner appointments and the high turnover of legal staff at the ALRC:

Now we have a very junior and inexperienced staff at the ALRC. I think that is a double whammy. Who there is going to say to the commissioner, 'You know, we had that kind of problem three references back, and this is how we handled it,' or, 'Two references back, this organisation was especially useful to us and this one wasn't so good; they just gave us the standard work.'⁶⁶

4.58 The committee sought the Department's view on the high turnover of staff at the ALRC. The Secretary of the Department stated that he did not know why there was a 90 per cent turnover of staff at the ALRC, but it was a matter for the CEO of the organisation. However, the Secretary did note that there is 'nothing about [the ALRC's] budget that requires a 90 per cent turnover'.⁶⁷

64 *Committee Hansard*, 3 March 2011, p. 8.

65 *Committee Hansard*, 3 March 2011, p. 8.

66 *Committee Hansard*, 3 March 2011, p. 10.

67 *Committee Hansard*, 11 February 2011, p. 97.

CHAPTER 5

Impact of budget cuts – information and education program and conduct of inquiries

Introduction

5.1 The budget cuts to the ALRC have also impacted on the organisation's ability to provide its public information and educational services program. In addition, aspects of the ALRC's inquiry process have been curtailed, particularly the ability of the ALRC to travel to undertake face-to-face consultations. These impacts are discussed in this chapter.

Discontinuation of public information and educational services program

5.2 One of the measures the ALRC has taken to reduce its expenditure has been to reduce the number of programs from two to one by removing the public information and educational services program from the ALRC's budget. In particular, the ALRC has discontinued publication of the bi-annual law journal, *Reform*, which had been published since 1976. The ALRC's remaining program is the conduct of inquiries.

5.3 The committee received evidence from stakeholders in relation to the impacts of this savings measure. Macquarie Law School described as 'deeply regrettable' the discontinuation of *Reform*:

The topically themed journal was intended to raise public awareness of contemporary law reform issues – through contributions written by leading Australian and international authorities – and provided a valuable source of information on law reform projects across Australia and internationally.

This aspect of law reform – now lost – was instrumental in placing new and emerging issues on the agenda for community discussion and prompting eventual attention by governments and others.¹

5.4 RoLIA noted that former High Court judge, and inaugural President of the ALRC, the Hon. Justice Michael Kirby, AC CMG, has described *Reform* as 'vital reading for the modern lawyer'.² RoLIA also highlighted that *Reform* was an important source of revenue for the ALRC:

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

1 *Submission 8*, p. 3.

2 *Submission 14*, p. 34, quoting the Hon Michael Kirby AC CMG, Launch of *Reform*, Autumn Edition 1998 – Issue 72, Tuesday, 7 April 1998, Sydney.

currently being spent, the ALRC is left with reduced independence from the government.³

5.5 At the first public hearing, Professor Croucher outlined other impacts arising from the loss of this program:

Our educational outreach program was a significant element of our work... At any request we were able to host international visitors, providing them with training on law reform. We were able to provide resources to allow our staff to travel internationally, such as when Professor Weisbrot – when he was President – and our then research manager were able to conduct training in Papua-New Guinea in law reform. Professor McCrimmon and Professor Weisbrot both went to Botswana at the invitation of the government there. We do not have the capacity to even allow the time to do those sorts of things.⁴

5.6 In terms of educational outreach, the committee also notes the submission from Macquarie Law School, which expressed concern that the student internship program at ALRC may also suffer due to the budget cuts:

The ALRC has an active internship program, which is highly competitive and has developed an excellent reputation over the last decade...Although interns work on a voluntary basis they require considerable supervision, which clearly has resource implications for the ALRC. There are limited opportunities to undertake internships in public law institutions in Australia and, given the impact of the budget cuts on staff numbers at the ALRC, we are very concerned that the already limited opportunities for students to participate in this program may face the same fate as other elements of the ALRC's public information and education services discussed above. Alternatively, student intern numbers might not diminish, but the quality and intensity of the supervision inevitably will decline in the absence of experienced legal staff. In either case, this would be a tragedy, given the importance and power of teaching students that they need not only work with the law as it is, but might actively engage with institutions and processes that analyse and critique the law as it is and develop constructive proposals for change.⁵

5.7 The submission of Victorian Women Lawyers also noted the important role that the ALRC's public education and community consultation function plays in linking the legal community with members of society who may not otherwise have the opportunity to engage in the law reform process.⁶

3 *Submission 14*, p. 34.

4 *Committee Hansard*, 11 February 2011, p. 68.

5 *Submission 8*, p. 5.

6 *Submission 11*, p. 3.

5.8 In his submission, Professor Weisbrot listed the abandonment of community education initiatives as one of the devastating impacts of the budget cuts. However, while acknowledging the importance of these functions, in the attachment to his submission Professor Weisbrot also advocated that law reform commissions must remain focussed on 'their main function':

Although law reform commissions must engage in a number of important ancillary activities – such as community education, conference organisation, publishing, and making submissions to other inquiries based upon previous or current research – they must remain focussed squarely upon their main function: to provide the highest quality legal and policy advice on matters referred to them, and thus to be useful to government.⁷

Changes to inquiry processes

5.9 The ALRC's Background Submission outlined a number of steps that have been taken as savings measures in the inquiry process:

- producing only one consultation paper, as opposed to the usual two (an Issues Paper and Discussion Paper), preceding a final report;
- developing online consultation strategies so as to reduce the cost of consultation travel; and
- producing the Consultation Paper for the Discovery inquiry in a soft copy online and not producing any hard copies, as well as introducing full cost recovery on final reports.

5.10 Each of these measures is discussed below.

Producing a single consultation paper

5.11 A number of witnesses criticised the combining of the Issues Paper with the Discussion Paper. For example, Mr Edward Santow from PIAC argued that conflating these two stages of an inquiry misses out on a number of opportunities for reflection and consultation with stakeholders.⁸ Mr Santow went on to note that, while prima facie it is more cost-effective to conflate those two stages, in the long run it is 'clearly' a false economy:

If you go back and look at previous discussion papers – which effectively would have become reports – there are a number of times when the ALRC has floated what at the time it believed to be a good recommendation for reform but on further analysis from stakeholders, and reflection from the ALRC itself, has realised was not the best solution to the problem it was trying to solve.⁹

7 *Submission 16*, p. 8 and Attachment A, p. 22.

8 *Committee Hansard*, 11 February 2011, p. 22. See also RoLIA, *Submission 14*, p. 17.

9 *Committee Hansard*, 11 February 2011, p. 27. See also Law Council of Australia, *Submission 5*, pp 11-12.

5.12 Mr Benjamin Giles, Secretary and Treasurer of RoLIA, described the process as appropriate to the role of the ALRC because it is 'not a hasty approach to law reform'.¹⁰ Mr Warwick Soden, Registrar of the Federal Court of Australia, highlighted the important role that the discussion paper played. According to Mr Soden, the discussion paper stage is the opportunity for the 'elephants in the room' to be discussed, and for urban myths to be tested and either confirmed or abolished.¹¹

5.13 In contrast, the Hon. Justice Hammond, President of the NZLC, stated that it is a matter of efficiency to consolidate the preliminary work of an inquiry into a single paper.¹²

Reducing travel for consultation

5.14 The reduction in travel for consultations as a measure to reduce expenditure, and the implementation of other strategies to supplement face-to-face consultation, was the subject of significant comment by submitters and witnesses. The committee received submissions on the extensive manner of the ALRC's consultations and how this process contributes to the high-quality reports that the ALRC produces. For example, the Australian Domestic and Family Violence Clearinghouse stated that, in the course of the first Family Violence inquiry in 2010, the ALRC 'demonstrated an excellent capacity to involve and represent the positions of a wide range of stakeholders through respectful consultation'.¹³

5.15 The ALRC's Supplementary Submission stated:

Community consultation lies at the heart of the ALRC process, 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.¹⁴

5.16 The NSW LRC noted that, while some stakeholders are 'comparatively easy to engage', law reform bodies must ensure that consultation engages individuals and sectors of the community who may not find it as easy to participate in law reform processes, such as rural and regional stakeholders, and Indigenous peoples.¹⁵

10 *Committee Hansard*, 11 February 2011, p. 35.

11 *Committee Hansard*, 11 February 2011, p. 2.

12 *Committee Hansard*, 3 March 2011, p. 5.

13 *Submission 17*, p. 1. See also PIAC, *Submission 21*, p. 5, which stated that in the past the ALRC has effectively involved the public and extensively consulted on matters that have been referred to the commission; and Macquarie Law School, *Submission 8*, p. 3. However, this view was not shared by the Men's Rights Agency which described the ALRC's consultation on the first Family Violence inquiry as a 'pre-planned' process that 'effectively locked out men/fathers and their representatives from being included in the initial and ongoing inquiry': *Submission 18*, p. 1.

14 *Supplementary Submission 2*, p. 14.

15 *Submission 3*, pp 1-2.

5.17 The potential impact of budget cuts on the ALRC's consultation process was a concern to some submitters. For example, PIAC argued that the budget cuts have already affected the ALRC's capacity to consult outside the 'Sydney/Melbourne/Canberra axis'.¹⁶ Mr Edward Santow expanded on this issue at the hearing:

...from my observation, the ALRC has not travelled widely out of its Sydney-Melbourne-Canberra axis. That is something it used to do prior to the budget cuts. It consulted frequently in areas, like the Northern Territory, that are not always the subject of those kinds of consultation. It devoted significant resources, both time and energy, in doing that. When you do not do that, the problem you often encounter is that well resourced stakeholders continue to be able to fly to Sydney, where the ALRC is based, and make their views heard and less well resourced organisations or individuals find it much harder to do that or even to become aware in the first place that the ALRC is holding an inquiry.¹⁷

5.18 The ALRC's Supplementary Submission outlined some of the strategies used in inquiries in addition to face-to-face consultations, including online forums; online submission forms; blogs, podcasts and twitter updates.¹⁸ The committee received some positive feedback on these strategies, in particular from the Law Council of Australia.¹⁹ However, the ALRC stated in its Final Submission that these strategies could not replace face-to-face consultation:

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 consultation.²⁰

5.19 In considering this issue, the committee also believes that the ALRC makes a pertinent point in highlighting that travel expenses are only two per cent of the ALRC's total expenditure. This means that even significant savings in travel have only a limited impact in the overall budget: for example, a saving of 20 per cent in travel expenses only reduces total expenditure by 0.4 per cent.²¹

16 *Submission 21*, p. 3.

17 *Committee Hansard*, 11 February 2011, p. 22. See also RoLIA, *Submission 14*, p. 18; Professor Les McCrimmon, *Submission 19*, p. 2.

18 *Submission 2*, p. 20.

19 *Submission 5*, p. 11.

20 *Supplementary Submission 2*, p. 14. See also Macquarie Law School, *Submission 8*, pp 2-3; and PIAC, *Submission 21*, p. 5.

21 *Submission 2*, p. 28.

Cost recovery for reports

5.20 The ALRC introduced cost recovery for the final report of the Family Violence inquiry which it completed in November 2010 (previous Family Violence inquiry). The Federation of Community Legal Centres (Victoria) raised this issue in its submission, describing as 'disappointing' the fact that bound copies of the final report of the inquiry cost \$80:

We understand that this new policy of full cost recovery reflects the present under-resourcing of the ALRC. While the ALRC's reports are available for download via the internet, the resulting documents can be very unwieldy, as in the case of the Family Violence report which ran to 1,500 pages. Like many community organisations, the Federation must make strategic decisions concerning the use of its limited resources. In some instances, the practice of charging for bound ALRC reports may compromise our ability to access and utilise this material.²²

5.21 Professor Croucher stated in evidence to the committee that the introduction of full cost recovery has drawn 'considerable complaint', but that the measure was introduced to prevent the 'absolutely unpalatable alternative' of dismissing staff.²³

Moving from current premises

5.22 A further issue resulting from budgetary constraints is the need for the ALRC to move from its current premises. Professor David Weisbrot expressed his concern as follows:

...the ALRC will be forced to leave its purpose built premises in the Sydney CBD, despite having negotiated very favourable lease arrangements – and I understand the proposed new premises will not include any reception area, meeting rooms or library – which likely means that the ALRC's Michael Kirby Library, the major dedicated law reform library in Australia, of 35 years standing, will be eliminated...²⁴

5.23 In evidence to the committee, Professor David Weisbrot informed the committee that the ALRC's lease for its current premises is an 'exceptionally good deal':

Part of it was luck: we happened to find a building where one of the law firms...was about to leave, and the owners were a bit desperate and happy to give us a deal that was below market rates. It is a much lower level of rent than, for example, what ASIC or the ACCC are paying per square foot – they are just nearby...[The ALRC's premises] are custom built premises

22 *Submission 4*, p. 2. See also PIAC, *Submission 21*, p. 5.

23 *Committee Hansard*, 11 February 2011, p. 68.

24 *Submission 16*, p. 8.

that were very good for morale and collegiality. They provide adequate meeting rooms...to work with stakeholders through the process.²⁵

5.24 Professor Weisbrot described the ALRC's upcoming change of premises as 'very penny-wise, pound-foolish'.²⁶

5.25 At the first public hearing, Professor Croucher told the committee that an agreement has been finalised for the ALRC to sub-license premises from the Australian Government Solicitor (AGS) in Sydney. The agreement will allow the ALRC to reduce its rental expenditure and remain in 'the heart of [Sydney's] legal district', an important factor in leveraging the honorary contributions upon which the ALRC relies.²⁷ Professor Croucher also noted that the move was made in order to avoid 'an unpalatable alternative', being the reduction in staff.²⁸ The committee sought further details from Professor Croucher as to the nature of facilities at the ALRC's new premises:

By a strategic move with a compatible partner, like the [Australian Government Solicitor (AGS)], we can invoke the reception space that the AGS use and we are able to use their [meeting rooms] – that is part of our agreement. Obviously we have to book them all in advance, but we will be able to use those rooms. There is some ability to share the library service as well.²⁹

5.26 The committee was informed that the ALRC still has commitments under its current lease until September 2012, but is endeavouring to offset those costs through subleasing its current premises:

Because we have to carry our current lease through until September 2012, we will endeavour to offset that by subleasing as project space our current premises.³⁰

5.27 The committee questioned the Department about the need for the ALRC to move premises. The Secretary of the Department noted that the ALRC would be moving to premises 'that are more affordable for an organisation of the size of the commission'.³¹ An officer of the Department also stated that once the ALRC has

25 *Committee Hansard*, 3 March 2011, pp 10-11.

26 *Committee Hansard*, 3 March 2011, p. 11.

27 *Committee Hansard*, 11 February 2011, p. 60.

28 *Committee Hansard*, 11 February 2011, p. 60.

29 *Committee Hansard*, 11 February 2011, p. 60.

30 *Committee Hansard*, 11 February 2011, p. 60.

31 *Committee Hansard*, 11 February 2011, p. 86.

'regularised' its accommodation, it 'will be able to afford a full-time commissioner from [its] base budget'.³²

5.28 In response to the committee's concerns about the ALRC being required to share facilities such as a library and meeting rooms, officers of the Department informed the committee that these were matters for the President of the ALRC to negotiate independently with the AGS.³³

5.29 During the course of the ALRC's and the Department's appearances at Additional Estimates in February 2011, the committee returned to the issue of the ALRC's rent commitments, particularly the potential for the ALRC to be in a position to have a double commitment to rent once it moves premises in April 2011. Professor Croucher indicated that the ALRC has been given a rent-free threshold until July in its new premises. However, Professor Croucher noted that in the 'worst case scenario', being that the ALRC is unable to sublease its current premises, the ALRC would be carrying both rents through the next budget year.³⁴ The Department was optimistic that the ALRC's current premises would be subleased:

...[the Department does] not believe that the president is necessarily expecting that the [commission] will need to pay the rent in two facilities, because they are taking steps to sublease their original premises. So, should they be successful in doing so, they will, as well as being relieved of the burden of the rent in their original premises, enjoy a number of months rent holiday from the Australian Government Solicitor in their new premises as part of the negotiations for the move.³⁵

5.30 In contrast, the committee notes Professor Weisbrot's less optimistic assessment of the ALRC's chances of being able to sublet its current premises:

I think the subletting will be problematic, because another entity coming in will not have much security of tenure. They will not want to invest much money in refitting, so they would have to be able to use the exact space for their exact purposes without much change. Whether they can do that or not, I have no idea. I think it is risky, and it is one of those things where I wonder: 'Why do that now? Why put the commission in a position where it may lose hundreds of thousands of dollars 18 months before the very good lease expires?'³⁶

32 *Committee Hansard*, 11 February 2011, p. 90. See also *Committee Hansard*, 11 February 2011, p. 86.

33 *Committee Hansard*, 11 February 2011, p. 87.

34 *Committee Hansard*, 22 February 2011, pp 23-24.

35 *Committee Hansard*, 22 February 2011, p. 38.

36 *Committee Hansard*, 3 March 2011, p. 11.

Other matters

5.31 The Terms of Reference for this inquiry provided the opportunity for comment on 'other related matters'. The committee received evidence on a number of issues in this regard which are covered briefly in this section of the report, including:

- government responses to, and implementation of, the ALRC's reports;
- the setting of the ALRC's work program; and
- time frames for the ALRC to report on references.

5.32 This section of the report also covers the Term of Reference in relation to the appropriate allocation of functions between the ALRC and other statutory agencies.

Government responses to ALRC reports

5.33 As noted in Chapter 3, the implementation rate of ALRC reports is very high. However, there is no formal process in place for the government to respond to ALRC reports. This issue was commented on by a number of submissions. For example, in its submission, RoLIA advocated for greater transparency in government consideration of ALRC reports 'in order to avoid the wastage of [scarce] law reform resources'.³⁷ The Law Council of Australia's submission highlighted the need for timely responses to ALRC reports:

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.³⁸

5.34 The Law Council of Australia's submission suggested amending the ALRC Act to provide a statutory timeframe for government responses.³⁹ The committee notes that the Secretary of the Department stated that he did not have a view on the tabling in Parliament of government responses to ALRC reports within a certain timeframe. However, the Secretary warned that such requirements may become 'just sort of bureaucratic form':

All you will do is force in some cases the government to respond arbitrarily or in a pre-emptory fashion to something that requires more consideration.⁴⁰

5.35 Other jurisdictions have mechanisms which provide for government responses to law reform reports. RoLIA's submission explained that new legislation in the

37 *Submission 14*, p. 6.

38 *Submission 5*, p. 12.

39 *Submission 5*, p. 12. See also Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 11 February 2011, pp 15-16; Mr Richard Gilbert, RoLIA, and Mr Benjamin Giles, RoLIA, *Committee Hansard*, 11 February 2011, p. 45; and PIAC, *Submission 21*, p. 9.

40 *Committee Hansard*, 11 February 2011, pp 104-105.

United Kingdom requires the government to table in parliament each year a document outlining its response to proposals of the Law Commission of England and Wales.⁴¹

5.36 New Zealand also has a formal process, published in a Cabinet Office Circular, which sets out the government's obligations to respond to the reports of the New Zealand Law Commission (NZLC). At the second public hearing, the President of the NZLC explained the process to the committee:

...if the government accept our recommendations, they get straight on with the bill. [The NZLC] may be asked to attend a select committee to enlarge on matters. If [the government] do not accept our recommendations or most of them, then...the minister has to, within 120 days, file in the house a reason why they are not accepting them.⁴²

5.37 Professor Bryan Horrigan suggested changing the current ALRC process to accommodate an implementation report:

...the ALRC's standard practice of producing three major outputs per referral could be modified and enhanced to accommodate a consultation document, final report, and implementation report (with accompanying draft legislation for public comment)...with the latter report being produced in conjunction with other relevant governmental participants.⁴³

5.38 The ALRC's Background Submission indicated that it strongly supports the release of government responses to its reports.⁴⁴

Process for setting the work program

5.39 The ALRC can only undertake inquiries that are referred by the Attorney-General, either at the suggestion of the ALRC or at the Attorney-General's own initiative.⁴⁵

5.40 The committee was given a number of examples of how the work programs for law reform agencies in other jurisdictions are established. For example, the Law Commission of England and Wales does not receive specific references, but instead prepares a program of work which is put to the Lord Chancellor for agreement.⁴⁶

5.41 The NZLC has the power to self-initiate references. However, the NZLC's submission noted that the volume of government referrals in recent years has meant

41 See, for example, RoLIA, *Submission 14*, p. 25.

42 *Committee Hansard*, 3 March 2011, p. 4.

43 *Submission 9*, p. 2.

44 *Submission 2*, p. 8.

45 ALRC Act, section 20.

46 See Attorney-General's Department, *Submission 15*, p. 14; RoLIA, *Submission 14*, p. 25.

that the NZLC has not carried out any self-initiated inquiries.⁴⁷ Civil Liberties Australia indicated its support for the ALRC to have the power to self-initiate references.⁴⁸

5.42 The Victorian Law Reform Commission (VLRC) also has the power to 'review issues of general community concern'. Ms Ursula Noye, of the Public Interest Law Clearing House, explained to the committee how this referral power works in practice:

...individuals and organisations and lawyers may suggest issues to the VLRC for review. The VLRC staff and, ultimately, its commissioners consider the issues and refer them as appropriate for review by the VLRC. Since 2006, the VLRC has received 100 suggestions for law reform from the community and, of those suggestions, it has initiated four reviews. Of the reviews so far published, all have been partially or fully implemented in Victorian law and policy.

...It truly reflects representative government creating a more participatory and just society where those who may not normally have a say in law reform can do so.⁴⁹

5.43 To this end, the committee notes that the ALRC in its Supplementary Submission addressed the value of a community referral power:

...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.⁵⁰

Timeframes for inquiries

5.44 The short timeframes for ALRC inquiries were highlighted as problematic in some submissions. For example, the NSW LRC noted that the timeframe for the ALRC's reporting on references is frequently of short duration:

Prompt responses to law reform questions may be important – law reform may lose its immediacy and relevance if a relatively speedy response cannot be secured. However, thorough, independent research that includes consultation in meaningful ways with stakeholders and produces sound recommendations cannot be carried out speedily without resources...⁵¹

5.45 The ALRC's Supplementary Submission refers to the fact that the time taken by the ALRC to complete inquiries is dictated by the Attorney-General in the Terms

47 *Submission 12*, p. 2.

48 Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 11 February 2011, pp 17-18.

49 *Committee Hansard*, 11 February 2011, p. 79.

50 *Supplementary Submission 2*, p. 16.

51 *Submission 3*, p. 4. See also Law Council of Australia, *Submission 5*, p. 5.

of Reference, at the time each inquiry is referred. Over the past ten years, only two ALRC reports have taken over two years to complete (both of which were highly complex inquiries). All other inquiries during that time have taken less than 18 months to complete.⁵²

5.46 The Department's submission contended that one of the ways that the ALRC's functions and 'ongoing financial stability within its budget' can be achieved is through shorter, more focused references.⁵³

5.47 The ALRC's submission responded to this suggestion by noting that there is scope for shorter, more focused inquiries in some circumstances. However, the ALRC did not advocate focusing only on shorter, less complex inquiries as a way of solving its current resourcing deficit, because this would be a waste of the ALRC's intellectual capital and knowledge. Further, the ALRC went on to state that an organisation with its capacity and experience to deal with complex legal issues must not lose that ability.⁵⁴

Allocation of functions between ALRC and other statutory agencies

5.48 The committee also received a number of submissions which addressed the inquiry's Term of Reference in relation to the appropriate allocation of functions between the ALRC and other statutory agencies.

5.49 Mr Bruce Arnold, a Law Lecturer at the University of Canberra, submitted as follows:

...it is appropriate that the Commonwealth maintains a 'distributed' law reform regime that features activities by Senate Committees, by the ALRC, by sector-specific bodies (such as the Productivity Commission, the Australian Institute of Criminology and Australian Institute of Family Studies) and by ad-hoc inquiries. However, the existence of [different] Commonwealth research bodies and of state/territory entities such as the NSW Bureau of Crime Statistics & Research should not be regarded as an excuse for the ongoing erosion of the ALRC.⁵⁵

5.50 The Office of the Australian Information Commissioner (OAIC) submitted that, in its view, the allocation of functions between the ALRC and the OAIC is 'appropriate, effective, and essential to the work of the OAIC'. The OAIC's submission noted that a number of the ALRC's inquiries are directly relevant to the role and function of the OAIC.⁵⁶

52 *Supplementary Submission 2*, p. 16.

53 *Submission 15*, p. 6.

54 *Supplementary Submission 2*, p. 16.

55 *Submission 6*, p. 2.

56 *Submission 7*, p. 4.

5.51 The Public Interest Law Clearing House's submission compared the role of the ALRC with the Australian Human Rights Commission:

While PILCH supports and recognises that the impact of Commonwealth laws upon human rights is a relevant and important consideration for the ALRC in the performance of its functions, it is not the ALRC's main function.

The primary function of the [Australian] Human Rights Commission is to meet its responsibilities under federal anti-discrimination and human rights laws. In addition to investigating and conciliating complaints under these laws, the [Australian] Human Rights Commission holds public inquiries, develops education programs, provides independent legal advice to courts and makes submissions to governments on law and policy development and reform...PILCH considers that the functions and funding of the ALRC and the [Australian] Human Rights Commission reflect their sufficiently discrete and complementary roles and functions.⁵⁷

5.52 The ALRC's Supplementary Submission noted that there are key differentials that distinguish the ALRC from other agencies and organisations responsible for developing legal policy, including:

- the ALRC's independence;
- 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; and
- engagement with the international legal community.⁵⁸

5.53 Further, the ALRC's Supplementary Submission stated that 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.⁵⁹

57 *Submission 13*, p. 5. See also Attorney-General's Department, *Submission 15*, p. 17, which noted that the ALRC's reform focus and the Australian Institute of Criminology's subject specialisation make these organisations different in operation to each other.

58 *Supplementary Submission 2*, p. 17.

59 *Supplementary Submission 2*, p. 17.

CHAPTER 6

Committee view

6.1 The committee notes that the ALRC was established for the purpose of enabling law reform in Australia to take place on a national scale, and to ensure that the law is responsive to the social needs of the day.¹

6.2 In 1994, the House of Representatives Standing Committee on Legal and Constitutional Affairs conducted an extensive review of the ALRC. The first and third recommendations in the House of Representatives committee's report were:

...that the government recognise that there is a continuing need for a commission to carry out law reform functions.

...that the commission should continue to do high quality, well researched and well documented reports.²

6.3 It is the view of this committee that the original purpose of the ALRC, and the recommendations of the House of Representatives committee, are still relevant and important today. The committee believes that these functions are appropriately captured in section 21 of the *Australian Law Reform Commission Act 1996* (ALRC Act).

6.4 The ALRC is an international best practice organisation and it plays a key role in law reform in Australia. The committee agrees with the majority of submissions to this inquiry, which expressed strong support for an independent and well-resourced law reform commission in Australia.

6.5 However, in the committee's view, the introduction of changes to the ALRC's governance structure, in parallel with significant cuts to the ALRC's budget, places the ALRC in an extremely precarious position. While the committee accepts the Attorney-General's Department's (Department) evidence that it is only coincidence that these events are occurring together, the committee is very concerned about the overall impact of the changes on the ALRC and its capacity to continue to produce the high quality work for which it is renowned.

Changes to governance structure

6.6 In relation to the changes to the ALRC's governance structure implemented by the *Financial Framework Legislation Amendment Act 2010* (FFLA Act), the committee accepts the criticism by the Rule of Law Institute of Australia (RoLIA) that

1 Attorney-General's Department, *Submission 15*, p. 1.

2 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Law Reform: the Challenge Continues*, May 1994, pp 25-26.

the FFLA Act lacked sufficient parliamentary scrutiny. The committee agrees with the representatives of RoLIA that the legislation's seemingly innocuous title belied significant changes to the ALRC, and, further, that the explanatory memorandum 'glossed over the changes'.³

6.7 The committee notes the Department's explanation that the changes implement recommendations pursuant to the *Review of Corporate Governance of Statutory Authorities and Office Holders* (Uhrig Review), and are consistent with the *Governance Arrangements for Australian Government Bodies* policy. Further, the committee also notes that this is a policy which has bipartisan support.⁴

6.8 However, the committee considers that Professor David Weisbrot highlighted some significant issues as to the inappropriateness for a blanket application of the *Financial Management and Accountability Act 1997* (FMA Act) structures to the ALRC.⁵

6.9 Critically, in the committee's view, the changes in the FFLA Act place in jeopardy the perception that the ALRC is independent from government. The committee agrees with the observation of Professor Rosalind Croucher, President of the ALRC, that it will require 'confident management to preserve the perception of independence'.⁶ Members of the committee intend to use the Senate Legal and Constitutional Affairs Legislation Committee's estimates process to maintain close scrutiny of this aspect of the ALRC's operations.

Impact of budget cuts

6.10 The ALRC has had a budget cut of \$0.242 million in 2010-11 and will have further reductions of \$0.495 million per year over the period 2011-12 to 2013-14. These cuts are in addition to the government's two per cent efficiency dividend.

6.11 The submissions and evidence to this inquiry clearly refute the submission of the Department that the ALRC's resources are adequate to discharge its functions.⁷ The committee agrees with the evidence of Professor Croucher that these budget cuts

3 Mr Benjamin Giles, Rule of Law Institute of Australia, *Committee Hansard*, 11 February 2011, pp 30-31.

4 *Submission 15*, p. 5.

5 Attorney-General's Department, answers to questions on notice, received 25 February 2011 (Letter from Professor David Weisbrot, President of the Australian Law Reform Commission (ALRC), to Mr Marc Mowbray-d'Arbela, Assistant Secretary, Legislative Review Branch, Financial Management Group, Department of Finance and Deregulation, dated 18 November 2008).

6 *Committee Hansard*, 11 February 2011, p. 74.

7 *Submission 15*, p. 6.

place the ALRC at the point of viability, fighting a losing battle, like the Black Knight in *Monty Python and the Holy Grail*.⁸

6.12 The committee also does not see how it is feasible, once the transitional funding from the Attorney-General's Department is exhausted, for the ALRC to continue to fund a second full-time commissioner position out of its reduced budget.

6.13 The committee believes that the savings measures that have been put in place by the ALRC in response to the budget cuts do not merely represent a different, more efficient, way of doing inquiry work. The budget cuts threaten the ability of the ALRC to continue to produce the high quality and highly respected work that it has undertaken for the last 35 years.

6.14 While the committee acknowledges that witnesses were unable to point to specific examples demonstrating a decline in the ALRC's work, the committee's view, based on the evidence provided by the ALRC, is that the staff at the ALRC have been working extraordinarily hard to ensure that there is no decline in the quality of the ALRC's work. This situation cannot continue. The ALRC cannot be expected to rely on a decreasing number of staff, particularly full-time commissioners, to produce the same volume and standard of work.

6.15 Further, the committee agrees with Professor Weisbrot that the current savings measures that have been implemented due to inadequacies in the ALRC's budget also highlight the potential for a reduction in the ALRC's independence from government.⁹ The committee agrees with Professor Weisbrot's sentiments that the ALRC should be given an adequate budget so that it does not need to rely on supplementary funding, or any form of assistance, from the government.

6.16 Therefore, the committee recommends that the budget cuts to the ALRC for the period 2010-11 to 2013-14 be restored as a matter of urgency.

6.17 The committee has some specific comments on issues arising out of the evidence in relation to the impact of the budget cuts on the ALRC, and those comments are set out below.

Full-time commissioners

6.18 The committee applauds the work that Professor Croucher has contributed to the ALRC since she was appointed President in December 2009, providing leadership at both an organisational and inquiry level. However, the committee is mindful of Professor Croucher's statement that it is 'impossible to be in three places at once'.¹⁰ Obviously it is not a sustainable situation to have a single person as the Chief

8 *Committee Hansard*, 11 February 2011, pp 49 and 51.

9 *Committee Hansard*, 3 March 2011, p. 8.

10 *Committee Hansard*, 11 February 2011, p. 52.

Executive Officer of the ALRC, and to also be the only full-time commissioner for at least two ongoing inquiries. This is not a reflection on Professor Croucher's abilities – it is simply impossible for one person to maintain that type of workload over an extended period of time.

6.19 The committee notes that the government has indicated an intention to appoint an inquiry-specific full-time commissioner for the ALRC's 'Review of censorship and classification' inquiry. However, in the committee's view, there is a need for a legislative safety net to ensure that leaving the ALRC bereft of standing, fixed-term, full-time commissioners does not occur again. As the ALRC notes in its Supplementary Submission, the spirit and intent of the ALRC Act is that a full complement of commissioners would constitute the proper leadership of the commission.¹¹

6.20 As Professor Croucher stated, the appointment of an inquiry-specific full-time commissioner is 'better than nowt'. However, in the committee's view, the appointment of standing fixed-term full-time commissioners is imperative to the operation of the ALRC. The ALRC needs to be led by specialists in law reform, and it needs to retain this intellectual capital.

6.21 Therefore, the committee recommends that the ALRC Act should be amended to provide for a minimum of two standing, fixed-term (not inquiry-specific), full-time commissioners at all times. Further, the committee recommends that an additional full-time commissioner be appointed, for each additional inquiry referred to the ALRC, in circumstances where the ALRC already has two or more ongoing inquiries.

Moving premises

6.22 The committee is unconvinced that the sublicensing of new premises will, in fact, generate savings for the ALRC in the short term. The committee accepts that it may be necessary for the ALRC to reduce its rental expenditure in the longer term by moving to lower cost premises at the end of the current lease. However, any new premises will need to have adequate meeting room space; allow for the retention of the ALRC's library; and be located in an area that ensures that the ALRC can continue to benefit from the honorary contributions it currently relies on from the legal community.

6.23 In the committee's view, the ALRC should have remained in its former premises until the expiry of the lease. The committee notes that the ALRC has been given a 'rent-free' period in its new premises until July 2011.¹² However, the ALRC will only benefit from this rent-free period if its current premises are sublet, a situation that is by no means guaranteed. The committee is very concerned that this situation has exposed the ALRC to a double commitment for rent. The committee appreciates

11 *Supplementary Submission 2*, p. 9.

12 Professor Rosalind Croucher, ALRC, *Committee Hansard*, 22 February 2011, p. 24.

that little can be done about this situation now. However, members of the committee will continue to follow the outcome of the situation through the Senate Legal and Constitutional Affairs Legislation Committee's estimates process.

Other savings measures

6.24 The committee is of the view that the savings measures of discontinuing the public information and educational services programs, and reducing travel for consultation for inquiries, are not areas where it is appropriate for the ALRC to be reducing expenditure. These areas are central to the work that the ALRC does: the value of the ALRC's work is that it is accessible to the whole community, not just the legal fraternity or well-resourced stakeholders. For this reason, the committee believes these elements of the ALRC's work should be maintained. The committee recommends that the public information and education services program of the ALRC resume. Further, the committee recommends that the ALRC be provided with the necessary resources so it can continue to travel to undertake face-to-face consultations as part of the inquiry process.

Turnover of legal staff

6.25 The committee did not receive definitive evidence as to the reason for the high turnover of legal staff at the ALRC in recent years. The committee readily accepts that the experience that a person gains while working at the ALRC would open doors for them to pursue excellent alternative opportunities. However, the committee believes that restoring the budget cuts and ensuring that a minimum of two full-time commissioners are appointed to the ALRC will provide the elements of leadership and stability that are fundamental in attracting and retaining appropriate staff.

Conclusion

6.26 The ALRC is critically important to the development of legal policy in Australia. It has a proud history of undertaking important reviews and inquiries into key areas of law and making significant recommendations to unify and improve Australia's laws. The ALRC's high quality of work cannot continue on a shoestring budget.

6.27 In order to maintain this important organisation, the government must provide the ALRC with the necessary funds to enable it to have a full complement of qualified staff, including full-time commissioners; to be accommodated in premises that cater to the nature of the ALRC's work; to provide a comprehensive public information and education program; and to allow the ALRC to travel to undertake extensive consultations for the purposes of its inquiries.

Recommendation 1

6.28 The committee recommends that the Australian Government restore the ALRC's budget cuts for the period 2010-11 to 2013-14 as a matter of urgency.

Recommendation 2

6.29 The committee recommends that the ALRC Act be amended to provide for a minimum of two standing, fixed-term (not inquiry-specific), full-time commissioners.

Recommendation 3

6.30 The committee recommends that an additional full-time commissioner be appointed, for each additional inquiry referred to the ALRC, in circumstances where the ALRC already has two or more ongoing inquiries.

Recommendation 4

6.31 The committee recommends that the ALRC's public information and education services program be resumed immediately.

Recommendation 5

6.32 The committee recommends that the ALRC be provided with all necessary resources to enable it to continue to travel to undertake face-to-face consultations as part of its inquiry processes.

Senator Guy Barnett

Chair

DISSENTING REPORT BY GOVERNMENT SENATORS

Introduction

1.1 Government Senators strongly support the Australian Law Reform Commission (ALRC) and its important work, however, Government Senators disagree with the views of the committee majority and the recommendations in the majority report. In particular, Government Senators believe that the majority report does not recognise the clear advantages for the ALRC in relation to the changes in its governance structure. These changes will introduce a more flexible membership model which will allow the composition of the ALRC to be adapted as circumstances require. Further, the ALRC will benefit from the appointment of short-term commissioners, who will assist the ALRC on specific references with their expert knowledge, experiences and advice.

1.2 In terms of the majority report's concerns about the ALRC's budgetary situation, Government Senators note that the Australian Government is committed to resourcing the ALRC for the long term and, further, that the Attorney-General's Department is committed to assisting the ALRC to ensure that it is properly resourced to carry out its functions.¹

Government support for the ALRC

1.3 The Australian Government has put on the record its strong support and commitment to the Australian Law Reform Commission (ALRC). As the Attorney-General has noted:

It was a Labor government that established the ALRC and since that time Labor attorneys have reaffirmed the party's commitment to the [ALRC]'s important input in shaping the Australian legal landscape.²

1.4 The Attorney-General's Department's submission sets out the ALRC's impressive record, and highlights the esteem in which the Australian Government holds the work of the ALRC:

The [ALRC] has conducted over 100 thoroughly researched and comprehensive inquiries. Their highly regarded reports and recommendations have made a large contribution to the law reform landscape to Australia...[T]he Attorney-General, the Hon Robert McClelland MP, has stated the Government's strong support for the

1 *Committee Hansard*, 11 February 2011, p. 85.

2 The Hon. Robert McClelland MP, Attorney-General, 'ALRC performs vital role', *Australian Financial Review*, 11 February 2011, p. 46.

Commission's work and its history of demonstrating insight, providing expert analysis and having a practical grasp of law reform.³

1.5 Government Senators reiterate that the Australian Government holds the ALRC's contributions in the highest regard and is committed to ensuring that the ALRC remains at the forefront of modern law reform.

Changes to the ALRC's governance structure

1.6 Government Senators disagree that the amendments to the governance structure of the ALRC, contained in the *Financial Framework Legislation Amendment Act 2010* (FFLA Act), place the ALRC in an 'extremely precarious position'.

1.7 As was pointed out in the Attorney-General's Department's submission, these reforms have been foreshadowed since the *Review of Corporate Governance of Statutory Authorities and Office Holders*, which was conducted by Mr John Uhrig AC in 2003:

The primary purpose of the amendments contained in the FFLA Act is to move the Commission to governance arrangements consistent with Australian Government policy on statutory bodies as set out in the *Governance Arrangements for Australian Government Bodies*. These arrangements were issued following the *Review of Corporate Governance of Statutory Authorities and Office Holders*...⁴

1.8 Further, as noted by Mr Roger Wilkins AO, Secretary of the Attorney-General's Department, the Uhrig Review reforms have bipartisan support:

The Uhrig review seems to be something that has a measure of bipartisan support. It originated with the previous government and there was every intention, I think, in the [D]epartment of [F]inance of gradually moving in these areas. They moved faster in some than they had done under the previous government and they are now implementing some of them under the current government.⁵

1.9 The amendments in the FFLA Act will introduce a more flexible membership structure for the ALRC, so that the composition of the ALRC can be adjusted based on the subject matter of the inquiries referred to it. The Attorney-General outlined the benefits to the new structure as follows:

...appointing subject matter experts to specific inquiries will strengthen the [ALRC's] ability to undertake expert analysis, research and consultation across the country...the amendments will enhance the [ALRC's] ability to

3 *Submission 15*, p. 1.

4 *Submission 15*, p. 5.

5 *Committee Hansard*, 11 February 2011, p. 101.

carry out its important functions and will ensure it remains completely independent in fulfilling its responsibilities.⁶

1.10 The ALRC's recent Family Violence inquiry demonstrates the advantages that these changes will bring. The Australian Government appointed magistrate Anne Goldsbrough as a specialist commissioner for the duration of the inquiry, utilising her expertise as a state supervising magistrate for family law. Similarly, the ALRC's 'Discovery in civil litigation' inquiry will benefit from the knowledge and experience of Federal Court justices Arthur Emmett and Bruce Lander, who were appointed as commissioners for the duration of the inquiry.

1.11 The submission of the Attorney-General's Department noted that commissioners would be 'targeted for their expert wealth of experience, to provide advice on specific references'.⁷

1.12 Mr Wilkins also pointed out in his evidence to the committee that the amendments in the FFLA Act would:

...introduce more flexibility into the commission structure, taking into account the varied and often highly technical subject matters on which it undertakes inquiries.⁸

1.13 For this reason, Government Senators disagree with Recommendation 2 of the majority report, because we do not believe it is necessary to legislatively mandate a minimum number of full-time commissioners. The changes in governance structure introduced by the FFLA Act provide the ALRC with a more flexible membership structure to enable the composition of the ALRC to be adjusted based on the subject matter of the inquiries referred to it.

1.14 The majority report expresses concerns that the changes in the FFLA Act will detract from the independence of the ALRC. Government Senators do not agree, and are of the view that the changes do not detract from the ALRC's independence. Instead, these changes provide more flexibility, and allow the ALRC to adapt as circumstances require and to remain completely independent in fulfilling its responsibilities. The revised Explanatory Memorandum explicitly states that the Attorney-General's written directions to the President are limited to administrative matters only, and will not affect the independence of the ALRC in undertaking inquiries.⁹ This point was emphasised by Mr Wilkins at the committee's first public hearing:

6 The Hon. Robert McClelland MP, Attorney-General, 'ALRC performs vital role', *Australian Financial Review*, 11 February 2011, p. 46.

7 *Submission 15*, p. 2.

8 *Committee Hansard*, 11 February 2011, p. 85.

9 Revised Explanatory Memorandum for the Financial Framework Amendment Bill 2010, p. 17.

The government does have a continuing commitment to the independence and efficacy of the [ALRC]...I wish to stress that none of the structural changes go to the independence of the commission.¹⁰

Impact of budget cuts on the ALRC

1.15 In terms of the impact of budget cuts on the ALRC, Government Senators note the Attorney-General's Department's evidence about the context in which the budgetary reductions were introduced:

The reductions in the commission's budget were made at a time...when \$3.5 billion of savings were being found from across government, occasioned by, as we all know, the global financial crisis. The savings from the 2009 Mid-Year Economic and Fiscal Outlook are a key component of the government's commitment to returning the budget to surplus at the earliest possible responsible time and, once the budget returns to surplus, maintaining spending restraint to support long-term stability.¹¹

1.16 Further, Government Senators believe that the majority report does not give adequate consideration to the submission of the Attorney-General's Department in relation to the adequacy of the ALRC's budget:

The Government considers the [ALRC]'s resources are adequate to discharge its functions... It is a matter for the [ALRC] to determine how to use its budget. The [ALRC] has identified a range of efficiencies. The Department is available to assist the [ALRC] where requested and is committed to maintaining a close working relationship with the [ALRC] to ensure that feedback about resourcing is appropriately considered.¹²

1.17 Government Senators agree with the Attorney-General's Department that professional public servants need to manage within their budget.¹³ In this context, Government Senators also note that the ALRC is an independent body and the chief executive has to make his or her own decisions about how resources are utilised within the budget allocation.¹⁴

1.18 Government Senators also emphasise the point that the Attorney-General's Department has engaged in ongoing discussions with the ALRC to assist it as it moves through this transition phase:

The department is working with the commission as it moves towards this new way of doing business, and the department is confident that this transition will position the ALRC to maintain the high standards of research

10 *Committee Hansard*, 11 February 2011, p. 85.

11 *Committee Hansard*, 11 February 2011, p. 85.

12 *Submission 15*, p. 6.

13 *Committee Hansard*, 11 February 2011, p. 85.

14 *Committee Hansard*, 11 February 2011, p. 85.

and analysis for which it is acclaimed as well as serving the government in the best way that it can.¹⁵

1.19 Further, the Attorney-General's Department assured the committee that it 'remains committed to maintaining frequent and meaningful contact with the [ALRC]'.¹⁶

1.20 In relation to Recommendation 3, the Australian Government has already announced that it will appoint a full-time commissioner for the ALRC's review of censorship and classification. Further, the government will assist the ALRC with the costs of this appointment. The Australian Government expects to announce the appointment of a full-time commissioner for that inquiry shortly.

1.21 In terms of the concerns expressed in the majority report regarding the ALRC's relocation to new premises, Government Senators note the Attorney-General's Department's evidence which sets out the benefits of this move:

...the [ALRC] was paying in the vicinity of \$600,000 a year in rent, which seemed to us to be an area where there was capacity for considerable savings to be made. I am pleased to say that the Law Reform Commission has recently negotiated arrangements to move to premises that are about half that price, which then makes it much more commensurate with the kind of size and budget of the commission as a whole. So nearly \$300,000 worth of savings are being achieved as a result of a move to premises that are somewhat more in keeping with the normal space utilisation for public service officers.¹⁷

1.22 Government Senators note that as part of a move to working more efficiently, the Issues and Discussion Papers for ALRC inquiries have been consolidated. To this end, Government Senators note the evidence of the President of the New Zealand Law Commission, that that organisation had consolidated all its preliminary research into a single paper as a matter of efficiency:

...you have two or three chapters on the background, the present law, and what you want to end up with is what really has to be answered here. Then of course you consult and there is a separate final report.¹⁸

1.22 Further, Government Senators consider that the budget cuts also provide opportunities for the ALRC to explore other ways of conducting inquiries by, for instance, using new media to facilitate consultation on inquiries. The Law Council of Australia indicated its support for these types of changes:

15 *Committee Hansard*, 11 February 2011, p. 85.

16 *Submission 15*, p. 2.

17 *Committee Hansard*, 11 February 2011, p. 86.

18 The Hon. Justice Grant Hammond, *Committee Hansard*, 3 March 2011, p. 5.

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.

Forums like [podcasts, e-newsletters, twitter contributions and updates, RSS feeds and on line forums] 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.¹⁹

1.23 Finally, the Attorney-General's Department advised the committee that the Australian Government is of the view that the resources of the ALRC are adequate for it to discharge its functions:

The [ALRC]'s functions and ongoing financial stability within its budget can be achieved in a number of ways. Shorter, more focused references and alternative staffing models are two examples of different approaches. It is a matter for the [ALRC] to determine how to use its budget. The [ALRC] has identified a range of efficiencies. The Department is available to assist the [ALRC] where requested and is committed to maintaining a close working relationship with the [ALRC] to ensure that feedback about resourcing is appropriately considered.²⁰

Conclusion

1.24 Government Senators consider that the Australian Government strongly supports the work of the ALRC. As Mr Wilkins stated at the first public hearing:

The government regards the work of the [ALRC] as important to a vibrant and sustainable legal system...[T]he [ALRC] is highly regarded for the way it goes about its work, including the quality of its research and its emphasis on consultation.²¹

1.25 The changes to the ALRC's structure introduced by the FFLA Act will improve the ALRC's flexibility to respond to circumstances as required, and will enhance the ALRC's ability to undertake expert analysis through access to subject-matter expert commissioners for specific inquiries. Government Senators also believe that the ALRC is adequately resourced to undertake its important functions, particularly in light of the Attorney-General Department's ongoing commitment to assist the ALRC and ensure that it is adequately resourced.

19 *Submission 5*, p. 11.

20 *Submission 15*, p. 6.

21 *Committee Hansard*, 11 February 2011, p. 84.

Senator Trish Crossin
Deputy Chair

Senator Mark Furner

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Mr Brett Dawson
2	Australian Law Reform Commission
3	NSW Law Reform Commission
4	Federation of Community Legal Centres (Vic)
5	Law Council of Australia
6	Mr Bruce Arnold
7	Office of the Australian Information Commissioner
8	Macquarie Law School
9	Professor Bryan Horrigan
10	Civil Liberties Australia
11	Victorian Women Lawyers
12	New Zealand Law Commission
13	Public Interest Law Clearing House
14	Rule of Law Institute of Australia
15	Attorney-General's Department
16	Professor David Weisbrot
17	Australian Domestic and Family Violence Clearinghouse
18	Men's Rights Agency
19	Professor Les McCrimmon
20	Non-Custodial Parents Party
21	Public Interest Advocacy Centre
22	Federal Court of Australia
23	Northern Territory Law Reform Committee
24	Australian Academy of Law

ADDITIONAL INFORMATION RECEIVED

1. Document tabled by Attorney-General's Department at public hearing on 11 February 2011.
2. Answers to questions on notice provided by Attorney-General's Department on 25 February 2011.
3. Additional information provided by Australian Law Reform Commission on 9 March 2011.

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 11 February 2011

ALSTON, Mr Bruce, Senior Legal Officer, Australian Law Reform Commission

CROUCHER, Professor Rosalind, President, Australian Law Reform Commission

FREDERICKS, Mr David, First Assistant Secretary, Strategy and Policy Advice Unit, Priorities and Coordination Division, Attorney-General's Department

GILBERT, Mr Richard, Chief Executive Officer, Rule of Law Institute of Australia

GILES, Mr Benjamin, Secretary and Treasurer, Rule of Law Institute of Australia

HART, Ms Emily, Co-Chair, Victorian Women Lawyers Law Reform Committee

LEON, Ms Renee, Deputy Secretary, Strategic Policy Coordination Group, Attorney-General's Department

NOYE, Ms Ursula, Lawyer, Public Interest Law Clearing House

O'BRIEN, Ms Lucinda, Policy Officer, Federation of Community Legal Centres Victoria

PHILLIS, Mr Michael, Member, Civil Liberties Australia

ROWLINGS, Mr William, CEO/Secretary, Civil Liberties Australia

SANTOW, Mr Edward, Chief Executive Officer, Public Interest Advocacy Centre

SAUNDERS, Miss Jessica, Member, Victorian Women Lawyers Law Reform Committee

SODEN, Mr Warwick, Registrar and Chief Executive, Federal Court of Australia

VINES, Ms Laura, Member, Victorian Women Lawyers Law Reform Committee

WALTER, Mr Andrew, Assistant Secretary, Strategy and Policy Advice Unit, Priorities and Coordination Division, Attorney-General's Department

WILKINS AO, Mr Roger, Secretary, Attorney-General's Department

WYNN, Ms Sabina, Executive Director, Australian Law Reform Commission

Canberra, 3 March 2011

HAMMOND, The Hon. Justice Grant, Private capacity

WEISBROT, Professor David, Private capacity