



Australian Government

Australian Law Reform Commission

Australian Law Reform Commission Submission to the Commission of Audit

The Terms of Reference for the National Commission of Audit ask for submissions to look at the scope, efficiency and functions of the Commonwealth government to:

- ensure taxpayers are receiving value-for-money from each dollar spent;
- eliminate wasteful spending;
- identify areas of unnecessary duplication between the activities of the Commonwealth and other levels of government;
- identify areas or programs where Commonwealth involvement is inappropriate, no longer needed, or blurs lines of accountability; and
- improve the overall efficiency and effectiveness with which government services and policy advice are delivered.

The role and operation of the Australian Law Reform Commission (ALRC) have been the subject of two recent inquiries—the 2011 Senate Legal and Constitutional Affairs References Committee Inquiry into the Australian Law Reform Commission (the Senate Inquiry) and the 2012 Review into Small Agencies conducted by Stephen Skehill (the Skehill Review). Both these inquiries found that the role of the ALRC as an independent law reform agency remained of key importance to the government and the Australian community and that it delivered high value and should continue to be supported by the government. Both reviews also found that the ALRC was a highly effective and efficient agency.

In making this submission, the Australian Law Reform Commission (ALRC) will draw on the Senate Inquiry and the ALRC's submission to the Skehill Review. The findings of these in-depth reviews both re-affirmed:

- the ongoing important and unique role of the ALRC as an independent law reform body;
- the relevance and value of the ALRC's functions to the Commonwealth government, legal community and to the Australian people;
- the appropriateness of the ALRC to carry out its function; and
- the ALRC's efficiency in operations.

Value for money

The ALRC is a small, efficient and focused legal policy agency providing value for money to the Commonwealth and the Australian people. The ALRC usually conducts two law reform

inquiries at any one time at this level of resourcing, and all inquiries are completed within the timeframe allocated by the Attorney-General in Terms of Reference. With a staff of 15.4 EFT and a budget of \$2.8M, the ALRC represents an extremely efficient and effective use of government resources.

The ALRC is now in its 39th year, having been established in 1975 under its own Act¹, and over this time has completed 120 Reports. The ALRC records an 89% implementation rate² of its recommendations, which is highly significant and represents a world class benchmark in law reform. In its submission to the Senate Inquiry, the Federal Court stated

Since its creation in 1975, the ALRC has become the leading law reform agency in Australia, and a lead in the common law world.³

Over this time, the ALRC has undergone significant changes in size, budget and structure to accommodate new requirements and circumstances. These various changes were documented in an ALRC background paper to the Senate Inquiry.⁴ A snapshot of the current work of the ALRC and its resourcing levels is provided as Attachment A.

The 2011 Senate Inquiry was prompted by a significant reduction in the ALRC's funding in 2009, amounting to a 25% reduction in its appropriation. The ALRC responded to this situation by streamlining its activities including by reducing the number of full-time Commissioners and corporate staff, finding new premises and halving its rent, sharing appropriate services with another government agency (the Australian Government Solicitor) and driving productivity savings. The ALRC maintained its work program and continued to meet the expectations of Parliament and the community while ensuring that operated within its appropriation. That there was no waste in the ALRC's operations was affirmed throughout this Inquiry.

The issue of funding to achieve its function was therefore the subject of comment in the final report of the Senate Inquiry.

In order to maintain this important organisation, the government must provide the ALRC with the necessary funds to enable it to have a full complement of qualified staff, including full-time commissioners; to be accommodated in premises that cater to the nature of the ALRC's work; to provide a comprehensive public information and education program; and to allow the ALRC to travel to undertake extensive consultations for the purposes of its inquiries.⁵

Many submissions to the Senate Inquiry noted the very high rate of implementation of ALRC recommendations—over 89% of ALRC reports have been substantially or partially implemented as of June 2013.⁶ This high level of implementation is evidence of both the relevance of the ALRC's recommendations to government and the general Australian community, and the effectiveness of the processes that lead to the recommendations. The ALRC has no direct role in implementing its recommendations and there is no statutory

1 *Australian Law Reform Commission Act 1975* (Cth).

2 Australian Law Reform Commission, *Annual Report 2012-13*, 23.

3 Federal Court of Australia, Submission 22 to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission*, 2011, 1.

4 Australian Law Reform Commission, Submission 2 to the Senate Legal and Constitutional Affairs References Committee *Inquiry into the Australian Law Reform Commission*, 2011.

5 Senate Legal and Constitutional Affairs References Committee, *Final Report of the Inquiry into the Australian Law Reform Commission*, 2011 [6.27].

6 The ALRC considers that a report is substantially implemented when the majority of the report's key recommendations have been implemented by those to whom the recommendations are directed. Partial implementation refers to implementation of at least some recommendations of an ALRC report.

requirement for the Australian Government to respond formally to ALRC reports. However, the ALRC monitors major developments in relation to issues covered in its past reports, and assesses the level of implementation that those reports have achieved. It is not uncommon for implementation to occur some years after the completion of a report. Clearly with such a high level of implementation, the ALRC is delivering high value to the Australian government's law reform agenda.

Duplication—The Unique and Independent Role of the ALRC

The ALRC is the only Commonwealth statutory agency specialising in law reform. The functions of the ALRC, as set out in the ALRC Act, are not being duplicated by other statutory agencies. The findings of the Senate Inquiry and Skehill Inquiry found that these functions remain important and relevant and are best delivered by an independent, properly resourced and constituted law reform body.

The vast majority of the 23 submissions made to the Senate Inquiry, including from the Attorney-General's Department, the Federal Court, the Australian Academy of Law, a number of state Law Reform Commissions, legal bodies and community organisations and individuals, supported the importance of the ALRC as an independent law reform body.

An independent law reform agency, such as the ALRC, is not the only type of body developing legal policy: for example, other government departments, Parliamentary Committees, joint ministerial councils, other statutory agencies, the courts themselves, all make contributions to law reform. However, a number of features of the ALRC distinguish it from these other mechanisms and demonstrate the ALRC's uniqueness and why the ALRC is a crucial contributor to the health and growth of Australian law, including the ALRC's:

- independence from government, party politics, business and academic interests, special interest groups and other community stakeholders;
- focused legal expertise;
- authority and capacity to leverage relationships with key stakeholders;
- role and experience in engaging the Australian community in law reform through in-depth consultative and research strategies; and
- dedicated experience and intellectual capital in best practice law reform processes.

The ALRC is independent and is able to research, analyse and provide legal policy advice at arm's length from government, and free from special interest or lobby groups. The types of law reform reviews that the ALRC is uniquely experienced to undertake include those where there are complex legal issues involved, and a need to be—and to be seen to be— completely independent from government, industry and special interests. These reviews involve a need to consult widely with diverse and often opposing stakeholders, and to balance their opinions and interests carefully, so that the government is provided with independent and frank advice. Through its widespread and thorough consultation strategies, the ALRC is able to build consensus and understanding within the community for the law reform proposals that it suggests, and this assists the government in being able to implement various recommendations, even in a context where change may be challenging. The ALRC is unique in its ability and experience to focus on such complex legal issues that require finding a policy pathway that balances the different views in the community and that is acceptable to government.

Submissions to the Senate Inquiry and the Government's response,⁷ supported the role of the ALRC as distinct from other statutory agencies, recognising that independence is vital to maintaining a system of law reform that is separate from the interests of a particular government at any one point in time. While still being relevant to a government's reform agenda, the actual law reform process and reform recommendations must remain at arm's length to government, and be perceived to be at arm's length, for the community to have faith and trust in the independence of the legal system.

The Final Report of the Skehill Inquiry⁸ also supported the ongoing and separate role of the ALRC and concluded

ALRC – this agency is a generalist law reform adviser that, over the years, has been given references covering areas of the law that are the concern of many portfolios. While there are some other law reform/advisory agencies (such as the Companies and Markets Advisory Committee and the Administrative Review Council), these work within recognised and specialised disciplines and have no necessary synergy with the broader and more general functions of the ALRC. This means that there is no other body with which its functions have any particular synergy and with which it would be sensibly merged. On these bases, the Review supports the continued existence of both the AHRC and the ALRC in their present separate forms.

The Appropriateness of Commonwealth Law Reform

The ALRC is the key federal body looking into the modernisation, harmonisation and simplification of Commonwealth laws. It is crucial that federal laws are updated to reflect changes in Australian society and in community expectations, and many of the ALRC's inquiries are about ensuring our laws are able to both respond to current challenges and are flexible enough to cope with the future. Laws do change gradually through case law, but often the community demands that the law moves more quickly, and more assuredly, to accommodate changes in the environment, particularly in the digital era. A dedicated expert agency that assists the government to keep the laws relevant, accessible and fair is needed now, more than ever before. Looking at the recent inquiries referred to the ALRC attests to this need—Privacy Laws, Classification Laws in the Digital Economy, and Copyright Law are all inquiries addressing laws and legal frameworks that were developed before the age of the internet.

Many laws that directly affect the wellbeing of all Australians are within the Commonwealth's jurisdiction and can be leveraged to achieve greater access to justice for the Australian community through law reform. The two Family Violence Inquiries, the Commonwealth Laws and Barriers for Older People entering the workforce, and the current Barriers in Commonwealth Laws for People with Disability Inquiry are examples of areas where complex social, economic and legal issues arise. Undertaking the in-depth research and analysis, and finding possible legal solutions is the value-add that the ALRC provides to government decision-making. In this way, the ALRC contributes to the government's agenda for a fair and accessible system of Commonwealth law.

7 Senate Legal and Constitutional Affairs References Committee, *Government Response to the Inquiry into the Australian Law Reform Commission*, 2011, 1.

8 The Skehill Inquiry was conducted in 2012 by the Attorney-General's Department and the then Department of Finance and Deregulation.

The Senate Inquiry concluded that

The ALRC is critically important to the development of legal policy in Australia. It has a proud history of undertaking important reviews and inquiries into key areas of law and making significant recommendations to unify and improve Australia's laws.⁹

In its submission to the Senate Inquiry, the Federal Court stated that

The Court benefits greatly from the ALRC's reports, research and analysis of complex areas of law within federal jurisdiction... More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented. For example, the ALRC's reports on evidence, admiralty and insurance have been critical in assisting the Court's own appreciation and development of the law in these areas. In this way, the ALRC's reports have assisted the Court in the tasks of ascertaining the law, interpreting statute and developing the common law... It is only because the scholarship embodied in the ALRC's reports has been first class that they have been of assistance to the judiciary... In this way the ALRC's published work contributes to the high quality of judicial decision-making in this Court.¹⁰

The ability to work on harmonisation projects with other state-based law reform agencies is also of key importance. ALRC inquiries such as the Evidence, Privacy and Family Violence Inquiries provide examples of the importance for the Commonwealth in maintaining a federal body that can conduct inquiries with other state law reform bodies to drive the harmonisation of laws across state boundaries. In its submission to the Senate Inquiry, the NSW Law Reform Commission stated

It [the ALRC] has made a strong contribution to collaborative law reform efforts in support of consistent legislation across Australia. It has carried out significant work on uniformity and consistency of laws across Australia - see for example its recent reports on evidence and family violence (referred to above). As globalisation increases, international and inter-state trade develops further, and the population of Australia and the region becomes increasingly mobile this work will become more important.¹¹

Efficiency

The ALRC is a highly efficient micro agency, able to respond flexibly to Government's requests, to operate within its resources and to deliver high quality advice. Over its history, the ALRC has developed an internationally recognised best practice methodology for law reform. The maintenance of this intellectual capital in law reform generates an enormous efficiency, where the ALRC is expert at the process of law reform, and, with its reputation and the standing of its Commissioners, is able to leverage enormous outside expertise and contributions—all honorary/pro bono—that inform the ALRC's work. In responding to the Skehill Review of Small Agencies, the ALRC provided evidence of the value of the

9 Senate Legal and Constitutional Affairs References Committee, *Final Report of the Inquiry into the Australian Law Reform Commission*, 2011 [6.26].

10 Federal Court of Australia, Submission 22 to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission*, 2011.

11 NSW Law Reform Commission, Submission 3 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission*, 2011, 3.

contribution made to the ALRC inquiry process by members of the legal community, business and academia, as part of their unpaid participation in Advisory Committees, Expert Panels and through the consultation process. Based on the ALRC's conservative estimates, the monetary value of this participation in two recent inquiries (Discovery and Privacy Inquiry) amounted to \$498,000 per annum of pro bono contribution.¹² The Skehill Inquiry concluded that

such bodies are often able to access, at no or minimal cost, input and advice that could not be expected to be made available to a Department of State on the same basis. Based on ALRC undertaking two to three inquiries per annum this would equate to approximately \$400,000 to \$600,000 per annum in pro bono contributions to inquiries. The Review doubts that "free goods" of anything like this value would be available to the Department if it were to assume the role of the ALRC. It is the very independence of the ALRC from the Executive that is understood to be a significant attractor for those who freely make their expertise and time available to it.¹³

Another indicator of efficiency goes to the time taken to complete law reform inquiries. In this regard it is worth noting the ALRC does not set its own timeframe. Indeed, the time taken by the ALRC to complete its reports is dictated by the Attorney-General and included in the Terms of Reference that are issued at the time an inquiry is referred. Most ALRC reports are completed within 12 to 18 months. While the time taken to complete an inquiry is always affected by both the breadth and complexity of the issues to be researched, since 2003, only two ALRC reports have taken two years to complete—Privacy (26 months) and Human Genetic Information (24 months)—both of which were highly complex inquiries that required this longer timeframe, a time agreed to by the presiding Attorney-General.

As indicated above, following the budget reduction in 2009, the ALRC reviewed its operations, including the number of standing Commissioners, its staffing levels and its corporate support functions. One saving initiative was to co-locate and share appropriate services with the AGS in Sydney thereby halving the office leasing costs, and saving on services and facilities such as library resources, reception and meeting rooms. The ALRC is now operating with one standing Commissioner and the appointment of inquiry-specific Commissioners. Other savings measures such as moving publication of consultation documents online have also led to greater efficiencies. The ALRC has aligned its operations with its appropriation and is efficiently operating within its resources, with no decrease in either the quality or quantity of its output.

To be able to respond to the government's law reform agenda and to deliver on the ALRC's outcome, it is essential that the ALRC is able to maintain a complement of highly qualified and experienced Commissioners and legal researchers who are always ready to pick up and run with an inquiry. This ability comes with experience, people who know the processes of law reform, who have skills in using these processes and in analysing laws and their effects, and who can then develop law reform proposals that will deliver a principled and practical policy outcome. Having an ongoing commitment of adequate resources to continue the intellectual capital in best practice and responsive law reform, saves time and therefore, dollars, in the longer term and ensures that there is an effective mechanism to support the government in the maintenance and improvement of Australia's system of law and justice.

12 The estimation was based on hourly rates, extrapolated from those advised to the ALRC by certain participants and included expenditure for both appearances at the meeting itself and a small allowance for time to prepare and comment outside the meeting time. Travel time for interstate participants has been excluded.

13 See note 8 above.

25 November 2013.

Attachment A

In-coming brief that summarises ALRC's budget and current inquiries.

Attachment B

Organisational Chart