

# DISSENTING REPORT BY GOVERNMENT SENATORS

## Introduction

1.1 Government Senators strongly support the Australian Law Reform Commission (ALRC) and its important work, however, Government Senators disagree with the views of the committee majority and the recommendations in the majority report. In particular, Government Senators believe that the majority report does not recognise the clear advantages for the ALRC in relation to the changes in its governance structure. These changes will introduce a more flexible membership model which will allow the composition of the ALRC to be adapted as circumstances require. Further, the ALRC will benefit from the appointment of short-term commissioners, who will assist the ALRC on specific references with their expert knowledge, experiences and advice.

1.2 In terms of the majority report's concerns about the ALRC's budgetary situation, Government Senators note that the Australian Government is committed to resourcing the ALRC for the long term and, further, that the Attorney-General's Department is committed to assisting the ALRC to ensure that it is properly resourced to carry out its functions.<sup>1</sup>

## Government support for the ALRC

1.3 The Australian Government has put on the record its strong support and commitment to the Australian Law Reform Commission (ALRC). As the Attorney-General has noted:

It was a Labor government that established the ALRC and since that time Labor attorneys have reaffirmed the party's commitment to the [ALRC]'s important input in shaping the Australian legal landscape.<sup>2</sup>

1.4 The Attorney-General's Department's submission sets out the ALRC's impressive record, and highlights the esteem in which the Australian Government holds the work of the ALRC:

The [ALRC] 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...[T]he Attorney-General, the Hon Robert McClelland MP, has stated the Government's strong support for the

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1 *Committee Hansard*, 11 February 2011, p. 85.

2 The Hon. Robert McClelland MP, Attorney-General, 'ALRC performs vital role', *Australian Financial Review*, 11 February 2011, p. 46.

Commission's work and its history of demonstrating insight, providing expert analysis and having a practical grasp of law reform.<sup>3</sup>

1.5 Government Senators reiterate that the Australian Government holds the ALRC's contributions in the highest regard and is committed to ensuring that the ALRC remains at the forefront of modern law reform.

### **Changes to the ALRC's governance structure**

1.6 Government Senators disagree that the amendments to the governance structure of the ALRC, contained in the *Financial Framework Legislation Amendment Act 2010* (FFLA Act), place the ALRC in an 'extremely precarious position'.

1.7 As was pointed out in the Attorney-General's Department's submission, these reforms have been foreshadowed since the *Review of Corporate Governance of Statutory Authorities and Office Holders*, which was conducted by Mr John Uhrig AC in 2003:

The primary purpose of the amendments contained in the FFLA Act is to move the Commission to governance arrangements consistent with Australian Government policy on statutory bodies as set out in the *Governance Arrangements for Australian Government Bodies*. These arrangements were issued following the *Review of Corporate Governance of Statutory Authorities and Office Holders*...<sup>4</sup>

1.8 Further, as noted by Mr Roger Wilkins AO, Secretary of the Attorney-General's Department, the Uhrig Review reforms have bipartisan support:

The Uhrig review seems to be something that has a measure of bipartisan support. It originated with the previous government and there was every intention, I think, in the [D]epartment of [F]inance of gradually moving in these areas. They moved faster in some than they had done under the previous government and they are now implementing some of them under the current government.<sup>5</sup>

1.9 The amendments in the FFLA Act will introduce a more flexible membership structure for the ALRC, so that the composition of the ALRC can be adjusted based on the subject matter of the inquiries referred to it. The Attorney-General outlined the benefits to the new structure as follows:

...appointing subject matter experts to specific inquiries will strengthen the [ALRC's] ability to undertake expert analysis, research and consultation across the country...the amendments will enhance the [ALRC's] ability to

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3 *Submission 15*, p. 1.

4 *Submission 15*, p. 5.

5 *Committee Hansard*, 11 February 2011, p. 101.

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carry out its important functions and will ensure it remains completely independent in fulfilling its responsibilities.<sup>6</sup>

1.10 The ALRC's recent Family Violence inquiry demonstrates the advantages that these changes will bring. The Australian Government appointed magistrate Anne Goldsbrough as a specialist commissioner for the duration of the inquiry, utilising her expertise as a state supervising magistrate for family law. Similarly, the ALRC's 'Discovery in civil litigation' inquiry will benefit from the knowledge and experience of Federal Court justices Arthur Emmett and Bruce Lander, who were appointed as commissioners for the duration of the inquiry.

1.11 The submission of the Attorney-General's Department noted that commissioners would be 'targeted for their expert wealth of experience, to provide advice on specific references'.<sup>7</sup>

1.12 Mr Wilkins also pointed out in his evidence to the committee that the amendments in the FFLA Act would:

...introduce more flexibility into the commission structure, taking into account the varied and often highly technical subject matters on which it undertakes inquiries.<sup>8</sup>

1.13 For this reason, Government Senators disagree with Recommendation 2 of the majority report, because we do not believe it is necessary to legislatively mandate a minimum number of full-time commissioners. The changes in governance structure introduced by the FFLA Act provide the ALRC with a more flexible membership structure to enable the composition of the ALRC to be adjusted based on the subject matter of the inquiries referred to it.

1.14 The majority report expresses concerns that the changes in the FFLA Act will detract from the independence of the ALRC. Government Senators do not agree, and are of the view that the changes do not detract from the ALRC's independence. Instead, these changes provide more flexibility, and allow the ALRC to adapt as circumstances require and to remain completely independent in fulfilling its responsibilities. The revised Explanatory Memorandum explicitly states that the Attorney-General's written directions to the President are limited to administrative matters only, and will not affect the independence of the ALRC in undertaking inquiries.<sup>9</sup> This point was emphasised by Mr Wilkins at the committee's first public hearing:

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6 The Hon. Robert McClelland MP, Attorney-General, 'ALRC performs vital role', *Australian Financial Review*, 11 February 2011, p. 46.

7 *Submission 15*, p. 2.

8 *Committee Hansard*, 11 February 2011, p. 85.

9 Revised Explanatory Memorandum for the Financial Framework Amendment Bill 2010, p. 17.

The government does have a continuing commitment to the independence and efficacy of the [ALRC]...I wish to stress that none of the structural changes go to the independence of the commission.<sup>10</sup>

## **Impact of budget cuts on the ALRC**

1.15 In terms of the impact of budget cuts on the ALRC, Government Senators note the Attorney-General's Department's evidence about the context in which the budgetary reductions were introduced:

The reductions in the commission's budget were made at a time...when \$3.5 billion of savings were being found from across government, occasioned by, as we all know, the global financial crisis. The savings from the 2009 Mid-Year Economic and Fiscal Outlook are a key component of the government's commitment to returning the budget to surplus at the earliest possible responsible time and, once the budget returns to surplus, maintaining spending restraint to support long-term stability.<sup>11</sup>

1.16 Further, Government Senators believe that the majority report does not give adequate consideration to the submission of the Attorney-General's Department in relation to the adequacy of the ALRC's budget:

The Government considers the [ALRC]'s resources are adequate to discharge its functions... It is a matter for the [ALRC] to determine how to use its budget. The [ALRC] has identified a range of efficiencies. The Department is available to assist the [ALRC] where requested and is committed to maintaining a close working relationship with the [ALRC] to ensure that feedback about resourcing is appropriately considered.<sup>12</sup>

1.17 Government Senators agree with the Attorney-General's Department that professional public servants need to manage within their budget.<sup>13</sup> In this context, Government Senators also note that the ALRC is an independent body and the chief executive has to make his or her own decisions about how resources are utilised within the budget allocation.<sup>14</sup>

1.18 Government Senators also emphasise the point that the Attorney-General's Department has engaged in ongoing discussions with the ALRC to assist it as it moves through this transition phase:

The department is working with the commission as it moves towards this new way of doing business, and the department is confident that this transition will position the ALRC to maintain the high standards of research

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10 *Committee Hansard*, 11 February 2011, p. 85.

11 *Committee Hansard*, 11 February 2011, p. 85.

12 *Submission 15*, p. 6.

13 *Committee Hansard*, 11 February 2011, p. 85.

14 *Committee Hansard*, 11 February 2011, p. 85.

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and analysis for which it is acclaimed as well as serving the government in the best way that it can.<sup>15</sup>

1.19 Further, the Attorney-General's Department assured the committee that it 'remains committed to maintaining frequent and meaningful contact with the [ALRC]'.<sup>16</sup>

1.20 In relation to Recommendation 3, the Australian Government has already announced that it will appoint a full-time commissioner for the ALRC's review of censorship and classification. Further, the government will assist the ALRC with the costs of this appointment. The Australian Government expects to announce the appointment of a full-time commissioner for that inquiry shortly.

1.21 In terms of the concerns expressed in the majority report regarding the ALRC's relocation to new premises, Government Senators note the Attorney-General's Department's evidence which sets out the benefits of this move:

...the [ALRC] was paying in the vicinity of \$600,000 a year in rent, which seemed to us to be an area where there was capacity for considerable savings to be made. I am pleased to say that the Law Reform Commission has recently negotiated arrangements to move to premises that are about half that price, which then makes it much more commensurate with the kind of size and budget of the commission as a whole. So nearly \$300,000 worth of savings are being achieved as a result of a move to premises that are somewhat more in keeping with the normal space utilisation for public service officers.<sup>17</sup>

1.22 Government Senators note that as part of a move to working more efficiently, the Issues and Discussion Papers for ALRC inquiries have been consolidated. To this end, Government Senators note the evidence of the President of the New Zealand Law Commission, that that organisation had consolidated all its preliminary research into a single paper as a matter of efficiency:

...you have two or three chapters on the background, the present law, and what you want to end up with is what really has to be answered here. Then of course you consult and there is a separate final report.<sup>18</sup>

1.22 Further, Government Senators consider that the budget cuts also provide opportunities for the ALRC to explore other ways of conducting inquiries by, for instance, using new media to facilitate consultation on inquiries. The Law Council of Australia indicated its support for these types of changes:

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15 *Committee Hansard*, 11 February 2011, p. 85.

16 *Submission 15*, p. 2.

17 *Committee Hansard*, 11 February 2011, p. 86.

18 The Hon. Justice Grant Hammond, *Committee Hansard*, 3 March 2011, p. 5.

The Law Council is supportive of the multiple mediums through which the ALRC has sought feedback in its consultations and encourages the ongoing use of such technology in future inquiries.

Forums like [podcasts, e-newsletters, twitter contributions and updates, RSS feeds and on line forums] make it easy for the Law Council and its Sections and Committees to stay up-to-date with all relevant developments relating to the inquiry and to exchange ideas with other organisations and individuals and make contributions to complement the more conventional written submissions.<sup>19</sup>

1.23 Finally, the Attorney-General's Department advised the committee that the Australian Government is of the view that the resources of the ALRC are adequate for it to discharge its functions:

The [ALRC]'s functions and ongoing financial stability within its budget can be achieved in a number of ways. Shorter, more focused references and alternative staffing models are two examples of different approaches. It is a matter for the [ALRC] to determine how to use its budget. The [ALRC] has identified a range of efficiencies. The Department is available to assist the [ALRC] where requested and is committed to maintaining a close working relationship with the [ALRC] to ensure that feedback about resourcing is appropriately considered.<sup>20</sup>

## Conclusion

1.24 Government Senators consider that the Australian Government strongly supports the work of the ALRC. As Mr Wilkins stated at the first public hearing:

The government regards the work of the [ALRC] as important to a vibrant and sustainable legal system...[T]he [ALRC] is highly regarded for the way it goes about its work, including the quality of its research and its emphasis on consultation.<sup>21</sup>

1.25 The changes to the ALRC's structure introduced by the FFLA Act will improve the ALRC's flexibility to respond to circumstances as required, and will enhance the ALRC's ability to undertake expert analysis through access to subject-matter expert commissioners for specific inquiries. Government Senators also believe that the ALRC is adequately resourced to undertake its important functions, particularly in light of the Attorney-General Department's ongoing commitment to assist the ALRC and ensure that it is adequately resourced.

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19 *Submission 5*, p. 11.

20 *Submission 15*, p. 6.

21 *Committee Hansard*, 11 February 2011, p. 84.

**Senator Trish Crossin**  
**Deputy Chair**

**Senator Mark Furner**

