



**Australian Government**  
**Attorney-General's Department**

**Priorities and Coordination Division**

**ATTORNEY-GENERAL'S DEPARTMENT'S SUBMISSION  
TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS  
COMMITTEE INQUIRY INTO THE  
AUSTRALIAN LAW REFORM COMMISSION**

***Introduction***

The Commission

The Commission's role is to conduct inquiries into areas of law as referred by the Attorney-General, and to report the results of such inquiries, including any recommendations for reform, to Government. The Commission was established by the *Law Reform Commission Act 1973* (Cth). Senator Lionel Murphy, the then Attorney-General, in introducing the legislation into the Parliament stated that its purpose was to enable the task of law reform in Australia to be tackled on a national scale.<sup>1</sup> The Commission was to ensure law was responsive to the social needs of the time.<sup>2</sup> The *Law Reform Commission Act 1973* (Cth) was repealed in 1996 at the same time that the *Australian Law Reform Commission Act 1996* (hereafter the Act) came into force.

The Commission's valuable contribution to the law reform landscape

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>3</sup>

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<sup>1</sup> The Australian Law Reform Commission, *20 Years of Law Reform, 25 years of law reform – a brief history of the Australian Law Reform Commission*, Sydney, 1995, citing Senator Murphy, Parliamentary Debates, Senate Hansard, 23 October 1973, 1345, 1346.

<sup>2</sup> The Australian Law Reform Commission, *20 Years of Law Reform, 25 years of law reform – a brief history of the Australian Law Reform Commission*, Sydney, 1995, citing Senator Murphy, Parliamentary Debates, Senate Hansard, 23 October 1973, 1345, 1346.

<sup>3</sup> The Honourable Robert McClelland MP, *Launch of the Australian Law Reform Commission report 'For Your Information: Australian Privacy Law and Practice'*, Sydney, 11 August 2008.

Examples of the Commission's contributions are evident in the areas of privacy and evidence. The Commission's 2008 inquiry into the *Privacy Act 1988* (Cth) resulted in significant and continuing Government action to improve privacy laws. This followed the Commission's inquiry into privacy between 1976 and 1983 which prompted the enactment of the Privacy Act. Likewise, the inquiry into evidence laws tabled in 1987 had a large impact and resulted in the enactment of the *Evidence Act 1995* (Cth) providing a sound basis for the uniform legislative scheme. Operation of the Evidence Act was later reviewed by the Commission, in conjunction with the New South Wales and Victorian law reform commissions. The final report on Uniform Evidence Laws was tabled in 2006, resulting in the *Evidence Amendment Act 2008* (Cth) which substantially implemented the Commission's recommendations.

#### The Department's support for the Commission

Budgetary pressures have been a feature of the Commission's recent history and will continue to necessitate a close working relationship between the Department and the Commission. The Department remains committed to maintaining frequent and meaningful contact with the Commission.

The Department has facilitated a number of reforms to the Commission's structure recently in an effort to support the Commission in discharging its functions up to its historically high standards, despite the pressures of the current fiscal environment. These reforms have included facilitating the short-term appointment of part-time Commissioners, targeted for their expert wealth of experience, to provide advice on specific references.

#### ***The ALRC's role, governance arrangements and statutory responsibilities***

##### Functions

As already noted, the role of the Commission is to undertake inquiries into matters referred to it by the Attorney-General under section 20 of the Act. The Attorney-General may refer matters either at the Commission's suggestion or by his or her own initiative.<sup>4</sup>

The functions of the Commission with respect to matters referred to it are set out in section 21 of the Act, which states:

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<sup>4</sup> Australian Law Reform Commission Act section 20 (1).

(1) The Commission has the following functions in relation to matters referred to it by the Attorney-General:

(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;

(e) to consider proposals for complementary Commonwealth, State and Territory laws about those matters.

(2) It is a function of the Commission to report to the Attorney-General on the results of any review or consideration it carries out under subsection (1), and to include in the report any recommendations it wants to make.

#### Current membership and governance arrangements

The Commission's membership size and structure has varied over time. Originally, under the Law Reform Commission Act, the Commission was made up of a Chairman and five part-time members.<sup>5</sup>

Under section 6 of the Act the Commission consists of a President, a Deputy President and at least 4 other members. However, section 6 (2) provides that the performance of the Commission's

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<sup>5</sup> Law Reform Commission Act section 12. Justice Michael Kirby was the first Chairman, beginning as a part-time member from 1 January 1975, appointed as a full-time Chairman on 4 February 1975. The Chairman was joined by part-time Commissioners Professor Alex Castles, Gareth Evans and Associate Professor Gordon Hawkins. In June 1975, Gerard Brennan and John Cain were also appointed as part-time members. Note: titles used in this submission are those applicable during the Member's time at the Commission.

functions, and the exercise of its powers, are not affected merely because of one or more vacancies in its membership.

Section 7 of the Act provides a member must be appointed by the Governor-General and sets out the qualification requirements for appointment. A person must not be appointed as a member unless he or she:

- (a) is 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 5 years, a legal practitioner of the High Court, or of the Supreme Court of a State or Territory; or
- (c) is a graduate in law of a university, and has experience as a member of the academic staff of a tertiary educational institution; or
- (d) is, in the Governor-General's opinion, suitable for appointment because of the person's special qualifications, training or experience.

While the President and Deputy President must be appointed as full-time members,<sup>6</sup> other members may be appointed on either a full-time or part-time basis.<sup>7</sup> Part 4 of the Act provides for the establishment of a Board of Management which consists of the President, Deputy President and other full-time members. The Board's function is to manage the Commission and, in particular, ensure that it performs its functions effectively and economically.<sup>8</sup> (Section 34 provides that the President is the Chief Executive Officer and is responsible for management of the Commission under the Board.)

The Commission is an independent statutory authority,<sup>9</sup> is a Commonwealth Authority for the purposes of the *Commonwealth Authorities and Companies Act 1997* (Cth) (hereafter the CAC Act) and is subject to the accountability and governance arrangements set out in that Act.

#### Recent amendments affecting membership and governance arrangements

Schedule 2 to the *Financial Frameworks Legislation Amendment Act 2010* (Cth) (hereafter the FFLA Act) that received Royal Assent on 17 December 2010, makes significant changes to the

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<sup>6</sup> Australian Law Reform Commission Act section 8 (1).

<sup>7</sup> Australian Law Reform Commission Act section 8 (2).

<sup>8</sup> Australian Law Reform Commission Act section 28 (1).

<sup>9</sup> Australian Law Reform Commission Act section 5.

membership and governance arrangements of the Commission as set out in the Act. These amendments commence on 1 July 2011.

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*.<sup>10</sup> These arrangements were issued following the *Review of Corporate Governance of Statutory Authorities and Office Holders* conducted by John Uhrig AC in 2003.

Once in effect, the amendments will transition the Commission from operating under the CAC Act to a prescribed agency under the *Financial Management and Accountability Act 1997* (Cth) (hereafter the FMA Act) and a statutory agency for the purposes of the *Public Service Act 1999* (Cth) (hereafter the PS Act). The transition moves the Commission's governance arrangement to an executive management model by replacing the existing Board of Management with a Chief Executive Officer – the President.<sup>11</sup> The Attorney-General will also be able to appoint a management advisory committee to advise the President on the exercise of the Commission's functions.

In addition to the changes made to transfer the Commission to an FMA Act agency, the amendments in Schedule 2 of the FFLA Act will:

- remove the position of Deputy President from the Commission's membership structure, providing that the Commission consists of the President and not more than six other members,<sup>12</sup> and
- allow the Attorney-General to appoint part-time members as the Attorney-General considers necessary from time to time (a role previously with the Governor-General).<sup>13</sup>

The amendment provisions relating to the composition of the Commission's membership introduce a more flexible membership structure, so that adjustments can occur based on the size and subject matter of the inquiries referred to the Commission. The amendments also facilitate short-term

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<sup>10</sup> Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, August 2005. Fifteen agencies had moved from the Commonwealth Authorities and Companies Act to the Financial Management and Accountability Act between 31 December 2004 and 1 October 2009.

<sup>11</sup> Financial Frameworks Legislation Amendment Act Schedule 2, item 34.

<sup>12</sup> Financial Frameworks Legislation Amendment Act Schedule 2, item 11.

<sup>13</sup> Financial Frameworks Legislation Amendment Act Schedule 2, item 13.

appointment of members with expertise in particular areas of inquiry. These amendments are consistent with the Department's ongoing commitment to supporting the Commission to discharge their functions.

***The adequacy of the ALRC's staffing and resources to meet its objectives***

Like many Commonwealth agencies, the Commission has had its funding reduced in recent years. However, the Government is confident in the ability of the Commission and its President to meet the challenges this poses. The Government will continue to work with the Commission to:

- ensure referrals are well targeted and adequate time is given for completion
- keep the Commission's workload manageable
- appoint additional part-time Commissioners where this would assist with particular inquiries, and
- ensure ongoing financial stability.

The Commission had its budget reduced in the 2009-10 Mid-Year Economic and Fiscal Outlook by \$0.242 million in 2010-11 and by \$0.495 million for each year thereafter. These reductions were consistent with the Government's commitment to returning the Budget to surplus in 2012-13 and containing overall spending growth to under 2% per annum.

The Government considers the Commission's resources are adequate to discharge its functions. The Commission'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 Commission to determine how to use its budget. The Commission has identified a range of efficiencies. The Department is available to assist the Commission where requested and is committed to maintaining a close working relationship with the Commission to ensure that feedback about resourcing is appropriately considered.

## Resourcing and staff over the past 10 years

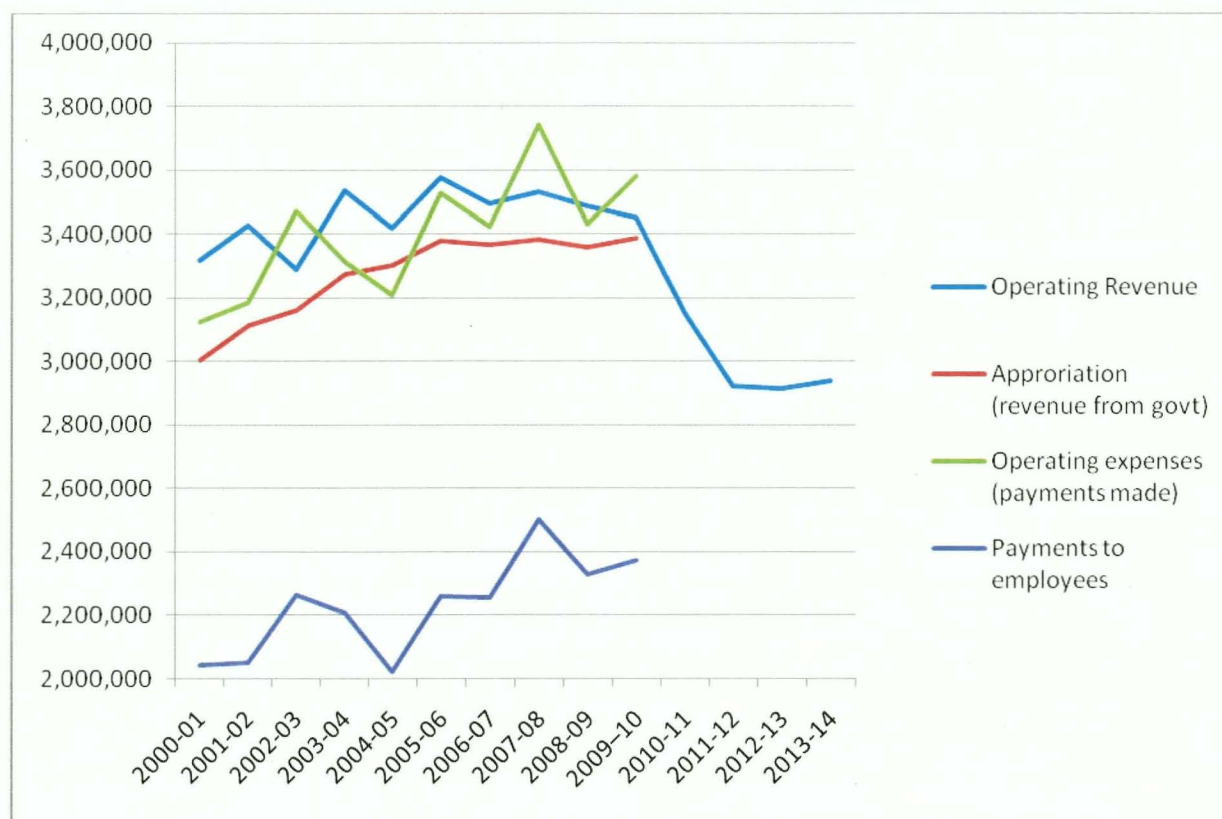
Finances <sup>14</sup>							
	Operating Revenue	Appropriation (revenue from govt)	Operating expenses (payments made)	Surplus (deficit) attributable to Australian Govt	Operating revenue change from previous year	Appropriation change from previous year	Operating expenses change from previous year
2000-01	\$3,318,551	\$3,003,000	\$3,123,571	\$194,980	-	-	-
2001-02	\$3,426,423	\$3,112,000	\$3,183,894	\$242,529	\$107,872	\$109,000	\$60,323
2002-03	\$3,290,176	\$3,159,000	\$3,470,521	-\$180,345	-\$136,247	\$47,000	\$286,627
2003-04	\$3,535,368	\$3,275,000	\$3,314,818	\$220,550	\$245,192	\$116,000	-\$155,703
2004-05	\$3,420,947	\$3,303,000	\$3,209,701	\$211,246	-\$114,421	\$28,000	-\$105,117
2005-06	\$3,577,016	\$3,377,000	\$3,527,636	\$49,380	\$156,069	\$74,000	\$317,935
2006-07	\$3,495,330	\$3,366,000	\$3,421,280	\$74,050	-\$81,686	-\$11,000	-\$106,356
2007-08	\$3,532,229	\$3,382,000	\$3,742,757	-\$210,528	\$36,899	\$16,000	\$321,477
2008-09	\$3,488,813	\$3,360,000	\$3,432,712	\$57,465	-\$43,416	-\$22,000	-\$310,045
2009-10	\$3,450,130	\$3,387,000	\$3,581,082	-\$130,952	-\$38,683	\$27,000	\$148,370
2010-11		\$3,152,000					
2011-12		\$2,921,000					
2012-13		\$2,913,000					
2013-14		\$2,938,000					
Staffing							
	Average full-time staffing equivalent <sup>15</sup>	Full-time equivalent staffing Level At close of reporting period <sup>16</sup>	Payments to employees	Members of the Commission at close of period full-time	Members of the Commission at close of period part-time	Total Members of the Commission (full-time and part-time)	
2000-01	21.3	-	\$2,043,269	4	4	8	
2001-02	20.5	-	\$2,048,810	4	4	8	
2002-03	18.8	18.2	\$2,262,894	4	3	7	
2003-04	17.6	-	\$2,205,843	3	3	6	
2004-05	16.7	18.05	\$2,021,186	3	3	6	
2005-06	18.8	18.9	\$2,261,324	3	2	5	
2006-07	-	17.8	\$2,254,538	3	3	6	
2007-08	19.37	21	\$2,500,938	3	3	6	
2008-09	-	17.71	\$2,329,838	3	2	5	
2009-10	-	19.99	\$2,374,022	1	3	4	

<sup>14</sup> Finance and staff figures taken from the Commission's Annual Reports where available.

<sup>15</sup> Number equivalent to average full-time staff complement over each financial year, where recorded in the Commission's Annual Reports

<sup>16</sup> Full-time staff complement at the end of each financial year, where recorded in the Commission's Annual Reports.

### Finances over the past 10 years in graph form



### Budget and staffing into the future

The Commission is developing a strategy to ensure that the organisation can bring its operating costs into line with its appropriation with assistance from the Attorney-General's Department.

The Department notes the Commission's desire for a second full-time Commissioner. The Attorney-General wrote to the President of the Commission on 24 December 2010 agreeing that a second full-time Commissioner could be a useful asset to the Commission, but noting that under current budgetary pressures consideration of such an appointment could only be had if a fully-costed option for accommodating this within the Commission's appropriation was developed. The Department has offered to assist the Commission in assessing whether fully-costed options for accommodating this within the Commission's appropriation are feasible. The Department will endeavour to continue providing the Commission with ongoing support through frequent dialogue to ensure the best outcomes can be reached.

### Operating Loss and reserves

The Commission incurred an operating loss of \$0.131m in 2009-10. The Commission has approximately \$900,000 in accumulated reserves. Using reserves to supplement an annual



appropriation results in an operating loss being recorded and requires prior approval from the Minister for Finance and Deregulation.

### ***Best practice examples of like organisations interstate and overseas***

There are two main models of law reform organisations in Australian and overseas. Some, like the Australian Law Reform Commission, are independent, government-funded law reform commissions established by statute. This model exists in the United Kingdom, Ireland, New Zealand, New South Wales, Queensland, Western Australia and Victoria. In other jurisdictions law reform work is carried out by not-for-profit organisations that are governed by their own board of directors. These often receive some funding from government, as well as from other sources such as law foundations, law societies, law schools and law firms. A number of law reform organisations in Canada and the United States operate under this model.

Other models include:

- a collaborative arrangement between Governments and Universities. This is occurring in Tasmania and in the Australian Capital Territory, and
- establishment of advisory committees to Government, which receive administrative and executive support from government departments.

### Victoria

The Victorian Law Reform Commission (VLRC) was established under the *Victorian Law Reform Commission Act 2000* (Vic). The Commission had a budget of \$3,027,485 in 2009-10. Of this, \$1,310,500 was received from the Victorian Department of Justice and \$1,700,000 was received from the Legal Services Board of Victoria.<sup>17</sup> The VLRC worked on four references throughout the year and produced three reports. It also produced two information papers, one background paper and one consultation paper. The VLRC is unique in that, as well as taking references for topics from the Attorney-General, it also selects one or two community law reform topics each year. These are topics of inquiry that come from community organisations or the public and only involve minor changes to the law.<sup>18</sup>

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<sup>17</sup> Victorian Law Reform Commission, *Annual report 2009-10*, p 34.

<sup>18</sup> Victorian Law Reform Commission, *Community Law Reform*, Melbourne, 2010, viewed 5 January 2010, <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Community+Law+Reform/>>.

Completed community law reform projects have included:

- Supporting Young People in Police Interviews — suggested by the Youth Referral and Independent Person Program — the report aims to clarify the role of the ‘independent person’: volunteers who are called upon to attend police interviews with young people when the young person’s parent or guardian is unable to attend
- Assistance Animals — suggested by the Victorian Equal Opportunity Commission — aimed at improving the legal protection for people with disabilities who rely on assistance animals, and
- Residential Tenancy Databases — suggested by the Tenants Union of Victoria — which examined the way residential tenancy databases function and made general recommendations for their regulation.<sup>19</sup>

### Tasmania

The Tasmanian Law Reform Institute (TLRI) is the result of an agreement between the State Government, the University of Tasmania and the Law Society. The TLRI’s functions include the review of laws with a view to:

- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary, and
- uniformity between laws of other States and the Commonwealth.<sup>20</sup>

The TLRI is governed by a Director with assistance and advice from its Board. The Board consists of:

- the Director
- the Dean of the Faculty of Law at the University
- 1 person appointed by the Honourable the Chief Justice of Tasmania
- 1 person appointed by the Attorney-General
- 1 person appointed by the Law Society
- 1 person appointed by the Council of the University, and

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<sup>19</sup> Victorian Law Reform Commission, *Community Law Reform*, Melbourne, 2010, viewed 5 January 2010, <<http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Community+Law+Reform/>>.

<sup>20</sup> Tasmanian Law Reform Institute, *Founding Agreement*, made 23 July 2001, p 2.

- No more than two co-opted members.<sup>21</sup>

Topic proposals are sought from a wide range of sources including: the judiciary, the Attorney-General, the Legal Aid Commission, government departments, Parliament, the legal profession, members of the community and community groups.<sup>22</sup>

The TLRI receives funding on an annual basis from the Tasmanian Government's Department of Justice and Industrial Relations and the University of Tasmania (in kind). For the calendar year of 2009, the TLRI had a total expenditure of \$48,102. Appropriation came from a standard grant from the State Government Department of Justice of \$50,000. In addition the University of Tasmania made contributions in kind of \$115,837.<sup>23</sup> The TLRI released three issues papers in the 2009 calendar year.<sup>24</sup> The TLRI has produced 2 research papers, 15 issues papers and 11 final reports since its establishment in 2001.<sup>25</sup>

The Tasmanian Law Society provides support by the provision of advice on proposals for research project and provides funding on a case by case basis. The TLRI also may receive annual grants from the Law Foundation of Tasmania.<sup>26</sup>

Tasmania originally established a Law Reform Commission in 1974, that received reference from the Attorney-General and had its reports presented to Parliament. This Commission existed until 1989 and had representatives from the government, Law Society, Bar Association, University's Faculty of Law and had two community members. This Commission operated with one full-time Executive Director and three staff. During its time, this Commission produced approximately 50 major reports, most of which resulted in the introduction of legislation.<sup>27</sup>

The Tasmanian Law Reform Commission was replaced by a single Law Reform Commissioner with reduced administrative staff from 1989 until 1997. During this time, approximately 20 reports were produced. The office lapsed under a sunset clause in the legislation and the functions were

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<sup>21</sup> Tasmanian Law Reform Institute, *Founding Agreement*, made 23 July 2001, p 3.

<sup>22</sup> Tasmanian Law Reform Institute, *Call for Proposals*, Hobart, 2008, viewed 17 January 2010, <[http://www.law.utas.edu.au/reform/call\\_proposals.htm](http://www.law.utas.edu.au/reform/call_proposals.htm)>.

<sup>23</sup> Tasmanian Law Reform Institute, *Annual Progress and Financial Report 2009*, p 7.

<sup>24</sup> Tasmanian Law Reform Institute, *Annual Progress and Financial Report 2009*, p 5.

<sup>25</sup> Tasmanian Law Reform Institute, *Annual Progress and Financial Report 2009*, p 5.

<sup>26</sup> Tasmanian Law Reform Institute, *Founding Agreement*, made 23 July 2001, p 4.

given to the Director of Legal Aid Commission. This arrangement remained until the TLRI was established in 2001.<sup>28</sup>

### Australian Capital Territory

The Australian Capital Territory disbanded its law reform commission in 2004. However, the law reform functions have been subsumed by the ACT Law Reform Advisory Council (LRAC). Established in 2009, LRAC is a collaborative effort between the ACT Government and the Australian National University's College of Law.<sup>29</sup>

LRAC's role is to provide advice and recommendations to the Attorney-General on matters of law reform referred to it by the Attorney-General.<sup>30</sup> LRAC is currently chaired by the Director of Law Reform and Social Justice at the ANU College of Law, who is supported by a number of members. Members operate on a volunteer basis and can include judges, magistrates, practising lawyers, police, individuals from community and consumer agencies and victims support groups. Members are appointed for a period of three years by the Attorney-General.<sup>31</sup>

### Western Australia

The Law Reform Commission of Western Australia (LRCWA) had a budget of \$944,000 in 2009-10.<sup>32</sup> Within this budget it produced two final reports, one consultation paper and one discussion paper.<sup>33</sup> The LRCWA currently operates under a structure where work is carried out by three part-time commissioners and four support staff. The LRCWA does not currently employ any full-time commissioners. In Western Australia references can result from proposals submitted by the Commission or by the public, as well as by the Attorney-General. However, it is the Attorney-General who decides on the priorities for work.

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<sup>27</sup> Tasmanian Law Reform Institute, *History of Law Reform in Tasmania*, Hobart, 2008, viewed 17 January 2010, <<http://www.law.utas.edu.au/reform/history.htm>>.

<sup>28</sup> Tasmanian Law Reform Institute, *History of Law Reform in Tasmania*, Hobart, 2008, viewed 17 January 2010, <<http://www.law.utas.edu.au/reform/history.htm>>.

<sup>29</sup> A.C.T Department of Justice and Community Safety, *Law Reform Advisory Council*, Canberra, 2010, viewed 17 January 2010, <[http://www.justice.act.gov.au/criminal\\_and\\_civil\\_justice/law\\_reform/law\\_reform\\_advisory\\_council](http://www.justice.act.gov.au/criminal_and_civil_justice/law_reform/law_reform_advisory_council)>.

<sup>30</sup> Australian Capital Territory Law Reform Advisory Council, *Terms of Reference*, made 2009, p 1.

<sup>31</sup> A.C.T Department of Justice and Community Safety, *Law Reform Advisory Council*, Canberra, 2010, viewed 17 January 2010, <[http://www.justice.act.gov.au/criminal\\_and\\_civil\\_justice/law\\_reform/law\\_reform\\_advisory\\_council](http://www.justice.act.gov.au/criminal_and_civil_justice/law_reform/law_reform_advisory_council)>.

<sup>32</sup> Law Reform Commission of Western Australia, *Annual report 2009-10*, p 17.

### Northern Territory

The Northern Territory Law Reform Committee (NTLRC) is a non-statutory committee responsible for advising the State Attorney-General on issues of law reform. The Committee has a Chair and 12 other members including:

- the Chief Magistrate
- the Ombudsman
- the Executive Officer of the Law Society
- members of the legal profession
- academics of the Northern Territory University (including at least one member of the Faculty of Law)
- a representative of the Police Force, and
- a member from an Aboriginal body.<sup>34</sup>

Matters for consideration are referred to the Committee by the Attorney-General. Executive and administrative support is provided by the Legal Policy Division of the Department of Justice.<sup>35</sup>

### South Australia

South Australia does not have a law reform body. It is the responsibility of the State Attorney-General to investigate the need for reform of State laws.<sup>36</sup>

### United Kingdom

The Law Commission of England and Wales (LCEW), like the Commission, is an independent, government funded body headed by five Commissioners appointed by the Lord Chancellor. All five Commissioners work full-time at the LCEW. In 2009-10 the LCEW produced four reports containing recommendations that were laid before Parliament, and published one consultation paper and two issues papers.<sup>37</sup> Its expenses for the year were £4,385,300<sup>38</sup> (approximately

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<sup>33</sup> Law Reform Commission of Western Australia, *Annual report 2009-10*, p 46.

<sup>34</sup> Northern Territory Government Department of Justice, *Making Better Laws*, Darwin, 2010, viewed 17 January 2010, <<http://www.nt.gov.au/justice/policycoord/lawmake/lawref.shtml>>.

<sup>35</sup> Northern Territory Government Department of Justice, *Making Better Laws*, Darwin, 2010, viewed 17 January 2010, <<http://www.nt.gov.au/justice/policycoord/lawmake/lawref.shtml>>.

<sup>36</sup> Legal Services Commission of South Australia, *Law Reform*, Adelaide, 2010, viewed 17 January 2010, <<http://www.lawhandbook.sa.gov.au/ch25s05.php>>.

<sup>37</sup> Law Commission, *Annual report 2009-10*, p 40.

<sup>38</sup> Law Commission, *Annual report 2009-10*, p 69.

A\$7,901,932)<sup>39</sup>. The LCEW has a broad mandate to oversee the entire body of law, thus does not receive specific references for work but instead prepares programs of work which are put to the Lord Chancellor for agreement. A similar process occurs at the Law Reform Commission of Ireland.

### New Zealand

The New Zealand Law Commission (NZLC) is also an independent, government funded organisation. It had a budget of NZ\$4,800,000 in 2009-10<sup>40</sup> (approximately A\$3,883,764<sup>41</sup>). The NZLC produced eight final reports, three issues papers, one draft bill with commentary and two briefing papers with recommendations that were provided to the Minister for Justice in 2009-10.<sup>42</sup> References can be made by the NZLC itself or by the Minister responsible. In recent years, however, the NZLC has not carried out any self-referred projects as these have been outweighed by the number of government references.<sup>43</sup>

### Canada

Canada has not had a government funded national law reform commission since 2006, when the funding for the Canadian Law Commission was removed. National law reform work is largely carried out by the Canadian Institute for the Administration of Justice (CIAJ), an independent, not-for-profit organisation, governed by its own board of directors, made up of 30 members. The CIAJ receives some funding from the Canadian Department of Justice, as well as the Law Foundations of Ontario and British Columbia, and some law firms.<sup>44</sup>

The Uniform Law Conference of Canada (ULCC) functions primarily for the purpose of ensuring uniformity in laws across provinces and territories. It also makes recommendations for changes to federal criminal legislation based on identified deficiencies, defects or gaps in the existing law, or based on problems created by judicial interpretation of existing law.<sup>45</sup> Commissioners, appointed

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<sup>39</sup> Historical exchange rates from xe.com..

<sup>40</sup> New Zealand Law Commission, *Annual report 2009-10*, p 21.

<sup>41</sup> Historical exchange rates from xe.com.

<sup>42</sup> New Zealand Law Commission, *Annual report 2009-10*, p 47-48.

<sup>43</sup> New Zealand Law Commission, *Annual report 2009-10*, p 9.

<sup>44</sup> Canadian Institute for the Administration of Justice, *Contributors*, Montreal, 2011, last viewed 11 January 2011, <<http://www.ciaj-icaj.ca/en/sponsors/contributors>>.

<sup>45</sup> Uniform Law Conference of Canada, *Welcome*, Ontario, last viewed 12 January 2011, <<http://www.ulcc.ca/en/home/>>.

by member governments, meet annually to recommend changes and uniform statutes are drafted by professional drafters.<sup>46</sup>

### Provincial law reform bodies in Canada

Law Reform Commissions in the provinces of Nova Scotia, Saskatchewan and Manitoba are independent bodies established by statutes of their relevant provincial governments. The Manitoba Law Reform Commission is funded jointly through grants from the Government of Manitoba and the Manitoba Law Foundation.<sup>47</sup> Others in Canada, such as the Alberta Law Reform Institute (ALRI), the Law Commission of Ontario (LCO) and the British Columbia Law Reform Institute (BCLR), are, like the CIAJ, not-for-profit organisations governed by its own board of directors. Its funding comes from various sources.

The LCO receives funding from the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, the Law Society of Upper Canada, as well as various Ontario law schools.<sup>48</sup> Its topics of inquiry are self-selected, identified through proposals from any member of the public.

Funding for the ALRI comes partly from the Alberta Government's Department of Justice and partly from the Alberta Law Foundation. Topics of inquiry come to the attention of the ALRI's Director through various sources. The Director and Counsel work together to identify critical research issues and the Institute's Board makes the final decision on which projects will be carried out. The ALRI also plays a deeper role in assisting with the law reform process. It engages in providing explanations to 'client' departments and those in the legal profession, responds to legislative and drafting requests and provides assistance to implementation groups.<sup>49</sup>

### United States

In the United States there is no government funded national law reform commission as such. Organisations such as the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI), however, play an important law reform role.

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<sup>46</sup> Uniform Law Conference of Canada, *About us*, Ontario, last viewed 12 January 2011, <<http://www.ulcc.ca/en/about/>>.

<sup>47</sup> Law Commission of Ontario, *Project Proposals Received*, 2009, viewed 11 January 2011, <<http://www.lco-cdo.org/en/content/project-proposals-received>>.

<sup>48</sup> Law Commission of Ontario, *Our Founders and Supporters*, 2009, viewed 11 January 2011, <<http://www.lco-cdo.org/en/content/our-funders-supporters>>.

<sup>49</sup> Alberta Law Reform Institute, *ALRI Process*, Edmonton, viewed 5 January 2011, <<http://www.law.ualberta.ca/alri/About-ALRI/ALRI-Process/index.php>>.

The NCCUSL is a non-profit, non-incorporated association. Its membership is made up of Commissioners appointed by the state governments. NCCUSL's main function is to study and review the law of the states to determine which areas of law should be made uniform.<sup>50</sup> NCCUSL receives most of its funding from state level appropriations with the remainder coming from the American Bar Association, the American Law Institute, and foundation and federal grants.<sup>51</sup>

The ALI is an independent not-for-profit organisation that produces scholarly work to clarify, modernize, and improve federal law. The ALI is made up of over 4000 members and is governed by a volunteer board of directors.<sup>52</sup> The work of the ALI is decided solely by its governing board.

### California

The California Law Revision Commission (CLRC) is state funded and had a budget of US\$664,223 in 2008-09<sup>53</sup> (approximately A\$942,333<sup>54</sup>). In this financial year the CLRC produced four final recommendation reports.<sup>55</sup> The CLRC produces reports that generally do not exceed more than 200 pages.

### Hong Kong

The Law Reform Commission of Hong Kong (LRCHK) is chaired by the Secretary for Justice, who is the head of the Department of Justice. At the LRCHK, the Secretary for Justice and the Chief Justice deliberate together on topics for inquiry. These usually come from suggestions made by members of the LRCHK, the legal profession, the public, or the Administration.

### Singapore

In Singapore, law reform is carried as part of the work of the Legislation and Law Reform Division, which is a division of the Attorney-General's Chambers. Government staff prepare an annual work plan to identify law reform projects. The Legislation and Law Reform Division works closely with

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<sup>50</sup> National Conference of Commissioners on Uniform State Laws, *About NCCUSL -Introduction*, Chicago, 2002, viewed 6 January 2011, <<http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11>>.

<sup>51</sup> National Conference of Commissioners on Uniform State Laws, *About NCCUSL -Frequently Asked Questions*, Chicago, 2002, viewed 5 January 2011, <<http://www.nccusl.org/update/DesktopDefault.aspx?tabindex=5&tabid=61>>.

<sup>52</sup> The American Law Institute, *About ALI - Overview*, Philadelphia, viewed 5 January 2011 <<http://www.ali.org/index.cfm?fuseaction=about.overview>>.

<sup>53</sup> Californian Law Revision Commission, *Annual report 2008-09*, p 27.

<sup>54</sup> Historical exchange rates from xe.com.

<sup>55</sup> <http://www.clrc.ca.gov/Mreports-publications.html#V39>



the Law Reform Committee of the Singapore Academy of Law, which is chaired by a Judge of the High Court.<sup>56</sup>

### ***The appropriate allocation of functions between the ALRC and other statutory agencies***

#### **Law reform is a distinct role**

Law reform is a unique function in comparison to superficially like agencies. The statutory functions and subject matter expertise of different agencies distinguish them from the Commission.

While the Australian Human Rights Commission (AHRC), for example, shares a similar ethos in direction to the Commission, its outputs, outcomes and statutory functions are significantly different. The AHRC has an investigation and advocacy role, which is different in nature to the role of the Commission. The Commission's role is to review laws with the aim of removing defects and improving simplicity, currency and accessibility.

The *Australian Human Rights Commission Act 1986* (Cth) sets out the AHRC's functions, which include:

- On its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights.<sup>57</sup>

This is intended to reflect the expertise of the AHRC in the area of human rights. The mandate of the Commission is far broader in that it is expected to inquire into diverse areas of law.

Similarly, while the Commission could be seen as similar to the Australian Institute of Criminology (AIC) in that research is a core component of this work. However, the AIC's subject specialisation and the Commission's reform focus make these quite different in operation.

### ***Other related matters***

#### **Previous reviews of interest**

The Senate Standing Committee on Constitutional and Legal Affairs inquired into the processing of law reform proposals in 1979.<sup>58</sup> Their report noted the need for Commission recommendations to

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<sup>56</sup> Attorney-General's Chambers, Government of Singapore, *Legislation and Law Division*, Singapore, 2010, viewed 5 January 2011, < <http://www.agc.gov.sg/llrd/>>.

<sup>57</sup> Australian Human Rights Commission Act section 11 (1)(j).

account for political and institutional factors affecting the acceptability of proposals. The Committee report recommended draft legislation being included in Commission reports, and suggested secondment of legislative drafters from the Office of Parliamentary Counsel to the Commission for this purpose. These recommendations were not actioned.

The House of Representatives Standing Committee on Legal and Constitutional Affairs inquired into the Commission in 1993, at the request of the then Attorney-General, to review the role, functions and operations of the Commission. This inquiry also considered the relationships between the Commission and other bodies of related function. The resulting report did not support amalgamation of agencies.<sup>59</sup>

The Senate Legal and Constitutional Legislation Committee conducted an inquiry into the powers and functions of the Australian Law Reform Commission beginning mid-1999. This reference was to consider a 1997 dispute which arose between the Commission and the then Attorney-General about the power of the Commission to act without authorisation from the Attorney-General.<sup>60</sup> The Committee stated in their final report that the inquiry demonstrated the need for clarity in relation to the limits to the powers and functions of statutory authorities and the nature of the relationship with Government. Despite this, the Committee said in their final report, published in 2003, that too much time had passed since the incident and so the reference was not pursued.

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<sup>58</sup> Standing Committee on Constitutional and Legal Affairs, *Processing of Law Reform Proposals in Australia - Reforming the Law*, tabled 10 May 1979.

<sup>59</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Law Reform – the Challenge Continues*, May 1994, pg 111.

<sup>60</sup> The dispute arose following the Commission making submissions to various parliamentary committees in relation to the constitutionality or otherwise of the *Native Title Amendment Bill 1997* (Cth).