



**Australian Government**

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**Australian Law Reform Commission**

**Submission to the Senate Legal and Constitutional Affairs  
Committee Inquiry into the Australian Law Reform  
Commission**

**Background Submission**

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# 1. Introduction

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## Introduction

1.1 The Australian Law Reform Commission (ALRC) has a proud record of achievement. In 1994, in a review of the role and function of the ALRC, the House of Representatives Standing Committee on Legal and Constitutional Affairs recognised and recommended the continuance of the ALRC’s ‘high quality, well researched and well documented reports’.<sup>1</sup>

1.2 The ALRC welcomes the opportunity to participate in this Inquiry, and acknowledges the important contribution of the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) to the continuous improvement of institutional law reform in Australia. Periodic reviews, such as this Inquiry, provide a valuable opportunity to reflect on the contribution that independent law reform institutions such as the ALRC have made—and can continue to make—to government and the broader community.

1.3 The Committee’s Inquiry is timely. It has been 17 years since the last major Parliamentary review of the role and functions of the ALRC.<sup>2</sup> Moreover, a re-examination of the value of independent law reform bodies, such as the ALRC, is particularly pertinent at this time of diminishing funding. In the context of the Australian Government’s current agenda of public administration reforms,<sup>3</sup> this Inquiry provides an opportunity for constructive discussion about how the ALRC can maintain and enhance its strategic policy capability to:

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1 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—the Challenge Continues: a Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), Rec 3.

2 House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—the Challenge Continues: a Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994). See also: Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Powers and Functions of the Australian Law Reform Commission: Final Report* (2004); Senate Privileges Committee—Parliament of Australia, *Possible Improper Interference with a Potential Witness Before the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, 73rd Report (1998); and Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Processing of Law Reform Proposals in Australia—Reforming the Law* (1979).

3 Advisory Group on the Reform of Australian Government Administration, *Ahead of the Game: A Blueprint for the Reform of Australian Government Administration* (2010).

- support government;
- foster community discussion and debate about the development of Australian law and legal processes; and
- meet emerging and future challenges, both domestic and global.<sup>4</sup>

### **About the submission**

1.4 This background submission is provided at an early stage in the Committee's inquiry to provide background information for the Legal and Constitutional Affairs Committee and other interested stakeholders.

1.5 The ALRC will make a second, more comprehensive submission after the close of public submissions on 28 January 2011. This subsequent submission will:

- address and identify the ALRC's policy position on all matters within the Committee's terms of reference—including its views on the optimum role, governance arrangements and statutory responsibilities for the ALRC, and corresponding resourcing implications; and
- take into account views expressed in other submissions.

1.6 This background submission is divided into five parts:

- Introduction
- Role, governance and statutory responsibilities
- The approach to inquiries
- Adequacy of staffing and resources
- Current issues and trends.

### **The value of independent law reform**

1.7 In conducting its inquiry, the Committee has been asked to refer to the role and statutory responsibilities of the ALRC and the appropriate allocation of functions between the ALRC and other statutory agencies. These questions are closely related, and more broadly concern the crucial question of the value independent law reform agencies can bring to law reform and policy development in Australia.

1.8 The primary function and work of the ALRC is, in short, to inquire into and report on matters referred to it by the Attorney-General, with a view to reforming Commonwealth laws and harmonising Commonwealth, state and territory laws. The structure, expertise, reputation and history of the ALRC make it ideally suited to performing this function.

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4 Relevant challenges are identified in *Ibid*, 8–12, some of which are discussed further below.

1.9 Law reform agencies such as the ALRC are not, of course, the only bodies responsible for developing policy. Government departments, Parliamentary committees, joint ministerial councils, statutory agencies, such as the Australian Human Rights Commission and the Productivity Commission, private consultants, academics and others all make vital contributions. However, a number of features of the ALRC distinguish it from other agencies and demonstrate why it is a crucial contributor to the health and growth of Australian law.

1.10 Law reform agencies such as the ALRC are not, of course, the only bodies responsible for developing policy, but a number of features of the ALRC distinguish it from other agencies and demonstrate why it is a vital contributor to the health and growth of Australian law. These features answer the question ‘why law reform commissions?’ and include the ALRC’s:

- independence (from government, party politics, academic interests, special interest groups and other stakeholders);
- broad generalist legal expertise;
- authority and capacity to leverage relationships with key stakeholders;
- distinguished consultative and research strategies;
- dedicated experience in best practice law reform processes.
- engagement with the international legal community;
- contribution to regional developments in law reform;
- role in educating and engaging the Australian community in law reform; and
- contribution to other government inquiries and reports;

1.11 The ALRC will address these and other features of best practice law reform agencies in its next submission.



## 2. Role, Governance Arrangements and Statutory Responsibilities

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### Introduction

2.1 The Senate Standing Committee on Legal and Constitutional Affairs (the Committee) is directed to examine, among other things, ‘the role, governance arrangements and statutory responsibilities’ of the Australian Law Reform Commission (ALRC).<sup>1</sup> To assist the Committee inquire into these matters, this Part provides background about the role, functions and operations of the ALRC.

2.2 This section is divided into two parts. The first section provides a high-level summary of the ALRC’s current role and functions; the second provides an overview of the corporate governance framework and operations.

### Overview of role and functions

#### Statutory basis

2.3 The ALRC is an independent statutory agency established in 1975<sup>2</sup> and currently operates under the *Australian Law Reform Commission Act 1996* (Cth)

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1 Australian Senate, *Terms of Reference to the Senate Standing Committee on Legal and Constitutional Affairs—Australian Law Reform Commission* (23 November 2010) <[www.aph.gov.au/senate/committee](http://www.aph.gov.au/senate/committee)> at 16 December 2010, paragraph (a).

2 The ALRC’s history is summarised in House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Law Reform—the Challenge Continues: A Report on the Inquiry into the Role and Function of the Law Reform Commission of Australia* (1994), Ch 2. See further, Australian Law Reform Commission, *Submission to the House of Representatives Standing Committee*

(ALRC Act).<sup>3</sup> It is accountable to Parliament through the Attorney-General. The ALRC supports the Attorney-General and the Australian Government in the maintenance and enhancement of Australia's system of law and justice by contributing to the process of law reform in Australia. The primary function of the ALRC, set out in s 21 of the ALRC Act, is to advise the Parliament and Australian Government on the systematic development and reform of areas of the law referred to the ALRC by the Attorney-General.<sup>4</sup> Under the Australian Government outcomes and programs framework, the ALRC has one outcome, namely:

informed government decisions about the development, reform and harmonisation of Australian laws and related processes through research, analysis, reports and community consultation and education.<sup>5</sup>

2.4 The ALRC has one program to achieve its outcome—conducting inquiries into aspects of Australian law and related processes for the purpose of law reform.<sup>6</sup> The ALRC produces timely reports on its inquiries (interchangeably referred to as references), outlining its recommendations, reasoning and evidentiary basis for reform.<sup>7</sup> Through the inquiry process, the ALRC undertakes extensive research and analysis and conducts widespread consultation to support its recommendations for law reform to provide the basis for informed government decisions.

### **The focus of inquiries**

2.5 In conducting inquiries, the ALRC is required to focus on:

- bringing the law into line with current conditions and ensuring that it meets current needs;
- removing defects in the law;
- simplifying the law;
- adopting new or more effective methods for administering the law and dispensing justice; and
- providing improved access to justice.<sup>8</sup>

2.6 In discharging its responsibilities under the allocated terms of reference, the ALRC is required further to consider proposals for:

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*Inquiry into the Role and Functions of the Law Reform Commission of Australia* (1993), Volume 1, Appendix 1—a Brief History of the Australian Law Reform Commission.

3 The ALRC Act was amended by the *Financial Framework Legislation Amendment Act 2010* (Cth), which received royal assent on 17 December 2010. As these amendments were not incorporated into the ALRC Act at the time of writing, all references to section numbering are to the ALRC Act compilation prepared on 22 March 2000, taking account amendments up to no 156 of 1999, unless otherwise indicated.

4 See also *Australian Law Reform Commission Act 1996* (Cth) s 20(1), which contemplates a role for the ALRC in suggesting references to the Attorney-General.

5 Australian Government, *Portfolio Budget Statements 2010-11: Budget Related Paper no 1.2: Attorney-General's Portfolio* (2010), 229–241.

6 *Ibid.*

7 *Australian Law Reform Commission Act 1996* (Cth), Part 3—the Commission's functions, powers and reports, especially ss 21 and 24.

8 *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(a).

- making or consolidating Commonwealth laws;
- the repeal of obsolete or unnecessary laws;
- uniformity between state and territory laws; and
- complementary Commonwealth, state and territory laws.<sup>9</sup>

2.7 The ALRC is required to ensure that relevant laws, proposals and recommendations:

- do not trespass unduly on personal rights and liberties;
- do not make the rights and liberties of citizens unduly dependent on administrative, rather than judicial, decisions; and
- are, as far as practicable, consistent with Australia's relevant international obligations.<sup>10</sup>

2.8 The ALRC must also take into account the potential impact of its recommendations on access to justice and—from the commencement on 1 July 2011 of recent amendments to the ALRC Act—persons and businesses who would be affected by the recommendations. This includes, for example, the economic effects of recommendations.<sup>11</sup> The purpose of this amendment, as expressed in the Explanatory Memorandum to the amending legislation, is to ensure that the ALRC 'has regard to any broader implications its recommendations may have'.<sup>12</sup>

### **Consultation**

2.9 The ALRC is permitted to 'inform itself in any way it thinks fit' in conducting its inquiries.<sup>13</sup> As part of the inquiry process, the ALRC typically produces consultation documents that present issues, ask questions and raise proposals for reform and call on the community to respond. While the nature and extent of the consultation process varies with each reference, its focus is always on those sectors of the community, profession or industry for which the reference is most relevant. 'Hallmarks' or distinguishing features of the ALRC's approach to law reform, including consultative processes, are discussed separately below, as are current issues and recent trends arising in the ALRC's performance of its functions.

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9 *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(b)–(e).

10 *Australian Law Reform Commission Act 1996* (Cth) s 24. Amendments to the ALRC Act removing the express reference to the *International Covenant on Civil and Political Rights* from this section received royal assent on 17 December 2010, but had not been incorporated into the ALRC Act at the time of writing.

11 The relevant amendments to the ALRC Act, enacted in the *Financial Framework Legislation Amendment Act 2010* (Cth) had not been incorporated at the time of writing, but will be the new s 24(2).

12 Revised Explanatory Memorandum, *Financial Framework Legislation Amendment Bill 2010* (Cth), [100].

13 *Australian Law Reform Commission Act 1996* (Cth) s 38.

## Implementation

2.10 The recommendations in ALRC reports are not self-executing and their implementation is a matter of policy for government. However, the implementation by government over time of ALRC recommendations gives an indication of the ALRC's relative success in facilitating informed government decision-making. In the 2009–10 financial year, 90% of the ALRC's reports had been either substantially or partially implemented,<sup>14</sup> making it one of the most effective and influential agents for law reform in Australia and therefore contributing significantly to the government's law reform progress.

2.11 While the Attorney-General is required to table each ALRC report—including interim reports—within 15 sitting days of receipt,<sup>15</sup> there is no statutory requirement for the Australian Government to respond formally to an ALRC report. However, the ALRC strongly supports the release of formal government responses to its reports, which appears to be a limited practice at the present time.<sup>16</sup>

## External pressures

2.12 As discussed further below, the ALRC's ability to achieve its outcome and the ways in which it performs its statutory functions are influenced by a range of external factors, including:

- the government's policy agenda and timelines, which influence the nature, scope and number of inquiries referred to the ALRC;
- resourcing levels, which determine the ALRC's capacity to undertake inquiries; and
- the involvement of a wide range of public and private stakeholders, and the quality and timeliness of their contributions—including by way of submissions, consultations, informal contributions, participation in expert advisory committees, appointments to part-time Commissioner positions or engagement as special advisers.

## Enhancing the inquiry work

2.13 In addition to its statutory functions, the ALRC utilises its standing knowledge and experience to make contributions beyond its immediate inquiry-based work to broader legal policy development, community engagement with government and the achievement of Australian Government policy priorities. These extended functions—discussed separately below—have included initiatives directed to the following:

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14 Australian Law Reform Commission, *Annual Report: 2009–2010* ALRC Report 113, 25–28 and Appendices F and G.

15 *Australian Law Reform Commission Act 1996* (Cth) s 23.

16 See, eg, Australian Government, *Enhancing National Privacy Protection: Australian Government First State Response to the Australian Law Reform Commission Report 108, For Your Information: Australian Privacy Law and Practice* (2009) <<http://www.dpmc.gov.au/privacy>> at 21 December 2010.

- public outreach activities about the work of the ALRC and the law reform process generally, including education and information dissemination through participation in conferences and seminars, particularly through keynote presentations, and media engagement;
- extensive collaboration and cooperation—for example: engagement with other domestic and overseas law reform bodies to share information and benchmark ALRC practice and procedures; formal and informal meetings with domestic and foreign government agencies, ministers and parliamentarians; and making submissions to other government inquiries where appropriate to ensure that relevant ALRC reports and recommendations are understood and taken into account in legal policy development;
- monitoring the implementation of recommendations, and citation of ALRC reports in major judicial decisions, parliamentary debates, academic publications, media reportage and other publications;
- acting as a ‘clearinghouse’ for law reform information in Australia—for example, monitoring law reform efforts in all Australian states and territories and overseas jurisdictions;
- undertaking empirical research, where necessary for individual references;
- where specifically required by the terms of reference in individual inquiries, preparing draft legislation incorporating law reform recommendations.

2.14 The nature and magnitude of these extended functions have varied over time, in accordance with internal and external factors including organisational and government priorities, work flow, resourcing levels, membership and staffing.

## **Overview of governance arrangements**

### **Statutory basis**

2.15 The ALRC is, until 1 July 2011, a Commonwealth Authority under the *Commonwealth Authorities and Companies Act 1997* (Cth) (CAC Act).<sup>17</sup> As a separate legal entity from the Commonwealth, with the power to hold money on its own account, the ALRC is subject to the corporate governance, financial management and reporting requirements of the CAC Act, in addition to the ALRC Act.

2.16 Two major reforms to the ALRC’s governance arrangements will commence on 1 July 2011, following recent amendments to the ALRC Act.<sup>18</sup> First, consistent with the recommendations of the 2003 *Review of the Corporate Governance of Statutory Authorities and Office Holders*, conducted by John Uhrig AO (the Uhrig Review),<sup>19</sup> and the Australian Government policy on governance arrangements for Australian

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17 *Commonwealth Authorities and Companies Act 1997* (Cth) s 7, ALRC Act s 5.

18 *Financial Framework Legislation Act 2010* (Cth), Schedule 2.

19 J Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003).

Government bodies,<sup>20</sup> the ALRC will become a Prescribed Agency under the *Financial Management and Accountability Act 1997* (Cth) (FMA Act), and a Statutory Agency for the purposes of the *Public Service Act 1999* (Cth) (PS Act). Broadly, this means that the ALRC will be financially part of the Commonwealth as a single legal entity. The ALRC will move to an executive management model, by replacing its existing board of management with a Chief Executive Officer (the President), supported by a management advisory committee appointed by the Attorney-General. The staff of the ALRC will be employed under the PS Act.

2.17 Secondly, the 2010 amendments adjust the ALRC's membership structure and appointments process to reflect the Australian Government's intention to

introduce a more flexible membership structure for the Commission, so that the composition of the Commission can be adjusted based on the subject matter of the inquiries referred to it. The ... amendments would facilitate the short-term appointment of members with expertise in particular areas of inquiry, rather than appointing exclusively legal experts or generalists ... This will provide greater workability in the Commission's membership, enhance the timeliness and workability of the appointment process and allow for better use of appointments for the length of specific references.<sup>21</sup>

2.18 The amending legislation received assent on 17 December 2010, and the amendments will commence on 1 July 2011.<sup>22</sup> A comparative summary of the current and new statutory governance frameworks follows.

### **Pre-July 2011 statutory governance framework**

#### ***Statutory membership***

2.19 Under the ALRC Act prior to the 2010 amendments, the ALRC's statutory membership comprises a President, Deputy President and at least four other members (known as Commissioners).<sup>23</sup> There is no upper limit for the number of Commissioners appointed to the ALRC. All members are currently appointed by the Governor-General, and must meet certain appointment criteria, namely:

- holding the office of a judge or justice of a federal court or a state or territory supreme court; or
- admission for at least five years as a legal practitioner of the High Court, or of a state or territory supreme court; or
- a graduate in law of a university, with experience as a member of the academic staff of a tertiary educational institution; or

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20 Australian Government, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (2005).

21 Revised Explanatory Memorandum, Financial Framework Legislation Amendment Bill 2010 (Cth), [37].

22 *Financial Framework Legislation Act 2010* (Cth) s 2.

23 *Australian Law Reform Commission Act 1996* (Cth) s 6.

- in the opinion of the Governor-General, suitable for appointment because of the person's special qualifications, training or experience.<sup>24</sup>

2.20 Members may be appointed for a term not exceeding seven years, and are eligible for re-appointment.<sup>25</sup> The President and Deputy President must be full-time appointments, and Commissioners may be appointed on a full-time or part-time basis.<sup>26</sup>

### ***President***

2.21 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.

2.22 Currently, the President and sole full-time statutory member is Professor Rosalind Croucher, who was appointed on 14 December 2009 for a five-year term to 13 December 2014.

### ***Role of Commissioners***

2.23 In practice, full-time and part-time Commissioners play distinct but complementary roles.

2.24 ***Full-time Commissioners:*** While the internal structure of the ALRC has varied, the standing practice is that references are managed by individual, full-time Commissioners as Commissioners in charge of particular inquiries. In this sense, there are parallels between Commissioners' strategic leadership and management roles and those of Senior Executive Service officers within the Australian Public Service. In addition, full-time Commissioners are generally eminent or very senior members of the legal profession, whose standing and connections can facilitate access to a wide range of people and information.

2.25 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. Full-time Commissioners take responsibility for scoping the inquiry from the Terms of Reference; identifying the policy framework; using their experience to assist the President to identify and establish an Advisory Committee with high level stakeholders and assisting the President to conduct Advisory Committee meetings; identifying stakeholders and leading consultations; providing supervision to legal officers, overseeing their research and reviewing all written work; leading the policy discussions and formulation of proposals and recommendations for reform; and taking

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24 *Australian Law Reform Commission Act 1996* (Cth) s 7.

25 *Australian Law Reform Commission Act 1996* (Cth) s 9.

26 *Australian Law Reform Commission Act 1996* (Cth) s 8.

overall responsibility for the timely completion of all consultation documents and reports. The Commissioner will also contribute significantly to any publication and share presentation and media engagements with the President.

2.26 Full-time Commissioners makes a key contribution to an ALRC inquiry, most importantly bringing their high level knowledge and experience to the law reform process, adding credibility to the ALRC's processes by their seniority, and taking inquiry management responsibility to ensure the inquiry is completed to schedule, and ensuring the final report is of high quality, well researched and well documented. Full-time Commissioners also contribute through the ability to leverage considerable influence and contributions in an inquiry based upon their personal standing, expertise and networks. Part-time Commissioners also contribute in this way.

2.27 Full-time members (the President, Deputy President and Commissioners) are also responsible for the management and administration of the ALRC, in accordance with the board of management structure set out in the ALRC Act, which is operational until 1 July 2011 and discussed further below.

2.28 ***Part-time Commissioners:*** The description of 'part-time' for these Commissioners is somewhat of a misnomer. 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. The status of such persons as part-time Commissioners also contributes to the quality of public participation in inquiries—and ultimately enhances public confidence in the calibre of the ALRC's work—by promoting impartiality, independence and respect.

2.29 However, 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.

2.30 Part-time Commissioners may be appointed for a period of years or specifically for an inquiry.

2.31 *Standing part-time Commissioners*, as distinct from inquiry-specific part-time Commissioners, form part of any Advisory Committee established for an inquiry and provide input with the Committee, in addition to their formal administrative responsibility as a statutory office-holder of the Commission.

2.32 *Inquiry-specific Commissioners* may take a more active role, drawing upon inquiry-relevant expertise to assist, eg, participating more actively in consultations, in proposal workshops and in inquiry team meetings as their schedule will allow.

2.33 There are currently four part-time Commissioners, all of whom are judges of the Federal Court of Australia. These members are:

- The Hon Justice Susan Kenny (since 14 May 2003, term of current appointment 9 July 2009 to 8 July 2012);
- The Hon Justice Berna Collier (since 2 October 2007, term of current appointment 27 October 2010 to October 2013);
- The Hon Justice Arthur Emmett (from 27 October 2010 to 30 April 2011); and
- The Hon Justice Bruce Lander (from 27 October 2010 to 30 April 2011).

2.34 The Hon Justice Emmett and the Hon Justice Lander have been appointed specifically to contribute to the ALRC's current inquiry into improving the discovery process in civil litigation in federal courts. Their appointments are consistent with the Government's stated intention to make greater use of short-term, reference-specific appointments of eminent persons with expertise in specific fields of inquiry. The appointment of Victorian Magistrate Anne Goldsbrough to the ALRC's recently completed inquiry into family violence laws is another instance of this approach.

2.35 The office of the Deputy President has been vacant for much of the past 10 years, and was last occupied from December 2005 to September 2006. While, in the ALRC's experience, a complement of full-time members is integral to its capacity to discharge its statutory mandate, the ALRC Act provides that vacancies in membership do not invalidate or otherwise affect the performance of its functions or exercises of its powers.<sup>27</sup>

### ***Board of Management***

2.36 The ALRC Act further provides for a board of management governance model, operational until 1 July 2011. The function of the board is to 'manage the Commission and, in particular, ensure that it performs its functions efficiently and economically'.<sup>28</sup> The board's membership is prescribed as the President, Deputy President and full-time members.<sup>29</sup> The current board consists solely of Professor Croucher, as the only full-time member. The President is the Chief Executive Officer of the ALRC and is, under the board, responsible for the management of the ALRC. The President's powers are delegable, wholly or partially, to members and employees of the ALRC.<sup>30</sup> The ALRC has established an audit committee, in accordance with CAC Act requirements, as a sub-committee of the Board of Management.<sup>31</sup>

2.37 The ALRC Act also prescribes an operational framework for meetings and proceedings of the ALRC in the performance of its functions. In addition to meetings of the full Commission, the Act permits, but does not mandate, the establishment of

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27 *Australian Law Reform Commission Act 1996* (Cth) s 6(2).

28 *Australian Law Reform Commission Act 1996* (Cth) s 28(1).

29 *Australian Law Reform Commission Act 1996* (Cth) s 29.

30 *Australian Law Reform Commission Act 1996* (Cth) s 35.

31 *Commonwealth Authorities and Companies Act 1997* (Cth) s 32.

Divisions for the purposes of individual references—for example, as structures for the making of policy decisions about recommendations. Divisions must comprise at least three members and are subject to formal quorum requirements and deadlock resolution mechanisms for the determination of questions arising in the course of inquiries.<sup>32</sup> In practice, however, members assume collegial responsibility for the findings and recommendations in all references.

2.38 The distinction between the abovementioned structures may be summarised as follows. The Board of Management is the ALRC's governance body with responsibility of general oversight of organisational operations, including budget and policies. The audit committee is a sub-committee of the Board of Management. Full Commission meetings, generally convened at least twice per year, provide an opportunity to discuss the progress of current inquiries, the ALRC's financial performance and other matters of interest to Commissioners. Divisions, where constituted, have responsibility for legal policy decisions relating to specific references.

### ***Appointment of staff***

2.39 The ALRC has power to appoint staff under s 43 of the ALRC Act. Since 1996, all staff have been appointed on a fixed-term, renewable basis, in accordance with the ALRC's certified agreement. Staffing is discussed further below.

2.40 The ALRC Act further permits the engagement of persons with 'suitable qualifications and experience' as consultants, on such terms and conditions as determined by the ALRC and approved by the board.<sup>33</sup> While there are some similarities between the role of external consultants and part-time Commissioners, in terms of the expertise such persons contribute, each has quite discrete and complementary functions. For example, the scope of a consultant's brief may be limited to specific aspects of references, whereas part-time Commissioners' involvement is more general. The status of part-time Commissioners, as statutory appointees, encourages impartiality, independence and respect. Consultants, on the other hand, may have well-defined views and more freedom to express their personal views for consideration by the ALRC, without being constrained by the need to maintain independence or be part of the collective decision-making process. In addition, consultants may be engaged on a full-time basis, whereas part-time Commissioners generally participate around existing full-time employment commitments.

### ***Directions***

2.41 In addition to referring matters to the ALRC, the Attorney-General is expressly empowered by the ALRC Act and the CAC Act to issue certain directions, including:

- alterations to the terms of reference for a particular Inquiry;<sup>34</sup>

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32 *Australian Law Reform Commission Act 1996* (Cth), Part 4, Division 3—Divisions of the Commission.

33 *Australian Law Reform Commission Act 1996* (Cth) s 44.

34 *Australian Law Reform Commission Act 1996* (Cth) s 20(2).

- directions about the order in which it is to deal with multiple references;<sup>35</sup>
- directions to make an interim report on an reference;<sup>36</sup> and
- directions to comply with a general policy of the Australian Government.<sup>37</sup>

## Post-July 2011 statutory governance framework

### Summary

2.42 The *Financial Framework Legislation Amendment Act 2010* (Cth) made several significant changes to the ALRC's statutory governance framework, to achieve the dual purpose of a transition to regulation under the FMA Act and PS Act (using an executive management structure), and enhancing flexibility of membership structure for the purposes of specific inquiries.<sup>38</sup>

2.43 Key amendments directed towards an executive management structure under the FMA Act include:

- Repealing provisions establishing the ALRC as a separate legal entity to the Commonwealth and thus subject to the CAC Act.<sup>39</sup>
- Replacing the existing Board of Management with the President as Chief Executive Officer.<sup>40</sup>
- Expressly empowering the Attorney-General 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 function.<sup>41</sup> The Explanatory Memorandum states:

The management advisory committee will not possess executive powers or decision-making authority and may not compromise the intellectual independence or impartiality of the Law Reform Commission. The intent of this provision is that the management advisory committee will provide support to the President on the management of the Law Reform Commission in a non-binding manner, within a relationship where the committee is subordinate to the President. The Law Reform Commission 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 (as provided for in section 21). Additionally, the President of the Law Reform Commission 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.<sup>42</sup>

35 *Australian Law Reform Commission Act 1996* (Cth) s 20(3).

36 *Australian Law Reform Commission Act 1996* (Cth) s 22 (2).

37 *Commonwealth Authorities and Companies Act 1997* (Cth) s 28.

38 As the relevant amendment to the ALRC Act had not been incorporated at the time of writing, all references in this sub section are to the amending legislation, the *Financial Framework Legislation Amendment Act 2010* (Cth).

39 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 10.

40 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 34.

41 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 33.

42 Revised Explanatory Memorandum, *Financial Framework Legislation Amendment Bill 2010* (Cth), [104].

- Formalising the current practice of at least two Full Commission meetings per financial year, and streamlining quorum requirements in respect of such meetings.<sup>43</sup>
- Amending provisions pertaining to members' disclosure of certain interests in matters being considered by the ALRC, largely for consistency with FMA Act terminology.<sup>44</sup>
- Abolishing Divisions of the ALRC for the purposes of specific references.<sup>45</sup>
- Providing for the engagement of ALRC staff under the PS Act, and deeming the President and the staff as together constituting a statutory agency for the purposes of the PS Act, and that the President is the head of the agency under the latter Act.<sup>46</sup>
- Streamlining arrangements for the engagement of external consultants, with the effect that the President may engage consultants with suitable qualifications and experience, under general contract law.<sup>47</sup>
- Repealing provisions relating to the ALRC's financial management, which will be subject to the FMA Act, and creating an ALRC Special Account for the purposes of the FMA Act.<sup>48</sup>

### ***Membership structure***

2.44 Key amendments directed towards membership structure include:

- removal of the office of Deputy President, and providing that the ALRC consists of the President and not more than six other members.<sup>49</sup>
- empowering the Attorney-General to appoint part-time members as he or she considers necessary from time-to-time, while all full-time appointments continue to be made by the Governor-General.<sup>50</sup>
- amending appointment criteria for both full and part-time members—in particular to include the holder of a 'judicial office', which expressly includes magistrates and judges of state and territory courts, as well as federal courts.<sup>51</sup>
- amending the term of appointments to promote consistency with Commonwealth guidelines for the merit-based selection of Australian Public Service agency heads and statutory office holders. Members can hold office for

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43 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Items 35–39.

44 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Items 40–44.

45 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 45.

46 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 46.

47 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Items 47–48.

48 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 49.

49 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 11.

50 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 13.

51 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Items 14–15, 20.

a minimum term of six months, and a maximum term of five years, and are eligible for re-appointment.<sup>52</sup>

***Performance of functions***

2.45 Other key amendments, directed towards the ALRC's performance of its functions, include:

- The repeal of the express reference to the *International Covenant on Civil and Political Rights* (ICCPR) as a matter to which the ALRC must have regard in performing its functions under s 24. The amendment reflects the current obligation that the ALRC must consider all of Australia's relevant international obligations relevant to the terms of reference, including the ICCPR.<sup>53</sup>
- Requiring the ALRC to have regard to the effect of recommendations on persons and businesses in general (including economic effects), in addition to the effect of recommendations on the costs of gaining access to and dispensing justice.<sup>54</sup>
- Enabling the Attorney-General to give written directions to the President with respect to the administration of the ALRC.<sup>55</sup> The Explanatory Memorandum provides that the amendment is designed to ensure that the ALRC's administration is consistent with government policy. It states that the provision is consistent with FMA Act requirements and is limited to administrative matters.<sup>56</sup>

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52 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 19.

53 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 29.

54 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 30.

55 *Financial Framework Legislation Amendment Act 2010* (Cth), Sch 2, Item 31.

56 Revised Explanatory Memorandum, *Financial Framework Legislation Amendment Bill 2010* (Cth), [101].



## 3. Approach to Inquiries

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### Introduction

3.1 As discussed in the previous section of this background submission, the ALRC's key function is to inquire into and report on matters referred to it by the Attorney-General. Broadly speaking, there are two key elements to this inquiry work:

- consultation;
- research, analysis and reporting.

3.2 This section provides a closer look at the ALRC's approach to inquiries.

### Consultation

#### Wide reach

3.3 Commitment to widespread consultation is a hallmark of best practice law reform.<sup>1</sup> As noted above, it is also contemplated in the ALRC Act, which provides that the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.<sup>2</sup> At times, the Terms of Reference issued for a given inquiry may specify some of the institutions or groups to be consulted. For example, in the recently completed Family Violence inquiry, the ALRC was directed to consult

with relevant courts, the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, relevant State and Territory agencies,

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1 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 202.

2 *Australian Law Reform Commission Act 1996* (Cth) s 38.

State and Territory Legal Aid Commissions, the Family Law Council, the Australian Domestic Violence Clearinghouse and similar bodies in each State and Territory.

3.4 For each inquiry, the ALRC consults broadly with relevant stakeholders, experts and the general public. This consultation occurs throughout the inquiry process—often from when the Terms of Reference are first scoped and the key issues identified, through to when the last written submissions are received and considered for the final report.

3.5 Though some persons ask not to be identified, the consultation process is otherwise transparent. The ALRC publishes a list of all the stakeholders and persons it consults for each inquiry.

### **Consultation strategies**

3.6 Stakeholders, experts and the public are consulted using a number of strategies, tailored to each inquiry, including the following:

- the release of discussion and consultation papers, inviting written submissions from all stakeholders and the general public;
- face-to-face consultations with individual stakeholders, interested persons and organisations, including industry and professional groups, departments and agencies at all relevant levels of government and non-government and community organisations;
- roundtable discussions;
- convening expert advisory committees or reference groups of honorary consultants for inquiries, comprising eminent persons in the relevant field of inquiry, to assist in policy analysis and the formulation of key recommendations;
- public and online forums;
- phone-ins;
- e-newsletters;
- blogs, podcasts and Twitter updates;
- an online submission form;
- media releases and press conferences;
- surveys and questionnaires;
- media engagement;
- addressing professional bodies, universities, community organisations and conferences.

3.7 Some of these consultation strategies are well-established and their benefits are self-evident, but the ALRC's use of online tools might deserve some elaboration. The ALRC is committed to adapting its practices to take advantage of the opportunities that

online tools present better and more to widely engage the community. This commitment is reflected in the ALRC's adoption of the online tools, listed above, as part of its consultation strategy.

3.8 A further matter of specific concern is to develop appropriate strategies for consultation with Indigenous stakeholders.

### **Online tools**

3.9 ***E-newsletter***: The ALRC now publishes regular e-newsletters for each of its inquiries. These e-newsletters keep stakeholders informed about the progress of an inquiry and can include a calendar of upcoming consultations, and accounts of recent consultations. Each e-newsletter also highlights an important issue in the inquiry, with links to an online comment form, so that subscribers to the newsletter may provide immediate feedback. The newsletters may also feature links to other inquiries of immediate relevance.

3.10 Eight e-newsletters were published during the ALRC's recent family violence inquiry, by the end of which there were 965 subscribers.

3.11 ***Online forum***: The ALRC has run online forums for each of its recent Secrecy (2009), Royal Commissions (2009) and Family Violence (2010) inquiries. Such forums aim to stimulate engagement with stakeholders, inform the community about the ALRC's thinking, and provide an immediate and accessible way to contribute to the ALRC's inquiries.

3.12 For example, the Family Violence Online Forum was conducted from November 2009 to January 2010 amongst a closed group from the women's legal services community. The forum was assisted by a grant from the Government 2.0 Taskforce, formed in 2008 against a backdrop of increased interest by governments worldwide in the potential of online engagement. This forum facilitated frank and open discussion in a secure online environment about issues relevant to the concerns and experiences of women's legal services.

3.13 ***Online submissions***: The ALRC now invites stakeholders to take advantage of an online submission form that it designed to enable people to respond in a focused way, addressing the individual questions and proposals set out in consultation papers.

3.14 These external contributions, and the ALRC's own extensive research and analysis, inform its final recommendations in each inquiry.

3.15 The ALRC is keen to build upon its successful base of online tools and to contribute pioneering consultation techniques that can provide an illustrative model for government agencies and others to emulate.

### **Indigenous consultation and participation**

3.16 A commitment of the ALRC's Reconciliation Action Plan (RAP) is to engage and consult widely, on all aspects of ALRC work, with Indigenous groups, individuals and organisations. The Family Violence inquiry provided a testing ground for this commitment. From the beginning of the inquiry, the ALRC sought guidance from its

Indigenous Advisory Committee (established as part of the Commission's Reconciliation Action Plan) about consultation strategies and developed an Indigenous Consultation Plan.

3.17 In endeavouring to engage with Indigenous stakeholders the Commissions were conscious of what has been referred to as 'consultation fatigue', expressed in consultations and submissions as a frustration by Indigenous communities about the frequency with which individuals and organisations are consulted, without meaningful outcomes or feedback for communities. In addition to recommendations made in the Family Violence Report, the release of a Summary Report, and a podcast,<sup>3</sup> reflect the ALRC's commitment to ensuring that the information and experiences shared by Indigenous people with the ALRC produce meaningful outcomes and stakeholders are aware of the use to which such information has been put.

3.18 The ALRC recognises that each inquiry will require specific consideration of strategies to ensure an appropriate way of dealing with issues affecting indigenous stakeholders in future inquiries.

### **Research, analysis and reporting**

3.19 The typical approach has been for the ALRC to release three key papers for each inquiry: an issues paper, a discussion or consultation paper, and a final report. For two recent inquiries, where the timeframe and resources did not permit it, the ALRC decided not to release an issues paper and published instead a single Consultation Paper—in the Family Violence Inquiry and the Discovery Inquiry.

3.20 The issues and discussion papers are substantial works in their own right, and feature considerable research and analysis. Discrete sections are generally structured as follows:

- an exposition of the law, practice and policy issues concerning a specific matter, with references to the relevant literature;
- an analysis of literature concerning the relevant law, including any law reform and government consideration of the area under review;
- a synthesis of ideas and the expression of 'ALRC's views' on the matter, engaging with current thinking and discussion of contrasting views; and
- questions and proposals are then featured in highlighted text; the ALRC particularly seeks stakeholder views on these questions and proposals.

3.21 For the final report, the research is refined and clarified. Importantly, each section of the final report features thematic summaries of submissions and consultations. The ALRC ensures the final report engages with all significant submissions made on each matter. The final report also includes the ALRC's recommendations.

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3 <<http://www.alrc.gov.au/news-media/alrc-news/podcast-indigenous-issues-and-consultation-family-violence-inquiry>>.

3.22 Final reports include Executive Summaries, providing a high level analysis of the policy framework and recommendations in the report. In the Family Violence Inquiry the ALRC developed the approach to reporting by providing a summary in the form of a separate Summary Report, to provide an accessible overview of the two-volume Final Report. The full Report, on the other hand, sets out in detail the issues raised by the Terms of Reference, and the research and evidence base upon which the Commissions' recommendations were formulated, including a thorough discussion of stakeholder views and the Commissions' conclusions.

3.23 The ALRC drafted legislation for some of its earlier reports as the focus of its law reform effort, where this was required by the Terms of Reference. For example, for its 2001 review of the *Marine Insurance Act 1909* (Cth), the ALRC drafted a Marine Insurance Amendment Bill and a draft explanatory memorandum, and the ALRC's 1983 report on privacy contained draft legislation which formed the basis of the *Privacy Act 1988* (Cth). The ALRC's practice has changed, however, and draft bills are not produced unless specifically called for by the terms of reference. This is partly because drafting is a specialised function better left to the parliamentary experts and partly because the ALRC's time and resources are better directed towards determining the policy that will shape any resulting legislation.



## 4. Responding to Challenges

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### Introduction

4.1 In conducting its inquiry, the Committee has been asked to refer to the adequacy of the ALRC’s staffing and resources to meet its objectives.

4.2 The ALRC operates in a dynamic public policy and administrative environment. This section maps current challenges to the performance of the ALRC’s functions. In particular, several organisational challenges for public administration identified in the *Blueprint for the Reform of Australian Government Administration* are pertinent to the ALRC. These include:

- managing increasing fiscal pressures;
- responding flexibly and contributing to broader government policy priorities—including increasing pressure to deliver in restricted timeframes and contributing to national and whole-of-government policy projects; and
- meeting rising citizen expectations for engagement with government and participation in policy design and development.

4.3 In this section of the background submission, the ALRC considers what is meant by ‘adequacy’ and provides an analysis of the scope and resourcing of past inquiries to provide a backdrop for the questions asked in this Inquiry.

### **The idea of ‘adequacy’**

4.4 The idea of adequacy is a complex one, linked to desired outcomes and purposes. The idea of adequacy prompts the question ‘adequacy for what?’ Whether the ALRC’s resources are adequate to meet its objectives, depends therefore on how those objectives are defined—their scope and their depth. The ALRC’s functions and objectives have been outlined at a general level above, and some functions may be seen to be intrinsic to a law reform body, others may seem to develop from and enhance the former.

4.5 The ALRC considers that the baseline for any consideration of adequacy is the production of high quality, well researched and well documented reports and the necessary staff and time to produce them.

4.6 The wider the understanding of what an independent institutional law reform body can do generates a broader appreciation of ‘adequacy’.

4.7 From quite a small base the ALRC can generate considerable extra ‘gain’ in terms of impact, including:

- a significant enhancement of the government’s law reform agenda through reports;
- a valuable contribution to international goodwill through cooperation and training; and
- a significant contribution to legal education, judicial understanding and academic debate on matters covered in reports.

## **Managing fiscal pressures**

### **Significant budget cuts**

4.8 Consistent with its medium-term fiscal framework, the Australian Government has committed to limiting annual growth in government spending to 2% until the budget returns to surplus.<sup>1</sup> This policy requires public sector agencies, including the ALRC, to operate within limited resources. A major challenge for the ALRC over the current budget and forward estimates period is to align its expenditure with significant budget reductions, which are additional to the so-called ‘efficiency dividend’.<sup>2</sup> These

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1 Australian Government, *Intergenerational Report 2010: Australia to 2050—Future Challenges* (2010), Ch 3.

2 The impacts of the efficiency dividend on the ALRC are detailed in Australian Law Reform Commission, *Submission to the Joint Committee of Public Accounts and Audit Inquiry into the Effect of the Efficiency Dividend on Small Agencies* (2008), <<http://www.aph.gov.au/house/committee/jcpaa/effdiv>> at 21 December 2010.

include a \$0.242 million reduction in 2010–11 appropriation,<sup>3</sup> with further reductions of \$0.495 million per year over the forward estimates period (from 2011–12 to 2013–14). The latter reductions represent a 20% cut on 2009–10 levels.

4.9 A reduction of this magnitude to a small organisation is significant and has meant that the ALRC has had to reduce its expenditure significantly. 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.

### Savings measures

4.10 The ALRC is implementing savings measures from 2010–11. The ALRC has decreased its programs from two programs to one program. The ALRC has traditionally had two programs (formerly 'outputs')—the first concerning conducting inquiries and the second about public information and education services to enhance community consultation and participation in the law reform process. As a direct savings measure, the ALRC has removed its second program from its budget to focus on the first. In particular, the ALRC has discontinued the publication of its bi-annual law journal, *Reform*. This publication provided a quality discussion of law reform issues—such as water, animal law, native title and children—including articles contributed by eminent authors, updates on the work of the ALRC and an overview of current law reform projects within Australia and internationally.

4.11 Other strategies to generate savings have been:

- Delaying the appointment of full-time Commissioners. The ALRC is now operating with only one full time Commissioner, the President—the minimum allowable under the ALRC Act, as opposed to having, in addition, at least two full-time Commissioners—one per inquiry. This strategy was agreed with the Australian Government Attorney-General's Department as a short-term strategy as the ALRC was able to call upon the NSWLRC full-time Commissioner for the joint Family Violence inquiry. One direct consequence, however, was a significantly increased workload and level of responsibility of the ALRC's Senior Legal Officers.
- Reducing the staffing complement, by not refilling a number of positions as they have become vacant as follows: Legal Officer, Research Manager, Executive/Project Assistant, Communications Manager, and Publications Coordinator. The duties of these positions have been allocated to remaining staff across the organisation, and have significantly increased the workload of all staff.

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3 The ALRC's departmental appropriation in 2010–11 is \$3.15 million.

- Streamlining the inquiry processes to fit within tight time-frames and reduced resources, including producing only one consultation paper, as opposed to the usual two (an Issues Paper and Discussion Paper), preceding a final report.
- Producing the Consultation Paper for the Discovery Inquiry in a soft copy online and not producing any hard copies, as well as introducing for the first time, full cost recovery on our final report for the Family Violence inquiry. Charging for this report has significantly reduced the number of reports requested by submitters and stakeholders. Charging has therefore created a barrier to access to ALRC reports.
- Developing online consultation strategies so as to reduce the cost of consultation travel

4.12 However even with these savings and efficiencies, the ALRC is facing significant challenges going forward, due the size of the decrease in its appropriation and the increase in its operating budget due to increases in the fixed costs such as rent (annual increase of 4%), salaries, communication charges, travel and suppliers' costs.

4.13 The ALRC has made genuine attempts to reduce other general operating expenses but given that such expenses constitute a small proportion of the total budget, even significant savings have little impact on overall expenditure. For example, the ALRC is required to travel within Australia in order to ensure effective consultation on law reform issues, but travel expenses constitute only around 2% of total ALRC expenditure. A 20% saving in travel expenses would only reduce total expenditure by 0.4%. (The ALRC does, however, make every effort to reduce travel expenses and is looking increasingly to online communication strategies and use of telephone conferences in place of face to face consultation where appropriate).

4.14 Reducing the number of legal and complementary inquiry staff any further would have a direct impact on the ALRC's capacity to conduct law reform inquiries, to meet tight deadlines and to ensure widespread national community consultation.

### **Recent trends**

4.15 The abovementioned reductions form part of a broader trend. Table 3 below indicates that the ALRC's appropriation has steadily declined, in real terms, from 2000–01. As remuneration is the ALRC's major area of expenditure, staffing levels (full-time equivalents, excluding statutory members) are also included in Table 3.

**Table 3—ALRC appropriations and staffing levels, 2000–01 to 2013–14**

Year	Appropriation (\$000)	% Increase	Annual Inflation Rate	Staffing level (FTE)
2000–01	3,003		4.4752%	25
2001–02	3,112	3.63%	4.3808%	22
2002–03	3,159	1.51%	3.0032%	18.8
2003–04	3,275	3.67%	2.7707%	17.6

Year	Appropriation (\$000)	% Increase	Annual Inflation Rate	Staffing level (FTE)
2004–05	3,303	0.85%	2.3436%	18.05
2005–06	3,377	2.24%	2.6687%	18.9
2006–07	3,366	-0.33%	3.5385%	17.8
2007–08	3,382	0.48%	2.3324%	19.37
2008–09	3,360	-0.65%	4.3526%	17.71
2009–10	3,387	0.80%	1.8201%	19.99
2010–11	3,152	-6.94%		16.2
2011–12	2,921	-7.33%		16.2 (estimate)
2012–13	2,913	-0.27%		16.2 (estimate)
2013–14	2,938	0.86%		16.2 (estimate)

## **Responding flexibly and contributing to government policy priorities**

### **Shorter timeframes**

4.16 As noted in the previous section of this background submission, the timely completion of high quality, well researched and well documented reports involves a complex interrelationship between time, scope and the team available. Where government wants a quicker turnaround, the scope of an inquiry needs to be much tighter and an appropriate team allocated—either from within existing staff or additional resources provided to support the particular inquiry. A quicker turnaround also has a necessary impact on the inquiry process and demands of stakeholders to respond. Some stakeholders—especially governments and government agencies—have limited flexibility themselves to produce a submission in a quicker time, given layers of internal review and approval.

4.17 In order for a shorter inquiry to be undertaken efficiently, a suitable team needs to be available. Where this is drawn from ALRC staff the timing for commencement of an inquiry needs to be factored in around the completion of any other inquiries.

### **Flexibility in Commissioner appointments**

4.18 The government has suggested that flexibility in undertaking inquiry work can be achieved by a greater use of part-time and short-term Commissioners. There are practical issues in relation to such an aspiration that have to be navigated properly for this to generate desired efficiencies. For example, the lead-time in securing the appointment of an appropriate part-time or short-term Commissioner must be factored in to any proposed reference. If not, the opportunity for effective contribution and enhancement of the law reform process may be lost.

4.19 Flexibility needs to be balanced with timely planning for effective use of all staff resources.

### **Change management**

4.20 A further challenge in the immediate future of the ALRC is the implementation of the Uhrig reforms, which place additional responsibilities on the President and corporate team.

### **Adequacy for producing reports**

4.21 How is adequacy for the production of high quality, well researched and well documented reports to be tested? There are several variables and a complex interrelationship between time, scope and the team available. As outlined in the previous section of this background submission, the model is a consultative one, in which extensive community and stakeholder engagement is intrinsic to independent law reform.

4.22 Adequate staffing to achieve these objectives needs to factor in:

- the number of inquiries referred to the ALRC at any given time;
- the complexity of inquiries—given the scope of the Terms of Reference, the complexity of the law relevant to each inquiry and the number of legislative schemes to be considered;
- the time given to the ALRC to conduct each inquiry; and
- the number, complexity, and geographical spread of consultations the ALRC undertakes, given that the ALRC is a national body ; and
- the extent of research and analysis the ALRC undertakes.

4.23 The assessment of the adequacy of staffing needs to include consideration of both the research and writing team and the complementary inquiry team. Adequacy of resourcing also needs to factor in resources for research, the library and technology.

4.24 Historical information provides an illustration of the research and writing team necessary for to complete inquiries, which can be used as a guide to assessing adequacy of resourcing in the future. The aim is to provide a basis for consideration of what a core complement of ALRC staff should be. Adequate resources would then comprise at least the budget to support that staff complement.

### **Scope and staff resourcing of past inquiries**

4.25 The following section summarises the scope and staff resourcing of ALRC inquiries for which the final report was completed in the calendar years 2003 to 2010. In this period, the following 11 final reports were completed:

- *Family Violence: A National Legal Response*, 2010 (ALRC 114)
- *Secrecy Laws and Open Government in Australia*, 2009 (ALRC 112)

- *Making Inquiries: A New Statutory Framework*, 2009 (ALRC 111)
- *For Your Information: Australian Privacy Law and Practice*, 2008 (ALRC 108)
- *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, 2007 (ALRC 107)
- *Fighting Words: A Review of Sedition Laws in Australia*, 2006 (ALRC 104)
- *Same Crime, Same Time: Sentencing of Federal Offenders*, 2006 (ALRC 103)
- *Uniform Evidence Law*, 2005 (ALRC 102)
- *Genes and Ingenuity: Gene Patenting and Human Health*, 2004 (ALRC 99)
- *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, 2004 (ALRC 98)
- *Essentially Yours: The Protection of Human Genetic Information in Australia*, 2003 (ALRC 96).

4.26 Relevant to the assessment of adequacy is a consideration of the scope of the inquiry, its duration and the staff needed to support the completion of the inquiry.

### **Scope of inquiries**

4.27 The scope of ALRC inquiries varies significantly. Table 1 characterises the scope of inquiries according to high, medium or low complexity. The complexity of an inquiry has been assessed in the light of the nature of the legal and policy issues under consideration; and the breadth and intensity of stakeholder interests involved.

#### ***High complexity***

4.28 Five inquiries are characterised as being of high complexity. An example is the review of the *Privacy Act 1988* (Cth). The Terms of Reference for this inquiry required the ALRC to review the extent to which the *Privacy Act* and related laws continue to provide an effective framework for the protection of privacy in Australia.

4.29 The inquiry involved, among other things, the development of recommendations to: redraft and restructure legislative privacy principles; restructure privacy regulation to follow a three-tiered approach of high-level principles of general application, regulations and industry codes, and guidance issued by the Privacy Commissioner (and other relevant regulators); adopt a common approach to privacy protection in all Australian jurisdictions; update important definitions in the *Privacy Act* to deal with new technologies and new methods of collecting and storing personal information; rationalising and clarifying exemptions; improve complaint handling and penalty provisions; alter the structure and role of the Office of the Privacy Commissioner; establish a new data breach notification regime; permit the implementation of a form of more comprehensive credit reporting; improve regulation of telecommunications and health information privacy; and establish a statutory cause of action for a serious invasion of privacy.

4.30 The breadth of the subject matter covered in the privacy inquiry required the ALRC to undertake the largest community consultation program in its history. The ALRC organised: over 250 face-to-face meetings with individuals, organisations and agencies; major public forums in Melbourne (focusing on consumers and privacy), Sydney (focusing on business and privacy) and Coffs Harbour (focusing on health privacy and research); six workshops for children and young people (aimed at those aged 13–25); a series of roundtables with individuals, agencies and organisations on a variety of themes including: credit reporting; telecommunications; the privacy principles; children and young people; and health and research; a highly publicised ‘National Privacy Phone-In’ on 1–2 June 2006, during which more than 1,300 members of the public contacted the ALRC to share their experiences, ideas and attitudes about privacy protection; and the establishment of a ‘Talking Privacy’ website, designed specifically to appeal to young people. The ALRC received 585 written submissions from a broad cross-section of individuals, organisations and agencies.

### ***Medium complexity***

4.31 Five inquiries are characterised as being of medium complexity. An example is the review of Commonwealth secrecy laws. The Terms of Reference for this inquiry required the ALRC to review options for ensuring a consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government by providing appropriate access to information.

4.32 The inquiry involved, among other things, the development of recommendations to: repeal the wide catch-all provisions currently in the *Crimes Act 1914* (Cth), and introduce a new general secrecy offence, limited to disclosures that harm essential public interests; establish best practice principles to guide the review, repeal and amendment of specific secrecy offences; and improve the management of government information within this framework. An integral component of the background research undertaken by the ALRC for this inquiry was a ‘mapping exercise’ to identify and analyse the multitude of secrecy provisions in Commonwealth legislation.

4.33 The inquiry featured wide consultation, but was more limited than that involved in the privacy inquiry. The ALRC conducted 35 meetings with a number of Australian Government agencies, academics, judges and members of the legal profession and used an online forum and a national phone-in. Eighty-four written submissions were received.

### ***Low complexity***

4.34 For an ALRC inquiry, the review of sedition laws was unusually narrow in ambit. It concerned review of a small number of specific criminal offences contained in the Commonwealth *Criminal Code* and *Crimes Act*.

4.35 The ALRC developed recommendations for: reform of the existing sedition offences in s 80.2 of the *Criminal Code* and related matters, including

recommendations for reform of the treason offences in s 80.1; and the repeal of the unlawful associations provisions contained in Part IIA of the *Crimes Act*.

4.36 The ALRC consulted with a wide spectrum of stakeholders, including: community groups; prosecution and law enforcement agencies; criminal defence lawyers; judges; government lawyers and officials; media organisations and peak associations; legal professional associations; human rights and civil liberties groups; and academics. The ALRC conducted 27 consultation meetings and received 126 written submissions.

**Table 1—Complexity, consultations and submissions, publications and team, 2003–2010**

Report	Complexity	Publications	Consultation	FT/PT Commissioners	Legal officers
	<i>Topic and categorisation of complexity (high, medium, low)</i>	<i>Formal publications</i>	<i>Number of meetings/submissions</i>	<i>Significant engagement</i>	<i>Number (average)</i>
114	<b>Family violence</b> (High)	Consultation Paper Final Report	236/240	President 1 part-time + NSWLRC	1 Special Adviser 3 Senior Legal Officers 5 Legal Officers
112	<b>Secrecy</b> (Medium)	Issues Paper Discussion Paper Final Report	35/84	President 1 full-time	2 Senior Legal Officers 3 Legal Officers
111	<b>Royal Commissions and official inquiries</b> (Medium)	Issues Paper Discussion Paper Final Report	70/32	President 1 full-time	1 Senior Legal Officer 3 Legal Officers
108	<b>Privacy</b> (High)	2 x Issues Papers Discussion Paper Final Report	250/585	President 1 full-time	4 Senior Legal Officers 5 Legal Officers
107	<b>Privilege</b> (Medium)	Issues Paper Discussion Paper Final Report	51/116	President 1 full-time	2 Senior Legal Officers
104	<b>Sedition</b>	Issues Paper Discussion	27/126	President 1 full-time	2 Senior Legal

	(Low)	Paper Final Report			Officers 2 Legal Officers
103	<b>Sentencing of federal offenders</b> (High)	Issues Paper Discussion Paper Final Report	80/98	President 1 full-time	2 Senior Legal Officers 2 Legal Officers
102	<b>Evidence</b> (High)	Issues Paper Discussion Paper Final Report	145/130	President 1 full-time + NSWLRC VLRC	2 Senior Legal Officers 3 Legal Officers + NSWLRC VLRC
99	<b>Gene patents</b> (Medium)	Issues Paper Discussion Paper Final Report	73/119	President 2 full-time	2 Senior Legal Officers 2 Legal Officers
98	<b>Security sensitive information</b> (Medium)	Background Paper Discussion Paper Final Report	16/34	President 1 full-time	2 Senior Legal Officers 2 Legal Officers
96	<b>Human genetic information</b> (High)	Issues Paper Discussion Paper Final Report	200/316	President 2 full-time + AHEC	2 Senior Legal Officers 3 Legal Officers

## Team

4.37 The team that undertakes an inquiry for each Terms of Reference includes a legal research team and the complementary inquiry team supporting all inquiries. In addition, there is a considerable element of honorary or pro bono contribution. While the latter involves minimal cost, it adds enormous value to the integrity and quality of the reports.

### *Legal research team*

4.38 The table provides information as to the complement of ALRC full-time and part-time Commissioners and legal officers who were engaged to an important degree in each of the inquiries. These figures require some explanation. In the past decade the pattern has been that one full-time Commissioner has had responsibility for the inquiry and leads the research and writing team.

4.39 As discussed elsewhere in this submission, the complement of President and other Commissioners has varied over the life of the ALRC. The engagement of the President and other Commissioners on specific inquiries has varied depending on the nature of the inquiry and the number and role of other Commissioners.

4.40 At one end of a spectrum of engagement, a Commissioner may be the sole Commissioner in charge of an inquiry and intimately involved in all aspects of its conduct. At the other end of the spectrum, a Commissioner may be on the formal 'division' of the ALRC constituted for the purposes of a particular inquiry, but not involved in the day to day work of the inquiry.

4.41 The table assumes that the President of the ALRC has had an important role in each of the ALRC's inquiries. The President also has duties as Chief Executive Officer of the agency and an important role in all concurrent ALRC inquiries. In some inquiries the President has taken a more active role. For example, in the gene patents inquiry, conducted from December 2002 until June 2004, the then ALRC President, Professor David Weisbrot played the leading role. In addition, two full-time ALRC Commissioners, Professors Anne Finlay and Brian Opeskin, were engaged fully in the inquiry.

4.42 The usual position over this period, however, has been for the President to oversee, and another full-time Commissioner to lead, inquiries. This was the structure of eight of the 11 inquiries featured in the table—sometimes assisted by Commissioner-level personnel from partner organisations, such as state law reform commissioners. For example, the secrecy and privacy inquiries were led by Commissioners in charge Professor Rosalind Croucher and Professor Les McCrimmon respectively, together in each case with oversight from ALRC President Professor David Weisbrot.

4.43 Since December 2009, Professor Rosalind Croucher has been the President with no other full-time Commissioners. She has had oversight, in her capacity as President, but also performed the role of Commissioner in charge of the inquiries undertaken since that time.

4.44 Commissioners are counted in the table only where they had an important day-to-day role in the conduct of an inquiry. This approach is not intended to diminish the role of other full-time and part-time Commissioners as experts and advisers, which is fundamental to the operation of the ALRC. It does, however, give an accurate indication of the staff resources available to the ALRC in undertaking the research, writing and consultation effort in an inquiry.

4.45 Where the ALRC was assisted on a day-to-day basis by 'Commissioner level' personnel from other law reform commissions or bodies such as the National Health and Medical Research Council (NHMRC), this is also recorded.

4.46 The figures for Commissioners and staff engaged on each inquiry are approximate and take into account individuals' other responsibilities and personnel changes during the duration of a reference. For example, while three Senior Legal Officers and seven Legal Officers worked on the uniform evidence law review, at any

one time about two Senior Legal Officers and three Legal Officers were engaged. The table therefore provides a practical insight into the core writing team for any inquiry.

4.47 The average complement of legal officers engaged in each ALRC inquiry is five, comprised of two Senior Legal Officers and three Legal Officers—the designation of staff under the ALRC’s Enterprise Agreement.

4.48 The desirable complement of legal officers varies depending on other resources available to the ALRC in a particular inquiry. For example, in the family violence inquiry, research, consultation and writing was contributed by the NSWLRC Commissioner (appointed in March 2010) and one legal officer; and, in the human genetic information inquiry, by members and staff of the Australian Health Ethics Committee of the NHMRC.

4.49 The important role of personnel who directly support and complement the inquiry-related roles of legal officers, including those managing research and information resources and online consultation is considered below.

#### ***Complementary Inquiry team***

4.50 Supporting the work of the inquiry writing teams is a team of complementary staff, including the Executive Director, Project Coordinators, Website Manager, Librarian, Research Manager, and finance team.

#### ***Honorary contribution***

4.51 Under this heading the ALRC notes that for each inquiry there is great value in the contributions of advisory committees, part-time Commissioners, and those consulted throughout an inquiry, as noted in the second part of this background submission. Details of such contributions are listed for each inquiry in the Final Reports.

4.52 The ALRC also has an active internship program. Entry into the program is highly competitive and interns on a voluntary basis. Interns require considerable supervision, which in itself has resourcing implications, but their contribution to the research effort in inquiries is noteworthy. This participation is recognised through listing of interns in the list of participants in inquiries.

#### **Duration of inquiries**

4.53 Table 2 sets out the duration of inquiries, as measured from the date of the Terms of Reference to the date the final report was delivered to the Attorney-General. This duration ranges from 5 months to two years and four months. The table includes inquiries reporting between 2003 and 2010.

Table 2—Duration of inquiries 2003–2010

Report	Complexity of inquiry	Duration (mths)
	<i>Topic and categorisation of complexity (high, medium, low)</i>	<i>Terms of Ref to delivery – rounded to nearest full month</i>
114	Family violence (High)	17 July 2009 8 October 2010 <i>15 months</i>
112	Secrecy (Medium)	5 August 2008 11 December 2009 <i>16 months</i>
111	Royal Commissions and official inquiries (Medium)	14 January 2009 30 October 2009 <i>10 months</i>
108	Privacy (High)	30 January 2006 30 May 2008 <i>28 months</i>
107	Privilege (Medium)	29 November 2006 21 December 2007 <i>13 months</i>
104	Sedition (Low)	1 March 2006 31 July 2006 <i>5 months</i>
103	Sentencing of federal offenders (High)	12 July 2004 28 April 2006 <i>20 months</i>
102	Evidence (High)	12 July 2004 5 December 2005 <i>17 months</i>
99	Gene patents (Medium)	17 December 2002 29 June 2004 <i>18 months</i>
98	Security sensitive information (Medium)	2 April 2003 31 May 2004 <i>14 months</i>
96	Human genetic information (High)	5 February 2001 28 March 2003 <i>26 months</i>

4.54 The duration of inquiries is largely a result of the reporting period specified in the Terms of Reference. This specified duration depends on a range of factors, not all of which are transparent to the ALRC. These include perceptions of the scope of the proposed inquiry, the ALRC's existing inquiries, and the desirability of receiving the final report in time to inform other law reform or policy processes, such as those undertaken by the Standing Committee of Attorneys-General.

4.55 Measuring the duration of an inquiry from the date of Terms of Reference can be misleading. For example, while the duration of the recent family violence inquiry was 15 months, it was not until several months after the Terms of Reference were issued that a full complement of ALRC staff could be dedicated to the inquiry (as existing inquiries had to be finalised) and the assistance of the part-time Commissioner and the NSWLRC commenced. On the other hand, the ALRC sometimes has advance notice of expected Terms of Reference and is able to commence initial research even before the formal document is issued.

4.56 The ALRC undertakes every reasonable endeavour to report within the specified period. It is not uncommon, however, for extensions to be sought from the Attorney-General—in particular, where the reporting period provides insufficient time for stakeholder groups to make submissions. In addition, there are times that, even where there is consultation about a proposed duration for an inquiry, and the ALRC provides advice about an appropriate timeframe to undertake the project, the reporting date does not reflect such advice, and terms of reference may issue with a shorter timeframe than advised.

4.57 There is a clear relationship between the scope of ALRC inquiries and the duration of inquiries. For example, the sedition review was conducted in five months and the privacy review in two years and four months, including an extension of two months on the original reporting date.

4.58 The duration of most inquiries of medium complexity is between one year and eighteen months (the average duration of the 11 inquiries analysed in the table is 16 months). Inquiries of such duration include the reviews on secrecy, privilege, gene patents and security sensitive information.

4.59 The duration of an inquiry may be affected by the number of consultation documents produced. For example, the Family Violence inquiry was effectively completed within 10 months, due to staff being committed to completing two other inquiries (Secrecy and Royal Commissions), and the successful completion in the shorter timeframe was achieved through only producing one—albeit major—consultation document.