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Law reform can't just come cheap

**Submission to the Senate Legal and Constitutional
Affairs Committee's Inquiry into the ALRC**

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Peter Dodd, Solicitor

Edward Santow, Chief Executive Officer

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on law reform issues and the ALRC

PIAC has a long history of responding to Australian Law Reform Commission (ALRC) reports and papers and participating in the ALRC consultation process. Recent examples of PIAC's contribution in this way are PIAC's submission in response to the ALRC Consultation Paper into Discovery in Federal Courts and several submissions, at various stages of the consultation process, regarding the ALRC reference on privacy law.

Disclosure

PIAC wishes to declare that its CEO, Edward Santow and co-author of this submission, is a former ALRC employee. A former President of the ALRC, Prof. David Weisbrot, is a member of the PIAC Board. Prof Weisbrot did not contribute to the writing of this submission.

1. Summary

PIAC welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's reference on the Australian Law Reform Commission (ALRC).

PIAC strongly supports the concept of independent law reform commissions advising government and leading the public debate on law reform issues.

This submission highlights the previous success of the ALRC in meeting these objectives but raises concerns that budget cuts to the ALRC, since the late 1990s, have the potential to undermine the effectiveness, and even more critically, the independence of the ALRC.

PIAC is particularly concerned about the effect of budget cuts on the capacity of the ALRC to conduct face-to-face consultations outside the large capital cities and in regional areas. PIAC is also concerned that budget cuts have meant that the ALRC no longer consistently has the capacity to produce initial 'issues papers' as part of its law reform consultation process. These issues are highlighted in the submission.

The submission also highlights the importance of the ALRC maintaining independence, particularly its 'intellectual independence', in the face of budgetary restrictions and in an era of increased accountability of all government authorities.

The submission outlines PIAC's concerns that the ALRC President, Prof. Ros Croucher, is now the only full time senior officer-bearer at the ALRC. PIAC believes the lack of other full-time Commissioners affects the capacity of the ALRC to meet its statutory objectives, particularly with regard to independence and the consultation process.

PIAC also suggests that there should be a statutory obligation for the Commonwealth Government to respond to ALRC recommendations within a reasonable set timeframe.

Finally PIAC also refers the Committee to the recent NSW Law and Justice Foundation Report on community participation in law reform and endorses their strategies to promote participation in law reform set out in their report.

2. The effectiveness of the ALRC

PIAC believes that the ALRC has been very effective in fulfilling its objectives since its inception in the 1970s. PIAC notes that the Attorney General, Mr Robert McClelland, recently described the ALRC as 'Australia's foremost law reform institution'¹

Section 21 of the *Australian Law Reform Commission Act 1996* (Cth) states that the ALRC's objectives are:

- (a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:

¹ Hon Robert McClelland MP, 'Review of the National Classification Scheme' (Media Release 21 December 2010).

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

PIAC, subject to the concerns about reductions in the ALRC's budget allocation, submits that in the years since its inception, the ALRC has been very effective in fulfilling the objectives set out in section 21.

Evidence of the ALRC's effectiveness is the high take-up rate by government of ALRC recommendations. Former ALRC President, Prof. David Weisbrot, noted in 2009 that about 90% of ALRC reports have been recommended for implementation, either partly or substantially (with an equal break up between these two categories). He commented that few equivalent Law Reform Commissions in the world have such a high implementation rate.²

PIAC submits that in its history, the ALRC has more than effectively carried out its objectives under its Act, as set out above.

3. Concerns about reduced budget allocations to the ALRC

PIAC has concerns that since the late 1990s, the funding of the ALRC has been significantly reduced. This has affected the operation of the ALRC in several ways. PIAC is particularly concerned that reduced funding has affected the capacity of the ALRC to consult widely in the community, particularly outside the Sydney/Melbourne/Canberra axis, in the smaller capital cities and in regional Australia.

While previously this was a consistent feature of the ALRC inquiry process, it has not been maintained since the most recent reductions in its budget allocation.

² ABC Radio National, *The Law Report*, 'David Weisbrot steps down as head of Australian Law Reform Commission', 8 December 2009 < <http://abc.net.au/rn/lawreport/stories/2009/2763972.htm> > at 24 January 2011.

The Australian Parliamentary Library commented in 2010:

The 2010 Budget contains significant budget reductions for the Australian Law Reform Commission.

Its budget will be reduced in 2010–11 by \$242 000 with further reductions of \$495 000 per year from 2011–12. The latter reduction represents a cut of about 20% on 2009–10 levels. These reductions will require the ALRC to find additional productivity savings as well as streamline its operations and further develop its online resources.

In 2009–10 the ALRC conducted three inquiries but is only expecting to conduct two in this and subsequent years to 2013–14. There is also an expected reduction in the number of consultation meetings from 180 in 2009–10 to (an estimated) 100 from 2010–11.³

The ALRC Background Submission to the current Inquiry sets out in table form the ALRC appropriations and staffing levels from 2000–01 until a projected 2013–14, highlighting both budget cuts and consequent reductions in staffing levels.⁴ The Background Submission also sets out the savings measures adopted by the ALRC to respond to recent budget cuts.⁵

The terms of reference for this Inquiry require consideration of the 'adequacy of ALRC staffing and resources to meet its (the ALRC's) objectives'. Clearly, if the ALRC had previously operated on a best practice basis on already stretched resources, any further reduction in available resources must detract from its ability to meet its statutory objectives.

The data compiled by the ALRC illustrate PIAC's concern about the impact of recent and longer-term budget reductions on two vital aspects of the ALRC's work. They are firstly the ALRC's capacity to conduct appropriate consultations on references throughout Australia including geographically, by consulting in regional Australia, as well as conducting consultations that reach out to disadvantaged and marginalised members of the Australian community. PIAC is also concerned that budgetary considerations have forced the ALRC to pare back its law reform processes, no longer following its longstanding and successful three stage process of releasing an issues paper (to set the parameters of the inquiry), followed by a discussion paper (inviting stakeholder and public comment on draft 'proposals' for reform) and then a final report. The conflation of this process into only one or two such documents severely curtails the opportunity to canvass a wide range of policy options in any one reference.

³ Pauline Downing, *Budget 2010-11 Legal issues and the Attorney General's portfolio Australian Law Reform Commission –funding*, Parliament of Australia Parliamentary Library (2010) <<http://www.aph.gov.au/library/pubs/RP/BudgetReview2010-11/LawReformComm.htm>> at 1 February 2011

⁴ Australian Law Reform Commission (ALRC) *Background Submission to the Senate Legal and Constitutional Affairs Committee into the ALRC* 23 December 2010, 28-29 <http://www.alrc.gov.au/publications/first-submission-senate-legal-and-constitutional-affairs-committee-inquiry-australian-l> at 2 February 2011

⁵ Ibid 27-29.

3.1 Consultation in Regional Australia and the smaller capital cities

PIAC endorses the sentiment expressed by Roslyn Atkinson in a recent volume of papers on law reform and the work of law reform commissions:

We must accept the challenge to involve citizens in both the reconsideration of areas of the law, and in the process by which we work towards suggested reforms.⁶

PIAC notes that in the past the ALRC has effectively taken up this challenge and has extensively consulted with the Australian public regarding issues that have been referred to the Commission. For example, in the ALRC inquiry on *The Protection of Human Genetic Information* (ALRC 96) the Commission received 316 submissions.⁷ It held 73 stakeholder meetings.⁸ In contrast consultation leading to the latest ALRC Report *Secrecy Laws and Open Government in Australia*, only 35 stakeholder meetings were held.⁹

PIAC believes that this level of consultation, vitally necessary to maintain public support and maximum public participation in law reform, would not be achievable under the 2010-2011 funding levels. PIAC believes that online consultation should not be a substitute for face-to-face consultation, particularly at well-advertised forums, held over a wide spread of geographic locations.

Many people, because of their age, their financial circumstances or because of other factors of disadvantage such as homelessness, have no or restricted access to 'online' resources. Also for commercial and technological reasons, many people in regional and rural areas do not have the same access to Internet services as the larger cities (particularly broadband services).

This point can also be made about the ALRC not producing hard copies of ALRC papers and reports. If a person does not have easy Internet access (and access to affordable printing by downloading often large online documents), then their only access to hard copies of these documents may be through public libraries or through local organisations with limited resources. In NSW, prisoners, who often are directly or indirectly affected by ALRC recommendations, have almost no access to online material for security and other reasons.

The Law and Justice Foundation of NSW, as part of its Access to Justice project, identified people in rural, regional and remote areas as one particular group that faced barriers in participating in the law reform process.¹⁰ The authors of the report stated:

⁶ Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 162.

⁷ Ian Davis, 'Targeted Consultations' in Opeskin and Weisbrot, above n 6, 153-4.

⁸ Brian Opeskin, 'Measuring Success' in Opeskin and Weisbrot above n 6, 215.

⁹ ALRC *Secrecy Laws and Open Government in Australia* ALRC 112 Introduction to the Inquiry <http://www.austlii.edu.au/au/other/alrc/publications/reports/112/1.html#Heading22> at 3 February 2011

¹⁰ Louis Schetzer and Judith Henderson *Access to Justice and Legal Needs, Stage 1: Public Consultations* (2003) 291.

Locating law reform commission inquiries, parliamentary inquiries, and special commissions of inquiry in city locations presents access barriers to people in rural regional and remote areas.¹¹

PIAC notes that the cost of travel represents only 2% of total ALRC expenditure¹² and strongly submits that the ALRC budget should be increased to allow the ALRC to conduct face-to-face consultations in regional areas and all capital cities appropriate to the references it receives from the Commonwealth Government.

PIAC submits that consultation forums are important because they also provide the opportunity to educate the public on current legal and social issues and the background to these issues. The two way communication provided by a face-to-face meeting cannot be totally replicated by online communication, however interactive the different forms of today's social media may be. Online communication should be supplementing active and targeted consultation throughout Australia and with disadvantaged groups, rather than being the primary medium of the ALRC's consultation strategies.

If citizens do not have access to ALRC consultations or ALRC publications, then they will not feel they have any ownership in either the law reform process or any resulting legislative change. This effectively undermines one of the very reasons for establishing bodies like the ALRC in the first instance and means that the challenge as set out by Roslyn Atkinson above cannot be met.

Therefore, the ALRC budget should be supplemented to provide resources so that the ALRC can conduct consultations, including holding consultation forums outside the major capital cities and in regional areas and so that the ALRC can resume providing hard copies of their reports and papers to relevant organisations and libraries.

3.2 The importance of maintaining issues papers as part of the law reform process

PIAC submits that the practice of producing issues papers as the first step of the law reform consultation process should be reintroduced by the ALRC and, if necessary, that the ALRC budget allocation should be increased so that this can occur.

The issues paper stage of the law reform process is a vital part of community participation and engagement with that process. Unless canvassing all of the possible options for reform (or alternatively not introduce reform and maintain the status quo) in particular area of the law are part of the initial law reform process, then a law reform body deprives itself of a wider range of views and opinions on a particular issue. Further, it then risks being seen as elitist, presenting only one position on an issue, where there could be several options available.

Setting out the issues initially, separate from more concrete recommendations, should be an important part of the ALRC's educative role. The initial contact with the public should not be one of 'here is both a problem and, at the same time, and here is our ('the experts') suggested answer

¹¹ Ibid 291.

¹² ALRC (2010) n4 above 28.

to the problem' but rather 'here is a possible problem and this is why government thinks it is a problem'.

By putting out more than one paper on an issue, there also is more chance of attracting public attention to a particular issue warranting law reform.

There is no principled need to 'streamline' the ALRC's inquiry process, except as a cost saving measure. The formal law reform process performed by the ALRC is not designed for providing urgent and/or short-term advice on a legal issue. There are other bodies and authorities that can perform that function. The law reform commission model's strength is that it can provide a measured response to legal issues with maximum public participation in coming to that response, and therefore engendering a level of public ownership of the legislated outcome.

In short, the law reform process at a Commonwealth level in Australia is not in need of 'streamlining'.

4. The Importance of the independence of the ALRC

PIAC believes that the recommendations of this Inquiry should emphasise the importance of maintaining the independence of the ALRC.

Prof. David Weisbrot refers to the importance of 'intellectual independence', which he defines¹³ as the ability to make research findings and to offer recommendations without fear or favour'. However, as pointed out by Peter Hennessy:

dramatic changes in the government sector and in public sector management mean that law reform agencies operate in a very different environment than when they first came into existence in the 1960s and 1970s.¹⁴

Marcia Neave (now Justice Neave of the Victorian Supreme Court) was in 2002 critical, in part, of these changes and how they affected law reform commissions. She referred to the current emphasis on accountability of public sector managers for the performance of the area which they supervise and stated that:

its downside has been an over-emphasis on numerical and mathematical accountability measures and corresponding under-emphasis on more subtle qualitative measures of performance such as intellectual rigour, consistency or social justice¹⁵.

¹³ Quoted in Peter Hennessy, 'Independence and Accountability of Law Reform Agencies' in Opskin and Weisbrot, above n 6, 76.

¹⁴ **Ibid** 75

¹⁵ Marcia Neave *Law Reform in the Age of Managerialism*, Australian Law Reform Agencies Conference (20 June 2002), 3
<<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches/LAW+REFORM+-+Law+Reform+in+the+Age+of+Managerialism+speech>> at 1 February 2011.

She suggests that:

Law reform commissions cannot and should not be sheltered from the demand to show that they do good work at reasonable cost. However we also need to question the application of measurable, numerical performance indicators of the law reform process.¹⁶

PIAC endorses these comments. Clearly, if one looks at the Background Submission of the ALRC, ALRC staff are now struggling to meet their statutory obligations under the *Australian Law Reform Commission Act 1996*. Maintaining independence in this context is going to be difficult for the ALRC.

Of course, PIAC does not suggest that the current or previous Commonwealth Governments have tried improperly to influence ALRC reports or recommendations and therefore threaten the ALRC's 'intellectual independence' by threatening future funding. However, the current tight financial situation makes the effective execution of the ALRC's objectives difficult to achieve.

5. The need for full-time ALRC Commissioners

PIAC notes that the *Financial Framework Legislation Amendment Act 2010* (Cth) introduced a more flexible membership structure for the Commission allowing the composition of the Commission to be enhanced based on the subject matter of referrals to the ALRC.¹⁷ PIAC further notes that the Office of the Deputy President of the ALRC has been vacant for much of the past 10 years¹⁸ and note that this position was abolished by the *Financial Framework Legislation Amendment Act 2010* (Cth).

PIAC endorses the statement by the ALRC in their Background Submission to the Inquiry:

Full-time Commissioners makes (sic) 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.¹⁹

PIAC notes that the ALRC goes on to say 'Part-time Commissioners also contribute in this way.' However, this must be qualified by the necessarily limited capacity of part-time Commissioners to continually contribute to the on-going management of the law reform process. PIAC submits that, with different commissioners for every reference, the ALRC loses the capacity to develop expertise in the law reform process itself, and robs the ALRC of having senior staff with the

¹⁶ Ibid 5.

¹⁷ Australian Law Reform Commission, above n 4, 10.

¹⁸ Ibid, 13.

¹⁹ ALRC above n 4, 12.

appropriate corporate memory and experience necessary to add to the learning experience of the organisation as a whole.

Given the concerns expressed above about the curtailment of the consultation process, especially the reduced capacity of the ALRC to travel to regional Australia and the smaller capital cities, PIAC is concerned that relying on part-time Commissioners, inevitably reduces the capacity of commissioners to have the time to travel to conduct regional consultations.

PIAC is certainly not opposed to part-time commissioners with particular expertise being appointed to assist with large and complex references. However, we submit that this should supplement the ALRC's core operation structure.

6. Statutory Requirement for Government to respond to ALRC Reports

PIAC considers it an anomaly that there is no statutory requirement for Government to respond to ALRC reports. As the Government of the day controls the referral process, it is clearly in the interests of transparency that the Government advises whether or not it intends to respond to the end result of that referral, that is, an ALRC final report. This would seem to be an approach consistent with the Australian Government's recent (2010) *Declaration of Open Government*.²⁰

Whilst there is no recent history of government responses to ALRC reports not being publicly available in one form or another, a statutory requirement of a government response within a reasonable set timeframe, would ensure that decisions not to follow ALRC recommendations would always be subject to public scrutiny. If the response were published on the ALRC website, it would ensure that those who participated in the consultation process and the public in general, had an accessible and comprehensive statement of the Government's response to each ALRC recommendation.

Further, if there were an additional requirement that the Government response be tabled in the Parliament, as is the case with ALRC final reports, this would ensure further transparency. This could be enhanced by a possible parliamentary debate on the relevant issues in the ALRC report and the Government response.

7. NSW Law and Justice Foundation - strategies to promote participation in law reform

The NSW Law and Justice Foundation, as part of the 'Access to Justice and Legal Needs' project, in November 2010 released a report into community participation in law reform.²¹ The specific aims of the report were to investigate: (1) how law reform in New South Wales occurs; (2) what opportunities and constraints there are for public participation in law reform, directly and through representative bodies; (3) what particular constraints there are for the participation of

²⁰ Hon. Lindsay Tanner, *Declaration of Open Government* 16 July 2010
<<http://agimo.govspace.gov.au/2010/07/16/declaration-of-open-government/>> at 31 January 2011.

²¹ Natalia Nheu and Hugh McDonald *By the People, for the People* (2010)

disadvantaged people in law reform and; (4) the implications of these findings for law reform in New South Wales. Particular attention is paid throughout the report to the participation needs of disadvantaged people and civil society organisations (CSOs).

The findings from the study demonstrate a significant gap between the law reform capabilities required for effective participation, and the levels of law reform capability among the general population and many CSOs

On the basis of these findings, the authors of the report propose strategies to promote participation in law reform:

1. Provide the public and stakeholders with adequate time for law reform consultation. Timeframes and timing of law reform consultation should be commensurate with the significance of the issue, its breadth and complexity, as well as the participation needs of stakeholders.
2. Ensure that the information in law reform consultation documents is accessible.
3. Improve public access to information about law reform, including information about opportunities to participate.
4. Enhance the capacity of CSOs to participate and represent their constituencies, particularly disadvantaged communities, in law reform.
5. Ensure that the scope and aims of law reform consultation processes are clear to participants, and that processes match the participation needs of affected stakeholders. Where appropriate, tailor processes in line with the specific needs of stakeholders..²²

PIAC supports these strategies as relevant to all law reform bodies and submits that the Senate Committee should recommend them to the ALRC as general principles for public participation in law reform.

7. Conclusion

PIAC starts from the premise that the ALRC has in the past (and continues to do so in 2011) played an invaluable role in initiating significant law reform in Australia, fulfilling its consultative and educative role along the way. In doing so it has also scrupulously maintained its independence, preparing its reports and recommendations without fear and favour.

However, PIAC remains concerned, in the light of consistent budget cuts to the ALRC since the late 1990s, that the ALRC's capacity to fulfil its statutory objective of conducting Australia wide consultations has already been greatly diminished. PIAC is also concerned that budget cuts together with an otherwise acceptable increase in accountability for all public authorities will, in the future, undermine the independence of the ALRC (or perhaps create a perception of lack of independence, however unfounded).

The immediate solution would be to increase the ALRC budget so that, at least, the ALRC can again prepare issues papers as part of their consultation process and consultations are again able to take place over a wide range of geographic locations.

²² Ibid 'Executive Summary' <<http://www.lawfoundation.net.au/report/lawreform>> at 3 February 2011.

In the long run, strategies should be adopted to ensure that the objectives of the ALRC set out in the *Australian Law Reform Commission Act (1996)* are never able to be not fulfilled because of lack of government funding.

8. Recommendations:

The ALRC budget should be supplemented to provide additional resources so that the ALRC can have the capacity to conduct consultations, including holding consultation forums, outside the major capital cities and in regional areas and so that the ALRC can resume producing hard copies of its reports and papers.

The practice of producing issues papers as the first step of the law reform consultation process should be reintroduced by the ALRC and, if necessary, that the ALRC budget allocation should be increased so that this can occur.

At least one extra full-time Commissioner should be appointed to the ALRC.

There should be a statutory requirement on the government to respond formally to ALRC recommendations within a reasonable set timeframe. The mandated Government response to ALRC recommendations should also be required to be tabled in the Commonwealth Parliament.

The Senate Legal and Constitutional Affairs Committee should recommend the following to the ALRC as general principles for public participation in law reform:

- 1. Provide the public and stakeholders with adequate time for law reform consultation. Timeframes and timing of law reform consultation should be commensurate with the significance of the issue, its breadth and complexity, as well as the participation needs of stakeholders.*
- 2. Ensure that the information in law reform consultation documents is accessible.*
- 3. Improve public access to information about law reform, including information about opportunities to participate.*
- 4. Enhance the capacity of CSOs to participate and represent their constituencies, particularly disadvantaged communities, in law reform.*
- 5. Ensure that the scope and aims of law reform consultation processes are clear to participants, and that processes match the participation needs of affected stakeholders. Where appropriate, tailor processes in line with the specific needs of stakeholders’.*