CHAPTER 3

Changes to the ALRC's governance arrangements

Introduction

3.1 The majority of submissions and evidence to the inquiry highlighted the excellent work that the ALRC (or commission) does. Despite the high regard in which the ALRC is held nationally and internationally, submitters and witnesses expressed grave concerns as to whether the ALRC will have the capacity to continue its role as a leading law reform agency.

3.2 These concerns focused on two main areas: the changes to the ALRC's governance arrangements from 1 July 2011 as a result of the *Financial Framework Legislation Amendment Act 2010* (FFLA Act); and the impacts of the recent budget cuts on the operations of the ALRC.

3.3 This chapter discusses the changes in the structure of the ALRC which will come into effect on 1 July 2011 as a result of the FFLA Act, and considers some of the concerns raised throughout the course of the inquiry about those changes. The impacts of the budget cuts are discussed in Chapters 4 and 5.

Changes to the ALRC's governance arrangements

3.4 As set out in Chapter 2, the main purpose of the amendments to the ALRC contained in the FFLA Act is to move the ALRC from governance arrangements under the *Commonwealth Authorities and Companies Act 1997* (CAC Act) to become a prescribed agency under the *Financial Management and Accountability Act 1997* (FMA Act) and a statutory agency for the purposes of the *Public Service Act 1999*. The Revised Explanatory Memorandum for the FFLA Act notes that the transfer of governance arrangements for the ALRC is consistent with the Australian Government's 2005 *Governance Arrangements for Australian Government Bodies* policy.[1] This policy was developed following the *Review of Corporate Governance of Statutory Authorities and Office Holders*, undertaken by Mr John Uhrig AO, and released in 2004 (Uhrig Review).[2]

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1 Revised Explanatory Memorandum, *Financial Framework Legislation Amendment Bill 2010*, pp 8-9.

2 For more information, see Department of Finance and Deregulation, *Review of Corporate Governance of Statutory Authorities and Office Holders* at: http://www.finance.gov.au/financial-framework/governance/review_corporate_governance.html, accessed 2 March 2011.

3.5 Some of the changes to the ALRC which will take place from 1 July 2011 include:

- the abolition of the position of Deputy President of the ALRC;[3]
- provision for the Attorney-General to appoint part-time Commissioners;[4]
- provision for the Attorney-General to establish, appoint members to and remove members from, and dissolve, a management advisory committee to advise the President on issues relevant to the proper discharge of the functions of the ALRC;[5]
- replacing the existing Board of Management structure of the ALRC with an executive management model, with the President as the CEO.[6]

3.6 This change in governance arrangements was criticised in submissions and evidence to the inquiry. The criticisms relate to the executive management structure not being an appropriate model for the ALRC, and the manner in which the FFLA Act changes have been introduced. These issues are discussed below.

Application of the executive management structure to the ALRC

3.7 During the course of the inquiry, the Attorney-General's Department (Department) advised that the changes to the ALRC's governance arrangements implemented by the FFLA Act resulted from the Uhrig Review and had bipartisan support. Further, the changes were described as 'fairly uncontroversial in relation to bodies of the sort of the ALRC'. An officer from the Department advised the committee that it was coincidental that the changes in the ALRC's governance structure coincided with the budget cuts to the ALRC.[7]

3.8 Despite the Department's evidence that the changes to the ALRC introduced through the FFLA Act are uncontroversial, during the inquiry the committee was made aware of significant concerns by some stakeholders about the application of the FMA Act structures to the ALRC.

3.9 The committee notes that, in response to a question on notice, the Department provided a timeline of consultation with the ALRC on the legislative amendments contained in the FFLA Act. Even in the initial stages of discussions on those legislative changes, concerns were expressed by Professor David Weisbrot, then President of the ALRC, about the impact of the proposed governance changes on the

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3 *Financial Framework Legislation Amendment Act 2010* (FFLA Act), Schedule 2, item 11.

4 FFLA Act, Schedule 2, item 13.

5 FFLA Act, Schedule 2, item 33.

6 FFLA Act, Schedule 2, item 34.

7 *Committee Hansard*, 11 February 2011, pp 100-1.

ALRC.[8] At the committee's second hearing, Professor Weisbrot summarised his concerns in that regard:

> In terms of the Uhrig review, that was conducted to find good governance models for very large, parastate corporations – like Medicare, the [National Health and Medical Research Council], the [Australian Broadcasting Corporation] – bodies with multi hundred-million dollar budgets and thousands of staff. I think it is a poor governance model for a very small organisation like the ALRC and especially for one that operates in the public domain...
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> I think the new model diminishes the real and perceived independence of the ALRC. It provides a much less effective governance model. It provides a number of serious financial inflexibilities in relation to staffing, the maintenance of reserves and good budgeting practices and it imports a lot of extra compliance work, which will have to come at the expense of reference work. So I do not think it is a good model, and the changes that were made to the ALRC Act in effect to bring it in I think is not a good change. Not every reform is a good reform.[9]

3.10 Professor Weisbrot also acknowledged that his preferred option had been to 'drag [his] feet as strongly as possible' because he thought the changes were a 'very bad thing for the commission'.[10]

3.11 To this end, Professor Weisbrot indicated in his evidence that he understood that the officers from the Department of Finance and Deregulation did not disagree with his concerns:

> They did not disagree with any of those concerns I had about financial inflexibilities, staffing problems or management problems. As you will see from my confirming letter back to the department of finance, basically what they said was that they would find a 'patch' or a 'fix' or an exception in each of these cases, which led to the rather strange conclusion, as I said at the time, that they were determined to 'Uhrig the ALRC'. In fact, it was going to be a Clayton's Uhrig, because they were going to find an exception for the ALRC in each case. It did not seem to me to be a sensible exercise to pursue, but I understood that they were under pressure to fulfil a broad mandate that every entity would come under this Uhrig model.
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> ...I was disappointed at the outcome that a lot of those exceptions, caveats and special pleading things that were supposed to be done for the ALRC

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8 Attorney-General's Department (Department), answers to questions on notice, received 25 February 2011 (Letter from Professor David Weisbrot, President of the Australian Law Reform Commission (ALRC), to Mr Marc Mowbray-d'Arbela, Assistant Secretary, Legislative Review Branch, Financial Management Group, Department of Finance and Deregulation, dated 18 November 2008).

9 *Committee Hansard*, 3 March 2011, p. 8.

10 *Committee Hansard*, 3 March 2011, p. 9.

> seem to have fallen by the wayside. All of those concerns I had actually came to fruition in the new legislation.[11]

3.12 One of the potential impacts of the ALRC's governance changes highlighted to the committee is that the ALRC would be subject to increased control by the Attorney-General. For example, the Rule of Law Institute of Australia (RoLIA) noted the following changes as potentially compromising the independence of the ALRC:

- the powers of the Attorney-General in relation to the dissolution of the management advisory committee;
- the power of the Attorney-General to appoint part-time Commissioners; and
- the provision that the CEO of the ALRC must act in accordance with any policies determined, and comply with any directions given, in writing by the Attorney-General.[12]

3.13 In its discussion of the proposed governance changes, the ALRC's submission noted that the Revised Explanatory Memorandum addresses the issue of the independence of the ALRC and the role of the management advisory committee:

> The management advisory committee will not possess executive powers or decision-making authority and may not compromise the intellectual independence or impartiality of the [ALRC]. The intent of this provision is that the management advisory committee will provide support for the President on the management of the [ALRC] in a non-binding manner, within a relationship where the committee is subordinate to the President. The [ALRC] will continue to report to the Attorney-General on the results of any reviews and to include in those reports, any recommendations it may wish to make...Additionally, the President of the [ALRC] may decide matters about the management advisory committee that are not provided for in the ALRC Act, such as the timing and conduct of meetings.[13]

3.14 Despite the explanation in the Revised Explanatory Memorandum, RoLIA stated that the relevant provision is still an extension of executive control over the ALRC.[14]

3.15 In evidence to the committee, Professor Croucher, President of the ALRC, stated that during consultations on the FFLA Act she had expressed concerns in relation to the advisory board. She also noted that the role of the board will need to be

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11 *Committee Hansard*, 3 March 2011, p. 11.

12 *Submission 14*, p. 12. See also Mr Bill Rowlings, Civil Liberties Australia, *Committee Hansard*, 11 February 2011, p. 14.

13 Revised Explanatory Memorandum, *Financial Framework Legislation Amendment Bill 2010*, p. 17.

14 *Submission 14*, p. 12.

clearly managed so that it 'does not in any way, shape or form jeopardise the perception of the ALRC's independence'.[15]

3.16 When questioned by the committee in the course of the hearings as to the ability of the ALRC to maintain its independence after 1 July 2011, Professor Croucher stated:

> I am concerned that it will require confident managing to preserve the perception of the independence of the ALRC...I am confident that, in the established processes of the ALRC, as I have experienced and observed them over many years, that there is capacity to manage that. There is a lot of goodwill there to make sure that it does happen. But it could possibly be perceived as impinging upon independence. It will need a fairly confident hand to ensure that it does not do that.[16]

3.17 Aside from the content of the changes in the FFLA Act, a specific area of concern raised with the committee is the apparent lack of scrutiny over the amendments contained in the FFLA Act. RoLIA expressed the opinion that the FFLA Act was not subjected to adequate scrutiny when it was considered by the Parliament, particularly in light of the significant changes that it made to the ALRC:

> One would have expected these changes to have occasioned heated debate in parliament, but that was not the case. Not a single member of the House of Representatives, nor any senator, commented on the changes to the ALRC in the second reading debate. There was no opposition to the amendments. Maybe that was because the name of the bill, the Financial Framework Legislation Amendment Bill 2010, gave no indication of the dramatic changes proposed to the commission structure or because the proposed changes were buried in the text of the bill and within an explanatory memorandum over 40 pages long. Maybe it was because the explanatory memorandum glossed over the changes by saying they were necessary to achieve greater flexibility. No doubt parliamentarians are very busy during sittings of parliament and the changes to the commission's structure may have been overlooked. That is unfortunate but unavoidable when so many thousands of pages of legislation are proposed and passed every year.[17]

3.18 Professor Weisbrot also commented that he was misled by the title of the FFLA Act and did not realise the content of the legislation:

> I am embarrassed to say that I was unaware of it until this inquiry brought it to light, and there are very few closer followers of parliamentary process than myself, other than members of parliament and their staff. I think I was misled by the title and did not realise it was in the works. I did not see anything on the front page of the ALRC's website that alerted me to it. It

15 *Committee Hansard*, 11 February 2011, p. 73.

16 *Committee Hansard*, 11 February 2011, p. 74.

17 *Committee Hansard*, 11 February 2011, pp 30-1.

> was only this Senate inquiry that alerted me to the fact that this had happened…[18]

3.19 The committee put to the Department these criticisms, particularly that the changes to the ALRC introduced by the FFLA Act were contained in the 'fine print' of the legislation. Officers of the Department reiterated on a number of occasions that the changes to the ALRC's governance arrangements brought in by the FFLA Act have been foreshadowed for many years as part of the recommendations of the Uhrig Review and, further, that the changes had bipartisan support.[19]

3.20 To this end, the committee is also cognisant of the evidence of Professor Croucher, who noted that the changes had been foreshadowed since 2003; however, the form in which the changes are expressed causes her some concern.[20]

Beale Review

3.21 In the course of consideration of the changes to the ALRC's governance arrangements, the committee was also presented with evidence in relation to another matter, a review of the Department by Mr Roger Beale AO in 2008 (Beale Review), commissioned by the Secretary of the Department, which also made recommendations in relation to the ALRC.

3.22 Professor Weisbrot detailed in his submission a meeting he had with the Secretary of the Department in 2009, at which the Secretary referred to the existence of a review of the ALRC in relation to which Professor Weisbrot was not aware and had not been interviewed. Further, Professor Weisbrot has never seen the final report or recommendations from that review:

> Not long after taking up his position of Secretary of the Attorney-General's Department, Mr Roger Wilkins paid me the courtesy of a brief 'meet and greet'. Curiously, Mr Wilkins said that he had previously commissioned a review, which indicated to him that the ALRC was an unaffordable 'Rolls Royce luxury operation' that should be wound up, or perhaps rolled back into the Department – but Mr Wilkins reassured me that he was not proposing to accept that advice.
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> I was quite perplexed, as I had not heard of any review being conducted in relation to the ALRC; had not been asked to provide any information for such a review; was never interviewed in relation to such a review; and was never shown any draft for comment or correction, nor a copy of the final report or its recommendations. (That remains the case to this day.)[21]

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18 *Committee Hansard*, 3 March 2011, p. 9.

19 *Committee Hansard*, 11 February 2011, pp 92, 95 and 101.

20 *Committee Hansard*, 11 February 2011, p. 74.

21 *Submission 16*, p. 4.

3.23 During the committee's inquiry, the Secretary of the Department, Mr Roger Wilkins AO, advised that the review to which Professor Weisbrot was referring was the Beale Review – a review of the Department that the Secretary had commissioned. Mr Wilkins described the Beale Review as a report about the structural changes that may be needed within the Department, and that '[i]n passing it made some mention about the Australian Law Reform Commission' but '[i]t was hardly a central to that report'.[22]

3.24 Mr Wilkins quoted from part of the Beale Review, headed 'Enlivening Law Reform', which refers to the ALRC (and was tabled by the Department at the committee's first hearing):

> The [Beale Review] has been surprised by the number of comments that has been made to it about the slowness, complexity and cost of the ALRC processes. It has apparently been difficult to convince governments in recent years of the merit of referrals to the ALRC. When referrals are given the work done is of outstanding quality but slow to produce, reflective of an extended and extensive consultation process and often not easy to digest. The [Beale Review] was told that reports tend to be long and not particularly user friendly for a policy-making audience.
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> ...If the Secretary wishes to take a strong leadership role in these areas it would be appropriate to bring them into the corporate centre …
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> At the very least, it has been suggested, [the] ALRC should be given some crisper references, with tighter timelines and strong guidance on the need for producing its reports in a form that is accessible and useful for those who are vested with the responsibility for determining whether and if so how they should be actioned.
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> Others have suggested that a bolder solution would be to replace the ALRC as a standing independent statutory authority with permanent members and a separate staff with a principally part time statutory advisory panel – say the Australian Law Reform Council – with a charter to advise on fruitful areas for law reform, a slim secretariat and a research budget – akin perhaps to the Administrative Review Council. This would free a considerable budget…which could be used flexibly to advance the Government's law reform objectives...
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> Because of the constraints of time and budget, the [Beale Review] has consulted neither with the ALRC, nor with external stakeholders. Nor has it examined ALRC reports and the action taken on them. However, there is at least a prima facie case that an alternative approach is worth examining.[23]

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22 *Committee Hansard*, 11 February 2011, pp 92-93.

23 *Committee Hansard*, 11 February 2011, pp 93-94. This section of the Beale Review is available on the committee's website at: http://www.aph.gov.au/senate/committee/legcon_ctte/law_reform_commission/submissions.htm.

3.25 In both evidence and in his submission, Professor Weisbrot was scathing in his criticism of the manner in which the Beale Review was conducted and its conclusions. In particular, Professor Weisbrot was aggrieved that he was not consulted in the course of the Beale Review:

> Despite a lifetime of service and leadership in law reform, when the Commonwealth [Attorney-General's] Department apparently determined in 2009 that it would radically alter the composition, nature, role and resourcing of the highly successful Australian Law Reform Commission, none of these matters were ever discussed with me.
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> My views were never sought about how best to proceed, nor about the implications of the radical surgery conducted to the complement of Commissioners and staff. I was never asked to provide my views about the strengths of the ALRC, nor its weaknesses or missed opportunities, nor any changes I might suggest to improve the breadth or quality of its work, the efficiency of its systems or the pertinence of its advice to Government.[24]

3.26 Professor Weisbrot indicated that he accepted it was appropriate for the Secretary to commission a review of the Department, but the review should not have canvassed issues in respect of the ALRC:

> The Beale review was of the department, and it is quite appropriate for a new government coming in to have a senior experienced public servant have a look at structures and seek to amend them in a way that supports the government's agenda. What I thought was quite extraordinary, though, was that the audit concluded that there was 'at least a prima facie case' that the ALRC should be replaced with another body which would 'be brought into the corporate centre'. The evidence base for this was zero…I find that quite extraordinary – no research, no evidence, no complaints that it is starting from, no institutional or stakeholder consultation. And it is followed by a very radical recommendation that a very successful 35 year-old organisation be fundamentally changed – and I do mean 'fundamentally'.[25]

3.27 The Secretary of the Department and Professor Weisbrot expressed differing views on the relationship between the changes introduced through the FFLA Act and the recommendations of the Beale Review. The Secretary was of the opinion that the two matters are not related, noting that he does not intend to pursue the recommendations in the Beale Review.[26]

3.28 In contrast, Professor Weisbrot described a connection between the Beale and Uhrig Reviews in that the reviews 'moved in and out' from one another:

> One of them was the Beale review, which seems to have unduly guided the attitude of the Attorney-General's Department to law reform. The other was

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24 *Submission 16*, p. 4.

25 *Committee Hansard*, 3 March 2011, p. 7.

26 *Committee Hansard*, 11 February 2011, pp 92-93.

> the Uhrig review, which I also believe unduly guided the department's approach to management, governance and financial management.[27]

3.29 In its Subpplementary Submission, the ALRC noted the tabling of the excerpt of the Beale Review by the Department. The ALRC reiterated that it was not consulted as part of the Beale Review, and advised that it had not seen the document prior to its tabling. Further:

> Given the absence of an appropriate evidence base supporting this report – and for the report's recommendation to abolish the ALRC altogether – it is difficult for the ALRC to answer the issues it raises.[28]

3.30 The ALRC set out several concerns that it has with the contents of the document tabled by the Department:

> The ALRC records its strong objection to having been excluded from that process of 'review', and questions the validity of any report that could provide such a radical suggestion to disband a statutory organisation of 35 years standing – that is internationally renowned and widely acknowledged as being of best practice in the field of law reform, with an implementation rate of its recommendations of over 90%—based on no actual research of the organisation, its output or consultation with its stakeholders.[29]

27 *Committee Hansard*, 3 March 2011, p. 7.

28 *Supplementary Submission 2*, p. 17.

29 *Supplementary Submission 2*, p. 18.