

From: *Civil Liberties Australia* **CLA**

To: Senate Legal and Constitutional Affairs Committee

re the

Australian Law Reform Commission (ALRC)

inquiry

Terms of reference:

The Australian Law Reform Commission (ALRC), with particular reference to:

- a) its role, governance arrangements and statutory responsibilities;*
- b) the adequacy of its staffing and resources to meet its objectives;*
- c) best practice examples of like organisations interstate and overseas;*
- d) the appropriate allocation of functions between the ALRC and other statutory agencies;*
and
- e) other related matters.*

CLA's submission mainly addresses reference criterion (d), the appropriate allocation of functions between the ALRC and other statutory agencies. However, we also make general recommendations covering resources, funding and independence.

The law reform function should remain in a generalist, independent body

The ALRC has a strong track record of useful, expert, and independent advice on legal reform. The reference point addressed admits of two distinct alternatives to the current allocation of functions:

1. The allocation of legal reform reporting functions to the agencies responsible for implementing the relevant laws; or
2. The establishment of independent, ALRC-style bodies specific to certain areas of law.

Either alternative would be less preferable than the current allocation of functions. It is important that the agency responsible for making recommendations of law reform be a generalist body, rather than allocate specialised reform responsibilities to corresponding specialist bodies.

We suggest that this is so for two reasons:

Firstly, the generality of the body tends to ensure consistency in quality and procedure, increasing public confidence in the body and removing much of the potential for claims of partisanship. A special agency commissioned to recommend changes to the welfare state, or migration policy, to take two examples, would lack the continuity of personnel and the public confidence associated with long-running public bodies such as the ALRC. These are important issues, necessary to make its function appear properly independent. A lack of independence would be exacerbated by the only workable alternative to specialist bodies, allocating reform functions to one or several departments of state. Further to this complication would be the problem of appointment of personnel and terms of reference associated with specialist allocation of functions.

Secondly, the substantive effect of specialisation, notwithstanding any issues of consistency or quality, is to focus on the agency's subject material largely to the exclusion of other interests. One need only look at the failure of the Industrial Relations Commission of New South Wales in the *Kirk* case¹ to see how a specialised subject-matter jurisdiction can obscure the requirements observed by more general bodies with similar functions. Similar failures can be seen in the rationalist agenda assumed by the great administrative agencies in North America, and the centrally planned communist states.

The considerations relevant to civil liberties

Most statutory law reform has a chilling effect on civil liberties, partly because the uncertainties of liberty are easy to compare unfavourably to the certainties of the benefits that flow from restrictive statutes. This need not be the case always, and the ALRC in particular has a strong record of wide consultation and prudent caution. To allocate its functions among different bodies would be to risk overemphasising the practicalities of each field taken against the more general principles of our legal system.

The emphasis on general principles is important, because civil liberties in Australia are often defined more by the restraint on specific powers granted through legislation than through statutory or constitutional protections. Equally, when contemplating reform or introduction of specific protections, such as bills of rights, acts protecting privacy or speech, or some other similar instrument, a general independent body such as the ALRC is in a useful position to consider the views of agencies and individuals, all of whom have a vested interest in the provisions of such laws, and give a reasonably integral series of recommendations. It is difficult to see a specially commissioned body, or a body with responsibility for observing the protections contemplated, possessing a similar level of public confidence or detachment to provide truly independent and publicly acceptable advice.

¹ *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1

The need for more – not less – funding and resources for the ALRC

The accelerated pace of legislating by the Australian Parliament over the past 10 years, plus time-restricted references² to the ALRC, call for an annual budget gradually expanding in both dollar and staff terms. What has occurred, however, as demonstrated by the ALRC's 'Background Submission' to this inquiry, is the reverse: over 10 years, staff numbers have dropped from 25 to 16, and funding is dwindling with further reductions of \$0.5m per year dictated for the period from 2011 to 2013. The latter reductions represent a 20% cut on 2009–10 levels. (ALRC Background Submission 4.8)

CLA is also concerned that from 1 July 2011 the ALRC will no longer be mandated to have regard for the ICCPR³ in its reports.

Cumulatively, these changes – less funding, fewer staff, disregarding core civil liberties documents – are generating a sea change in relation to the ALRC. Given that Australia has no Bill of Rights, the ALRC is one of the substitute pillars of an alternative protective system. With the government (and the opposition) committed to not introducing a Bill of Rights, it is absolutely vital that the existing protective mechanisms in society are supported by government.

For this reason, CLA believes this review should recommend:

- the law reform function remains with the ALRC, or a very similar body;
- funding is boosted;
- extra staff are provided; and
- the law reform body's continued freedom/independence of operation is publicly acknowledged by the federal government.

CLA Civil Liberties Australia

Lead author: Michael Phillis; co-author: Bill Rowlings

² Note also that the time for the ALRC to complete its work is often inappropriately truncated, throwing extra demand on financial and human resources. For example, the Sedition reference set an almost-impossible deadline of three months (the ALRC delivered in five months).

³ International Covenant on Civil and Political Rights