



27 January 2011

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

Dear Secretary

RE: INQUIRY INTO THE AUSTRALIAN LAW REFORM COMMISSION

Thank you for the opportunity to make a submission to this inquiry on behalf of Macquarie Law School. I note that the Senate Legal and Constitutional Affairs Committee has been asked to inquire into and report on the Australian Law Reform Commission (ALRC), with particular reference to:

- (a) its role, governance arrangements and statutory responsibilities;
- (b) the adequacy of its staffing and resources to meet its objectives;
- (c) best practice examples of like organisations interstate and overseas;
- (d) the appropriate allocation of functions between the ALRC and other statutory agencies; and
- (e) other related matters.

2. My colleagues and I would like to comment on a number of these issues in light of the significant budget cuts—a \$0.242 million reduction in 2010–11, followed by a \$0.495 million reduction per year in the following two years, representing a 20% cut on 2009–10 funding levels—that have been applied to the ALRC.¹

The value and quality of ALRC publications and process

3. The ALRC is established under the *Australian Law Reform Commission Act 1996* (Cth) (the ALRC Act) as an independent statutory agency to inquire into and report on matters referred to it by the federal Attorney-General and, in particular, to review Commonwealth laws in order to bring them into line with current conditions and needs; to simplify and remove defects in the law; to recommend new or more effective methods of administering the law; and to improve access to justice.² In conducting its inquiries the ALRC typically produces a number of consultation documents—which present issues, ask questions and raise proposals for reform—and asks for stakeholder and community input and comment on the questions and proposals.

4. ALRC reports provide a comprehensive, accurate and up-to-date survey of the law and policy in the area of inquiry, an analysis of the issues and problems, and a considered, informed view of the changes required to bring law and practice into line with domestic and international best practice. I note that 90% of the ALRC's reports have been either partially (29%) or substantially (61%) implemented,³ and that the reports are frequently cited by Australian courts.⁴ From this it is clear that the ALRC's process of developing recommendations for reform is leading to reports that are effective, relevant and practicable

1 Australian Law Reform Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Law Reform Commission: Background Submission* (2010), [4.8].

2 *Australian Law Reform Commission Act 1996* (Cth) s 21.

3 Australian Law Reform Commission, *Annual Report: 2009–2010*, ALRC Report 113, 25–28.

4 During 2009–2010, there were more than 64 references to ALRC reports in decisions of major courts and tribunals. These included two from the High Court of Australia, 12 from the Federal Court of Australia, and 38 from state and territory Supreme Courts or Courts of Appeal: Australian Law Reform Commission, *Annual Report: 2009–2010*, ALRC Report 113, 28.

in our changing economic, social, and cultural world. While reports of this calibre are clearly critical to providing sound advice to the Australian Government, the authoritative and comprehensive analysis contained in the reports is also relied upon in academic and judicial environments. Many of these consultation documents, as well as ALRC final reports and the ALRC journal, *Reform*, are found in our library and provide an invaluable resource for staff and students. ALRC consultation documents and, in particular, the ALRC's final reports are frequently referenced in student and academic work,⁵ as well as used as recommended course materials at this University. This is because there is great synergy between the work of law reform agencies and legal education. The Dean of Law at the Australian National University, Professor Michael Coper, has noted the importance of teaching not only the law as it is, but as it should be or might be:

A focus on law reform and social justice is consistent with the traditional role of a university in asking questions, submitting dogma to scrutiny, and exposing alternatives. The small step from critical perspectives to thinking about a constructive case for change, and the positive mindset that this encourages, has vast potential to provide lawyers, throughout their careers, with a wonderful pathway to add value to the society they service.⁶

5. For these reasons, my colleagues and I at Macquarie Law School greatly value the institution and work of the ALRC. From our own experience we understand that high quality, sustained and comprehensive research and analysis requires dedicated resources and time to achieve. We note with grave concern, therefore, that the full time equivalent staffing level at the ALRC has dropped from 25 to 16 over the last ten years, and that recently the ALRC has been unable to fill a number of positions as they have become vacant including Research Manager, Communications Manager, Publications Coordinator, Executive/Project Assistant, and one Legal Officer. The ALRC has stated that:

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.⁷

6. A particularly important part of the ALRC research methodology is consultation with targeted stakeholders and the community. Consultation processes, such as those conducted at the ALRC, are important for a number of reasons including: ensuring the independence and transparency of the law reform process; increasing community understanding and engagement; and achieving better informed outcomes. In our view, it is likely that one of the major reasons ALRC recommendations for reform are so successful is that they have been developed in close consultation with experts and those working in the field, who are aware of the issues and can offer practical advice in response to the ALRC's questions and proposals for reform. As the Hon Justice Michael Kirby AC CMG noted in 2003:

A feature of the ALRC, from 1975, has been an insistence upon gathering empirical data as a foundation for a thorough understanding of how the law operates in practice. For the ALRC it was not sufficient (as of necessity it often must be for judges) to study legal problems through the judicial opinions. For the ALRC it was essential to get out into the field and to discover how the law actually operated and affected ordinary Australians ... The capacity to gather empirical data on the actual operation of the law is a critical element of product differentiation in ALRC reports ... the ALRC can ensure that different perspectives are heard and that reform proposals are not only tailored to the voices of officials and powerful interest groups but also respond to the needs for law reform as viewed by consumers and ordinary citizens.⁸

7. While some stakeholders—such as Australian Government departments and industry bodies—may have the time and resources required to engage with the ALRC through written submissions, for those who don't—for example, those working in the community sector and many smaller private sector organisations—more targeted consultations, including face-to-face meetings and teleconferences, offer an opportunity to engage with the reform process and to submit their views and suggestions. Although we understand that the ALRC is making the most of information technology options to streamline its consultation and public engagement processes—including the use of e-newsletters, blogs, online forums, podcasts and Twitter updates—these mechanisms are no substitute for considered dialogue over time

5 In the 10 years to 2004, the ALRC attracted 548 academic journal citations: Brian Opeskin, 'Measuring Success' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 202, 220.

6 Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds', in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 388, 401.

7 Australian Law Reform Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Law Reform Commission: Background Submission* (2010) [4.14].

8 Justice Michael Kirby, 'The ALRC: A Winning Formula' (2003) 82 *Reform* 58, 60.

with targeted stakeholders. Substantive consultation involves thoughtful engagement with individuals and organisations, allowing sufficient time for stakeholders to consider and respond to the issues. As the Chair of the Queensland Law Reform Commission, the Hon Justice Roslyn Atkinson, has noted:

We live in an information rich age but information does not necessarily translate into engagement or that sense of civic involvement so necessary to a deliberative democracy in which people feel able to involve themselves with law, justice or the law reform process.⁹

8. We note that there have been around 10 or 11 legal officers working at the ALRC at any given time in the last two financial years¹⁰ but that, as noted above, this number is falling due to resource constraints.¹¹ It is of great concern that the capacity of the ALRC to engage in targeted consultation with the ‘small end of town’ is to be put at risk by the dramatic cut in resources to be imposed on the organisation over the next three years. This is likely to have a disproportionate effect on those stakeholders and members of the community who do not have the capacity or resources to produce a written submission, and will mean that larger stakeholders’ voices will dominate the discussion.

9. One of the great benefits of the ALRC’s methods of operation over many years has been its ability to go well beyond ‘the usual suspects’ and to engage the wider community, including disadvantaged, marginalised and other segments of the community that rarely have a voice in public policymaking. The ALRC’s inquiries into such sensitive areas as the recognition and application of Indigenous customary law, the protection of human genetic information, and the rights of the child, have benefitted enormously from the practical experience and wisdom of the general community as conveyed through the ALRC’s extensive consultation programs.

10. We note that in recent inquiries, due to resource constraints and, in particular, truncated timelines imposed by the Australian Government, the ALRC has also cut back on its consultation documents, publishing only one consultation paper—rather than an issues paper and a discussion paper—prior to preparation of the final report.¹² This is also likely to limit significantly the opportunities available to stakeholders to comment on issues and to put their views to the ALRC for consideration, and will almost certainly have a negative impact on the ability of the ALRC to gather empirical data upon which to base its recommendations.

Public information and community education

11. In its background submission to the current Inquiry, the ALRC notes that:

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*.¹³

12. It is deeply regrettable that the ALRC’s public information and community education services have been cut, and that the bi-annual journal, *Reform*, is no longer being published. The topically themed journal was intended to raise public awareness of contemporary law reform issues—through contributions written by leading Australian and international authorities—and provided a valuable source of information on law reform projects across Australia and internationally.

13. This aspect of law reform—now lost—was instrumental in placing new and emerging issues on the agenda for community discussion and prompting eventual attention by governments and others. For example, past thematic issues of *Reform* included *Older People and the Law*¹⁴ and *The Challenge of the New Genetics*,¹⁵ before these matters became mainstream areas of community debate and law reform activity. The ALRC’s groundbreaking discussion of the potential legal and social effects of Australia’s aging population was published at a time when this area was only beginning to register as a critical issue for government policy makers.

9 Roslyn Atkinson, ‘Law Reform and Community Participation’, in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 160, 161.

10 Australian Law Reform Commission, *Annual Report: 2008–2009*, ALRC Report 110 (2009) 61; Australian Law Reform Commission, *Annual Report: 2009–2010*, ALRC Report 113 (2010) 60.

11 Australian Law Reform Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Law Reform Commission: Background Submission* (2010) [4.11].

12 Ibid.

13 Ibid [4.10].

14 Australian Law Reform Commission, *Reform: Older People and the Law* (2002).

15 Australian Law Reform Commission, *Reform: The Challenge of the New Genetics* (2001).

14. As the late ALRC and Queensland Law Reform Commissioner Ian Davis noted in 2005:

A law reform agency's work is essentially public. The agency is there to provide an open sounding board for public and private opinion on issues of concern to the government of the day, and to the community as a whole, free from the political baggage that might hamper a similar governmental inquiry.¹⁶

In these circumstances, sustaining a profile in the community by providing some level of information and education about law reform generally would appear to be an important responsibility, rather than an optional extra.

The role of the President, full-time and part-time Commissioners

15. We note that Professor Rosalind Croucher, former Dean of Macquarie Law School, is currently the President and the sole full-time statutory member of the ALRC—and that this situation is a direct result of budgetary constraints.¹⁷ The ALRC Act provides that the ALRC should consist of a President, a Deputy President, and at least four other members. Despite this, there have not been any full-time Commissioners appointed to support the President in her work since November 2009.

16. As with the chief executive officer of any organisation, the President carries responsibilities in relation to organisational governance, budget and regulatory compliance, administration and strategic development, liaison with external stakeholders—including, in this case, the Australian Parliament and the federal Attorney-General—and as spokesperson and representative in relation to the media and the domestic and international community more generally. The ALRC Act does contain a 'saving provision' that provides that the performance of the ALRC's functions and the exercise of its powers are not affected merely because of a vacancy in its membership.¹⁸ However, this was clearly intended to avoid the situation where the findings and recommendations contained in an ALRC report could be challenged on the basis that the ALRC was improperly constituted at the relevant time. The provision clearly was *not* meant to provide an enduring loophole in the structure and management of the ALRC, given that the normal operational requirements were spelled out very clearly by the Australian Parliament in the legislation establishing the Commission. The absence of full-time Commissioners since November 2009 represents a significant change in the working structure of the ALRC, to the detriment of the institution and the people it serves.

17. In the past, full-time Commissioners at the ALRC—usually judges, senior legal professionals or academics appointed on the basis of their expertise in the area of a particular inquiry—have had responsibility for the day-to-day management of inquiries and have provided the intellectual leadership and focus that these major projects require. Clearly, the appointment of part-time Commissioners—all of whom already have demanding full-time employment commitments as Justices of the Federal Court of Australia¹⁹—cannot be a substitute for the ongoing, full-time appointment of Commissioners who are engaged on a daily basis with the issues, the stakeholders and the legal team responsible for preparing ALRC reports. Those unfamiliar with the operations of the ALRC may be unclear about the role of part-time and full-time Commissioners. The term 'part-time Commissioner' is something of a misnomer. Part-time ALRC Commissioners do not serve actively on a routine basis, such as one or two days per week. Rather, as busy senior judges, they attend occasional meetings and review the occasional document, operating more in the manner of casual consultants than part-time members.

18. In the absence of the important level of executive leadership and expertise provided by full-time Commissioners, the entire burden of managing the organisation, as well as conducting inquiries, falls upon the President. With the best will in the world, it is not possible for one person to do the jobs of three or more professionals on an ongoing basis. My colleagues and I are deeply concerned that this situation will have a negative impact on the quality of ALRC outputs which, as we have indicated above, are of great value to the Australian community, and play a critical part in legal education and scholarship, including at Macquarie Law School.

16 Ian Davis, 'Targeted Consultations', in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 148, 158.

17 Australian Law Reform Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Law Reform Commission: Background Submission* (2010) [4.11].

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

19 There are four part-time Commissioners currently appointed to the ALRC: the Hon Justice Susan Kenny, the Hon Justice Berna Collier, the Hon Justice Arthur Emmett and the Hon Justice Bruce Lander.

Internships

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

Conclusion

20. In Australia's rapidly changing society, my colleagues and I are of the view that an independent, dedicated, and expert law reform body such as the ALRC is increasingly important. The ALRC has demonstrated again and again that it has the skills and the processes in place to examine and respond to the difficult and complex legal issues thrown up by new and emerging economic, social, cultural and environmental trends and technology. The ALRC is a small organisation in the scheme of things, but it consistently produces reports of extremely high quality and utility. It is an organisation that deserves to be valued and supported.

21. If you have any questions, or require further information, please do not hesitate to contact Carolyn Adams, Senior Lecturer, on _____

Yours sincerely

Professor Natalie Klein
Dean
Macquarie Law School