Australian Government

Attorney-General's Department

Priorities and Coordination Division

10/34646

24 February 2011

Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Inquiry into the Australian Law Reform Commission

Thank you for the opportunity to appear before the Committee on 11 February 2011 with respect to its inquiry into the Australian Law Reform Commission. Please find enclosed our answers to questions that the Department took on notice during its appearance before the Committee.

If there is any other way in which the Department can assist the Committee with this inquiry please don't hesitate to contact me.

Yours sincerely

Andrew Walter
Assistant Secretary
Strategy & Policy Advice Unit

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS ATTORNEY-GENERAL'S DEPARTMENT

Output 1

Question No. 1

Senator Barnett asked the following question at the hearing on Friday 11 February 2011:

Question 1 –Further information on the appointment of a full-time commissioner (Hansard, pp 87 – 89).

CHAIR—From the Attorney-General's opinion piece in the Financial Review, Mr Wilkins. It says 'The government will also appoint a full-time commissioner to lead the inquiry into classification, a particularly technical area of law' et cetera. **Can you tell us more about that appointment, such as when the appointment will commence, will it be solely related to the classification inquiry, will there be extra funds provided to the commission to pay for that full-time commissioner**—noting that a full-time commissioner is $178,000 according to the remuneration tribunal plus on-costs, so a $230,000 a year commitment—**and can you give us any other details about that announcement**?
Mr Wilkins—The exact timing of the appointment is imminent but it is really a matter for the government to determine.

CHAIR—**Do you have a short list?**
...
CHAIR—... **I am asking you if you or someone in the department is aware of a short list.** I would like to know.
Mr Wilkins—**I do not know. I will have to take it on notice.**
...
Mr Walter—The department provides a list of possible appointments for these kinds of positions to the Attorney. I was not responsible for this, but **a list was prepared and provided to the Attorney.**
CHAIR—**When?**
Mr Walter—**I could get you an exact date for that, but it was late last year.**
...

CHAIR—... **Please take on notice and provide further and better particulars in regard to the answer to that question.**

The answer to the honourable Senator's question is as follows:

Appointments to the Australian Law Reform Commission are made by the Governor-General in Council on recommendation of the Government.

The Attorney-General said in an article in the Financial Review on 11 February 2011 that the Government will appoint a full-time commissioner for the duration of the proposed inquiry into classification. He confirmed this intent in a letter to the President of the Commission on 21 February 2011.

On 15 November 2010 the Attorney-General's Department put a submission to the Attorney-General and Minister for Home Affairs identifying a number of people whose knowledge or experience may make them suitable for appointment to the Commission. Shortlisting and consideration of the most appropriate recommendation to be made to the Governor-General remains a matter for Government. It is open to Government to consider candidates other than those put forward by the Department. Given the matter is with Government and is ultimately a matter for the Governor-General in Council, it would not be appropriate for the Department to provide a copy of this submission to the Committee.

The Attorney-General's Department will provide transitional financial assistance to the Commission to pay for this position.

Question No. 2

Senator Barnett asked the following question at the hearing on Friday 11 February 2011:

Question 2 – Details of Secretary's meeting with Professor Weisbrot (Hansard, pp 94 - 95).
CHAIR—...**Was this a meet and greet**?
Mr Wilkins—I had gone to see the THE COMMISSION as soon as I arrived at and he was not present—Ros Croucher was present then. I had gone around and met the staff, as you do with all of these organisations that are in the portfolio. So when you say 'meet and greet', I went back to see him specifically and had a bit of a chat about what he thought about some possibilities...
...
CHAIR—**How long was your meeting**?
Mr Wilkins—Probably a couple of hours or an hour and a half or something like that.
CHAIR—**You can let us know on notice when it was.**

Mr Wilkins—I am not sure whether I have a record of that but I will look. It was certainly earlier on.

The answer to the honourable Senator's question is as follows:

The Secretary of the Attorney-General's Department, Mr Roger Wilkins AO, visited the Australian Law Reform Commission office on 18 September 2008 from approximately 12:00pm-1:00pm. The Commission's President, Professor David Weisbrot was not available to meet with Mr Wilkins at this time. Mr Wilkins instead, met with staff and other Commissioners.

Mr Wilkins returned to the Commission's office on 8 May 2009 to meet with Professor Weisbrot. The meeting went from approximately 9:30am-10:30am.

Question No. 3

Senator Barnett asked the following question at the hearing on Friday 11 February 2011:

Question 3 – Submission by Professor Weisbrot to the Department of Finance and Deregulation (Hansard, pp 99-100).
Ms Leon—It was on 12 November 2008 that the THE COMMISSION met with the Department of Finance and Deregulation, and **that was followed up with a written submission by Professor Weisbrot explaining his views about the issue**.
CHAIR—When was that?
Ms Leon—That was 18 November 2008.
CHAIR—When he provided the submission?
Ms Leon—That is correct.
CHAIR—**Can you provide a copy of the submission on notice**.
Ms Leon—**The submission was provided to the department of finance, so we will have to ask that department if they would release it.**

CHAIR—Please, if you could.

The answer to the honourable Senator's question is as follows:

Please find a letter from Professor Weisbrot to Mr Mowbray-D'Arbela of the Department of Finance and Deregulation, dated 18 November 2008 at **Attachment A**.

The Department of Finance and Deregulation referred the letter to the Attorney-General's Department, as the Portfolio Department, to inform consideration of how the principles of the Uhrig Review should be applied to the Commission and for further discussion with the Commission, which occurred during the drafting of the *Financial Framework Legislation Amendment Act 2010* and its explanatory memorandum.

Question No. 4

Senator Barnett asked the following question at the hearing on Friday 11 February 2011:

Question 4 – Communications between the Attorney-General's Department and/or Minister and THE COMMISSION (Hansard, p. 100).
Ms Leon—I am happy to do that. **There was then detailed consultation with the Law Reform Commission once the amendments were being prepared in 2009.** By that time Professor Croucher was the president.
CHAIR—**Could you—also on notice—provide a copy of any correspondence between the commission and the department and/or the minister regarding these matters.**

Ms Leon—Yes.

The answer to the honourable Senator's question is as follows:

Date	Issue
September 2009	Government gives approval for amendments to the *Australian Law Reform Commission Act 1996* to be developed, based on the Attorney-General and the Minister of Finance and Deregulation's assessment that the Commission would most appropriately operate under an executive management model.
September 2009 – February 2010	The Attorney-General's Department begins development of the amendments by preparing drafting instructions.
9 February 2010	The Attorney-General's Department holds a teleconference with the Commission – raised development of drafting instructions.
10 February 2010	The Attorney-General's Department sends the Commission a copy of the proposed drafting instructions for the amendments.
22 February 2010	The Attorney-General's Department holds a teleconference with the Commission to discuss the drafting instructions. The Commission raised a number of questions, and the Attorney-General's Department undertook to review instructions on a number of issues.
19 April 2010	Attorney-General meets with Professor Croucher.
12 May 2010	The Attorney-General's Department holds a teleconference with the Commission – this includes discussion of status of legislative amendments, and details of changes made in response to the Commission's views.
21 May 2010	Draft of Financial Framework Legislation Amendment Bill sent to the Commission.
17 June 2010	Professor Croucher sends comments on the Financial Framework Legislation Amendment Bill to the Attorney-General's Department.
17 June 2010 – 21 June 2010	The Attorney-General's Department considered the Commission's comments and revised the Financial Framework Legislation Amendment Bill as appropriate.
21 June 2010	The Attorney-General's Department Deputy Secretary, Renée Leon meets with Professor Croucher. This included a discussion of what was/wasn't covered in revised Financial Framework Legislation Amendment Bill.
23 June 2010	The Attorney-General's Department notified the Commission that the Financial Framework Legislation Amendment Bill has been introduced into the Parliament.
19 July 2010	Prorogation of 42nd Parliament.
11 August 2010	The Attorney-General's Department holds a teleconference with the Commission. The Commission was advised that the Financial Framework Legislation Amendment Bill had lapsed with prorogation of Parliament.
5 October 2010	Professor Croucher notified of the Financial Framework Legislation Amendment Bill reintroduction.
18 November	The Attorney-General's Department provides the Commission with contacts at the Department of Finance and Deregulation and the Australian Public Service Commission to assist the Commission in preparing for transition to *Financial Management and Accountability Act 1997*, and employment of staff under the *Public Service Act 1999*.

Question No. 5

Senator Barnett asked the following question at the hearing on Friday 11 February 2011:

Question 5 – Communications between the Attorney-General's Department and THE COMMISSION (Hansard, p. 100).
CHAIR—... **Have you had further communications with the commission since the decision was made to amend the bill and those amendments went through last year**? They are now coming into effect on 1 July.
Ms Leon—Yes, there have been detailed discussions with the commission throughout the amendment process, and Mr Walter can take you through the detail of that.
CHAIR—**On notice, can you provide a copy of the correspondence between the commission and the department.**
Mr Walter—Sure. It is probably worth adding that we have been having, I guess, informal discussions with them and putting them in touch with people to assist with the transition as well. That has been the main focus since the passage of the legislation; it has been more about the transition issues.
Mr Wilkins—Can I just say that one of the things that Beale suggested that we did do was to make the new strategic division within the Attorney-General's Department responsible for the ongoing relationship with the Australian Law Reform Commission. So they have conversations all the time, on a regular basis, and try and help them—
CHAIR—**I would like a copy of the correspondence.** The commission has agreed to provide it, but I would like the department to also provide it.

Ms Leon—Most of the correspondence on the amendments has consisted of sending copies of the drafting instructions and the draft legislation, so it is pretty routine. The policy decisions had already been made after that consultation with Professor Weisbrot, so the consultation that has been occurring in the phase while the legislation was being developed is more routine; it is just about the drafting of the legislation.

CHAIR—Why don't you just outline that to the committee? If that is the case, outline that for the committee.

The answer to the honourable Senator's question is as follows:

Please refer to the answer to Question 4.

Question No. 6

Senator Barnett asked the following question at the hearing on Friday 11 February 2011:

Question 6 – Staffing numbers for the Attorney-General's Department (Hansard, pp 103-104)
CHAIR—How many staff are there in your department currently?
Ms Leon—At the moment it is about 1,400 or 1,450—something like that.
CHAIR—And 10 years ago?

Ms Leon—Sorry, I have been corrected. It is 1,394 as at 30 January.
Mr Wilkins—Ten years ago there would have been a lot fewer, actually.
...
CHAIR—**Can you take on notice the staff numbers for 10 years ago, please.**
Mr Wilkins—**We will provide you with a profile over the period.**
CHAIR—That is fine. All I want to know is how many staff—
Ms Leon—In 2002-03 the FTE was 774. Now it is 1,394.
CHAIR—This year is 2010. **I want to know what it was for 2000.** Do you have that figure with you?
Ms Leon—No.
CHAIR—If you could provide that, please.

Mr Wilkins—**We will provide all of those years.**

The answer to the honourable senator's question is as follows:

Year	FTE	Headcount
1999/00	583.7	596
2000/01	542.0	557
2001/02	644.6	659
2002/03	712.6	727
2003/04	791.9	808
2004/05	881.7	902
2005/06	1074.8	1100
2006/07	1267.7	1295
2007/08	1463.9	1501
2008/09	1468.7	1508
2009/10	1475.4	1513

Current FTE is 1394.45 as at 1 February 2011.

The Attorney-General's Department's staff numbers fluctuate as machinery of government changes occur and functions are acquired or lost. In 2007/08 for example, staff involved in the administration of Australian Territories became part of the Department, resulting in a rise. However, all Territories related staff moved out of the Department and into the Department of Regional Affairs, Regional Development and Local Government in the most recent machinery of government changes, accounting for a decrease in staff in the most current FTE numbers (1394.45).

The acquisition of national security and emergency management related functions, in general, account for the steady increase in staffing numbers over the past decade.

ADDITIONAL MATERIAL FOR THE COMMITTEE

The Attorney-General's Department has compiled the Commission's budget and staffing figures from 2000-01 to 2009-10, based on the Commission's annual reports over this period. Projections for 2010-11 to 2013-14 are also included. Please find this at **Attachment B**.

Australian Government

Australian Law Reform Commission

Emeritus Prof David Weisbrot AM
President and CEO

Mr Marc Mowbray-d'Arbela
Assistant Secretary, Legislative Review Branch
Financial Management Group
Department of Finance and Deregulation

18 November 2008

Dear Marc

ALRC governance arrangements

Thank you very much for initiating contact, and for the opportunity on Wednesday (12 November) evening to have a long chat with you and John Kalokerinos about the current and future governance arrangements of the Australian Law Reform Commission (ALRC). We agree that the aim of the exercise is to achieve the best model of governance for each Commonwealth agency.

At the end of that discussion we agreed that it would helpful if I provided you with an outline of our serious concerns about the impact of a possible transition from the ALRC's Board of Management in favour of an 'executive management' model, accompanied by a transition from regulation under the *Commonwealth Authorities and Companies Act 1997* (the 'CAC Act') to the *Financial Management and Accountability Act 1997* (the 'FMA Act').

General observations

The Uhrig report recognises that the 'board' and 'executive management' governance templates are a reference point, but that they may be varied to take account of unique factors—and that any variation should be questioned on the basis of whether it would lead to weaker governance arrangements.

The ALRC does not neatly fit either template—perhaps because the assumption in the Uhrig report seems to be that bodies with statutory office holders are either responsible for regulation or service provision and have no role in policy. This assumption is not accurate for the ALRC because our core role is policy development, while we have no role in regulation, service provision or complaints handling. In a sense, we already only have one 'client'—and that is the Commonwealth Attorney-General.

This suggests that the ALRC is one of those unique cases foreseen by Uhrig, in which case the question becomes how best to ensure good governance. We are not aware of any concerns about

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the quality of governance within the ALRC—indeed, the previous Attorney-General expressly acknowledged that the ALRC had excellent governance standards and that he had no concerns in this regard. Our current structure strikes a balance that is appropriate given the organisation's size and statutory role.

Our constituting Act was overhauled as recently as 1996, following an extensive review of the original (1973) legislation by the House of Representatives Standing Committee on Legal and Constitutional Affairs. Our current governance structure dates from that review and was a feature highlighted by the then Attorney-General, Daryl Williams MP, in the second reading speech for the 1996 Act.

It may well be appropriate to consider some minor changes to our governance structure—for example, we both agree that ss 43-44 do not reflect existing policy or practice—but a move to executive management, under the CAC Act, would create a number of serious difficulties, as elaborated below.

Application of the Department of Finance Guidelines to the ALRC

The Department of Finance and Deregulation ('Finance') publication, *Governance Arrangements for Australian Government Bodies* (August 2005) ('the Finance guidelines'), identifies five key factors that influence the choice of governance arrangements for a statutory body and whether the body should be subject to the FMA Act or CAC Act. I have briefly addressed each of these below.

(1) The purpose and functions of the body

The Finance guidelines focus on the need for clarity of purpose and functions. The ALRC's functions are clearly explained in Part 3 of the ALRC Act. Several other features of Part 3 of the ALRC Act are relevant to the way in which the ALRC's purpose and functions might influence a choice of governance structure.

Section 25 gives the Commission a high degree of autonomy in determining its own strategy in relation to the way in handles its references from the Attorney:

> The Commission has the power to do everything necessary or convenient to be done for, or in connection with, the performance of its functions.

Section 26 specifies the types of directions of the Attorney-General (besides written Terms of Reference) with which the ALRC must comply. These are limited to directions under s 20(3) (concerning the respective priority of references) and s 23 (requiring production of an interim report). It would be difficult to move to executive management, reporting to the Attorney, while maintaining the limitation implied by s 26. On the other hand, if this limitation were removed this might impact on the perceptions of stakeholders about the ALRC's ability to form an independent view on law reform issues, and provide the best advice to Government without fear or favour.

(2) The financial sector classification of the body

The ALRC is part of the General Government Sector (GGS). While the Finance guidelines suggest that GGS bodies should generally be covered by the FMA Act, the guidelines also acknowledge that this will not always be appropriate.

(3) Whether a governing board would be effective

The Finance guidelines indicate that the degree to which the relevant Minister controls policy and strategy will be a key factor in determining whether a board can be effective. The Attorney-General controls the ALRC's basic work program by issuing Terms of Reference for our inquiries, after consultation with the ALRC about project suitability, timing and resources. However, it is an essential characteristic of the ALRC model that the Attorney has no control over policy or strategy decisions (other than through issuing terms of reference or directions under s 20(3) or s 23 of the ALRC Act). In 33 years, no Attorney has ever sought a greater degree of control or influence, formally or informally, than that provided by the Act.

The current operations of the ALRC are entirely consistent with the description of good practice outlined in the Uhrig report for bodies with a board of governance. In particular:

- the Attorney-General (the Minister responsible for the ALRC) communicates specific expectations, including subject matter, key factors to be taken into account, and reporting dates, through written Terms of Reference;
- the Attorney has no role within areas of decision-making delegated to the ALRC;
- the ALRC regularly keeps the Attorney and the AG's Department informed of its operations;
- the Attorney is advised by both the President of the ALRC and by the Department when considering statutory appointments;
- the Attorney communicates primarily, if not entirely, with the President of the ALRC;
- the ALRC works with the Department to ensure that the Attorney is always appropriately briefed;
- the ALRC's Board of Management periodically develops a corporate plan, including output measures and performance indicators; and
- the Board of Management is responsible for appointment of the Executive Director.

These factors indicate that the Board model has been, and continues to be, an effective form of governance for the ALRC. The open and transparent manner in which the ALRC conducts it Board meetings also has benefits in keeping staff fully informed about key policies and developments, and the issues and challenges facing the Commission.

The ALRC has a very strong reputation—with the Attorney-General's office, the Department and the relevant Senate Estimates Committee—for effective governance and sound financial management

(4) The appropriate employment coverage

The Finance guidelines indicate a strong preference for the staff of FMA Act agencies to be employed under the *Public Service Act*. ALRC employees are not currently subject to the *Public Service Act*, and for the ALRC this would lead to additional cost, significant inflexibility and reduced productivity.

The ALRC has strategically used successive staff agreement negotiations to remove conditions that are generally available in the Australian Public Service (APS) but are inappropriate to the ALRC's mode of operation—most notably, ongoing employment status. The current ALRC Certified Agreement (2007–2010) accurately and effectively reflects the ALRC's working conditions (which move to the rhythms of research and consultation) and financial constraints, specifying (cl 6.1) that:

> The ALRC is a professional body focused on research, consultation and applied scholarly publications. The ALRC aims to provide the highest quality legal and policy advice to the Commonwealth Attorney-General, and through the Attorney-General to the Commonwealth Parliament and the Australian people. The nature of the ALRC's work is such that the intensity of the workload fluctuates in keeping with the natural rhythms associated with research, writing and publication deadlines. Accordingly, employees are expected to adopt a flexible and professional approach to their work, involving longer hours during periods of peak workload, balanced by shorter working hours at other times.

The basis of employment for ALRC staff is fixed-term (renewable) appointments for a maximum of three years, with annual, formal performance appraisal. While these appointments are renewable, this is at the discretion of the President. This implicitly recognises that the content of the ALRC's work can vary dramatically—in recent years involving such diverse areas as marine insurance, classified and national security information, genetic privacy and discrimination, sedition, sentencing, gene patenting, privacy, regulatory law and practice, evidence and secrecy laws—as well as the need for capturing different interdisciplinary and technical skills. Over time, this has provided much-needed flexibility in the way in which staff is engaged, in order to manage these complex projects within our budget.

This is also consistent with the practice concerning full-time Commissioners, who typically are appointed for three-year terms. The basis of employment at the ALRC stands in stark contrast to the APS, for which the usual basis for engagement under s 22(3) of the Act is as an 'ongoing APS employee'.

The ALRC has gradually phased out the notion of ongoing employment through successive Certified Agreement negotiations, in which the staff also had representation from their union (the CPSU). Those staff members (the great majority) who chose to relinquish their ongoing status in favour of fixed-term appointments were rewarded with more favourable employment conditions than those who chose to retain their status as ongoing employees. As a result of attrition, the ALRC no longer has any ongoing employees. To provide ongoing employment status to the ALRC's current staff would effectively reinstate a benefit that staff consciously relinquished as part of the trade-offs in enterprise bargaining—and with no corresponding benefit to the Commission or the Commonwealth.

The ALRC also has introduced a number of other flexible arrangements that reflect the nature of its project-based work cycle. These include a mechanism for staff to 'purchase' additional annual leave, which allows for a reduction in salary costs at times of lower workload; recognition that staff at senior levels are required to work additional hours without paid overtime or hour-for-hour time-in-lieu; and provision for common law agreements to be used in conjunction with, or to the exclusion of, the Certified Agreement. These conditions have been negotiated with a view to securing greater productivity and value for money for the ALRC and, ultimately, the Australian Government and taxpayers.

Another feature of the ALRC's status as an agency outside the Australian Public Service (APS) is that it is not required to provide staff mobility to and from other APS agencies. This allows the ALRC to maintain a relatively constant legal research team for the life of each inquiry (at least), avoiding the regular staffing changes that would arise from staff having access to temporary employment opportunities in other Australian Government agencies.

My own experience in similar agencies, state and federal, is that public sector mobility arrangements are particularly unsuitable for small research and advisory bodies because they make it difficult to develop and maintain the expertise that is required to complete complex projects within one or two year timeframes.

If the *Public Service Act* were applied to the ALRC as a consequence of the Uhrig review, the two most important features of our employment arrangements would disappear. Unless special arrangements are made, the ALRC will be required to confer ongoing employment status on all current employees and to provide mobility between the ALRC and other Commonwealth agencies.

Ironically, at a time when bipartisan policy and reforms have focused on deregulation of labour markets, increased flexibility, and customisation of terms and conditions to the particular circumstances of each employee and employer, the Uhrig review could lead to much greater rigidity in the ALRC's approach to engagement of staff.

I have grave concerns about the impact of these changes on the ALRC's productivity and therefore would encourage, at a minimum, the maintenance of the ALRC's status as a non-APS agency. I note that the Finance guidelines recognise that a body under the FMA Act may employ staff outside the *Public Service Act* where there is a persuasive reason for a different staffing regime. I believe that the diverse, constantly changing nature of the ALRC's work presents a persuasive case for maintaining the ALRC's status as an agency to which the *Public Service Act* does not apply.

(5) The level of independence of the body

In order to properly understand the impact of current laws and options for improving the effectiveness of the law, the ALRC depends on gathering sensitive information in confidence, often from stakeholders (whether individuals or corporations) who would be very reluctant to make the same information available to 'the Government'. This is absolutely critical to the quality of our policymaking and recommendations in final reports.

If the ALRC were to move to an executive management model, in association with transition to the CAC Act, the Attorney would be required to assume the governance role currently performed by the Board. This might well create some significant problems with the perception of the ALRC's independence.

In many inquiries (for example, in recent years, those on Sentencing and Sedition), the AG's Department is itself a significant stakeholder. If the Attorney and Department were also directly involved in the governance of the ALRC, this might make it more difficult for us to win the confidence of other stakeholders. I should stress that the ALRC has no concern about the way in which the Attorney or Department would actually approach such a role, as there has been a long tradition and a healthy culture of respect. Our concern is about the perceptions that such a change in management models might generate among stakeholders.

Similarly, it is now standard practice for the ALRC to establish an Expert Advisory Committee of 15-20 eminent persons to assist with each inquiry, helping us to maintain a clear focus and determine priorities, as well as in providing quality assurance in the research and consultation effort, and commenting upon the practicability of reform proposals.

The ALRC seeks to involve the acknowledged leaders in their respective fields—already busy people, whom the Commission could not possibly afford to pay what they are worth or could easily

command as consultants in the private market. And yet, virtually all such invitations are accepted and all work is performed on a pro bono basis. With our relatively modest budget and staffing complement, the ALRC is reliant upon 'the kindness of strangers', generating and harnessing an extraordinary volunteer effort in the course of its work, to supplement our in-house resources. Although members of our Expert Advisory Committees never quibble about their unpaid status, quite a few have pointed out that the ALRC's independence status and reputation were key factors in their decision to volunteer to take on a great deal of extra work—which they 'would never do for a Government department'.

Directors' duties

If I understand correctly, one of the key factors driving Finance in this instance is a concern about the inappropriate imposition of directors' duties on statutory officeholders under the CAC Act. This may well be a significant issue for other agencies.

However, as I explained, the ALRC does not regard this as a matter of concern: all of the Commissioners of the ALRC are lawyers (indeed, by definition, distinguished lawyers); we are all well aware of the nature and detail of our duties as directors; and we maintain liability insurance of respect of those obligations—with a very modest premium, given there has never been a claim made against any Member of the ALRC.

We remain comfortable in accepting these obligations, particularly when weighed against the institutional benefits of remaining under the CAC Act.

Practical considerations

As a CAC Act agency, the ALRC is only required to comply with a limited number of general government policies. This is one of the reasons that the ALRC has been able to continue to operate effectively, within its budget, with such a small (and declining) number of staff (currently 15.5 FTE). It has allowed the ALRC to keep administrative staff to a minimum and focus our salary budget on the engagement of the legal staff required to produce our core products—consultation papers and reports.

If the ALRC were to move to the FMA Act, we would be required to comply with a number of additional government policies—for example, the Finance Fleet Leasing Arrangements and the Mandatory Procurement Procedures of the *Commonwealth Procurement Guidelines* for procurements valued between $80,000 and $400,000. This would result in additional administrative costs and would require a shift in scarce human resources from legal to administrative staff.

More importantly, the financial management and reporting framework that applies under the FMA Act is significantly more detailed. Based on information from other agencies—and confirmed by the Attorney-General's Department—we believe that we would require supplementation for at least one additional finance staff member (1 FTE) in order to comply with these additional requirements on an ongoing basis. This is a cost in the nature of pure administration, with no assistance to the ALRC in achieving its agreed outcomes.

As the ALRC's appropriation continues to decline steadily in real terms, it becomes increasingly difficult with each year to manage costs within budget while maintaining the high quality of our advice to Government. In this context, all sources of 'other income' are critical, and in our case a significant source of such income is interest earned on accumulated surpluses. The ALRC has

maintained frugal policies and worked hard at managing its budget in order to save money wherever possible. The ALRC would not be able to operate at current levels without this revenue. If interest income were lost, this would lead to an immediate five percent reduction in our already lean staffing arrangements. Further, the management incentives for preserving funds at the end of each financial year would vanish, with any savings returned to consolidated revenue.

The funds maintained in the ALRC's reserves also provide us with the capacity with manage large projects which run over several years and to cope with unexpected contingencies. For example, the Privacy inquiry took about 2.5 years to complete (in accordance with the Terms of Reference), running across several financial years. The huge scale of the project—including the ALRC's largest ever community consultation exercise—and the extra printing costs associated with the large report (3 volumes, 2700 pages) caused a small budget deficit in the last financial year, which was easily accommodated by the reserves accumulated by carefully managing other, smaller projects. We worry greatly about losing this kind of project management and financial flexibility, which suits the particular nature of our work.

Finally, if the ALRC is required to move to the FMA Act, our preliminary research indicates that the implementation process would involve significant work, including legislative changes to the ALRC Act, preparation of Chief Executive's Instructions, a complete overhaul of our financial management system and constant project management to ensure that steps progress in the technically and legally correct sequence.

We understand that other portfolio agencies have been provided additional support for this process—either by seconding a senior officer on a full-time basis or by providing funding for engagement of an adviser. Given that the ALRC is so small, we would not be able to manage the transition without this kind of assistance, which would involve a one-off expense in the order of $100K–200K, in addition to the ongoing supplementation required for finance staff mentioned above.

In recent years, the ALRC has managed to continue to operate effectively, despite a declining budget—indeed, we have actually managed a significantly higher reference workload. Having increased efficiency to deal with these circumstances, it is difficult to see where else we can cut costs other than by reducing the number of legal staff (already trending down as a result of successive 'efficiency dividends'). We have serious concerns that if we were to move to the FMA Act our efficiency would be compromised for no good purpose, through the application of a template that was clearly not designed for an agency such as the ALRC.

Transition

If the ALRC were to become subject to the FMA Act, the most logical and least disruptive point at which to effect the transition would be at the start of a financial year. If the change were to occur in the middle of the financial year, this would require the preparation of two sets of financial reports for that financial year—one under the FMA Act and one under the CAC Act.

Informal advice from the Australian National Audit Office (ANAO) indicates that this would significantly increase the complexity of financial management and reporting for that financial year. As there is unlikely to be sufficient time to make all of the needed changes by 1 July 2009, I suggest that any changeover to the FMA Act, should it occur, take effect no earlier than 1 July 2010.

As discussed, we would want to insure, for the reasons outlined above, that any move to the FMA Act was accompanied by new arrangements that preserved to the extent possible those existing features that serve the ALRC well. For example, this should include: (a) the ability to employ on a contract basis under our own Certified Agreement and outside of the APS; (b) retaining body corporate status for the Commissioners as a group; (c) providing for a 'special account' in the name of the ALRC, to allow us to continue to maintain and manage reserve funds, in keeping with the major project-based nature of our enterprise.

Finally, we wonder if an audit or formal evaluation has been conducted of the agencies that have already been moved from the CAC Act to the FMA Act, so that we can see how much this actually cost, and what the major issues and effects have been, a year or so down the track? If not, perhaps it would be in all our interests to defer any action for a time until these evaluations are conducted and available for analysis?

Conclusion

Again, we accept that the aim of the exercise is to achieve the best model of governance for Commonwealth agencies; however, for the reasons outlined above, we believe that the ALRC already demonstrates this under its existing model as a CAC Act agency.

We are, by nature, reformers—and are not wedded to the status quo nor opposed to change. However, the ALRC is instinctively resistant to one-size-fits-all prescriptions, and only recommends changes to law and practice where we can identify clear benefits that would flow from such action.

In this particular case, we have identified many potential detriments, without *any* countervailing benefits to the governance of the ALRC, or to the quality or efficiency of our work. At best, you have indicated that some strategies may be available to mitigate some of these detriments, but we remain sceptical about the basic wisdom of applying the Uhrig prescriptions to the ALRC.

However, let me say again that we appreciate very much the opportunity to engage with you in this frank discussion, and are greatly reassured by your attentiveness to our concerns.

With warm regards

Yours sincerely

Emeritus Professor David Weisbrot AM
President and CEO,
on behalf of the Commissioners and Executive Director of the ALRC

	Finances							Staffing						
	Appropriation (revenue from govt)	Appropriation change from previous year	Operating revenue	Operating revenue change from previous year	Operating expenses (payments made)	Operating expenses change from previous year	Surplus (deficit) attributable to Australian Govt	Average full-time staff	Full-time equivalent staff at close of reporting period	Payments to employees	Full-time Commission members at close of reporting period	Part-time Commission members at close of reporting period	Total Commission members	Members' Remuneration
2000-01	$3,003,000	-	$3,318,551	-	$3,123,571	-	$194,980	21.3	-	$2,043,269	4	4	8	$778,796
2001-02	$3,112,000	$109,000	$3,426,423	$107,872	$3,183,894	$60,323	$242,529	20.5	-	$2,048,810	4	4	8	$821,415
2002-03	$3,159,000	$47,000	$3,290,176	-$136,247	$3,470,521	$286,627	-$180,345	18.8	18.2	$2,262,894	4	3	7	$818,622
2003-04	$3,275,000	$116,000	$3,535,368	$245,192	$3,314,818	-$155,703	$220,550	17.6	-	$2,193,227	3	3	6	$853,478
2004-05	$3,303,000	$28,000	$3,420,947	-$114,421	$3,209,701	-$105,117	$211,246	16.7	18.05	$2,021,186	3	3	6	$704,640
2005-06	$3,377,000	$74,000	$3,577,016	$156,069	$3,527,636	$317,935	$49,380	18.8	18.9	$2,261,324	3	2	5	$742,662
2006-07	$3,366,000	-$11,000	$3,495,330	-$81,686	$3,421,280	-$106,356	$74,050	-	17.8	$2,254,539	3	3	6	$719,787
2007-08	$3,382,000	$16,000	$3,532,229	$36,899	$3,742,757	$321,477	-$210,528	19.37	21	$2,500,938	3	3	6	$831,019
2008-09	$3,360,000	-$22,000	$3,488,813	-$43,416	$3,432,712	-$310,045	$57,465	-	17.71	$2,329,838	3	2	5	$887,418
2009–10	$3,387,000	$27,000	$3,450,130	-$38,683	$3,581,082	$148,370	-$130,952	-	19.99	$2,374,022	1	3	4	$637,543
2010-11	$3,152,000	-$235,000												
2011-12	$2,921,000	-$231,000												
2012-13	$2,913,000	-$8,000												
2013-14	$2,938,000	$25,000												

Figures taken from the ALRC's Annual Reports.
Surplus (deficit) attributable to Australian Govt is equivalent to Operating revenue - Operating expenses.
Payments to employees does not include workers compensation premiums.
Where members are judicial officers, no remuneration is payable.