Submission on the ALRC Inquiry by BS Dawson, Queensland

The ALRC as promoter and defender of the interests of the legal profession.
(or, Why can't we have more inquisitorial justice?)
"Anyone who has ever imagined trying to take a nice meaty bone away from a pack of Dobermans will have an idea of the difficulty of getting lawyers to accede to meaningful reform"
"What They Didn't Teach me at Yale Law School" Mark McCormack (Fontana Paperbacks 1988) page 205
Who runs law reform commissions? Lawyers.

Readers of section 21 of the Australian Law Reform Commission Act **http://www.austlii.edu.au/au/legis/cth/consol_act/alrca1996348/s21.html** might well ask where politics stops and 'law reform' begins..

Subsection 1(a) says that the commission's functions include investigating (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;

The ALRC would probably reply that its duty is just to advise the government, but on various subjects it is in charge of giving the advice, and if it is the government's principal source of advice, then it is going to be influential in guiding legislative outcomes.

'Law reform' is actually policy reform. 'Law reform' is about politics. (Politics in turn is about 'who gets what' (see Harold Lasswell)) Or perhaps one should say that 'law reform' at the 'law reform commission' level is the continuation of politics by other means. Any claim by the ALRC that 'we just look at the legal aspects of reform' should be regarded with suspicion. The difference between a legal issue and a factual issue and a politicial issue is often difficult to discern.

'Law reform' bodies do exist, and they are given the task of discussing and recommending changes to various areas of the law. It seems to be assumed that 'law reform' bodies do not engage in politics, and that, for example, the ALRC looks at all sides of everything in a neutral way, and comes out with

recommendations for policy change, which are more deserving of acceptance than policy changes arrived at by some other process

Law reform bodies are, in practice controlled by lawyers, because ultimately the lawyers on those bodies will (spuriously) claim unique knowledge of the 'legal issues' of 'law reform' and that, therefore, their opinions should prevail. The problem is that lawyers bring to the table an inability and unwillingness to think outside the legal square.
"...the internalisation of concepts of how things should be, which takes place via formal legal education ....has stymied the ability of components of the justice system to change the system from within. The concept of the internal aspects of rules and procedures was advanced by Professor Hart, who claimed that every rule or practise has internal and external elements, and that the internal element of a rule or procedure consists of the critical reflective attitude shared by the group members (in this case the legal profession) towards the conduct"
See "Kow Towing to the Twin Gods of Time and Money: The Guilty Plea Discount in Sentencing*
Fiona de Londras BCL, LL.M (NUI) (2004) 14(1) Irish Criminal Law Journal
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=906987

All government institutions tend to succumb to overly advancing the self interest of those who run them, and law reform bodies are no exception. Lawyers connected to the ALRC fraternize with lawyers in public and private practice, and just as judges favour the interests of the legal profession in what they do, so to can one expect lawyers who are connected to the law reform process to do the same thing.

There is no wide ranging research yet on members of law reform commissions being biased in favour of the interests of the legal profession, and if there was, one couldn't cite it for fear of defamation writs. However, if US judges exhibit such bias, then it follows that Australian lawyers in law reform commissions will do so too.

Anyone who doubts that judges look after the interests of the legal profession should read learned articles (which explain exactly what goes on) by (very high level) US judge Dennis Jacobs, and US law professor Benjamin Barton.

The latter will be coming out with an entire book entitled 'The Lawyer Judge Bias…' early in the New Year. Here is a summary:

Virtually all American judges are former lawyers. This book argues that these lawyer-judges instinctively favor the legal profession in their decisions and that this bias has far-reaching and deleterious effects on American law. There are many reasons for this bias, some obvious and some subtle. Fundamentally, it occurs because - regardless of political affiliation, race, or gender - every American judge shares a single characteristic: a career as a lawyer. This shared background results in the lawyer-judge bias. The book begins with a theoretical explanation of why judges naturally favor the interests of the legal profession and follows with case law examples from diverse areas, including legal ethics, criminal procedure, constitutional law, torts, evidence, and the business of law.

Lawyers, however, do not bark and snarl like dobermans. They are far too clever for that.
They know that Australia needs to transition from its adversarial litigation systems in its principal courts : Magistrates, District and Supreme. They need to become inquisitorial. That has been done for various tribunals, but usually only because lawyers can't figure out how to make much money out of the areas of law that they cover. However, truth seeking, judge dominated, lawyer disempowering, cheap quick and efficient inquisitorial justice is the last thing lawyers want to see in the 'profitable' courts.

To prove all of this, one need only look to what happened when the ALRC was asked whether Australia would be better off with an inquisitorial civil justice system in its federal courts. Obviously Australia should, but that is not in the legal profession's interest, so somehow the ALRC needed to engage in some fast footwork. So this is what it happened.

The Federal Attorney General asked the Australian Law Reform Commission in 1995 to conduct a "Review of the adversarial system of litigation" which would inquire into and report on *:"(a) the advantages and disadvantages of the present adversarial system"* (that was listed as the number one issue, and was therefore to be the focus of the review) . What I have quoted was the TITLE of the review : "Review of the adversarial system of litigation" The Commission came back years later in 1999 with a 500 page "Discussion Paper" which said : *"In the Commission's view there is limited utility in simply elaborating and comparing the advantages and*

disadvantages of the present adversarial system...." (ALRC Discussion Paper 62: Review of the Federal Civil Justice System, at para 2.30) and thus dumped the main job it had been told to do. It never even listed advantages and disadvantages. Note that the Commission had also by then dumped 'adversarial' from the title of the review, changing it by the time of the discussion paper to 'Review of the Federal Civil Justice System'. By the time of the final report it changed it again, to "Managing Justice" which is most misleading, because it was implied that the judges manage litigation. If there is one thing our judges do NOT do, it is manage litigation. The lawyers do the managing (although the judges do a *bit* more organising than they used to) 'Managing justice' is what *inquisitorial* judges do. The intellectual dishonesty is staggering. The ALRC is staffed by law professors and the like, who, if one of their students responded to the main question in a law exam in the ways they were doing, would have immediately delivered a failing grade with the curt comment "you have failed to answer the question". The members of the ALRC in my opinion should have been fired, yet the report cost a fortune.

The switch in the title was pure "Yes Minister" stuff
"I explained that we are calling the White paper 'Open Government' because you always dispose of the difficult bit in the title. It does less harm there than on the statute books"
Sir Humphrey Appleby, Yes Minister (See Courier Mail, Brisbane, 14/8/2001 page 11

In the report, the issue of whether an inquisitorial judge run system would be better at finding out the truth was, incredibly, relegated to two footnotes on one page of the final "huge book" which was the 700 page report (Page 92, footnotes 186 and 187 taking up about 30 lines on that page) . In a gigantic cop out, the ALRC quoted one source from 25 years ago where it was said: *"The argument as to whether the truth is best obtained by the adversary system or by something more closely approximating to the civil procedure adopted on the Continent is of course incapable of being resolved: R Eggleston `What is wrong with the adversary system?' (1975) 49 Australian Law Journal 428, 433."* This was outrageous. The ALRC is a research body. Its members are paid to research that sort of thing, and this was the big thing that cried out for an answer. They should have gone to the retired Chief Justice for a start, and asked why he thought the inquisitorial system was better at finding out the truth.

I say that because in 1999 a retired Chief Justice of Australia compared the adversarial and inquisitorial systems and said:
"....Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties. Whether European courts are effective in investigating the truth and actually finding out what is the truth is a vexed question ....Although there are those who assert that the European system is not notably successful on this score, it is probably rather more successful in this respect than the adversarial system."
Sir Anthony Mason (Chief Justice of Australia from 1987 to 1995 speaking on 'The future of adversarial justice' Paper 17th Annual AIJA Conference Adelaide 7 August 1999 (Australian Institute of Judicial Management : is on the internet)

The main excuse for not going inquisitorial would be cost, and as far as the comparative costs to the community of adversarial and inquisitorial systems) the ALRC's performance was, in my opinion, even worse, since it had discovered material which indicated an inquisitorial system might be cheaper for the community (even if it did make many lawyers redundant) In the *discussion paper* issued in the year before the final report, the ALRC (almost accidentally, while discussing administrative tribunals) wandered into that "comparative cost" area very briefly, (only on the one page) quoting these few lines:
"Although an inquisitorial approach is not going to save courts and tribunals money, it should reduce the amount of expenditure on litigation by the community as a whole, but that is hard to establish...."
(Para 12.148 of the Discussion Paper 62, quoting from J Dwyer, "Fair Play the Inquisitorial Way" 1997 5 Australian Journal of Administrative Law, at page 32.)
As I see it, that little quote (from a very respectable source) opened a very worrying door for our legal profession (suggesting as it does that the community is forking out far too much money to lawyers as a result of our having a 'lawyer run' system…that being the essential quality of 'adversarialism') and I was amazed to find that by the time of the final (bigger) report, that **the quote had been deleted.**
There wasn't anything else in the entire report on comparative cost.

Let's have a new ALRC. One with no lawyers on it. Independent practical people instead

Engineers would do well, I think. Can you imagine a lawyer trying to justify the adversarial system to a room full of engineers ?