

Inquiry into the Australian Law Reform Commission

Submission to the Standing Committee on Legal and
Constitutional Affairs

28 January 2011



17/461 Bourke St Melbourne VIC 3000
Tel: (03) 8636 4400 | Fax: (03) 8636 4455
www.pilch.org.au

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Ursula Noyé

Lawyer



Gregor Husper

Director

1. Executive summary

PILCH welcomes the opportunity to make a submission to the Standing Committee on Legal and Constitutional Affairs for its inquiry into the Australian Law Reform Commission (ALRC).

PILCH commends the Standing Committee on Legal and Constitutional Affairs on the initiative to undertake the inquiry.

This submission addresses terms (a), (b) and (d) of the inquiry.

1.1 Recommendations

In summary, PILCH makes the following recommendations:

(a) The ALRC's role, governance arrangements and statutory responsibilities

Recommendation 1

The ALRC's fundamental role in independent review, development and reform of Commonwealth laws must be supported and continued.

Recommendation 2

The powers of the ALRC should be widened to include the power to initiate reviews into Commonwealth laws which raise issues of general community concern ("a community reference power").

(b) The adequacy of ALRC's staffing and resources to meet its objectives

Recommendation 3

PILCH endorses Item 3 of the Federation of Community Legal Centres Victoria submission to this inquiry.

(d) The appropriate allocation of functions between the ALRC and other statutory agencies

Recommendation 4

As independent reviewer of Commonwealth laws, the ALRC's functions must remain distinct from other statutory agencies so as not to diminish their discrete and important roles, functions and powers.

Recommendation 5

In addition to the ALRC, the Australian Human Rights Commission must also be appropriately resourced and mandated to undertake its specific roles, functions and powers.

2. About PILCH

PILCH is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice; and
- ▶ foster a strong pro bono culture in Victoria; and, increase the pro bono capacity of the legal profession.

The ALRC's reports, submissions and discussion papers continue to inform PILCH's practices. Of the ALRC's publications between 2006 and 2010, approximately one third have intersected with PILCH's law reform and campaign policy objectives. Specifically, reviews of laws concerning family violence, anti-terror, freedom of information, privacy and rights of persons with disabilities have implications for marginalised and disadvantaged people.

3. The ALRC's role, governance arrangements and statutory responsibilities

3.1 The ALRC's role

PILCH supports the ALRC's fundamental role in independent review, development and reform of Commonwealth laws for the purposes of improving access to justice and making those laws more just for all Australians. As a federal statutory agency with direct access to government, the ALRC is appropriately placed to fulfil this role.

The ALRC produces high-quality and relevant publications, with over 85% of its recommendations being fully or substantially implemented by government.¹ Their frequent mention in argument before the High Court² is a further reflection of the quality scholarship among the research teams of experts assembled by the ALRC.

While not a human rights institution, PILCH recognises that the ALRC performs its role of review with regard to the maintenance of personal rights and liberties, the International Covenant on Civil and Political Rights and the impact upon access to and the costs of access to justice.³

As noted above, PILCH assists marginalised and disadvantaged individuals/groups to access justice. One of PILCH's programs is the Homeless Persons' Legal Clinic (HPLC), Australia's longest-running specialist legal advocacy service for people who are homeless, or at risk of becoming homeless.⁴ Family violence is a major contributing factor to homelessness in Australia, particularly for women.⁵ The interplay between family violence, homelessness and access to justice is a recurring issue in the work of the HPLC,⁶ and the ALRC's recent work on the Family Violence - A National Legal Response (ALRC 114) was a high-quality, thorough and apposite project, and one which should be commended. This work is an example of the ALRC's work which can, and will, directly improve vulnerable people's ability to access justice.

While not all of the ALRC references are pertinent to PILCH's work, we recognise the appropriate referral of law reform issues to the ALRC and its consequent high standard of publications, and consider the ALRC makes a valuable contribution to positive developments in Australian law.

Recommendation 1

The role of the ALRC as independent reviewer of Commonwealth laws for the purpose of reforming those laws should be continued and strengthened.

¹ <http://www.alrc.gov.au/about>, ALRC, last updated 31 August 2010, viewed 19 January 2011

² The Hon Michael Kirby AC CMG, '50 years in the law: A critical self-assessment' (2009) 32 Aust Bar Rev 1

³ s 24 *Australian Law Reform Commission Act 1996*

⁴ See further www.pilch.org.au/hplc/

⁵ Donna Chung, Rosemary Kennedy, Bev O'Brien and Sara Wendt, *Home Safe Home: The Link between Domestic and Family Violence and Women's Homelessness* (2000)

⁶ See further HPLC, *Outside Glass Houses: Mapping the Legal Needs of Women at Risk of Homelessness Escaping Family Violence*

3.2 A community reference power

In its commitment to furthering the public interest, PILCH supports a widening of the ALRC's powers to review issues for national law reform that are raised by the community. For example, one of the state counterparts of the ALRC, the Victorian Law Reform Commission (VLRC), has the power to review issues that are of general community concern ("community reference power").⁷ This power is in addition to the VLRC's powers (which mirror the ALRC's powers) to review issues referred by Attorney-General and to suggest issues to the Attorney-General for formal referral.⁸

The community reference power allows the community's participation in identifying issues for law reform which in turn enables the community to inform government. PILCH considers that the opportunity for the community to participate directly in the law reform process promotes a more just society.

Recommendation 2

The powers of the ALRC should be widened to include the power to initiate reviews into Commonwealth laws which raise issues of general community concern ("a community reference power").

4. The adequacy of ALRC's staffing and resources to meet its objectives

PILCH considers it imperative that the ALRC retain adequate and independent staffing and resourcing to perform its vital role as key referral agency to which organisations, public interest groups, lawyers and individuals can make submissions regarding law reform.

PILCH is pleased to endorse item 3 of the submission of the Federation of Community Legal Centres Victoria to this inquiry, a copy of which is attached as "**Appendix 1**".

Recommendation 3: Endorsement

PILCH endorses Item 3 of the Federation of Community Legal Centres Victoria submission to this inquiry

⁷ s 5(1)(b) *Victorian Law Reform Commission Act 2000*

⁸ s 5(1) *Victorian Law Reform Commission Act 2000* ; s 20(1) *Australian Law Reform Commission Act 1996*

5. The appropriate allocation of functions between the ALRC and other statutory agencies

This term of inquiry asks parties to comment on the comparative role of the ALRC and other (complementary) statutory agencies. PILCH notes that an earlier version of this term made specific reference to the Australian Human Rights Commission (the Human Rights Commission).⁹ PILCH considers the Human Rights Commission to be a relevant statutory agency.

PILCH has previously noted the importance of the ALRC's mandated independence. PILCH further considers that the ALRC must maintain the mandate of independence from other statutory agencies to properly perform its primary function as reviewer of Commonwealth laws for reform. PILCH also recognises the importance of other statutory agencies that may scrutinise these laws in accordance with their own objectives. For example, as a statutory agency concerned with human rights, the functions of the Human Rights Commission include examinations of laws and proposed laws for any inconsistency or contrariness with human rights.¹⁰

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

The primary function of the Human Rights Commission is to meet its responsibilities under federal anti-discrimination and human rights laws. In addition to investigating and conciliating complaints under these laws, the Human Rights Commission holds public inquiries, develops education programs, provides independent legal advice to courts, and makes submissions to governments on law and policy development and reform. It is imperative that the Human Rights Commission be adequately resourced and mandated to ensure its independence and effectiveness in the promotion and protection of human rights.¹¹

PILCH considers that the functions and funding of the ALRC and the Human Rights Commission reflect their sufficiently discrete and complementary roles and functions. Just as the ALRC must enjoy adequate and independent resourcing to properly perform its functions, so too must the Human Rights Commission to perform its functions and meet its international obligations.

Recommendation 4

As independent reviewer of Commonwealth laws, the ALRC's functions must remain distinct from other statutory agencies so as not to diminish their discrete and important roles, functions and powers

Recommendation 5

In addition to the ALRC, the Australian Human Rights Commission must also be appropriately resourced and mandated to undertake its specific roles, functions and powers

⁹ Commonwealth, *Parliamentary Debate*, The Senate, 23 November 2010, 36 (Guy Barnett, Senator)

¹⁰ ss 11(1), 31 and 46C *Australian Human Rights Commission Act 1986*

¹¹ As a national human rights institution, the Human Rights Commission must also comply with the Principles relating to the Status of National Institutions (The Paris Principles) which were adopted by United Nations Human Rights Commission General Assembly resolution 48/134 of 20 December 1993 and relate to the status of national human rights institutions.

Appendix 1

Submission of the Federation of Community Legal Centres Victoria to the Inquiry into the Australian Law Reform Commission

See attached Submission of the Federation of Community Legal Centres Victoria to the Inquiry into the Australian Law Reform Commission by Lucinda O'Brien, Policy Officer, dated 17 January 2011.

Senator Guy Barnett

Chair

Legal and Constitutional Affairs – References Committee

By email: legcon.sen@aph.gov.au

17 January 2011

Australian Law Reform Commission (ALRC) Inquiry

Dear Senator Barnett

The Federation of Community Legal Centres welcomes this opportunity to contribute to the Senate Legal and Constitutional Affairs References Committee inquiry into the Australian Law Reform Commission (ALRC).

1. Our engagement with the ALRC

The Federation regularly engages with the ALRC, either directly with respect to relevant inquiries and reviews, or indirectly via the Federation's use of reports prepared by the ALRC.

As one illustration, the ALRC, in association with the New South Wales Law Reform Commission, undertook a comprehensive review of specified family violence laws and legal frameworks to improve the safety of women and children (Family Violence Inquiry), resulting in the final Report, *Family Violence – A National Legal Response* (ALRC 114, 2010).

The Federation, in conjunction with Domestic Violence Victoria, Domestic Violence Resource Centre Victoria and Victorian Women with Disabilities Network, made an extensive submission to the Family Violence Inquiry

This submission will briefly address the present inquiry's first and second terms of reference, drawing where relevant on the Federation's participation in the Family Violence Inquiry.

2. The ALRC's role

The ALRC provides detailed, high quality advice to the Australian Parliament on national law reform issues. Due to its nation-wide scope, the ALRC is a vital counterpart to State law reform bodies. The ALRC's independence distinguishes it from other sources of law reform advice and analysis, such as Government departments, industry bodies, academics and not-for-profit organisations.

Since its establishment in 1975, the ALRC has attained a high public profile and developed expertise in consultation and research strategies. It is an important resource for lawyers, legal educators, students and the general population. By

Level 3
225 Bourke Street
Melbourne
Victoria 3000

Tel: 03-9652 1500
Fax: 03-9654 5204
administration@fclc.org.au
www.communitylaw.org.au

Federation of
Community Legal Centres
(Victoria) Inc
Registration A0013713H
ABN 30 036 539 902

engaging members of the public in law reform debates, the ALRC enriches Australian civil society.

3. Adequacy of staffing and resources

a. Capacity to produce timely, high quality work

We note that the ALRC has experienced 'significant budget reductions' in the last few years, with further reductions anticipated.¹ It has reduced its staffing levels by 20 per cent since 2001, increasing the workload of remaining staff. In its submission, the ALRC states that any further reductions '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.'²

With respect to the Family Violence Inquiry, the Federation was impressed by the speed with which the ALRC covered the key legal issues arising under the 26 relevant legislative regimes.

The Federation is concerned that as a result of funding cuts, the ALRC will lose its capacity to retain expert personnel and to carry out high quality work in a timely fashion.

b. Production of valuable and accessible legal resources

The Federation regularly draws on reports prepared by the ALRC. We found that both the Consultation Paper and the final Report of the Family Violence Inquiry provided comprehensive and accessible overviews of several complex, overlapping legal regimes. These documents are not simply a snapshot of the legal issues at a particular moment but provide an invaluable resource for our ongoing policy and law reform work.

We would be very concerned if the ALRC could not continue to produce material of this depth, breadth and calibre, as in our view there is no other federal entity providing similar resources on these kinds of legal issues.

It was disappointing that bound copies of the final Report were only available on payment of \$80. We understand that this new policy of full cost recovery reflects the present under-resourcing of the ALRC. While the ALRC's reports are available for download via the internet, the resulting documents can be very unwieldy, as in the case of the Family Violence report which ran to 1,500 pages. Like many community organisations, the Federation must make strategic decisions concerning the use of its limited resources. In some instances, the practice of charging for bound ALRC reports may compromise our ability to access and utilise this material.

c. Capacity to monitor implementation

Unlike many other law reform agencies, the ALRC monitors the level of implementation of its recommendations. This is very important, given that the Government is under no statutory obligation to respond to ALRC reports. Budget constraints may reduce the ALRC's capacity to monitor the Government's

¹ Australian Law Reform Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Australian Law Reform Commission – Background Submission*, 26.

² *Ibid* 28.

implementation of necessary law reform.

4. Conclusion

The Federation appreciates the need for efficient use of public resources. However, as stated above, we believe that the ALRC provides significant intangible benefits to the Australian community, as well as direct assistance to the Australian Parliament.

We strongly believe that the ALRC should retain its current funding levels, with future increases in line with increasing fixed costs, such as rent and travel expenses.

We hope that these comments will assist the committee. If you would like to discuss any aspect of this submission, please don't hesitate to contact me or my colleague Chris Atmore on

Sincerely

Lucinda O'Brien

Policy Officer