Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry on the Australian Law Reform Commission

By

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Summary of Recommendations

1. *ALRC's Role, Function, and Standing*: The Australian Government should maintain the Australian Law Reform Commission (ALRC) as an enduring, independent, and specialised national law reform agency. In doing so, the Government could also consider enhancing the ALRC's role as a hub of national law reform expertise, within a network of State and Territory law reform agencies, equivalent law reform bodies within the neighbouring region, and law reform institutions within the Commonwealth of Nations and broader international community.

2. *Performance and Impact Measurement*: In assessing the ALRC's role and functions in light of its track record, the Government should (amongst other matters) also take account of evidence such as the ALRC's standing in the Australian and international legal communities, as evidenced by the citation and use of its reports by other law reform bodies as well as their citation and use by lawyers, courts, and other institutions involved in the administration of justice. In addition, the Government should take into account the unique contributions that ALRC-initiated stakeholder consultations and other forms of community engagement make as part of the Government's overall process of legal and policy reform, which now requires multiple forms and opportunities of stakeholder input and engagement with a range of governmental bodies (including, but not limited to, the ALRC) from a range of different perspectives and entry points in the policy process.

3. *Community Contribution Opportunities and Costs*: As the ALRC is simply one amongst a large number of Commonwealth Government bodies whose activities require significant community input and other engagement, in terms of the time and work that non-governmental participants contribute to such public policy processes, the Government could consider developing and monitoring from a whole-of-government perspective a set of enhanced guidelines to ensure optimal

opportunities and conditions for stakeholder engagement in the outputs of the ALRC and other governmental bodies. This should be considered from the twin perspectives of governmental *and* non-governmental participants in the policy-making, law-making, and law reform process. In particular, this goes to the timeframes, opportunities, and modes of engagement that are necessary under the new conditions of public and professional contributions to 21st century governance and regulation.

4. *Joint Law Reform Referrals*: In light of the increasingly complex and multi-disciplinary character of major community problems that result in official law reform referrals, together with the recently enhanced legislative requirement for the ALRC to consider the socio-economic as well as legal impact of its recommendations, the Government could consider making greater use of joint law reform referrals to the ALRC and other governmental bodies with relevant expertise.

5. *Commissioner Expertise*: The ALRC's governance arrangements for official law reform referrals should accommodate both academic and non-academic expertise, of both legal and non-legal kinds, in the selection of lead commissioners and expert advisory groups for official law reform referrals, especially in light of recent changes to the ALRC's governing legislation to emphasise the need for the ALRC's recommendations to take adequate account of *both* 'the costs of getting access to, and dispensing, justice' *and* 'persons and businesses who would be affected by the recommendations' (see Schedule 2, section 30 of the Financial Framework Legislation Amendment Act 2010).

6. *Range and Focus of ALRC Outputs per Referral*: For so long as the ALRC's funding remains at or near its current levels, the ALRC's standard practice of producing three major outputs per referral could be modified and enhanced to accommodate a consultation document, final report, and implementation report (with accompanying draft legislation for public comment) as outlined in this submission, with the latter report being produced in conjunction with other relevant governmental participants.

7. *Governmental and Opposition Responses to ALRC Recommendations*: As a matter of standard policy and practice, community law reform needs that are of sufficient importance to produce an official referral to the ALRC, community engagement with the ALRC, and recommendations from the ALRC to the government of the day should receive a timely response from both the government of the day and the federal opposition as the alternative government, given that the cycle of major law reform often extends beyond individual terms of government. In addition, where the Government accepts and then implements ALRC recommendations in legislative form, it should be standard policy and practice for this to be released in a public exposure draft of the proposed legislation. One possible way of doing so is through a public implementation report produced in collaboration between the Attorney-General's Department, other governmental experts in legislative drafting, and the ALRC, with sufficient opportunity for public and professional

comment on this report and its accompanying draft legislation, as suggested above and outlined further in this submission.

8. *Enhancing Legal and Community Education about Law Reform*: The Government could consider ways of enhancing the alignment of school, university, and community education to improve public understanding and literacy surrounding law reform, thereby enhancing community capacity for engagement in law reform and other governmental processes. This could be done in collaboration with the States and Territories, given the common interest in law reform Australia-wide and the existence of official law reform agencies at both levels of government. This educational initiative could be confined to law reform or extended to the broader institutional process of making and reforming law and policy in the interest of social, economic, and political justice, in alignment with other initiatives outlined in this submission. As part of this initiative, the Government could also consider options for enhancing the engagement of the university sector and other non-governmental sectors in the national law reform effort. In particular: (a) standards for assessing and accrediting university law schools in Australia should meaningfully make law reform literacy a key graduate attribute; (b) universities should be encouraged to develop *and* report to government on tangible ways in which they train and otherwise engage students from relevant disciplines in the system of making and reforming law and policy; and (c) governmental and non-governmental organisations should be encouraged to work with academics and students in furthering the national law reform effort, in ways that align their organisational needs with university-based educational, research, and community service activities.

9. *Alternative Law Reform Resourcing Strategies that Engage the University, Legal, and Business Sectors*: In deciding the best way to resource the ALRC, in ways that better align with or otherwise contribute to the Government's other policy and funding initiatives, the Government could consider the following suggested governmental initiatives, as further outlined in this submission:

    a) Aligning the National Research Priorities (NRPs) with the public research needs of law reform referrals from the Attorney-General;
    b) Using or developing the various grant schemes and other funding initiatives administered by the Department of Innovation, Industry, Science and Research (DIISR) and the Australian Research Council (ARC) to fund academic commissioners to undertake official law reform referrals as major research projects in the public interest;
    c) Creating appropriate structures and other opportunities through such research funding schemes for academic commissioners, law reform agencies, and other institutions to work together on official law reform referrals as collaborative research projects with significant policy and regulatory outcomes;
    d) Establishing a national, regional, or wider transnational centre and broader network of governmental and non-governmental participants to meet the research and training needs of the collective law reform effort, or alternatively the broader needs of all

participants in the system of making and reforming law and policy, dedicated in particular to research and training that enhances the methodology, quality, and impact measurement of the legal and policy reform process;

e) Working with the university sector through university compacts, DIISR and ARC research funding mechanisms, and a research and training centre and associated network of the kinds outlined above to enhance the ways in which both legal and non-legal academics undertake and otherwise contribute to official law reform referrals in the public interest;
f) Recognising research-based law reform outputs by academic law reform commissioners at Commonwealth, State, and Territory levels as research publications that count for institutional reporting and funding purposes for universities;
g) Developing research excellence indicators for assessing the research performance of relevant academic disciplines in Australian universities for the 2012 Excellence in Research for Australia (ERA) exercise and other DIISR and ARC purposes that also serve public law reform and related needs, in terms of citation and use of academic work in official law reform outputs and possibly other major governmental publications, as evidence of the translation of world-class research into public outcomes; and
h) Enhancing professional, business, and community contributions to the national law reform effort through a variety of governmental policy and regulatory levers, including governmental procurement and corporate social responsibility initiatives.

Capacity, Expertise, and Scope

This submission is made in my individual academic capacity and concentrates mainly upon select aspects of Items (a), (b), (d), and (e) of this Senate Committee inquiry's terms of reference. In making this submission, I draw upon my experience of the inner workings of government (eg through my recent membership of an expert panel advising the Australian Government and also my co-held ARC collaborative research grant on public sector governance in Australia), as well as my own familiarity with the ALRC and its outputs and reputation through my various academic and professional roles and publications. At various points in this submission, there are comments and suggestions that are informed by (and draw conclusions from) material in the Background Submission provided to this Senate inquiry by the ALRC.

In addition, the initiatives suggested in this submission for alternative ways of resourcing the ALRC's research-related needs on official law reform referrals draw upon my combined experience as an academic research manager, research centre director and member, and university research committee member at four different Australian universities in the last 15 years, as well as my experiences of the ARC and the Government's ERA initiative. Finally, this submission also draws upon aspects of my research under a current ARC Discovery Project grant on Australia's judicial and other institutional engagement with comparative and international legal systems.

Contemporary Law Reform Context

Law Reform and 21st Century Conditions of Governance and Regulation: Law reform is a public good. It is an essential part of the rule of law and its achievement of social, economic, and political justice. It is also part of the business of government. It therefore constitutes a key component of the system of government's overall process of policy development, law-making, and law reform. As such, it needs to be assessed and itself reformed within a public policy and regulatory environment that is different in significant ways from that which prevailed for much of the 20th century.

In particular, the new conditions of societal governance and regulation that prevail in the early 21st century mean that governmental and non-governmental participants each have significant, different, and evolving roles to play throughout all stages of making, implementing, and reforming law and policy. This is necessary to meet the emerging and increasingly important requirements of collaborative governance, deliberative democracy, citizen empowerment, and other emerging forms of enhanced governmental accountability to society at large, including more and better pathways for stakeholder and expert engagement throughout all stages of the law reform process. These developments also have crucial implications for the role, relationships, and resourcing of the ALRC, in the ways outlined in this submission.

Need for a Wide-Angle Lens in Reviewing ALRC: In addition, many of the issues that arise concerning the ALRC can be viewed with either a short-angle lens (confined to the ALRC and law reform in their own right) or a wide-angle lens. Adopting a wide-angle lens focuses upon the ALRC's place in the national law reform enterprise and the broader system of making and reforming law and policy. This means looking from a whole-of-government perspective at ways to develop the ALRC, the national law reform effort, and its supporting infrastructure to meet a wide variety of policy needs, both nationally and internationally. In my submission, viewing this inquiry through a wide-angle lens raises more policy issues that need addressing and also offers the Government more policy opportunities than what occurs simply by looking at the ALRC and law reform in isolation from these broader connections. Most importantly, this goes to innovative ways of resourcing the ALRC's activities.

Resourcing Strategies: The Background Submission to this Senate inquiry by the ALRC details the recent history and current state of its direct public funding, and the way in which it has completed official law reform referrals and otherwise managed its affairs in ways that match its levels of public funding. Unless that level of direct funding is significantly increased, the only alternative is to resource the ALRC by other means.[1] Some of those alternative means relate to policy and regulatory levers available to government in stimulating contributions to the collective law reform effort from a variety of sectors. Some of them relate to existing governmental schemes, including more strategic deployment of the nation's university sector in meeting the research-related needs of official law reform referrals in the national public interest, given that the core work of the ALRC involves

[1] This assumes that the ALRC is maintained in something like its present form, and that the need for additional funding to enable its optimal functionality is accepted both within and beyond government, in light of this Senate Committee's findings and recommendations.

official law reform referrals and that academic commissioners have played a major role in meeting that need.

University Sector's Involvement: Indeed, the work of the ALRC in the past, present, and future is inextricably entwined with the work of Australia's academic community amongst others, on the following levels. First, all presidents and deputy presidents of the ALRC, especially its most recent incumbents, have either been academics or otherwise been held in high esteem in the academic community, not least because of the ALRC's pioneering work from its first president (Justice Michael Kirby) onwards. Secondly, the academic community is one of the communities most engaged in the ALRC's work - as a supplier of commissioners, a generator of law reform ideas and arguments, a source of public submissions, an audience involved in analysis and criticism of ALRC recommendations and their impact, and a body of expertise in scrutinising and shaping law reform outputs (including legislation). In short, the academic community is an important resource in the ALRC's work, on a number of levels.

Thirdly, official law reform recommendations must be based upon academically rigorous research, to survive criticism and to attract support. Referrals from the Attorney-General to the ALRC require a mixture of reliable policy-sensitive research that is community-sensitive, theoretically sound, practically workable, and evidence-based. So, whatever else it is, each law reform referral is a major research project with significant policy and regulatory outcomes attached. It requires clear conceptualisation and analysis of issues, understanding of theoretical and policy frameworks, developing of sound methodological approaches, undertaking of rigorous and reliable empirical and other research, reliable analysis and communication of data, and expert evaluation of outcomes. Whatever anyone might rightly or wrongly think about academics, good academic researchers know how to conduct complex research projects as well-managed projects that meet deadlines and deliver suitable outcomes according to a set budget. Academic commissioners have a track record in doing so at all levels of government in Australia.

Fourthly, as foreshadowed above, the pragmatics of the resourcing equation for the ALRC, if it is continued in something akin to its present form, mean that the resourcing options on the table for this inquiry must include more than simply increasing direct governmental funding to the ALRC. Given the integral role of research and academics (amongst others) in delivering on ALRC referrals from the government of the day, there is a need to examine ways in which the Government can better align its various existing policy and funding schemes with what it needs from the university sector in driving public research needs such as those reflected in law reform referrals. Fifthly, the recent changes to the ALRC's governing legislation make it even more important for ALRC outputs and recommendations and their research-informed evidential basis to be grounded in proper socio-economic analysis as well as legal analysis.

Finally, the national law reform effort - of which the ALRC institutionally forms a significant part - could benefit from better alignment of university legal and community education, law reform literacy and opportunities, and governmental support of community education. Law reform literacy goes to the capacity of citizens to engage in the making and reform of law and policy that affects them.

Indeed, the ALRC's engagement with community stakeholders depends upon it. More can be done to educate the community about the needs, processes, and impacts of law reform. The law reform process is a key component of the law-making process to be studied in school legal studies and citizenship courses, for example. Schools and universities could do more to work together on this level, as could universities and other community bodies that are dedicated to lifelong community education. Similarly, while almost all Australian law schools publicly profess to have some level of commitment to the ideals of law reform and social justice, they vary greatly in their individual and institutional activities that are committed to these ends. Standards for assessing law schools and their curricula can be enhanced to make demonstrable law reform literacy a key component of graduate attributes.[2]

Much more can be done, for example, in the involvement of university students in the collective law reform effort. The research training of the next generation of people with law reform interests and expertise is part of the national research training enterprise too. Students across state and national borders can collaborate on law reform needs, even to the point of using digital technology to work on specific law reform projects. Students at undergraduate level (including honours thesis candidates) and postgraduate level (including research degree students) can be encouraged to undertake research projects with a specific (and even topical) law reform focus. Students can be involved in the editing of university law journals that have standard sections devoted to coverage of law reform referrals at Commonwealth, State, and Territory levels, which contributes to wider academic, professional, and community discussion about particular law reform referrals and hence engagement in their official consultation processes. As the ALRC already does, governmental and non-governmental organisations alike could make even more opportunities available for student internships with a focus on particular law reform needs.

So, any serious evaluation of the ALRC's resourcing must canvass both conventional and innovative ways in which the Government might facilitate resourcing the ALRC's needs, including ways in which the Government might steer the university sector and other sectors towards better meeting the public need of national law reform research priorities enshrined in referrals to the ALRC from the Attorney-General. None of this means that only lawyers should be involved, and only legal academics at that. As this submission makes clear, the Government's whole law reform enterprise has the potential to be significantly enhanced through the combined effect of: (a) providing an optimal level of resourcing for the ALRC, benchmarked particularly against what is necessary to meet the needs of each referral; (b) streamlining and otherwise reframing the way in which the ALRC and other governmental bodies interact and collaborate on referrals; and (c) developing innovative ways of tapping into non-governmental expertise and resourcing (especially from universities and relevant professions) to meet collective law reform needs.

[2] While law reform perspectives and skills arguably should inform all Australian university law courses as part of a foundational orientation towards the justice system, its institutional reform, and its delivery of social, economic, and political justice, this does not mean that such law courses should be regulated simply by mandating additional content or priorities relating to law reform, which might come at the expense of other educational and training needs. There are many different ways in which this important need can be met in university courses in law and related disciplines, as a matter of orientation, emphasis, and content.

Terms of Reference Item (a) Role, Governance Arrangements and Statutory Responsibilities, and Terms of Reference Item (d) Appropriate Allocation of Functions between the ALRC and Other Statutory Agencies

ALRC's National and International Reputation and Impact: The Senate Legal and Constitutional Affairs Committee's own assessment and the assessments of others making submissions to this Senate inquiry could cover a wide range of evidence of the ALRC's value to the Australian community. For the purpose of this submission, I want to highlight one important aspect of the ALRC's reputation and impact that should not be lost in the myriad of possible perspectives and evidential assessments of the ALRC's track record – namely, the high regard in which the ALRC is held within judicial and other legal communities in Australia, the neighbouring region, and the broader Commonwealth of Nations, and the use that they make of ALRC material.

The ALRC has a well-established track record in researching and evaluating law reform needs, options, and arguments in a form that is relevant not only in the work of law reform itself, but also in other aspects of the business of government, whether or not particular ALRC referrals and recommendations ever result in any change to law and policy at all. In particular, the rigorous detailing of relevant legal interpretations, arguments, and evidence in ALRC reports commonly informs parties' submissions to courts in ordinary litigation as well as court decisions themselves, at high judicial levels in Australia and overseas. This should not be underestimated as a resource for the business of government, given that Australian courts have choices in interpreting and developing the law, particularly the body of law known as the common law.

The spectrum of reference to ALRC material in legal submissions and judicial decisions covers everything from citation of authoritative works, at one extreme, to crucial reliance upon a particular interpretation, argument, or body of evidence in the matter before the court, at the other. Even where courts do not accept arguments based upon ALRC interpretations or otherwise criticise ALRC conclusions, this is still an integral part of the institutional reasoning process towards a conclusion in a judgment. All of this is not only a discrete but nevertheless significant contribution to the development of the law in its own right, but also evidences the high regard in which the ALRC is held by communities that are intimately associated with its work and outputs.

For ease of reference and simply by way of illustration, the table attached to this submission covers significant references by judges of the High Court of Australia to ALRC material in the period 2007-2010. Other courts within the Australian judicial hierarchy also commonly make reference to ALRC reports in ways that have a significant impact upon the reasoning of courts in those cases. A recent example in the context of business regulation is the November 2010 judgment of the Federal Court of Australia in *Norman, in the matter of Forest Enterprises Australia Limited (Administrators Appointed) (Receivers & Managers Appointed) v FEA Plantations Ltd (Administrators Appointed) (Receivers Appointed)* (2010) FCA 1274 (18 November 2010).

The highest courts in other common law countries also refer to ALRC reports in their judicial work. Recent examples can be found in New Zealand,[3] and the UK[4]. Similarly, law reform agencies in the neighbouring region (eg Solomon Islands Law Reform Commission, Fiji Law Reform Commission, and Vanuatu Law Reform Commission) and other common law countries also have available and can make significant use of ALRC material in their own work, which is another contribution that Australia makes to comparative law and governance in neighbouring countries and beyond. Moreover, it is now common in Australia and overseas for the terms of reference for public and legislative inquiries to include reference to comparable experiences, lessons, and models from other jurisdictions. Indeed, Item (c) of the terms of reference for this Senate inquiry provides a perfect illustration of this development. All of this should be considered as part of the overall equation in assessing the worth and impact of the ALRC within Australia's system of government, the neighbouring region, and the broader international community.

ALRC's Governance Structure and Other Arrangements: Any assessment of the ALRC's governance structure and other arrangements for the purpose of this inquiry must be undertaken against the background of legislative implementation of changes to the ALRC's governance and management under the Financial Framework Legislation Amendment Act 2010 (Cth). In practice, this means that the ALRC has been structurally converted from mid-2001 onwards to an 'executive management' structure instead of a 'board' structure, in terms of the governance templates developed in the 2003 Uhrig Report, as accepted by the Government and implemented through the Department of Finance and Deregulation's 2005 *Governance Arrangements for Australian Government Bodies*. This change also has important flow-on implications for the ALRC's leadership and management, financial administration, reporting requirements, and resourcing from one year to the next, all within the overall Commonwealth budgetary framework and other governance arrangements for federal public sector bodies that conform to the 'executive management' template. Given that the ALRC performs what is clearly a public function and does not engage in market-related or other commercial activities for their own sake, there are levels on which it makes sense within the framework of the whole-of-government Uhrig-based governance templates for the ALRC not to have a true board in the sense of a governing body subject to the kinds of directors' duties and liabilities enshrined in the Corporations Act and the Commonwealth Authorities and Companies Act.

However, this still leaves the important operational question of the optimal internal management structures and arrangements for the ALRC from mid-2011 onwards. Here, my main focus is upon the optimal governance arrangements for completing official law reform referrals. The ALRC needs an optimum number of dedicated full-time commissioners, including but not limited to the

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[3] *D A Constable Syndicate 386 v Auckland District Law Society Inc.* [2010] 3 NZLR 23 (Court of Appeal); *Sanders v Houghton* [2009] NZCA 610; [2010] 3 NZLR 331 Court of Appeal); *Wi v R* [2009[NZSC 121; [2010] 2 NZKR 11 (Supreme Court); *Hardley v Fatupaito* [2009] 3 NZLR 676 (High Court- Auckland); *R v Bain* [2009] NZSC 16; [2010] 1 NZLR 1 (Supreme Court); *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 (Supreme Court) and *Progressive Enterprises Ltd v North Shore City Council* [2006] 2 NZLR 262 (High Court).

[4] *R (on the application of S) v Chief Constable of South Yorkshire; R (on the application of Marper) v Same* [2004] UKHL 39 (UK House of Lords).

President, to undertake the lead on law reform referrals from the Attorney-General. The appointment of such additional full-time commissioners could be referral-specific, so that appropriate commissioners can be identified as the lead commissioner for each referral, but this would still leave only the President as the gate-keeper for institutional memory, consistency of approach, continuity of relationships with governmental and non-governmental stakeholders, and guidance on accumulated law reform methodological expertise, which at face value seems hardly ideal. This crucial operational aspect is therefore connected to questions of resourcing too, which are covered later in this submission.

ALRC Role and Responsibility: In my submission, the Government should endorse the continuing operation of the ALRC as an independent national law reform agency. In its 1994 review of the ALRC's role and effectiveness, the House of Representatives Standing Committee on Legal and Constitutional Affairs considered and ultimately rejected alternatives to a permanent, independent, national law reform agency. Its report on the ALRC identified the distinctive contribution of such a body in these terms (at para [27]): 'The Committee concludes that the distinctive contribution that a permanent and separate law reform commission can make to the reform of the legal system lies in its capacity for detailed research, extensive consultation and critical analysis'. Those three attributes form part of the ALRC's specialised law reform expertise and should not be underestimated.

As presently advised, I can see only four potential reasons for reaching a different conclusion now:

1) the expansion of governmental agencies, parliamentary committees, and other bodies who engage in law reform consideration as part of their mandate, thus diluting or overlapping the ALRC's law reform role;
2) any similar dilution or overlap in what the Attorney-General's Department provides to the Attorney-General as policy advice directed towards law reform initiatives;
3) the availability of a better alternative vehicle for national law reform initiatives; and
4) demonstrable non-efficiency or non-effectiveness of the ALRC.

However, on review, none of these potential reasons - either alone or together - ultimately justifies reaching a different conclusion in this inquiry from that reached by the earlier parliamentary committee and extracted above. In terms of the first stated reason (ie expansion of governmental bodies with related roles), the rise in the number of such bodies was already an emerging pattern at the time of the 1994 review. Even if there are more of them now, none of them have law reform as their main or sole function, and all of them have more specialised subject areas than what is needed for a systematic, specialised, and national approach to law reform, alone and in collaboration with other official law reform bodies at State/Territory and international levels.

Questions arising in this inquiry about potential overlapping or complementary roles and functions across the spectrum of governmental bodies must be seen through the following prism. The reality of contemporary government is that many governmental bodies are engaged to different degrees and from different standpoints in the exercise of examining and suggesting reforms of existing and proposed laws, without that necessarily detracting from the value of each of their discrete

contributions to the overall enterprise of making and reforming law and policy. The Australian Human Rights Commission, for example, has a variety of statutory functions that relate to mediation, advocacy, research, education, and other matters, in addition to examination of laws and bills for human rights implications. Law reform therefore is not its core function, and it engages in law reform analysis of a statutorily confined kind and only in relation to human rights. Departments of state consult with stakeholders as part of the policy process in advising governments whether or not to change or repeal laws or even accept recommendations from expert panels and public/parliamentary inquiries (including recommendations in final reports of the ALRC). However, this does not render otiose the stakeholder consultations engaged in by the ALRC for different purposes and at a different stage of the policy development process in addressing referrals from the Attorney-General.

Similarly, a number of departments, agencies, statutory bodies, and parliamentary committees might engage to one degree or another in assessment of the impact of proposed and existing laws and policies on people's rights. A parliamentary committee charged with reviewing proposed legislation for its constitutionality might focus upon its potential impact upon constitutional rights. Yet, nobody seriously suggests that this completely duplicates, renders unnecessary, or otherwise detracts from the specialised and systematic scrutiny of laws for rights-related effects that is fulfilled by bodies such as the Senate Scrutiny of Bills Committee and the proposed Parliamentary Joint Committee on Human Rights. Equally, the ALRC is not treading on the turf of the Senate Scrutiny of Bills Committee or duplicating its role in scrutinising legislation, simply because the ALRC is directed by its governing legislation to undertake its law reform functions in ways that avoid trespassing unduly on individual freedoms (section 24(1), ALRC Act), even though similar wording governs one of the functions of the Senate Scrutiny of Bills Committee in its rights-sensitive evaluation of bills under relevant federal parliamentary standing orders.

In terms of the second stated reason (ie complementary twin pathways of expert advice to the Attorney-General on law reform), the 1994 review of the ALRC found an ongoing need for the ALRC as an additional and separate source of advice to the Attorney-General on law reform, for reasons that have just as much resonance now (paras [4.4.11]-[4.4.15]):

> 4.4.11 *A body that is separate from the Attorney-General's Department and other government agencies, is independent.* It has the capacity to develop comprehensive policy and is not distracted by routine policy development and the capacity to encourage open consultation. *An advantage for the government in having a separate and permanent law reform commission is that it can bring a medium to long term perspective to issues and policies.*
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> 4.4.12 As a permanent body with a permanent administrative structure it has a base from which to develop links with clients and other organisations. Commission staff provide the members with research analysis, writing and administrative services.
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> 4.4.13 The Committee regards the Commission as an important source of independent advice for the government because of its capacity for accessing expert and representative opinion. *Its direct*

relationship with the Attorney-General means it fulfils a need for advice to the Attorney-General independent from that of the department and others.

4.4.14 The Committee believes that there is considerable goodwill in the community towards the Commission. *As an independent body the Commission has the capacity to tap broader constituencies than those traditionally accessed by the department or minister.*

4.4.15 The Committee considers that the independence and objectivity of the Commission is founded in part in its statutory nature, and in part in the independent management and operations of the Commission. The objectivity of the Commission also derives from the wide consultation that the Commission undertakes in each reference, as its independence derives in part from the democratic nature of its processes. The Committee considers that together, the national character and the independence of the Commission encourage a more systematic development of the law in Australia. (emphasis added)

In terms of the third stated reason (ie feasible alternatives to a national law reform agency), the 1994 review of the ALRC identified limitations of alternatives to an enduring and stand-alone national law reform agency. None of the canvassed alternatives – 'subject specialist advisory bodies', 'special purpose ad hoc committees and Royal Commissions', 'government departments', 'parliamentary committees', and 'contracted consultants' - were identified then as fully meeting the needs of national law reform on a specialised and systematic basis. Time has not diluted the force of those reasons (paras [4.3.1] – [4.4.15]).

Nor should this Senate inquiry read too much into examples of other jurisdictions who have resisted or back-tracked at various points in time from having a national body dedicated to law reform. Care must always be taken in translating lessons from one jurisdiction to another, because the background context and drivers of change are affected by a range of political, legal, economic, and cultural conditions that vary from jurisdiction to jurisdiction. Moreover, the need for law reform coordination and harmonisation at the national level in conjunction with sub-national and international regulation is greater now than at any time in the past (see further below). The real question is not how to replace or confine the ALRC, reallocate its functions, or do without its expertise and outputs; rather, the question is how better to align the work and outputs of the ALRC with the work of other governmental bodies engaged in the collective effort of policy development, law-making, and law reform.

In terms of the fourth stated reason (ie efficiency and effectiveness), the ALRC's Background Submission details the recent success rate of ALRC reports and their recommendations being adopted in whole or in part by the Government. The adoption and implementation of ALRC reports and recommendations is affected by changes in political and parliamentary dynamics, electoral cycles, competing public policy priorities, and a range of another factors largely beyond the ALRC's control. To the extent that adoption and implementation rates are a useful measure of the ALRC's performance – and they are, to some degree - their evaluation must be conducted from a long-range view, compared to the equivalent success rates of other national and sub-national law

reform bodies, and combined with other measures of the ALRC's performance, to enable a holistic overall assessment of its track record.

The issue of performance measurement for governmental bodies associated with the administration of justice in general[5] and law reform bodies in particular[6] is a complex topic in its own right, and there is much debate over both the extent to which public goods such as law reform are completely amenable to particular kinds of economic performance indicators and the complete range of performance indicators that are suitable for law reform agencies. Much of this is beyond the present submission, and hence my assessment of the ALRC's efficiency and effectiveness is based upon my own knowledge of its work and reputation (also see accompanying table), as well as an assessment of the data provided in the ALRC's Background Submission to this inquiry.

On this basis, I see no good reason now to doubt, or reach a different view from, the finding of the previous official review of the ALRC, which endorsed the need for a standing, independent, national body specialising in systematic law reform. Indeed, since the time of the last official review of the ALRC, a number of new factors combine to reinforce rather than detract from the need for such a body devoted to systematic law reform at the national level. Developments such as enhanced cooperative federalism, global governance challenges (eg regulating human genetics, international security, and the Internet), regional cooperation (eg TransTasman and Asia-Pacific initiatives), and harmonised global governmental responses to the 2008-2009 global financial crisis all demonstrate the need for systematic law reform review at the national level, not least in terms of harmonisation and coordination of regulatory approaches across sub-national, national, regional, and global borders. In addition, the contemporary emphasis upon evidence-based policy development sits well with the reputation and methodology developed by the ALRC for efficient and effective stakeholder engagement, which is an important part of its specialised law reform expertise.

Terms of Reference Item (b) Adequacy of Staffing and Resources to Meet Objectives, and Terms of Reference Item (e) Other Related Matters

Optimal Level of Resourcing for the ALRC per Referral: The best outcome is for the Government to commit resources that enable at least minimum functionality for each law reform referral from the Attorney-General. Importantly, that mixed question of functionality and resourcing must now include consideration of the additional standard requirement for the ALRC to ensure that it properly assesses the costs of access to justice and the effect upon individuals and businesses arising from its recommendations. At the very least, in view of the data provided in the ALRC's Background Submission about the minimum personnel and other support needed for each referral, this means having: (a) overall coordination and guidance from the ALRC President for each referral; (b) at least one commissioner (and possibly two, of complementary expertise) who are dedicated full-time to the leadership and conduct of each referral; (c) adequate research officer and library support; (d)

[5] Australian Productivity Commission, Steering Committee for the Review of Government Service Provision, *Report on Government* Services (2005).

[6] B. Opeskin, 'Measuring Success' in B. Opeskin and D. Weisbrot (eds), *The Promise of Law Reform* (2005), Federation Press.

adequate expert advisory guidance, including that provided by part-time commissioners, and with a complement of both legal and non-legal expertise available on the expert advisory panel, including relevant governmental stakeholders (eg representation from the Attorney-General's Department); (e) whatever additional internal or external consultancy assistance is necessary to conduct relevant stakeholder consultations, focus group discussions, and socio-economic impact assessments of reform proposals; and (f) whatever additional governmental assistance and collaboration is needed to develop draft legislation accompanying or following on from ALRC recommendations, where that is required. In other words, questions about the adequacy of the ALRC's resourcing eventually must be addressed at the level of detail of what is actually needed to support the carriage of official law reform referrals.

Based on the data supplied by the ALRC's Background Submission for this inquiry, the ALRC is arguably approaching the point where both its capacity and the Government's return on investment in it potentially risk being undermined by its current level of resourcing.[7] No individual full-time commissioner alone could handle all of the referred matters, in terms of workload and areas of specialisation. Part-time commissioners can and do fulfil useful advisory roles, especially in subject areas of their own expertise, but usually are not in a position devote the time needed to lead complex referrals, especially where part-time commissioners also fulfil roles as judges or other full-time official/professional jobs. Commissioners of whatever kind need adequate library, research, and administrative support for minimum functionality.

All of this assumes that the ALRC is worth having. None of it means that the ALRC is perfect, or that the Government should necessarily be its sole source of resourcing. However, if the Government (for whatever reason) does not provide this level of resourcing through direct funding for the ALRC, the alternative is to find creative ways of meeting this joint resourcing and capability need through other avenues. Here, by way of illustration, the Government could consider using some of its existing public funding schemes, so that law reform needs are better aligned with other schemes through which the Government already supports research and policy innovation. In addition, the Government could consider ways in which it might use its existing approaches to public procurement and other regulatory levers to provide necessary professional, consultancy, and other support to the ALRC for its referrals. Accordingly, the next part of this submission focuses in turn upon suggested improvements to the ALRC's operations, and then some innovative resourcing strategies are covered in the remainder of this submission.

Commissioner and Collaborative Expertise: Ideally, where two commissioners take the lead on a referral, only one should be an academic (given the need for expertise in law's practical and policy dimensions too) and only one should be a legal expert (given the need for socio-economic expertise

[7] This conclusion reflects my own assessment of the ALRC's needs, informed by my own experiences of law reform processes as well as the data in the ALRC's Background Submission. In institutional reviews such as these, it is important to put such views to enable committees and governments to decide such matters for the institution's future. In doing so, I realise that others within and outside government might approach the related questions of need, adequacy, and priority differently from me or reach different conclusions, and that all governments face the unenviable reality that not every important public need can be met to the fullest from available sources of public funding.

too under the ALRC's amended statutory charter). Having two lead commissioners on a referral and combining complementary legal/practical and legal/non-legal expertise has its advantages. However, in the end, the selection of commissioners obviously depends on who is willing and available to undertake referrals, and the conditions of the supporting infrastructure that make their involvement possible.

In addition, where it is appropriate for the ALRC to conduct a referral in collaboration with another governmental body – for example, a body such as CAMAC on questions of law reform surrounding corporate law and regulation[8] – one commissioner should come from that other body. Here, there is a policy need to align the specialised law reform expertise of the ALRC with the subject-specific expertise of other governmental bodies (eg CAMAC, Australian Human Rights Commission, official regulators etc), through the mechanism of joint referrals and collaborative law reform reports.

This need is reinforced by the exponential growth of statutory agencies, commissions, and other public bodies in addition to departments of state that might have relevant expertise to bring to bear on a law reform problem, as well as the range of policy, regulatory, and other perspectives that increasingly matter in resolving the complexities of some community problems and their appropriate legal and regulatory solutions. To facilitate this, the Government should be encouraged to consider making more joint referrals on matters involving the possibility of law reform to both the ALRC (to capitalise on its specialised law reform methodology, expertise, and established stakeholder links and goodwill) and another Commonwealth body with relevant expertise (eg CAMAC, on matters of corporate legal and regulatory reform). This recommendation reinforces the ongoing work of the ALRC itself in developing relationships with other official law reform agencies within Australia and overseas, as part of a collective law reform enterprise with a stake in developing and measuring law reform outcomes.[9]

Relevance, Monitoring, and Enhancement of Stakeholder Engagement Across Government: As with most departments of state, governmental agencies, parliamentary committees, and other public bodies that call for or otherwise rely upon public submissions and stakeholder engagement in their work, the ALRC's processes and outputs must also be aligned as closely as possible with optimal efficiency and effectiveness from the standpoint of those audiences with which it engages both inside and outside government. This is a wider point that includes the ALRC as a body requiring significant professional and community engagement, but also extends beyond the ALRC to the myriad of governmental bodies at all levels of government that do and should require public input (including stakeholder engagement in the formulation and implementation of law and policy) and how they go about it.

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[8] There is precedent for this in the context of corporate legal and regulatory reform: see, for example, the joint referral to the ALRC and the Companies and Securities Advisory Committee in the context of collective investment schemes, referred to by the Federal Court recently in *Norman, in the matter of Forest Enterprises Australia Limited (Administrators Appointed) (Receivers & Managers Appointed) v FEA Plantations Ltd (Administrators Appointed) (Receivers Appointed)* [2010] FCA 1274.

[9] Eg R. Croucher, 'Relationships with Other Law Reformers – Joint Law Reform Projects', Address to the Australasian Law Reform Agencies Conference, Brisbane, 2010.

In addition to the number of reports of whatever length that must be studied and answered, there are multiple points at which some kind of stakeholder consultation, response, or expertise is necessary. This includes stakeholder consultations, responses, and submissions that inform the formation of recommendations, those that inform further internal governmental consultations with stakeholders in the course of making recommendations to government about law reform recommendations and other public or parliamentary inquiry outcomes, public input and submissions that result from the public release of governmental responses to public reports or exposure drafts of legislation, and public submissions and hearings that result from the referral of legislation upon its introduction into parliament to relevant parliamentary committees for review.

The ALRC and its counterparts at State and Territory levels are not alone in drawing upon this considerable exercise of public goodwill and engagement. Other public and parliamentary inquiries do so too, and not always in ways that are fully responsive to what non-governmental participants deserve or need. On this wider whole-of-government level, factors such as unnecessarily short timelines, duplicate inquiries, and multiple inputs on the same inquiry can each result in inefficient and non-effectiveness outcomes from a systemic perspective. In addition, the collective call upon non-governmental participants to engage with and respond to all such bodies at all levels of government in any one year, often within tight timeframes and with multiple calls upon the same professional, industry, and community representative bodies from one inquiry to the next, is a considerable one and rapidly becoming a crucial systemic issue from a whole-of-government standpoint. This can affect the range and quality of community inputs that government needs.

At the same time, everyone – governmental and non-governmental participants alike – has to live with the inevitable exigencies of a policy or parliamentary agenda that requires inputs and responses within tight timeframes. Such is public life. However, it is also a question of balance. At present, there are points at which this can produce less than optimal outcomes, put the overall system under strain, or result in missed opportunities for crucial community input and expertise at all stages of the process of making and reforming law and policy. The general point being made here is that, within the necessary constraints of conducting governmental business, it is important for each governmental body that needs and relies upon public engagement (and government as a whole) to be mindful of the burden in time and work – however necessary and welcome the opportunity - that this places on organisations and individuals who continuously face calls from a number of such bodies for input of various kinds, to optimise the opportunities and conditions of that input, and to be vigilant in reducing duplication of effort and other inefficiencies.

This is a considerable and often hidden cost of the law-making and law reform process, and there is a whole-of-government need to ensure that this stakeholder input is generated in the most efficient and effective ways, and without undue costs to the participants. This need has two prongs – ensuring that there is adequate recourse to stakeholders at all stages of the law reform process (ie both before and after the ALRC submits its final reports to the Attorney-General), and ensuring that the time and effort required of non-governmental stakeholders is otherwise optimised, all against the background of the simultaneous increase in official requests for stakeholder input and decrease in

available time and opportunities for considered input throughout the process, across the whole spectrum of government. Conversely, the flip side of this aspect is that the considerable work of stakeholder consultation and other engagement that is engaged in by the ALRC in the process of formulating law reform proposals has a value for the overall policy development process in government that also needs to be counted in assessing the ALRC's performance.

Accordingly, this two-sided standpoint of the cost in time and work of non-governmental participants, on one hand, and the value of stakeholder engagement of the right kinds, on the other, is an important perspective to include in assessing the efficiency and effectiveness of the collective national law reform effort, as well as identifying more meaningful opportunities for stakeholder engagement. To be clear, none of the discussion here detracts from the amount of time and work needed for meaningful law reform outcomes, the willingness with which governmental and non-governmental participants commit themselves fully to law reform in the public interest, or the need for better mechanisms of engagement for governmental and non-governmental participants throughout all stages of the law reform process, including its legislative outcomes. Rather, it simply highlights the need for continuous improvement in the efficiency and effectiveness of the overall law reform enterprise from a range of standpoints, including what is required of *and* by key participants to optimise the outcomes of this enterprise and the Government's return on investment in institutions such as the ALRC.

Range of Outputs for Each Referral: In producing its various outputs, the ALRC has to write for a wide variety of audiences, all of whom have some part to play in the policy development process for law reform, but not all of whom are necessarily experts in the matters referred to the ALRC by the Attorney-General. Moreover, even experts in some areas of relevance (eg legal expertise) are not necessarily experts in other areas of relevance (eg economic and social impact of reform proposals). So, from that perspective, there is a sound reason for the ALRC's current approach of producing three outputs per referral, where possible: (a) an issues paper (to raise awareness and develop understanding of the wide-ranging issues at stake, and to inform views and submissions); (b) a discussion/consultation paper (which advances matters to the next stage of identifying the need and options for reform); and (c) a final report (which contains the ALRC's final recommendations and evidential basis for them, informed by feedback from the public, private, and civic sectors on identified needs and options for reform).

Differences of views will exist over whether the ALRC should produce two or three outputs per referral (and of what kind), whether those outputs should be shorter or longer (and more or less policy-orientated and citizen-friendly), whether all law reform recommendations should be accompanied by proposed legislation in draft form, and whether there should be further public consultation processes attached to the implementation of ALRC proposals in legislation and policy. In my academic and professional capacities, I'd rather read and respond to one consolidated document to inform the ALRC's public consultation process, which itself does the work in an integrated fashion of developing understanding of relevant issues, charting the development of legal policy on issues to that point, and framing possible options for law reform in light of comparable

law reform experiences at sub-national, regional, and international level. This would mean combining issues papers and discussion/consultation papers into a single public consultation paper – a practice adopted by the ALRC itself when timing and resources do not permit its preferred standard practice of three distinct outputs.

The ALRC should be encouraged to continue this practice where appropriate for its benefits (eg integrated analysis of issues and options) and saving of opportunity costs for stakeholders, and not simply as a cost-cutting measure within government for its own sake. In my evaluation, the benefits of adopting this course if current resourcing restrictions continue bring additional gains that are worth the costs of what is lost through not having two separate outputs prior to a final report, even accepting that a considerable degree of community awareness-raising about issues might well be necessary to stimulate informed community responses that are necessary in framing possible law reform options. In other words, framing meaningful and responsive law reform options for Australian conditions involves more than simply canvassing comparative laws and other regulatory models from other jurisdictions as an abstract research exercise.

In any case, this is only one aspect of the ALRC's outputs that needs and is receiving continuous improvement. Another and equally important aspect in need of improvement from all governmental participants (including the ALRC) is what happens in framing suitable legislation to give effect to law reform recommendations. As discussed immediately below, more thought could be given within government to more meaningful ways of bringing governmental and non-governmental expertise together at the 'back end' of the law reform process, in the public consideration of any proposed legislation that results from the Government's adoption of ALRC recommendations. This matter is covered next in this submission.

Continuous Improvement of Community and Professional Engagement on Legislative Outcomes of Law Reform Referrals: The suggestions in this submission concerning the number and type of ALRC outputs per referral also relate to enhanced ways of engaging both governmental and non-governmental stakeholders in the 'back end' of law reform work. This covers the design, drafting, and content of proposed legislation to give effect to formal ALRC recommendations. Public and professional engagement is often as necessary for working out the implementation of a law reform proposal as it is for its development in the first place. Currently, in relative terms, there is a disproportionate amount of effort being directed at the 'front end' of the law reform process, across the three standard outputs preferred by the ALRC when time and resources permit, in terms of professional and other community input into decision-making about law reform proposals. This stops short of the 'back end' of the law reform process, including public service advice to the Government on the ALRC's recommendations, the Government's response to the ALRC's report, and ultimate implementation of ALRC recommendations in policy, legislative, or other forms.

Yet, recent experience with public inquiries and submissions – and not confined to ALRC referrals – suggests that there is a considerable body of professional and other expertise in the community that could meaningfully be brought to bear on proposed legislation that results from law reform proposals, in terms of its drafting and implementation, at least for the purpose of offering insights

on practicalities, traps to avoid, realities on the ground, and other aspects of fine-tuning legislation to ensure its alignment not only with official policy decisions and advice but also legal efficacy and practical workability from the standpoint of those most affected or otherwise involved in the subject matter within the community. Much of this occurs at present largely behind closed doors within government, in the additional and sometimes selective stakeholder consultations engaged in by the public service in advising ministers about the desirability of a proposed reform and its implementation in legislation, often without a public exposure draft of the relevant legislation.

In law and policy, as in life, the devil is always in the detail. So, the question is how to ensure that there is adequate input, guidance, and expertise deployed in the best ways at the 'back end' of the policy development process, from both governmental and non-governmental participants, in a collaborative effort between the Attorney-General's Department (as the lead department and primary source of advice to the Attorney-General), the ALRC (as the architect of a law reform proposal), legislative drafting experts within government, and the legal profession and wider community (with significant outside expertise in the legalities and practicalities surrounding the problems being addressed through law reform).

For the following reasons, it should *not* be a standard practice or governmental expectation of the ALRC to produce proposed legislation in draft form to accompany law reform proposals, unless that is requested specifically by the Attorney-General in a referral *and* the draft legislation is produced in collaboration between the ALRC and the Government's other experts in legislative drafting (eg Office of Parliamentary Counsel, and the Office of Legislative Drafting and Publishing). First, the ALRC does not currently have a critical mass of equivalent legislative drafting expertise. Secondly, its current level of resourcing makes both that capacity and its priority doubtful, across the spread of necessary ALRC tasks on each referral. Thirdly, while the task of translating law reform recommendations into concrete and detailed legislative form is an excellent exercise in focusing the ALRC's mind upon the implications and workability of its law reform recommendations, as others have suggested and the last official review of the ALRC recognised, in present circumstances that advantage is outweighed in my submission by the factors already listed, together with the additional factors that follow.

Fourthly, the effort to produce draft legislation, including any associated collaboration and work with other governmental bodies, at least at the stage of the ALRC's final report, is wasted if the Government ultimately decides not to accept the proposal at a policy level. Admittedly, putting a law reform proposal into draft legislative form might well have some extra value in informing the Government's consideration of the proposal and the ways of implementing it, but even then it will not necessarily capture all policy and drafting concerns at that stage of the process. Before it can accept the proposal, for example, the Government will properly need the advice of the Attorney-General's Department in any case, whose officials might need to engage in their own form of stakeholder consultation about the proposal. Unless the Attorney-General's Department is closely involved in preparing and advising on draft legislation for inclusion in the ALRC's final report – which has both strengths and weaknesses in terms of differentiating roles in the policy development

process – there may well be legislative drafting issues in addition to other policy matters that the Department would also raise in its advice to the Attorney-General. So, for all of its advantages, the inclusion of drafts of proposed legislation in ALRC reports can still result in significant gaps between what is proposed and what eventually is introduced into parliament, let alone passed into law.

Finally, during the course of a referral, a considerable number of non-governmental participants will have developed or otherwise brought to bear their expertise on various aspects of the community problem being addressed through the law reform process. They remain both stakeholders and sources of expertise for the final stages of the law reform process too. Some of them will have expertise in legislative drafting or the particular subject matter of the proposal from legal, economic, and other perspectives, and others of them will have experience on the ground in practicalities and workability of any proposals for reform, at a level of understanding and experience that conventional stakeholder consultation processes can capture only imperfectly.

A brief review of public, professional, and industry responses to calls for comments on public exposure drafts of legislation and similar submissions to public/parliamentary inquiries is sufficient to reveal the untapped resources that are available to complement and enhance the expertise of the Australian Public Service and associated governmental bodies in the policy development, law reform, and legislative drafting processes. Finding better ways to access these community resources and to harness them for the collective law reform effort is also consistent with the reforms of the Australian Public Service outlined by the Australian Government's Advisory Group on Reform of Australian Government Administration in its report, *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*.

This applies particularly to law reform proposals that have a significant potential impact upon the economy, big business, small-to-medium enterprises, and consumers, as well as social investment, social enterprises, and the general not-for-profit sector too. The business sector is always concerned – rightly or wrongly - about what it perceives as unnecessary regulatory 'red tape', but there is some evidence that this is reaching new levels, give the range of recent reforms to Australian business and consumer laws and the work yet to be done in reviewing the overall business regulatory burden. The front-page story for *The Australia Financial Review* on 21 January 2010, for example, refers to 'growing concerns from business that the Council of Australian Governments is struggling to reduce the complexity of business regulation'.[10] The engagement and receptiveness of the Australian business community in the national law reform effort generally and its economic impact in particular are important considerations, given that most of the ALRC's referrals in recent times have been more orientated towards social justice topics than economic justice matters of the kind reflected in corporate and consumer regulation, and that the economic effect (including business and consumer impact) of ALRC recommendations now has equal statutory significance with the effect upon access to justice and the administration of justice.

[10] 'Top Judge Hits Out at Federal Laws', *The Australian Financial Review*, 21 January 2011, p 1; see also J. Colvin, 'Director Liability Laws Must Be Reformed', *The Weekend Australian*, 15-16 January 2011, p 40.

For these reasons, I favour a standard procedure for ALRC referrals as follows, especially if the ALRC continues to be funded by the Government at something approaching its present levels.[11] The currently preferred practice of three reports – an issues paper, a discussion/consultation paper, and a final report (usually without draft legislation, unless specifically requested by the Attorney-General as part of the law reform referral) – could be modified to reframe the production of three outputs per referral as follows:

1) *An initial public consultation paper*, which provides the background, frames the issues, assesses comparative models and experiences from other jurisdictions, and identifies possible law reform options for the referral in question – this effectively combines the work of an issues paper and a separate discussion/consultation paper into one document, and forms the basis and focal point for stakeholder consultations and public submissions;
2) *A basic public report*, which includes a detailed policy assessment of the strengths and weaknesses of each law reform option together with a final evaluation and set of recommendations, produced in both a full version for all audiences and a distilled version for government audiences who advise and implement it, with the distilled version for policy and regulatory audiences covering law reform options considered,[12] their relative policy strengths and weaknesses from a law reform perspective, and final recommendations and their underlying reasons – in both cases, the policy assessment will need to include the legal, economic, business, and other societal impact of ALRC recommendations, in light of the changes to the ALRC's functions through 2010 legislative amendments to require it to consider the impact of its recommendations upon 'persons and businesses who would be affected by the recommendations (including the economic effect, for example)'; and
3) *A public implementation report*, at least where the Government on the advice of the Attorney-General's Department accepts the ALRC's recommendations in whole or in part *and* authorises their incorporation in draft legislative form, which is produced with necessary input from their various perspectives of the ALRC, the Government's legislative drafting experts, and the Attorney-General's Department, either as a collaborative report or alternatively with the Attorney-General's Department as lead coordinator, and also including a public exposure draft of the proposed legislation and associated commentary from the various governmental

[11] For the sake of clarity, I should affirm that I still see a lot of value in the ALRC's current model of three outputs of particular kinds per referral and would be happy to see that model continue along with other initiatives suggested here. In suggesting some tweaking of that model, I am simply acknowledging and accommodating the impact that resourcing constraints have upon that model, as well as highlighting ways of meeting the need for additional professional and other community input into legislation and other regulatory measures that flow from governmental acceptance of final reports from the ALRC.

[12] The ALRC should be encouraged to continue its recent practice of producing summary versions of its overall reports for the policy and regulatory audiences who will be primarily involved in evaluating and implementing ALRC recommendations, as occurred in the referral on family violence. The detailed versions of its reports are still necessary for other public purposes, especially in recording the evidential base, summary of stakeholder positions, and rationales for accepting or rejecting particular law reform options. The need for detailed public reports and stand-alone summary versions for follow-up policy and regulatory purposes is built into this recommendation concerning the number and nature of ALRC outputs.

participants' perspectives within the body of the implementation report for public consumption.[13]

To facilitate this, the Government could also, as standard policy and practice: (a) provide timely responses to ALRC reports and recommendations; (b) support the collaborative production within government of draft legislation for government-approved ALRC recommendations, with input from the ALRC at this stage too; and (c) publish for public comment exposure drafts of legislation that results from ALRC recommendations. In addition, the Federal Opposition could be under an equivalent expectation to inform the public of its position on each referral and its outputs. If a matter is sufficiently important to be referred to the ALRC by the Attorney-General, and for the ALRC to engage in significant community consultations and make substantive recommendations about it to the Attorney-General, it makes sense for the government of the day (and the alternative government in waiting) to make timely public responses to those recommendations, especially since the law reform process from initiation to implementation can straddle elections.

Moreover, it is incumbent on the government of the day to engage the public adequately (and in new and innovative ways) in both developing a law reform policy proposal *and* working through the contents and implications of any legislation to implement it. Professional and public engagement with the process should not end with the production of a final set of recommendations from the ALRC to the government of the day. Again, if a law reform problem and law reform proposal is significant enough to warrant attention and adoption by the government of the day as a matter of policy, after a process of detailed public input and consultation in the processes leading to those recommendations, any resulting legislation should be released as a public exposure draft in a further public consultation process by the government of the day. Such a step consolidates the public and professional goodwill and expertise invested in the law reform referral to that point and, for that reason alone, differentiates legislation that results from official law reform recommendations from other kinds of legislation. The public interest in transparent policy development, return on investment of public monies, engagement of multi-stakeholder expertise, and accountability of all organs of government to the people arguably demands no less in the current environment for government.

Anything less than this outcome potentially risks wasting public resources, public submission and consultation opportunities, and community investment of goodwill and expertise in law reform processes. These suggested actions have even more importance in an environment where: (a)

[13] This suggestion goes mainly to the need for public exposure drafts of legislation to give effect to the outcomes of official law reform referrals, produced in a form that draws upon and coordinates relevant inputs and guidance across government, to set up community and professional engagement with this 'back end' of the law reform process. None of this means that full implementation of law reform recommendations can always be done in such a 'once and for all' fashion, not least because both the implementation and its outcomes will need their own community engagement and monitoring. Nor is this suggestion intended to detract from other implementation mechanisms, such as the reports on implementing ALRC recommendations that the ALRC itself undertakes. Indeed, as other scholars and commentators have suggested, there is a wider institutional and community 'watchdog' role here in publicly reporting the results of governmental action (and inaction) on the results of law reform reports and other official recommendations to government.

complex law reform referrals can take between 12 and 18 months from start to finish; (b) the community's law reform needs and processes transcend electoral cycles; (c) Australia (along with other countries) has entered a political and electoral era of greater potential for 'hung' parliaments and minority/coalition governments at national and sub-national levels; and (d) the existing conditions of public trust and accountability and the emerging requirements of deliberative democracy demand more public transparency, monitoring, and engagement with what governments do in the people's name.

Alternative Governmental Resourcing Strategies: The remainder of this submission focuses upon alternative governmental resourcing strategies to support the ALRC's law reform work as part of the nation's collective law reform effort, beyond direct funding for the ALRC within normal governmental budgetary processes. In considering the initiatives that follow, it is necessary to bear four basic things in mind, which take the ongoing need for a body such as the ALRC and enhancement of its resourcing base as a starting point for the suggestions that follow.

First, if governments are unwilling or unable for whatever reason to provide additional public resources directly to the ALRC beyond its current levels of funding, the optimal level of resourcing must be met in other ways from within government or beyond it in the non-government sectors. Indeed, if the ALRC's place in the national law reform effort and the wider system of legal and policy reform is considered from the kind of long-term and wide-angle perspective advocated in this submission, there are good reasons for not limiting discussion of funding sources, resourcing opportunities, and public needs simply to what the ALRC gets directly from government and what government alone can do.

Secondly, as highlighted throughout this submission, academics remain important in delivering on ALRC outcomes for the Government, in various roles related to becoming commissioners, leading referrals, providing expert advice, making submissions, and providing analysis and critique of ALRC recommendations and their follow-up implementation. So, whatever else is done, the Government could examine ways of better engaging the university sector as part of the underlying infrastructure to support the public research needs of the national law reform effort.

Thirdly, there is an unavoidable need for both academics of various kinds and legal experts from all arms of the profession to be involved in law reform referrals, given the integral connection of law reform to law as a discipline, profession, and component of government. Whatever anyone in politics or the community rightly or wrongly thinks about lawyers, it is hard to avoid having lawyers involved on matters that relate to law reform and the administration of justice under the rule of law. Ideally, to the extent that lawyers are involved, each ALRC referral should draw upon legal experts from the different arms of the profession – especially its academic, judicial, regulatory, and professional arms – in the various roles of part-time commissioners, lead commissioners, expert advisory group members, stakeholder consultations and consultancy submissions, and so on. Their expertise should be deployed at all stages of the law reform process from start to finish, including expert insights on proposed legislation to give effect to ALRC recommendations.

Finally, the enterprise of policy development, law-making, and law reform in the interest of social and economic justice is not only an essential component of Australia's system of government, legal system, and administration of justice, but also a necessary public good in which both governmental and non-governmental participants each have a vital stake. This must affect the terms of engagement for governmental and non-governmental participants in legal and policy reform. Law reform in the 21st century must therefore be conducted in a governance and regulatory environment that now requires some adaptation in the practice of community engagement by governments, departments, and public officials. Some of them are used to a level of ownership and control of the public policy and regulatory reform agenda under past conditions that no longer match the new landscape and requirements of meaningful stakeholder engagement, participatory governance, deliberative democracy, and enhanced public monitoring and accountability.

1st Suggested Governmental Initiative – Recasting the National Research Priorities and ARC Research Grant Schemes to be Better Aligned with the Government's Law Reform Needs

The Government already provides significant public funding for individual and collaborative academic research projects through the ARC. In addition, the Government already identifies areas of special research need through various means, such as the National Research Priorities (NRPs) and the dedication of priority research funds for particular – conventionally, mostly scientific, medical, and industrial – areas of identified national research need. The Government could do two things to enhance the public interest in meeting official law reform needs through these schemes, without adding an additional dollar to the ALRC's direct funding and also without adding to the Government's overall public funding burden. In the first place, to the extent that they influence research grant decision-making, the Government could revise the NRPs to improve their alignment with research that relates to public goods, as distinct from research that is more easily commercialised or amenable to research and development schemes.

This would include law reform needs, but is best framed in terms of the discrete but related public goods of policy-making, law-making, and law reform as part of the business of government. Anyone reading the existing NRPs could be forgiven for thinking that Australia does not have a system of government, justice system, economy, or regional position in the international community worthy of being objects of study for researchers of all kinds, given the express priority given to the environment, human health, technological innovation, and national and border security in current NRPs – an outcome that is only partially mitigated by subsidiary research policy goals under each NRP that are slightly more inclusive.

In the second place, the Government could request or direct that the ARC gives some weighting, priority, or allocation of funds to support research projects (including fellowships) that meet the following conditions, under existing ARC grant schemes or else new schemes modelled specifically on meeting public research needs associated with public goods such as policy and regulatory reform in areas of priority identified by government. The ARC could fund the salary and other necessary research assistance to support an academic expert identified by the ALRC as a suitable person to take the lead on a referral (perhaps with matching institutional funding), with the research and

outputs associated with the referral forming a core part (but not necessarily the only part) of an overall research program supported by the ARC. The academic research grant recipient would hold a dual position for the duration of the referral as a full-time commissioner with sole or shared carriage of the referral for the ALRC.

As most ARC-funded research projects and fellowships extend beyond the timeframe for even complex referrals, this would enable relevant academic experts to integrate such necessary research-focused public work within a broader research agenda of acknowledged public relevance that includes other research outputs too. It would provide an additional incentive and pathway for individual academics from legal, economic, and other disciplines to align their research expertise with the broader law reform effort for the greater public good. At present, full-time academics contribute to law reform mainly through public submissions, advisory roles, or service as commissioners. In addition, they often need to take leave or a secondment from their university employment to undertake full-time work as lead commissioner on a referral. Conventionally, the salary of an academic on such leave or secondment would be met through funding from the relevant law reform body dedicated to that particular referral. So, the real question is whether the funding comes through that body or via some other governmental scheme, with a nett cost-neutral impact upon the overall level of public funding required.

No doubt the ARC would prefer to retain as much discretion as possible in this process, without diluting the resources it needs for funding a wide variety of worthy research projects in the public interest. However, the concept of prioritising areas of particular public research need is hardly new, and this area of publicly needed research is just as important as other public research needs too. The ARC already funds research grant projects whose academic outputs and outcomes have implications for legal and policy reform. Meeting such a discrete need could always be factored by the ARC into its budget planning for discussion with the Government. At the same time, the lead-in times for ALRC referrals are not always in sync with the timelines for preparing and awarding ARC grants. Any issue of double-up reporting requirements would also need to be addressed. However, matters such as these are matters of detail to be worked out in the implementation process if this initiative is adopted.

Neither of these initiatives concerning NRPs and ARC grants is about privileging the interests of law as a discipline and profession. Australia has a system of government based on the rule of law. Major societal problems are addressed through laws and their reform. Many of those problems are complex and multi-disciplinary in character, from improving social justice to addressing climate change. Finally, as this submission illustrates, there is a community need for more non-legal academics to be involved in law reform problems that are sufficiently important for the community that they result in a formal referral from the Attorney-General to the ALRC.

2nd Suggested Governmental Initiative – Creating More Effective Structures and Partnerships for the Research-Based Needs of Governmental Law Reform Referrals

The ARC-related initiative above focuses upon ways to facilitate the appointment of suitable full-time ALRC commissioners from the university sector to lead particular referrals from the Attorney-General to the ALRC, without the Government having to resource the ALRC for their employment, and through strategic deployment of other governmental funding schemes. A second and related initiative within the province of the ARC would be to use the ARC Linkage Project grant scheme (or an equivalent scheme) to structure law reform projects as collaborations between relevant academic commissioners and relevant external partners (including the ALRC and other governmental bodies as partners), with the usual research-related law reform needs of empirical and other research, data analysis, stakeholder and focus group consultations, expert advisory guidance, and other elements built into a publicly funded research grant constructed around an official ALRC referral. In other words, the design, stages, and collaborative partners for an ARC-funded research project can be matched to the needs of an ALRC referral from the Attorney-General, with the commissioners(s) leading the referral being recipients of the grant (where they are academics) and the ALRC being one of the organisational partners for the research project associated with the grant.

There are already models available in Australia of academic research projects that are undertaken in collaboration with law reform bodies, whose design and implementation match the normal aspects of an academic research project with the necessary consultative and other stages of a governmental referral on law reform. During my tenure as Associate Dean (Research) and the foundational head of the Legal Governance Concentration of Research Excellence at Macquarie University a couple of years ago, a number of academic colleagues from the Macquarie Law School were engaged in such a law reform project in the area of human health and its regulation. At that time, Macquarie University had a university-wide research grant scheme that provided seed funding for collaborative research projects involving academics and partner organisations from government, business, and industry. Former academic colleagues such as Associate Professor Cameron Stewart and Mr George Tomossy undertook such a project in partnership with the NSW Law Reform Commission and a number of other significant partner organisations,[14] under the general leadership of our then dean (now ALRC President), Professor Rosalind Croucher.

This collaborative project had the stated aims of developing 'an improved model for collaboration between university experts and law reform bodies that will increase the social impact of law reform initiatives' and stimulating 'law reform, policy development and further collaborative research on the area of consent to medical treatment by young persons (minors)'. Importantly, the stages of this collaborative research project were formulated and timed around a particular law reform referral on the topic of children's consent to medical treatment for the NSW Law Reform Commission, including public fora and other activities designed to raise community awareness and input into the law reform referral process. Such research-based tasks and stages informed the NSW Law Reform's Commission's final report, *Young People and Consent to Healthcare* (2008, Report 119).

[14] NSW Health, Office for Science and Medical Research, Avent (previously United Medical Protection), Royal Australian College of General Practitioners, and Australian and New Zealand Association for Psychology, Psychiatry and Law.

The project also planned to produce a scholarly collection of papers reviewing and critiquing the Commission's recommendations, and also to hold focus group meetings of stakeholders, researchers, and collaborative partners in areas that were of particular interest in the official law reform referral, including the liability of healthcare professionals treating children, medical research involving children, and the coercive medical treatment of children. This small-scale but nevertheless significant example shows what is possible at other levels too, in terms of innovative ways of aligning what academics do with what law reform agencies need, with the proper institutional and funding infrastructure to support them.

Where the law reform need being addressed results from transnational and international efforts in regulatory coordination and harmonisation in meeting global legal and regulatory problems, the ARC International Linkages program (or an equivalent program) could be used in a similar way, perhaps with the ALRC and an overseas law reform agency collaboratively involved as organisational partners. TransTasman initiatives, the global financial crisis, human rights, genetics, and intellectual property are examples of areas of necessary coordination and harmonisation of law-making and law reform across sub-national and national borders. Indeed, involvement in such large-scale research projects could also be used by Australia to support its own diplomatic and foreign aid initiatives in the region, through the involvement of other law reform bodies in the Pacific Islands and Asian-Pacific region in such projects. In particular, this would be one way of implementing the Australian Government's June 2010 policy, *Australia's Framework for Law and Justice Engagement with the Pacific,* as would the centre-based initiative discussed immediately below.

3rd Suggested Governmental Initiative – A New National or Transnational Centre Dedicated to Being the Research and Training Engine for Law Reform and Related Governmental Needs

In my submission, we have reached the point in the evolution of the sub-national and national law reform effort where Australia needs a major national research centre dedicated to research and training on the methodology, practice, and measurement of the outcomes of policy-making, law-making (including statutory interpretation, scrutiny of legislation, and judicial law-making), and law reform. All of those activities are essential aspects of the federal system of government and its constituent institutions and processes.

Discrete aspects of this higher-level and essential public need are dealt with in subsidiary and fragmented ways through worthy initiatives in their own right, such as the new government-funded public policy centre located in the ANU, the education and training of public servants and judges provided respectively by ANZSOG and the National Judicial College of Australia, and various academic research centres around the country that are dedicated to discrete aspects of public policy and regulation in general or the law-making process in particular.

However, none of them have research and analysis of the activity of making and reforming law and policy as the centre-piece of their work, and none of them are equipped to do so in orientation and resourcing, certainly not in the holistic way and at the scale necessary to meet the national need for a better approach to making and reforming laws and measuring their need and impact. This is even

more necessary in an environment where evidence-based research is required for informed policy-making and law-making, and public and parliamentary inquiries habitually look to comparative lessons from other jurisdictions.

A national research centre dedicated to research and training of this kind could act as the research and training engine not only for the ALRC in its work for the Attorney-General, but also for the various parliamentary committees and other governmental bodies engaged in law-making, law reform, scrutiny of legislation, and related governmental activity as part of the business of government, at all levels of government in Australia. The centre's research programs could be aligned with official law reform priorities, and develop relevant resources for institutional law reform work. The centre's educational and training programs could dovetail with undergraduate, graduate, and postgraduate education, as well as professional training and even community education. The centre's membership could extend beyond academics to embrace law reform practitioners, and the centre's university stakeholders could come from a consortium of universities.

The centre's focus could be confined to law reform, or alternatively combine law reform and scrutiny of legislation (given their connection and the range of governmental bodies engaged in them at sub-national, national, and international levels), or else extended to embrace holistically the related essential governmental activities of developing policy, making laws, and reforming both. Law reform is connected to these other essential governmental activities, and there is a need to take national research and analysis of them to another level in serving the public need for world-class policy-making, law-making, and law reform. This is one reason why the proposal for such a centre is not confined here simply to meeting the needs of law reform alone.

As with other initiatives outlined in this submission, the establishment of such a national research and training centre also offers the Government additional opportunities to meet its federal, diplomatic, and foreign aid needs too. The centre could be established in conjunction with the States and Territories, all of whom have bodies involved in policy-making, law-making (including scrutiny of legislation), and law reform. Alternatively, it could be established in partnership with neighbouring countries in the region (eg Pacific Islands), as a collaborative exercise in meeting the research and training needs of government officials engaged in these key activities within the business of democratic government. This would be a significant Australian contribution to capacity-building in the region.

Whether confined to law reform or not, it could also involve institutions in other major countries that share Australia's Anglo-American legislative and judicial heritage as common law systems, such as the UK, USA, Canada, and New Zealand. To the extent that such a centre includes a focus upon law reform and scrutiny of legislation, it could build upon the relationships already developed within and beyond Australian borders by various national, sub-national, and overseas law reform agencies and parliamentary scrutiny of legislation committees respectively.

Indeed, the enhanced status of human rights scrutiny in multiple governmental arenas throughout Australia also reinforces the need for an institutional focal point for world-class research that

analyses and measures the methodology, practice, and societal outcomes of the different forms of decision-making by the executive, legislative, and judicial arms of democratic government, including (but not necessarily limited to) legal and policy reform, especially in the treatment of human rights in the law-making and law-reform process. Australia already has a number of Commonwealth and State/Territory parliamentary committees charged directly with scrutinising proposed and existing laws for human rights implications, as well as a number of other Commonwealth and State/Territory parliamentary committees whose work involves them in scrutinising legislation or suggesting changes in policy from other perspectives. Australia might soon have a new joint parliamentary committee that scrutinises Commonwealth laws for consistency with international human rights obligations. The task of reviewing laws and practices for human rights implications is one of the tasks built into the statutory charter for bodies such as the ALRC and the Australian Human Rights Commission in performing their respective roles.

Enhanced research and training on this level also has the potential to benefit the practice, study, and performance assessment of Australian courts too. All Australian courts, including the High Court of Australia, currently have a stake in identifying and developing an appropriate methodology for legal interpretation that involves selective engagement with internationalisation of Australian law under clearly defined and publicly acceptable rules for constitutional interpretation, treaty interpretation, legislative interpretation, and judicial law-making and reform of the common law. Australian judges at all levels are in the middle of an ongoing global debate about the internationalisation of domestic law, not least (but not only) in human rights matters. 'International law has been transformed from an "inter-state law of peaceful co-existence" to a law that transcends individual state boundaries to affect domestic affairs and the people within the nation state', according to four of Australia's leading academics in public and international law.[15] Arguably, we are at the start of 'the gradual construction of a global legal system'.[16]

In its simplest forms, this enterprise recognises that 'judges around the world are talking to one another: exchanging opinions, meeting face to face in seminars and judicial organisations, and even negotiating with one another over the outcome of specific cases'.[17] At a more complex level, it represents 'a common judicial enterprise' across jurisdictional borders that comprises multiple forms of judicial interactivity.[18] Whatever differences this might involve for the roles of Australian judges at different levels of government as participants in such Australian-global judicial relations, and whatever other manifestations this global judicial enterprise might have now and in the future, at the very least it bears a connection to what Australian judges already do as part of a transnational judicial enterprise in developing comparative and Anglo-Commonwealth common law.

Law reform bodies, departments of state, parliamentary committees, and other governmental institutions are also all engaged in this common legal and policy enterprise of developing appropriate

[15] H. Charlesworth, N. Chiam, D. Hovell, G. Williams, *No Country is an Island: Australia and International Law*, UNSW Press (2006) 25.
[16] A. Slaughter, *A New World Order*, Princeton University Press (2005) 67.
[17] Ibid 65.
[18] Ibid 67-68.

methodology for scrutinising and translating the content and outcomes of legal and regulatory models across jurisdictions. To that extent, you do not have to believe in the existence or desirability of a global judicial order to see these multiple points of interface between the international and national legal orders and their constituent institutions of governments. In these ways and others, the work of the ALRC also relates to this wider global enterprise in which Australian courts and other governmental entities are also engaged, to one degree or another, in the ways outlined earlier in this submission. So, a centre of the kind described here could contribute to the methodology for how the three arms of democratic government handle human rights and other democratic features in their respective roles in making and reforming law and policy. In doing so, it could provide a platform for the work of a number of governmental bodies, including (but not limited to) the ALRC.

Developing enhanced institutional and societal performance evaluation and measurement of legal and policy reform would also be an essential part of such a centre's research and training agenda. It must not be captured by too narrow or legalistic a focus simply on the techniques of legislative and judicial law-making and reform, although it would include them too, but within a coherent and integrated research and training agenda that fully meets the various public needs at stake, including law reform impact and performance measurement. This is in keeping with the enhanced public environment for measuring regulatory impact and governmental performance. Governments regularly undertake and even publicise regulatory impact assessments before creating new laws or amending existing ones. The ALRC's recently amended legislative charter requires it to consider the socio-economic impact of any recommendations for law reform. Measurement of the impact of regulation is usefully provided by bodies such as the Australian Productivity Commission, whose assessments are used by others in the community in putting their case for legal and policy reform. For example, the current CEO of the major Australian representative body for company directors has recently cited Productivity Commission assessments of the overall financial costs and benefits of business regulatory compliance in making the AICD's public case for reform of Australia-wide laws covering the liability of company directors.[19] So, enhancement of both the techniques of law reform and measurement of its outcomes is a key part of the supporting infrastructure for the ALRC and the national law research effort.

Once you factor in the ALRC, all of the State and Territory law reform agencies, and other law reform bodies in Australia's neighbouring region who would benefit from the enhanced research and training on law reform processes, methodology, and measurement that would result from such a centre, the governmental and community benefits start to look considerable. If you add in all of the governmental bodies and parliamentary committees at Commonwealth, State, and Territory levels who engage in some form of scrutiny of existing and proposed laws and other regulation (and opportunities for their reform), the case becomes even stronger. If you then add in to the mix the range of departments, agencies, and other governmental institutions (eg courts) with an interest in research and training that improves the quality of making and reforming law and policy, the case for

[19] J. Colvin, 'Director Liability Laws Must Be Reformed', *The Weekend Australian*, 15-16 January 2011, p 40.

such a centre starts to become overwhelming. Finally, the potential involvement of overseas governmental bodies - all with a stake in the methodology and outcomes of law reform and related governmental activities - makes this a potential tool for cementing Australia's academic, policy and regulatory leadership and relationships in the neighbouring region.

The Government can follow a number of existing models in developing a national or even transnational research centre of the right focus, mass, and scale to meet this public need across all levels of government. A research and training centre of this kind could also be resourced in a number of different ways. Governmental funding and other support for university-based centres in areas of identified national need is a hallmark of stand-alone initiatives such as the Sydney-based United States Studies Centre, the ANU-based public policy centre (Australian National Institute for Public Policy), and the proposed Centre for International Finance and Regulation. The ARC also has a number of well-established and well-respected schemes involving university research centres, such as ARC national research networks, ARC Centres of Excellence, and ARC Cooperative Research Centres. For reasons that are understandable, the medical and scientific disciplines are heavily represented in existing ARC-supported centres of this kind, and this inquiry provides an opportunity to start the process towards establishing a centre of the kind outlined here, to meet an equally important public need of direct relevance to the business of government.

State and Territory governments, law reform agencies, and parliamentary committees might be interested in joining and supporting a truly national project of this kind, depending on its proposed focus and outcomes, in light of its significance for their work too. Given the direct connection with the processes of law-making and reform, the various arms of the legal profession (ie courts, government lawyers, the private bar, law firms, in-house counsel, and university law schools) and their representative bodies (eg Law Council of Australia, Australian Institute of Judicial Administration, Council of Chief Justices, Council of Australian Law Deans etc) and associated institutions all have a stake in such a body too and might be approached for funding and other support (eg high-level expert guidance for a centre advisory board).

In addition, the Australian business sector is fundamentally affected by the outcomes of making and reforming law and other regulation, in terms of the tangible costs and benefits for business in being subject to business law and regulation. Representative bodies such as the AICD (of which the present author is a member) are not backward in coming forward publicly to advocate legal and regulatory reform that they believe is necessary. For example, the AICD's chief executive, John Colvin, recently called for a fundamental review of the governmental approach to business legal and regulatory reform as follows:[20]

> Governments keep coming up with legislation that is impractical, often unworkable, disproportionate to the problem it purports to solve and which has unintended consequences. Stemming the growth of new regulation, and actually cutting back existing red tape, is an absolutely vital element of the agenda for boosting national productivity.

[20] J. Colvin, 'Director Liability Laws Must Be Reformed', *The Weekend Australian*, 15-16 January 2011, p 40.

> The growth of regulation and administrative compliance costs has been a huge and costly problem for business and, therefore, for Australia.
>
> The annual cost of complying with regulations has been calculated by the Productivity Commission to be 4 per cent of gross domestic product, or over $50 billion, and the estimated economic gains from removing unnecessary regulation to be 1.6 per cent of GDP, or $20 bn a year.
>
> *The whole system of creating – and removing – regulation needs to be reformed, not just the regulations themselves.*
>
> *It is also vital that existing red tape is frequently reviewed, rigorously assessed against cost-benefit principles and vigorously cut back as necessary.* (emphasis added)

Whatever your position on such views from Australia's corporate sector, nobody has to agree with them completely to agree with the wider point being made, which is that the Australian community and its governmental institutions and participants would all benefit from more accuracy and precision in assessing and measuring the true societal costs of making, reforming, and repealing laws. Identifying and implementing truly necessary legal and policy reform (and their associated business and societal costs and benefits) against such measures would be a core part of this endeavour.

Views such as these articulate a felt need for a better systemic approach to making and amending laws, establishing evidence of the need for new or amended laws, and assessing the full social and economic costs and benefits of making, reforming, and repealing laws. Indeed, to the extent that both these views and the statutory charter of the ALRC require it to consider the impact of law reform proposals upon individuals and business, the common thrust lies in a sounder methodology in identifying the need for laws and their impact. This is consistent with the bipartisan political support for identifying and changing or repealing unnecessary or overly burdensome business regulation – a policy priority that is also enshrined in Recommendation 1.4 of the 2010 report of the Australian Government's Advisory Group on Reform of Australian Government Administration, entitled *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*.

So, the centre-based initiative outlined in this submission also provides an opportunity to invite the business sector and other sectors to support something from which all can benefit in the public process of policy development, law-making, and law reform. It takes at least one step towards improving the information and capability that is publicly available to assess and measure the costs and benefits of policy, legal, and regulatory reform in a systematic way for governmental and non-governmental stakeholders alike. Such an outcome also has the potential to improve the focus and evidential base – and hence overall efficiency and effectiveness - of the public submission process upon which governmental departments, public inquiries, and parliamentary committees all depend, and in which many contributors from the public, private, and civic sectors are engaged.

4th Suggested Governmental Initiative – Building Better Government-Steered Networks of Expertise on Policy Development, Law-Making, and Law Reform

Whether or not this third suggested governmental initiative is adopted, the identified need for greater sophistication in the methodological approach of government to law reform can also be met

by developing networks of governmental and non-governmental participants with relevant expertise in this area, for the greater benefit of the overall law reform effort. The academic literature across a number of disciplines identifies the need for government-based networks and other multi-stakeholder initiatives to meet governance and regulatory challenges of the 21st century.[21] In *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*, the Australian Government's Advisory Group on Reform of Australian Government Administration advises the Government in Recommendation 3.2 to draw upon and integrate relevant policy expertise from across the public, private, and civic sectors, by building new collaborations and relationships between policy-makers, the business sector, the university sector, and community groups, as follows:

- The Secretaries Board would commission a project team from the APS 200 … to develop whole of government principles on agency engagement with academia, research institutions and the community and private sectors.
- Agencies would establish more formal policy networks with academic institutions, think tanks and the community and private sectors. These networks would assist APS employees to develop stronger links with academics and other researchers for developing initial policy ideas and conducting research …
- Agencies would develop models for long term research and enhanced evaluation of policy and programs.

Such networks need not always be focused simply on particular subject areas or emerging problems of public policy. They can also bring together and enhance relevant capability on the process, methodology, and impact of making and reforming law and policy. In addition, they can stand alone or else use and build upon other initiatives outlined in this submission, such as the creation of a national research, education, and training centre devoted to the process and methodology of making, reforming, and measuring the impact of law and policy in general, or law reform in particular. Finally, given the common interest of all of the Australian States and Territories, as well as Australia's neighbouring countries, in enhancing democratic law-making, law reform, and the rule of law, such networks also provide opportunities for Australia to forge new governmental relationships and deepen existing ones. This is another opportunity for Australia to contribute to innovative national and transnational government-centred public policy networks involving both governmental and non-governmental participants.

5th Suggested Governmental Initiative – Recognition of ALRC Outputs in Governmental Reporting and Funding Requirements for Universities

Given that ALRC reports are considerable high-quality research outputs in their own right, the Government could do more to align public reports such as ALRC reports (where they are written by academics, as many ALRC reports and other public reports have been) with the indicators of

[21] Eg J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press (2001); A. Slaughter, *A New World Order*, Princeton University Press (2004); S. Bell and A. Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society*, Cambridge University Press (2009); V. Chhotray and G. Stoker, *Governance Theory and Practice: A Cross-Disciplinary Approach*, Palgrave Macmillan (2009); and B. Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business*, Edward Elgar Publishing (2010).

research outputs that the Government recognises for university reporting and funding purposes, through the activities of the Department of Innovation, Industry, Science and Research (DIISR) and the ARC (including the Government's ERA initiative, which evaluates university research outputs).

At present, the only research publications that the Government counts for university funding and reporting purposes, and which most universities count for their own research performance and internal research funding purposes, are what are characterised by DIISR and conventionally known within the university sector as A1s (scholarly books), B1s (chapters in scholarly books), C1s (scholarly and mostly refereed journal articles), and E1s (refereed conference papers). Law reform reports written by an academic commissioner do not count for anything under this scheme for that academic and their home university. Yet, an academic law reform commissioner might have devoted 12-18 months to nothing else other than that ALRC report and its associated research activities and outputs. Similarly, many other high-quality research outputs from academics that contribute to the public good are not recognised for these purposes either, such as public submissions to public inquiries and parliamentary committees. However, this submission is not the place to press the claim for recognition of these ancillary research outputs.

Rather, it is sufficient for present purposes to note that while one arm of government depends upon research outputs from academics amongst others in undertaking the business of government associated with policy-making, law-making, and law reform, other arms of government presently do little to recognise significant and often high-quality research outputs that contribute to the public good but which are not published by institutional publishers of books, journals, and conference proceedings. At the very least, the Government could move to recognise ALRC reports written by academic commissioners as publications that count in governmental requirements for university research reporting and funding purposes, as significant research-based academic works in their own right. If this initiative is adopted, it should also be applied to official law reform reports authored or co-authored by academic commissioners from State and Territory law reform agencies too. A similar rationale could be applied to other reports authored by academics for governments, and that wider extension simply needs noting here.

6th Suggested Governmental Initiative – Revising ERA Indicators to Include Citations Relating to Policy-Making, Law-Making, and Law Reform

A related initiative concerns the citation of academic publications in law reform outputs, as well as other governmental outputs too (eg judicial and tribunal decisions, public submissions to governmental bodies, governmental policy documents, public inquiry reports, and parliamentary committee reports). At present, citations of academic publications by academic audiences and non-academic audiences alike similarly count for nothing in the various indicators used by DIISR, the ARC, and the ERA in university reporting, funding, and performance assessment. At one stage, the ARC publicly floated the possibility of counting citation of academic works in court decisions as an indicator of legal research excellence in the Government's initial ERA exercise in 2010, but this proposal was not ultimately adopted. The Government has announced that the next ERA exercise is likely to be held in 2012, so it is important and timely now to focus on improvements to its

methodology that might relate to the national law reform effort and other aspects of legal, regulatory, and policy reform.

Conventionally, the citation of academic work by others in the field of research is one indicator of research quality, while the citation of academic work by non-academic users (such as courts and other governmental bodies) is one indicator of research impact. This form of the distinction between research quality and research impact is an arbitrary and otherwise unsatisfactory distinction to some degree, not least because there are many non-academic experts in government and beyond whose role qualifies them to make assessments of academic quality and use academic publications in their work. This is especially true of academic disciplines that are also professions with members who assess and use academic research in their professional and institutional work. Anybody who thinks that only law deans and professors can identify high-quality academic publications in law, for example, should try saying that to a roomful of judges, law firm partners, silks, in-house counsel, and senior governmental lawyers. So, any objection to counting in governmental research assessment exercises the citation by courts and other governmental bodies (including other law reform agencies in their outputs) of official law reports that are authored by academic commissioners cannot properly be based simply on some notional distinction between 'academics citing other academics who are writing as academics' as an indicator of research quality, on one hand, and 'non-academics citing academics who are writing as academic commissioners', on the other.

In any case, however the translation of research into professional and governmental use is categorised, clearly the public business of law-making and policy-making in general and law reform in particular relies heavily upon the use of academic research of both legal and non-legal kinds as part of the platform of knowledge and evidence-based research that informs these governmental processes and their various public outputs. For example, the reports of law reform bodies at Commonwealth, State, and Territory levels evidence the heavy reliance upon previous academic work of both legal and non-legal kinds in identifying law reform needs, developing suitable methodological approaches, canvassing law reform difficulties and options from comparable jurisdictions, addressing different potential interpretations and arguments, and otherwise laying the foundations for law reform proposals on each official law reform referral.

While the range of citation-tracking sources and technologies for some academic disciplines (eg non-scientific disciplines) still lags behind what is available for others (eg scientific disciplines), digital technology has now reached the stage where many governmental reports are available online. Hence, academic citations in Commonwealth, State, and Territory law reform reports, court and tribunal decisions, and other published governmental works are now more easily trackable than in the past. So, in preparing for the next national ERA exercise in 2012, the Government could also enhance the collective law reform effort by recognising major law reform outputs and citations as indicators for the 2012 ERA exercise. If this initiative is adopted, it should extend to official law reform reports at Commonwealth, State, and Territory levels.

This could be undertaken as a pilot exercise just for the discipline of law and just in relation to law reform, or alternatively it could be extended beyond the discipline of law to other disciplines and

beyond law reform to other aspects of the business of government too. Doing so would also enable the Government to continue what it has started with the ERA exercise, in developing a world-class research assessment exercise not only for Australian purposes but also as a model for other countries to follow. All of this also relates to enhanced evidence-based performance assessment of the ALRC (and other governmental bodies) and universities alike.

7th Suggested Governmental Initiative – Aligning University Compacts with Governmental Law Reform Referral Needs

Beyond ARC schemes and the ERA exercise, the Government could make it a requirement of all university compacts it has with individual universities that, as part of their research-related community service obligations, universities will make available to the ALRC any of their academics identified by the Government and the ALRC as the best experts to be commissioners leading an official law reform referral from the Attorney-General to the ALRC. Those academics will not always be lawyers, but might be economists, social scientists, or even scientific researchers, depending upon the referral in question. They would be appointed ALRC commissioners for the duration of the referral, and would work full-time in leading the referral, conducting its consultative and other activities, and producing its outputs.

Obviously, someone has to bear the cost of the academic commissioner's salary, as well as the cost of replacing them for the duration of the referral. The first resourcing option here is for the Government to make this one of the costs for universities to bear as a condition under university compacts for receiving public funding for universities. After all, universities contribute to the public good in a number of ways, including the provision of research and devotion of resources to fulfil community service obligations, of a kind that many private sector organisations associate with organisational policies on corporate social responsibility.

However, everything must still be resourced, one way or another. In the system of devolved funding responsibility that operates in most universities, this means either that the university would need to compensate the academic's home faculty in its annual budget allocation from the university or else that faculty would somehow have to wear the cost. It would be a significant cost for an individual faculty to cover from its budget the loss of a senior academic for 6-18 months and their unavailability for other faculty work, such as management, teaching, student supervision, and other research grant and consultancy work.

On the other side of the ledger, such appointments would bring considerable prestige to the home faculty and attract others to the faculty's research efforts. Faculty deans would be able to use this contribution to meeting the university's compact obligations to government as leverage in securing resourcing or other assistance from their university, as a quid pro quo. If the resulting ALRC reports by academic commissioners become countable research outputs for university reporting and funding purposes, as suggested above, this would produce additional benefits for the individual academics and faculties concerned. The burden of this initiative would not necessarily fall continuously on only a few universities, as it is unrealistic to think that the leading experts in all relevant disciplines

are located in only a few Australian universities. However, even if such a disproportionate result eventuated, those faculties and universities concerned would be able to leverage their involvement in many ways, in their recruitment, profile-raising, and relationship-building, in addition to securing the benefits outlined above. In any case, all universities have an equal opportunity to recruit and foster high-quality academic researchers of the kind who might become ALRC commissioners.

The discussion immediately above assumes that no funding compensation for meeting this public need is provided by governments or universities themselves. At least two alternative compensation mechanisms are available, again without necessarily adding any more public dollars to the ALRC's annual budget. The first pool is the sum of money that the Government distributes to universities as institutional funding to support research and other activities. Some minor adjustments could be made to university funding arrangements to compensate universities who provide academic commissioners for ALRC referrals. Even if only a few universities provide more than one academic each for this activity over a given time period, the amounts involved are relatively small in the wider scheme of university sector funding. Where appropriate, the Government could require universities to match the funding to some degree, perhaps through their own internal research fellowship schemes, as their contribution under university compact arrangements to necessary research in the public interest. The second pool is the sum of money allocated to the ARC for the various research grant schemes administered by the ARC. As outlined earlier in this submission, there are a variety of ways in which ARC schemes could cover at least some of the resourcing needs of research projects in the public interest that are the subject of referrals from the Attorney-General to the ALRC.

8th Suggested Governmental Initiative – Enhancing Non-Governmental and Non-Academic Contributions to the National Law Reform Effort Through Governmental Procurement and Corporate Social Responsibility Initiatives

Finally, and beyond the university sector and its public administration, the Government could develop new ways of facilitating the involvement of expertise from lawyers, consultants, and others in the community, through policy initiatives that align public procurement and access to governmental work and services with an organisation's approach to pro bono, corporate social responsibility, and social investment. The Government's existing public procurement and pro bono policies relating to legal work for government already invite law firms and other organisations to commit to a designated amount of pro bono legal work.

Whether viewed as part of pro bono efforts from the legal community or more broadly as part of any organisation's own corporate social responsibility, there is an opportunity here for the Government to draw a closer connection between its public procurement, pro bono, and other relevant policies, on one hand, and enhancement of the public needs of the institutional law-making and law reform processes, on the other. This is not confined to lawyers and legal organisations. Many businesses and consultancy services secure governmental work and also have capabilities in data analysis, socio-economic modelling, focus group techniques, and stakeholder engagement that could usefully be brought to bear on an enhanced national law reform effort, in terms of making that expertise available to the ALRC for particular law reform referrals, perhaps as a condition of receiving governmental work.

Glimpses of the availability of relevant expertise beyond the governmental sector can be found in the worthy contributions already made voluntarily by a number of individuals, organisations, and representative bodies to law-making and law reform processes in the form of public submissions, consultancy reports, and other expert guidance. The ALRC and other governmental bodies, including parliamentary committees, have all benefited from the expertise available to them through such non-governmental inputs. However, the present point is how to advance beyond such voluntary and ad hoc contributions, to develop a more systematic way of securing and enhancing the necessary expertise in the private and civic sectors that could support the national law reform effort, stimulated by what governments can do to galvanise the forces across various sectors to meet this collective public need.

Everyone in the community has a stake in the public goods of policy-making, law-making, and law reform. Nevertheless, as law is both a discipline intrinsically connected to the rule of law and a profession with special responsibilities to the administration of justice and the system of law-making, lawyers in all arms of the profession have a special expertise and role to play in the collective law reform effort. In addition, professional contributions to the system of law and justice are a crucial part of the legal profession's own social 'licence to operate', in terms of what the community expects of the profession as a whole. More widely, as participants in mechanisms of participatory governance, deliberative democracy, and public accountability directed at the system of government and the administration of justice, lawyers from all branches of the profession have much expertise to offer public policy development, scrutiny of proposed legislation, and analysis of law reform initiatives, as witnessed by the legal profession's collective input into submissions on proposed legislation through its various national, State, and Territory representative bodies.

Still, more can be done in steering the legal profession towards even greater contributions to the collective law reform effort. This should not be seen by the legal profession just in terms of making contributions to the public good as part of their community work. Steering governments away from bad legislative options and helping governments enhance good legislation from the legal profession's collective experience of law in practice can bring significant benefits to a law firm's client base, for example. If the views of the business sector on business laws and their reform that are cited in this submission are correct, for example, law firms that provide legal services to businesses of all kinds can also serve their clients' collective interests in helping governments to match business regulation to the realities of business life. Similarly, law firms and other legal organisations across the public and private sectors could work even more closely with universities than some of them already do, for the greater good of the national law reform effort, through specific activities such as supporting academic and professional research that is directed at meeting law reform needs, including law reform consultancies and submissions within the range of their pro bono and business development activities, creating internship opportunities for students to work on law reform matters, encouraging graduate employees and other legal staff to assist community organisations with law reform submissions, and other ways canvassed in this submission.

None of this denies the significant contributions that all arms of the legal profession already make to this effort through judicial and academic law reform commissioners, expert advisory group involvement in law reform consultations, and public submissions from lawyers and their representative bodies to law reform inquiries. What is being highlighted here is the opportunity to develop a more systematic approach and support base for a mutual community need, through a wide variety of policy and regulatory levers available to government.

Conclusion

This Senate review sees Australia at the crossroads of the national law reform effort, at a time when there is more rather than less need for a coherent national focal point for high-quality and specialised law reform work. In the end, the real policy question is not whether to maintain the ALRC in its current or a modified form, but rather how to align the ALRC with other participants in policy development and law-making who have a stake and relevant expertise in the collective law reform effort, both within government and beyond government to the private and community sectors too. If the Government continues the ALRC's mandate in its current or a modified form, and maintains the ALRC's direct funding at approximately its current levels, the only answer to the inevitable resourcing need that results is to consider and adopt some of the alternative resourcing strategies suggested in this submission. In particular, this means enhancing the contributions of the university sector and other sectors to the institutional needs of Australia's system of government in making, reforming, and assessing the impact of law and policy.

Acknowledgements

As a legal academic with relevant academic and practical expertise to offer, I acknowledge and appreciate the opportunity afforded by this Senate Committee to contribute suggestions to inform the Committee's deliberations. This submission's relative length and detail accommodates the need to outline particular initiatives, how they might work, and also how they relate to broader policy and regulatory needs, especially in contributing options for this inquiry's consideration in resourcing the ALRC within the broader national need for enhancement of the infrastructure, process, and outcomes of institutional law reform.

Aspects of this submission draw upon discussion and material provided by my former Macquarie University colleague, George Tomossy. I am also grateful to academic colleagues who have read or commented on earlier drafts of this submission, especially Professor Louis Waller from the university where I am now employed. The table of ALRC references accompanying this submission and other country-based research on ALRC references relies upon work by Michael Adams, one of the student research assistants involved in my research grant work.

In the time available between finalising a draft of this submission and meeting the deadline for submissions, it has not been possible to do anything more than canvass the ideas and initiatives outlined here with a select group of academic colleagues and research managers here and at other law schools. I acknowledge general support for these ideas and initiatives in their individual

academic capacities from Professor Kathy Bowrey (University of New South Wales), Professors Dianne Nicol and Gary Meyers (University of Tasmania), and Dr Patrick Emerton (Monash University).

In the interest of full transparency in assessing the views expressed in this submission, I acknowledge that the present President of the Australian Law Reform Commission is known to me (as are some of her predecessors) because of our association at Macquarie University and beyond.[22] Finally, as indicated at the outset of this submission, some of the analysis in this submission draws upon my work in successive ARC grants and resulting publications related to public sector governance in general and judicial and other institutional engagement with comparative and international legal systems in particular. As per the standard convention, all responsibility for material in this submission remains mine.

[22] Of course, it is not unusual for members of different arms of the legal profession to know one another, because of the various interactions between them in the course of academic and professional life.

Table: High Court of Australia ALRC Citations 2007-2010

Case, Year and Citation	ALRC Report Cited	Pinpoint Reference	Citing Judge/Judges	Context of Reference
South Australia v Totani [2010] HCA 39	*Fighting Words: A Review of Sedition Laws in Australia*, Report No 104, (2006)	Para [36], Footnote 79	French CJ	Cited to substantiate the lack of use of provisions which permit the Attorney-General to apply to the Federal Court for a declaration that a body is an unlawful association, per Pt IIA of the *Crimes Act 1914* (Cth)
Spencer v Commonwealth of Australia [2010] HCA 28	*Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, (2000)	Para [19], Footnote 36	French CJ and Gummow J	Cited to give context to s31A of the *Federal Court of Australia Act 1976* (Cth)
Lehman Brothers Holdings Inc v City of Swan & Ors; Lehman Brothers Asia Holdings Limited (In Liquidation) v City of Swan & Ors [2010] HCA 11	*General Insolvency Inquiry*, Report No 45, (1988)	Para [49], Footnote 38	French CJ, Gummow, Hayne and Kiefel JJ	Cited to demonstrate that a vast array of relevant textual materials fails to shed light on the disputed construction of section 444D(1) of the *Corporations Act 2001* (Cth)
Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd [2009] HCA 50	*Insurance Contracts*, Report No 20, (1982)	Para [11], Footnote 12	French CJ, Gummow And Crennan JJ	Cited to provide context to the confused state of the law prior to the enactment of the *Insurance Contracts Act 1984* (Cth)
Aon Risk Services Australia Limited v Australian National University [2009] HCA 27	*Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, (2000)	Para [92], Footnotes 156 and 157	Gummow, Hayne, Crennan, Kiefel and Bell JJ	Cited to illustrate the increasing tendency of the courts to actively monitor and manage case progress (using case management strategies)
The Queen v Tang [2008] HCA 39	*Criminal Admiralty Jurisdiction and Prize*, Report No 48, (1990)	Para [3], Footnote 2	Gleeson CJ	Cited to give context to the enactment of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth)

Case, Year and Citation	**ALRC Report Cited**	**Pinpoint Reference**	**Citing Judge/Judges**	**Context of Reference**
*Hearne v Stree*t [2008] HCA 36	*Contempt*, Report No 35, (1987)	Para [25], Footnote 22	Kirby J	Cited to illustrate the incoherence of the law on civil contempt as it presently stands, and its need for reform
CGU Insurance Limited v Porthouse [2008] HCA 30	*Insurance Contracts*, Report No 20, (1982)	Para [51], Footnote 26	Gummow, Kirby, Heydon, Crennan and Kiefel JJ	Cited to give context to the enactment of the *Insurance Contracts Act 1984* (Cth)
Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20	*The Recognition of Aboriginal Customary Laws*, Report No 31, (1986)	Para [101], Footnote 92	Kirby J	Cited to illustrate the significance of the link between indigenous Australians, their land, and the operation of Aboriginal customary law
Gassy v The Queen [2008] HCA 18	*Criminal Investigation*, Report No 2 (Interim), (1975)	Para [45], Footnote 29	Kirby J	Cited to press the need for the judiciary to closely examine a criminal case made out partly on identification evidence to avoid a miscarriage of justice to the defendant
Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Limited [2008] HCA 9	*General Insolvency Inquiry*, Report No 45, (1988)	Para [46], Footnote 52	Kirby J	Cited to give context to the impetus which preceded the enactment of s 459F(2)(a)(i) of the *Corporations Act 2001* (Cth) and provide critical understanding of a particular interpretation of that provision
International Air Transport Association v Ansett Australia Holdings Limited [2008] HCA 3	*General Insolvency Inquiry*, Report No 45, (1988)	Para [158], Footnote 113	Kirby J	Cited to give context to the enactment of Part 5.3A of the *Corporations Act 2001* (Cth)
Evans v The Queen [2007] HCA 59	*Evidence*, Report No 26 (Interim), (1985); *Evidence*, Report No 38, (1987)	ALRC 26 Para [188], Para [207],	Heydon J	Discussed extensively during an analysis of the meaning of section 35 of the *Evidence Act 1995* (NSW).

		Para [209], Para [214], Para [215],		The reports were read as a whole and used to identify the meaning of statutory language, specifically the
Case, Year and Citation	**ALRC Report Cited**	**Pinpoint Reference**	**Citing Judge/Judges**	**Context of Reference**
(Continued)		Para [216], Footnote 201 Para [218] <u>ALRC 35</u> Para [188], Para [215], Footnote 196 Footnote 197 Footnote 198 Footnote 199 Para [216], Footnote 202 Footnote 203 Footnote 204 Footnote 206 Para [218]		meaning of **'**views' in the evidence context, and whether a statutory meaning of view had a similar meaning to that of common law.
Australian Finance Direct Limited v Director of Consumer Affairs Victoria [2007] HCA 57	*Insurance Agents and Brokers*, Report No 16, (1980)	Para [55], Footnote 67 Para [56], Footnote 69 Para [57], Footnote 70 Para [58], Footnote 71	Kirby J	Cited as an extrinsic material relevant to the interpretation of the *Credit Act 1984* (Vic) and the *Credit Act 1984* (NSW). Used by the judge to develop reasons for preferring an analogous interpretative approach to the *Consumer Credit (Victoria) Code*
Director of Public Prosecutions for Victoria v Le [2007] HCA 52	*Confiscation that Counts: A Review of the Proceeds of Crime Act 1987*, Report No 87, (1999)	Para [118], Footnote 106	Kirby and Crennan JJ	Cited to illustrate DPP's argument that the words 'sufficient consideration' in s 52(1)(a)(v) of

				the *Confiscation Act 1997* (Vic) should be
Case, Year and Citation	**ALRC Report Cited**	**Pinpoint Reference**	**Citing Judge/Judges**	**Context of Reference**
(Continued)				ascribed the meaning given to the terms in other equivalent Australian statutes with similar policy considerations
PM v The Queen [2007] HCA 49	*Child Welfare*, Report No 18, (1981)	Para [72], Footnote 40	Kirby J	Referred to as the report was cited by the Minister who introduced the Bill that became the *Children (Criminal Proceedings) Act 1987* (NSW) as one of several significant reports which merited the changes to the law brought about in the Act
Carr v The State of Western Australia [2007] HCA 47	*Criminal Investigation*, Report No 2 (Interim), (1975)	Para [82], Footnote 58	Kirby J	Cited to give historical context to the enactment of statutory provisions dealing with the recording of admissions
Em v The Queen [2007] HCA 46	*Evidence*, Report No 26 (Interim), (1985); *Evidence*, Report No 38, (1987)	ALRC 26 Para [51], Footnote 21 Para [183], Footnote 104 ALRC 35 Para [51], Footnote 20 Footnote 23 Para [52], Footnote 24 Para [108], Footnote 46	Gleeson CJ and Heydon J (paras 51-52) Gummow and Hayne JJ (para 108) Kirby J (para 183)	Cited extensively to assist the Court in giving meaning to s 90 of the *Evidence Act 1995* (NSW), which had its genesis in the ALRC reports. The report's commentary on s 90's function to reproduce the common law discretion to exclude admissions on fairness grounds was discussed by the judges

		Para [183], Footnote 104		
Case, Year and Citation	**ALRC Report Cited**	**Pinpoint Reference**	**Citing Judge/Judges**	**Context of Reference**
(Continued)		Para [186], Footnote 114		
Tofilau v The Queen; Marks v The Queen; Hill v The Queen; Clarke v the Queen [2007] HCA 39	*Evidence*, Report No 26, (1985)	Para [121], Footnote 121	Kirby J	Cited to illustrate the proposition that the common law on the admissibility of confessional evidence has developed in tandem with changes in 'social realities'
Chang v Laidley Shire Council [2007] HCA 37	*Lands Acquisition and Compensation*, Report No 14, (1980)	Para [21], Footnote 29	Kirby J	Cited in support of the observation that State constitutions do not guarantee compensation where an injurious affection has occurred due to changes in planning law
CGU Insurance Limited v AMP Financial Planning Pty Ltd [2007] HCA 36	*Insurance Contracts*, Report No 20, (1982)	Para [127], Footnote 82	Kirby J	Cited in support of AMP's interpretation of 'utmost good faith' as expressed in s 13 of the *Insurance Contracts Act 1984* (Cth)
Thomas v Mowbray [2007] HCA 33	*Review of Sedition Laws*, Discussion Paper No 71, (2006)	Para [285], Footnote 345	Kirby J	Cited in the course of a discussion about the possible obligations (if any) incurred by a Security Council Resolution and the subsequent exercise of s 51(xxix) of the Constitution to meet that obligation
John Fairfax Publications Pty Ltd v Gacic [2007] HCA 28	*Unfair Publication: Defamation and privacy*, Report No 11, (1979)	Para [81], Footnote 82	Kirby J	Cited to provide a brief definition of what published matter involving one's financial or trading situation can constitute a defamatory injury
New South Wales v Fahy [2007] HCA 20	*Complaints Against Police*, Report No 1, (1975)	Para [94], Footnote 93	Kirby J	Cited in support of the observation that viewing the exercise of police power as being personal left police

				potentially unprotected from common law tortious liability
Case, Year and Citation	**ALRC Report Cited**	**Pinpoint Reference**	**Citing Judge/Judges**	**Context of Reference**
Burge v Swarbrick [2007] HCA 17	*Designs,* Report No 74, (1995)	Para 97	Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ	Cited on account of its being discussed in the Explanatory Memorandum to the *Designs Act 2003* (Cth). Recommendation 172 is reproduced in full as the distinction drawn between artistic craftsmanship and an artistic work in its third sentence was incorporated into the Act
Cornwell v R [2007] HCA 12	*Evidence*, Report No 26 (Interim), (1985); *Evidence*, Report No 38, (1987); *Uniform Evidence Law* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report) (2005)	<u>Unspecified</u> Para [31], Para [58], Para [134], Para [165], Para [173], Para [183] <u>ALRC 26</u> Para [59], Para [60], Footnote 59 Para [61], Footnote 60 Footnote 61 Footnote 62 Para [62], Para [63], Footnote 67 Footnote 68 Para [64],	Gleeson CJ, Gummow, Heydon And Crennan JJ (paras 31-88) Kirby J (paras 134-183)	Cited and discussed extensively on account as its being heavily informative upon the development of s128 of the *Evidence Act 1995* (NSW) (which deals with the issuing of a certificate of indemnification against prosecution where the witness is compelled to give potentially self-incriminatory evidence in the interests of justice). The Court regarded the Reports as being useful aides to interpretation of the provision's application in the instant case and critically compared the proffered interpretations of s128 to the rationale for the provision provided by the ALRC.

		Footnote 69		
Case, Year and Citation	**ALRC Report Cited**	**Pinpoint Reference**	**Citing Judge/Judges**	**Context of Reference**
(Continued)		Footnote 72 Para [69], Footnote 73 Footnote 74 Para [74], Footnote 80 Footnote 81 Para [77], Para [88], Para [163], Footnote 176 Para [167] Footnote 180 <u>ALRC 38</u> Para [59], Para [62], Para [64], Footnote 70 Para [68], Para [69], Footnote 75 Footnote 77 Para [70], Para [71], Para [88], Para [163], Footnote 176		

Case, Year and Citation	ALRC Report Cited	Pinpoint Reference	Citing Judge/Judges	Context of Reference
(Continued)		ALRC 102 Para [88], Footnote 88		
Sons of Gwalia Ltd v Margaretic [2007] HCA 1	*General Insolvency Inquiry*, Report No 45, (1988) (referred to here as the "Harmer Report")	Para [132], Footnote 171 Para [172], Footnote 202 Footnote 203 Footnote 204 Para [246], Footnote 273 Para [247], Footnote 275	Kirby J (para 132) Hayne J (para 172) Callinan J (Para 246-275)	Cited to provide context to the enactment of s 553(1) of the *Corporations Act 2001* (Cth), (a provision pertaining to proof of a claim) specifically as the Report provided a comprehensive statement of the purpose of insolvency laws, which explained the broad scope of the provision's application