

## CHAPTER 2

### The ALRC's role, structure and reputation

#### Australian Law Reform Commission (ALRC)

2.1 The ALRC was established in 1975. It is a statutory agency operating under the *Australian Law Reform Commission Act 1996* (ALRC Act). This chapter provides background information in relation to the legislation establishing the ALRC, and the ALRC's role and functions.

#### *ALRC's role*

2.2 The Attorney-General may refer a matter to the ALRC, either on the Attorney-General's own initiative or at the ALRC's suggestion.<sup>1</sup>

2.3 Section 21 of the ALRC Act sets out the functions of the ALRC in respect of matters referred to it by the Attorney-General. Those functions include:

- (a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:
  - (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; and
- (e) to consider proposals for complementary Commonwealth, state and territory laws about those matters.

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1 *Australian Law Reform Commission Act 1996* (ALRC Act), section 20.

### ***ALRC's current structure***

2.4 Under the ALRC Act, the ALRC is composed of a President, a Deputy President and at least four other members, appointed by the Governor-General. While the President and Deputy President must be full-time members, other members may be either full-time or part-time members. A vacancy in the membership does not invalidate the ALRC's actions.<sup>2</sup>

2.5 The ALRC Act provides that members of the ALRC must meet certain application criteria, namely the person must be:

- (a) a judge or justice of a Federal Court, or of the Supreme Court of a state or territory; or
- (b) is, and has been for at least five years, a legal practitioner of the High Court, or of the Supreme Court of a state or territory; or
- (c) a graduate in law of a university, with experience as a member of the academic staff of a tertiary educational institution; or
- (d) in the Governor-General's opinion, suitable for appointment because of the person's special qualifications, training or experience.<sup>3</sup>

2.6 Members may be appointed for a period not exceeding seven years, and are eligible for reappointment.<sup>4</sup> Part-time commissioners may be appointed for a period or for a specific inquiry.<sup>5</sup>

### ***President***

2.7 The ALRC's Background Submission to this inquiry provided the following summary of the President's position:

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.<sup>6</sup>

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2 See ALRC Act, sections 6-8.

3 ALRC Act, subsection 7(2).

4 ALRC Act, section 9.

5 Australian Law Reform Commission (ALRC), *Submission 2*, p. 12.

6 *Submission 2*, p. 11.

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## Commissioners

2.8 The ALRC currently has one full-time commissioner – the President, Professor Rosalind Croucher – who was appointed on 14 December 2009 for a five-year term. The office of Deputy President has been vacant for much of the last ten years, and was last occupied from December 2005 to September 2006. There are four part-time commissioners, all of whom are judges of the Federal Court of Australia.<sup>7</sup>

2.9 In its submission, the ALRC set out the 'distinct but complementary roles' of full-time and part-time members in terms of their contribution to inquiries:

...the standing practice is that references are managed by individual, full-time Commissioners as Commissioners in charge of particular inquiries...

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...

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.

...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.<sup>8</sup>

## Board of Management

2.10 The ALRC is a Commonwealth authority subject to the accountability and governance arrangements in the *Commonwealth Authorities and Companies Act 1997* (CAC Act).<sup>9</sup>

2.11 The ALRC Act provides for a Board of Management which must manage the ALRC and ensure that it performs its functions effectively and economically. The Board consists of the President, Deputy President and other full-time members. The

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7 ALRC, *Submission 2*, pp 11 and 13.

8 ALRC, *Submission 2*, pp 11-12.

9 Attorney-General's Department (Department), *Submission 15*, p. 3.

President is the Chief Executive Officer (CEO) and is, under the Board, responsible for the management of the ALRC.<sup>10</sup>

2.12 Currently the President, being the only full-time member of the ALRC, is the only Board member.

### ***ALRC's structure after 1 July 2011***

2.13 The *Financial Framework Legislation Amendment Act 2010* (FFLA Act) made various changes to the ALRC's structure, which will take effect from 1 July 2011. The main purpose of the changes is to move the ALRC to governance arrangements consistent with government policy on statutory bodies, as set out in the *Governance Arrangements for Australian Government Bodies*. This policy was issued in 2005 following the *Review of Corporate Governance of Statutory Authorities and Office Holders* (Uhrig Review).

2.14 The changes will move the ALRC from operating under the CAC Act to the *Financial Management and Accountability Act 1997* (FMA Act), by replacing the existing Board of Management with an executive management model with the President as CEO. The Attorney-General will also be able 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 functions; and
- give written directions to the President with respect to the administration of the ALRC.<sup>11</sup>

2.15 Other changes include:

- removing the office of Deputy President;
- limiting the number of members of the ALRC to seven (that is, the President and not more than six other members); and
- allowing the Attorney-General to appoint part-time commissioners (this is now done by the Governor-General).<sup>12</sup>

### ***Conduct of inquiries and other work***

2.16 The ALRC conducts extensive research and consultation to support any recommendations that it ultimately makes. It typically produces consultation documents as part of the inquiry process. According to submissions, thorough

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10 ALRC Act, sections 27-29, and 34.

11 Revised Explanatory Memorandum for the Financial Framework Legislation Amendment Bill 2010, pp 15-16.

12 Department, *Submission 15*, p. 5; ALRC, *Submission 2*, pp 15-17.

consultation is a key factor in the high public standing of the ALRC's work.<sup>13</sup> For example, in the privacy inquiry (reported August 2008), the ALRC produced two issues papers, a discussion paper and a final report, received 585 submissions and held 250 face-to-face meetings.<sup>14</sup>

2.17 Beyond its immediate inquiry-related work, the ALRC contributes to broader legal policy development and community engagement with government through:

- public outreach activities;
- collaboration with other Australian and overseas law reform bodies;
- monitoring the implementation of recommendations; and
- acting as a clearinghouse for information relating to law reform in Australia.<sup>15</sup>

### ***ALRC's reputation***

2.18 The ALRC's work is widely respected and its recommendations have a high rate of take-up by government. To 30 June 2010, the ALRC has produced 77 reference-related reports.

2.19 The majority of submissions and evidence provided to the committee praised the work of the ALRC and the manner in which it conducts inquiries. For example, the Law Council of Australia summarised the value of the ALRC's work:

The Law Council considers that the ALRC provides an outstanding contribution to Federal law reform in Australia. The ALRC consistently conducts comprehensive inquiries and produces informative, well researched and well written reports. The ALRC's recommendations to government are generally sound and reasonably appropriate to the issues identified by the inquiry.<sup>16</sup>

2.20 Witnesses outlined to the committee the high regard in which the ALRC inquiry process is held. For example, Mr Edward Santow, CEO of the Public Interest Advocacy Centre (PIAC), explained to the committee:

I would say that we do not always agree with the ALRC. PIAC is a human rights oriented organisation. We do not feel that we get an easy ride with the ALRC. Indeed, while we agree with many of its recommendations, there are some that we very strongly disagree with. Nevertheless, we have long respected the integrity and processes that the ALRC carries out...<sup>17</sup>

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13 See for example: Federation of Community Legal Centres (Vic), *Submission 4*, p. 2; Law Council of Australia, *Submission 5*, p. 7; Public Interest Advocacy Centre, *Submission 21*, p. 6.

14 ALRC, *Submission 2*, pp 32-33.

15 ALRC, *Submission 2*, p. 9.

16 *Submission 5*, p. 4.

17 *Committee Hansard*, 11 February 2011, p. 21.

2.21 Submissions also highlighted the quality of ALRC publications, noting that they are often authoritative statements on the law in specific areas. In particular, Professor Bryan Horrigan provided the committee with an extensively referenced table setting out the High Court citations of ALRC publications for the period 2007-2010.<sup>18</sup> The submission of the Northern Territory Law Reform Committee (NTLRC) provided an example of the value of the ALRC's work to that small, voluntary organisation:

...the [NTLRC] places considerable reliance upon the work undertaken by larger, funded commissions, particularly the Australian Law Reform Commission (ALRC). The [NTLRC] has, in the past and for the foreseeable future, considered and adopted many recommendations contained in ALRC reports for the benefit of the Northern Territory. These reports are extensive and well considered, enabling the [NTLRC] to rely upon this work and apply it in the context of the Northern Territory.

A significant example is the comprehensive ALRC Uniform Evidence Law Report (ALRC 102, 2005), which [the NTLRC] believes will ultimately be adopted by all States and Territories in Australia. Indeed the Northern Territory has recently released an exposure draft Evidence (National Uniform Legislation) Bill 2010, which is based on the model bill produced by the Standing Committee of Attorneys-General following the tabling of ALRC 102. It is anticipated that the Bill will be introduced into the Northern Territory Legislative Assembly during 2011.<sup>19</sup>

2.22 Internationally, the ALRC is also held in high regard. The New Zealand Law Commission (NZLC) stated in its submission that Australia is one of the leaders in the law reform movement in the British Commonwealth and the work of the ALRC is of admirable quality.<sup>20</sup>

2.23 A number of submissions also referred to the high rate of implementation of ALRC recommendations.<sup>21</sup> According to the ALRC's 2009-10 Annual Report, 90 per cent of ALRC reports have been substantially or partially implemented.<sup>22</sup> According to the ALRC, this makes the ALRC 'one of the most effective and influential agents for law reform in Australia'.<sup>23</sup>

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18 *Submission 9*, pp 41-48. See also Federal Court of Australia, *Submission 22*, p. 2, which states that the Federal Court fully accepts that the ALRC's reports may constitute appropriate sources for reference; and Macquarie Law School, *Submission 8*, p. 2 which states that the ALRC's final reports are frequently referenced in student and academic work, as well as being used as recommended course materials at Macquarie University.

19 *Submission 23*, p. 1

20 *Submission 12*, p. 5.

21 See, for example, Law Council of Australia, *Submission 5*, pp 6-7; Office of the Australian Information Commissioner, *Submission 7*, p. 3; Macquarie Law School, *Submission 8*, p. 1.

22 Australian Law Reform Commission, *Annual Report 2009-10*, pp 25-27.

23 *Submission 2*, p. 6; ALRC 2009-10 Annual Report, p. 26.

2.24 However, the work of the ALRC goes beyond its inquiry function. The ALRC also performs important education and outreach work. As the NSW Law Reform Commission noted in its submission, the ALRC has played an important role in providing support for Pacific regional law reform bodies.<sup>24</sup>

2.25 The Attorney-General's Department submission highlighted the important contribution of the ALRC, and noted that the ALRC has the government's support:

The Commission has conducted over 100 thoroughly researched and comprehensive inquiries. Their highly regarded reports and recommendations have made a large contribution to the law reform landscape to Australia. The Department notes that the Attorney-General, the Hon Robert McClelland MP, has stated the Government's strong support for the Commission's work and its history of demonstrating insight, providing expert analysis and having a practical grasp of law reform.<sup>25</sup>

2.26 However, the committee also received a number of submissions which were critical of the work of the ALRC. For example, the Non-Custodial Parents Party (NCP) stated in its submission that it did not support the view that the ALRC is making a positive contribution to Australian law. Citing two recent inquiries by the ALRC, *Family Violence: A National Legal Response* and *Secrecy Laws and Open Government in Australia*, the NCP's submission stated that the concerns it raised during those inquiries were 'simply noted but not acted upon' or 'glossed over'.<sup>26</sup>

2.27 The committee notes these criticisms. However, the committee agrees with the comments of Professor Rosalind Croucher, President of the ALRC, that it is a 'given...that the ALRC has a high reputation for producing high quality, well researched and well documented reports [and] that what [the ALRC has] done has been done extraordinarily well'.<sup>27</sup>

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24 *Submission 3*, p. 2.

25 *Submission 15*, p. 1.

26 *Submission 20*, pp 1-2. See also Mr Brett Dawson, *Submission 1*; and Men's Rights Agency, *Submission 18*.

27 *Committee Hansard*, 11 February 2011, p. 48.

