

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

The Australian Law Reform Commission is an exemplary body that is fundamental to the operation of the Australian legal system and that addresses an emerging democratic deficit attributable to public sector managerialism and community disengagement from politics. The Commission should be strengthened, with a bipartisan reaffirmation of its role and provision of resourcing that reverses fundamental cuts over the past decade.

This submission

This submission responds to the Committee's call for public comment on the Australian Law Reform Commission (ALRC) following referral of several matters by the Senate on 23 November 2010.

The following paragraphs outline the background to this submission, provide overall comments regarding the ALRC and address specific references.

They are made as an individual, rather than on behalf of the University of Canberra Law Faculty.

Basis

I teach undergraduate and postgraduate law at the University of Canberra. Prior to becoming an academic I consulted in Australia and overseas on regulatory matters, after two decades as a Commonwealth official concerned with public sector governance. As an indication of credibility my writing has been cited in several hundred books and peer-reviewed journal articles and in government reports.

I do not have a political affiliation and am independent of the ALRC and other law reform/research bodies such as the Australian Institute of Criminology and Productivity Commission.

The Commission

The ALRC appropriately enjoys wide recognition within the legal community, academia, business, state/federal officials and among civil society bodies in Australia and overseas.

That recognition reflects –

- the substantive basis of its analysis, the cogency of its reports,
- the practicality of its recommendations,
- the timeliness with which it addresses complex matters (especially on a consultative basis), and
- its preparedness to offer high-quality advice that particular Governments or Ministers may find inconvenient but is in the national interest.

a) role

The ALRC fulfils a fundamental role in providing independent expert analysis and recommendations on areas of law that affect Australia. That activity has been marked by –

- transparent, accessible and relevant engagement with specialists and the broader community, ie avoiding the 'magic circle' apparent in some agency consultation exercises
- excellence in identification and appraisal of Australia and overseas legal frameworks, administrative or commercial developments, and technological innovations

- a commitment to communicating an awareness of legal issues and developments to specialists and the general community in ways that are appropriate (eg effective use of online media and professionalism in writing for diverse audiences)
- best practice delivery of advice about complex and serious matters on a timely basis, a notable achievement given the resources at the ALRC's proposal.

Its performance compares favourably with peers in the Australian states/territories and overseas.

b) resourcing

Law reform commissions have a critical mass: like a string quartet if they are pared beyond a certain point their performance suffers. They are not large-scale industrial organizations where the deletion of a person or two will have no impact. The ALRC is at that point. It should be strengthened through additional resourcing (with a commitment that it will not suffer from attrition in the medium term) rather than being cut further or expected to undertake its responsibilities with the current level of funding.

The ALRC's initial report to the Committee notes that it has undergone a funding cut in real terms of 20%. That reduction is situated in the same environment where other research bodies have been slashed (ie reductions in ALRC funding are not offset by strengthening of its peers within government or academia). The reduction is particularly egregious given the small ALRC budget (significantly less than the Commonwealth spends on executive travel, catering and potplant hire each year) and the impact on its operation.

It is clear for example that funding reductions have affected the ALRC's consultation and publication activity, two key responsibilities. Funding constraints presumably affect the turnaround time in the conduct of inquiries. They may also affect the ALRC's ability to recruit and retain expert staff; expertise is significant, as the organisation does more than shuffle paper or act as a mailbox for particular interests.

Good law, an outcome of the ALRC's activities, results in benefits for the Australian economy through reduced litigation costs, reduced uncertainty costs and reduced transaction costs. It also reinforces the stated commitment of all Australian political parties to a just, progressive and inclusive society. Undervaluing the ALRC implicitly undervalues law reform. That undervaluation or omission is significant because other agencies are not fulfilling the ALRC's role and are unlikely to do so, given their corporate culture and technical capacity, if tasked to do so.

Given the ALRC's responsibilities it is in the national interest for the Commonwealth to provide appropriate resourcing of the organisation.

That resourcing should provide for –

- fulltime members of the ALRC, addressing the concerns highlighted in the ALRC's initial submission regarding workloads and timeliness
- an active and comprehensive publication program, so that ALRC information is not restricted to specialists
- an active and comprehensive community consultation program, important in gathering information and in engendering community awareness of issues and mechanisms.

d) allocation of functions

It is appropriate that the Commonwealth maintains a 'distributed' law reform regime that features activity by the Senate committees, by the ALRC, by sector-specific bodies (such as the Productivity Commission, 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.

The Commonwealth has established (and maintained or wound back, depending on bureaucratic fashion and political expediency) a range of research bodies. Some of those bodies have experienced bureaucratic capture, ie the questions they ask and answers they provide reflect the values and language of key stakeholders. Others have maintained their independence but lack the experience to provide in-depth analysis of law reform questions (instead, for example, operating as a 'home away from home' for criminologists and other academics). Many regulatory bodies seek public comment on particular legislative or administrative proposals; recent research by myself and a colleague indicates that on an agency by agency basis there are typically few responses to those calls for comment.

As a consequence the independent expert analysis by the ALRC on a whole of government basis is particularly valuable.

e) Other Related Matters

The separation of powers in Australia, a foundation of the liberal democratic state, is weakened by the blurring of the Executive and Parliament. That blurring has led some observers to refer – tongue in cheek – to the 'elected dictatorship' and others to warn of a 'democratic deficit' that is marked by citizen disengagement from political processes, 'government by media release' and a managerialist ethos in which narrowly-defined notions of efficiency override concerns regarding accountability and human rights. That ethos has reinforced the primacy of the bureaucracy and presented Australians with choice between the tweedledum and tweedledumber parties, with media coverage of government centred on red hair and red budgie smugglers rather than on matters of substance.

In that environment it is fundamental that members of parliament (at the Federal and state/territory levels), officials, NGOs, business, the legal profession and the media have ready access to authoritative analysis of Australian legislative proposals that is informed by an understanding of the Australian regime and awareness of overseas developments (particularly in areas such as privacy, taxation and national security that are affected by developments offshore).

An example of why that access is significant is provided by developments in South Australia over the past two years, with the current state Government passing anti-bikie legislation that was endorsed by the state Opposition but was legally defective (as determined by the High Court) and represented a worrying denial of justice. (Similar legislation in NSW, another state experiencing a moral panic about crime, was aptly characterized by the Director of Public Prosecutions as "draconian" and "worrying".) The annual budget of the ALRC would more than offset the costs associated with one or two such defective statutes, prosecutions and Supreme/High Court challenges. Getting it right saves money.

Ultimately the people, rather than individual MPs or shock-jocks, "keep the bastards honest". The capacity of the Australian community, directly or otherwise, to take responsibility is strengthened by law reform commissions and by the Senate committees. Unlike the US, Australia has not built a strong parliamentary committee infrastructure. (That comment is *not* dismissive of the Senate committee secretariats, which perform excellently. The comment instead notes relativities in resourcing; it is unreasonable to expect Senators to meet the demands of 2011 with a personal and committee research base that has not advanced much since the 1960s.)

If the Senate – and those who engage with Senate committees – want comprehensive, high quality advice it is necessary to strengthen the ALRC rather than endorse on a bipartisan basis the erosion of the ALRC's resources (ie in terms of members, staffing, funding of publication and funding of travel). In the absence of that strengthening the Committee may wish to look forward and to expand its own resources. Such an expansion will of course be construed as subject to political capture and constrained by contingencies such as elections: committee secretariats may provide outstanding advice but are necessarily silent if the committee goes into abeyance. It would instead be most appropriate to strengthen the ALRC as an independent body.

The Committee might even look forward and ask whether the ALRC's independence should be statutorily recognized through authority to initiate its own investigations rather than being constrained by the directions of the Minister of the day.

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