COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Reference: Australian Law Reform Commission

THURSDAY, 3 MARCH 2011

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

http://www.aph.gov.au/hansard

To search the parliamentary database, go to:
http://parlinfo.aph.gov.au

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

REFERENCES COMMITTEE

Thursday, 3 March 2011

Members: Senator Barnett (Chair), Senator Crossin (Deputy Chair) and Senators Furner, Ludlam, Parry and Trood

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Eggleston, Faulkner, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ian Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senator Barnett, Senator Crossin, Senator Furner and Senator Pratt

Terms of reference for the inquiry:

To inquire into and report on:

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.

WITNESSES

Committee met at 4.47 pm

CHAIR (Senator Barnett)—This is a public hearing of the Senate Legal and Constitutional Affairs References Committee's inquiry into the Australian Law Reform Commission. This is a public hearing. The inquiry was referred to the committee by the Senate on 23 November 2010 for inquiry and report by 31 March. The terms of reference for the inquiry are on the committee's website. The committee has received 22 submissions for the inquiry. All submissions that have been authorised for publication are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, the witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

[4.50 pm]

HAMMOND, Justice Robert Grant, Private capacity

Evidence was taken via teleconference—

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Justice Hammond—I am appearing in a personal capacity, although I hold a warrant as a member of the New Zealand Court of Appeal and as President of the New Zealand Law Commission.

CHAIR—We have your submission, submission No. 12. Did you wish to make any amendments or alterations to that submission?

Justice Hammond—No, I do not. I have some brief opening comments.

CHAIR—We would like you to do that, but, before doing so, on behalf of the committee I express our sincere sympathies and condolences to you and your colleagues, particularly in Christchurch, following the earthquake. The Senate in Australia paused for two minutes silence this week in memory of that tragedy. On behalf of the committee I would like to pass on our sympathies, condolences and best wishes for the future.

Justice Hammond—Thank you. We are grateful for that. The contribution that is being made by Australian search and rescue personnel has been very warmly appreciated here. A function was held by the Prime Minister in Christchurch last weekend to personally thank them. They are doing very difficult and even dangerous work. It has been a splendid effort on their part. As I look down onto the harbour below me, I can actually see one of our Navy vessels departing to take more supplies to Christchurch. We are very grateful for the assistance.

CHAIR—Thank you very much for that response. It is well noted and appreciated. Please proceed.

Justice Hammond—I am in my own office and there is no other person present with me. One reason I filed a submission was that I noted in your terms of reference in paragraph (c) that you are invited to have regard to examples of how like organisations and overseas organisations proceed. I thought that you might find New Zealand offers some insights, although you have to weigh your own needs and aspirations.

I think it would be a fair summary of 20 years experience with an institutional law reform organisation in New Zealand to say that it really turns on two propositions. The first is a broad proposition that law reform is today a collaborative exercise. Reports, no matter how good they are, are not an end in themselves. We take the view that there is a need to bring about actual change, so interaction as to what is taken on, why and what happens to the output is vital and that is why we have in New Zealand a very close interaction with government. We have our own minister who is responsible for the Law Commission, and I made reference in my submission to the kinds of steps that have been taken by the New Zealand parliament to deal with the output we produce.

My second proposition is that, if this kind of enterprise is to be achieved, we have taken the view that there is an absolute and undilutable requirement for a quality, multimember full-time commission. I think I referred to the fact in my submission that my colleagues include the former Chief Parliamentary Counsel and law draughtsman, a former Deputy Secretary for Justice, a former deputy university vice-chancellor and a couple of very senior law professors. At the end of the day, as I often put it to my staff, I have to go across the road to my minister and say, 'We think you should do this about that,' and of course it is not just the authority of the report itself; it is the authority of the body that is making those comments which is of some significance. That is as best I can put the New Zealand thesis in a nutshell.

CHAIR—Thank you very much. We will proceed to questions. I will kick it off. You note in your submission that there is no formal collaboration between the various law reform commissions in the Commonwealth, but you do say very positive things about the work of the Australian Law Reform Commission. On page 5 of your submission you say:

Australia was one of the leaders in the law reform movement in the British Commonwealth.

Firstly, can you expand on that. Why do you believe they are one of the leaders? Secondly, what level of collaboration do you have, albeit that there is no formal collaboration, according to your submission?

Justice Hammond—I will make two or three points. First of all, the reason for the standing of the Australian commission could go under two headings. As a commission it has been somewhat of a pioneer in

the kinds of processes that are adopted in law reform. Indeed, some of those we have, frankly, copied. The second, of course, is the quality of the reports themselves.

As to collaboration around the British Commonwealth, there is the Commonwealth Association of Law Reform Agencies, which meets in conjunction with the Commonwealth Law Conference every couple of years. I was present at this year's conference in Hyderabad, India, and have not long been back. The theme of that conference, which mirrors problems all around the world, was law reform in difficult times. We spent a certain amount of time talking to those commissions who were able to be present about what kinds of techniques they were adopting to deal with the times in which we presently live and which we all have to face. I have to say that I was saddened that Australia was not present at that. For that matter, there were no Canadian jurisdictions there either.

CHAIR—Do you know why?

Justice Hammond—No, I do not. I checked with Mr Michael Sayers, who is the secretary of that organisation and was at one time the executive director of the UK Law Commission. He was not quite sure either, but he was inclined to think it was due to financial constraints.

CHAIR—All right. We can make our own inquiries. You mentioned in your opening remarks that you strongly support the multimember approach in terms of a law reform commission and the need for full-time commissioners.

Justice Hammond—Yes.

CHAIR—You indicated that you had some very senior people, whom you identified, which is excellent. Can you please explain to the committee why that is essential, in your view, to the proper and professional running of a law reform commission?

Justice Hammond—Yes. In practical terms, I am sitting in an office and on each side of me, in their offices, are two other full-time commissioners—five of us in all—of the character that I earlier suggested. A practical example might better suffice. Towards the end of last year the Prime Minister indicated that he had had enough of the rows over parliamentary allowances and so forth, which is something I suspect most parliaments have had. He said that he wanted the commission to take the matter on. We produced a review of the civil list, with a draft act, which essentially said that it has to go from parliamentarians to an independent tribunal. We produced a report, which we handed to the PM's office just before Christmas. He went on public media following day and proposed to adopt all of the recommendations we had made and that this should be implemented and would be implemented by June of this year. I understand from the cabinet secretary that he took that report with him to Christchurch and went through the boxes again as to what was to be done, on his way down in a plane. That is a busy Prime Minister for you!

But to give effect to that I needed full support from the most senior law draftsman in the country who could deal with this and who understood how this impacted with other legislation. There were a number of issues arising out of it which we were having to discuss on a day-to-day basis with people who had a significant appreciation of public life and parliamentary processes. The upshot of all of that is that the cabinet office came back to us and said that the research officer who helped us on that they regarded as being invaluable and could they please second her to the Prime Minister's department until June of this year to give effect to this. That was a hugely sensitive, very difficult project. It was not going to endear us to many parliamentarians and we were grateful for the support that we did get in the end.

But you cannot do that kind of exercise or anything like it through part-time commissioners and law reform commissions. I have worked under both. Thirty years ago I worked with part-time law reform committees in New Zealand when I was the permanent head of one of the Canadian provincial law reform agencies. I had part-time board members. We were trying to overhaul the commercial legislation in western Canada, which, as you know, is very strong on oil and gas interests. I did much of that and, quite frankly, I had to be able to walk in and out of the offices of my colleagues and they had to be able to walk in and out of each other's offices all day long. There was a constant interchange between us. There were five of us in a row and we worked together all the time. We had a commission meeting every month. That is required for formal reasons and it also looks at matters in the round. It is a working modality in a nutshell, if I could put it that way.

CHAIR—Can you imagine a law reform commission of your size or the size of the one we have in Australia operating with only one full-time commissioner?

Justice Hammond—I do not think it is a commission.

CHAIR—And even two is too few; you operate with five. What is the ideal number? Do you have a view on that?

Justice Hammond—No, I do not. We have to have at least three and up to six, so that is the view of the New Zealand parliament. That is in our statute; we cannot fall below three. You would have to amend the law on that. I did five-year breakdowns for you from 1986 to get a quick idea at five-year intervals. In 1986 there were five, 1991 four, 1996 four, 2001 six and 2007 four, but that was a transitional year—two more were coming on board.

I should say, to be accurate and in fairness to what I think will be a difficult year next year, I have three commissioners whose terms are up. I have already had discussions with the Ministry of Justice and, given the economic circumstances of the country and the Christchurch situation, which is going to be very difficult, I think I will have trouble persuading the minister—and it might even have to go to cabinet—that I could hold five. Personally I regard a commissioner plus three as being a working minimum, if I can put it that way.

CHAIR—I will move on because of the time factor. How many staff do you have in your commission?

Justice Hammond—I have that in a nutshell: at the moment I have 16; 10 of those are researchers.

CHAIR—And then there are the full-time commissioners on top of that?

Justice Hammond—That is right. We have sixteen staff, which includes a general manager of a small corporate services unit, and the five commissioners.

CHAIR—Can you outline to the committee the process by which the government responds to your reports.

Justice Hammond—Yes. Under the revised arrangements, which were settled by the Prime Minister herself with the then President, if the government accept our recommendations, they get straight on with the bill. We may be asked to attend a select committee to enlarge on matters. If they do not accept our recommendations or most of them, then, under the present cabinet manual—it is in the manual—the minister has to, within 120 days, file in the house a reason why they are not accepting them.

CHAIR—Okay. My final questions are: firstly, have you ever undertaken inquiries on your own motion; secondly, is most of your work undertaken as a result of references from the Prime Minister or the government of the day?

Justice Hammond—Under our legislation we are authorised to undertake matters ourselves and, historically, we have occasionally done so. We are even authorised to comment on the legal work done by other government departments, although I do not know that we have done that. But, more importantly, I negotiate a work program with the responsible minister each year, and it goes into a statement of intent. I got a letter from him the other day reminding me of what his expectations are.

CHAIR—I will just clarify that: is your responsible minister the Attorney-General?

Justice Hammond—No, it is a separate minister. It may be the Attorney-General, it may be the Minister of Justice or it could be another member of cabinet altogether.

CHAIR—Who is it at the moment?

Justice Hammond—At the moment it is Mr Simon Power, who is the Minister of Justice. He is a very senior minister, which is always useful; indeed, he is the house leader at the moment.

CHAIR—All right. Thanks so much for that. I will pass to Senator Crossin.

Senator CROSSIN—Thanks, Chair. Justice, thanks for your contribution and your submission. In New Zealand, if you are actually dealing with a specific area of law reform, is there a capacity to appoint temporary, full-time commissioners? Let me just give you an example. Here in Australia, the Law Reform Commission has undertaken some work in relation to family law, so the government provided the capacity for a full-time commissioner to be based with the Law Reform Commission during that period of work, because of that person's expertise. Does something similar happen in New Zealand?

Justice Hammond—I think it is authorised under our legislation, provided we do not go over six commissioners. I cannot recall an occasion on which it has been done in recent years.

Senator CROSSIN—Would that just be another model for the way in which a commission works? Instead of having five full-time people, you might have one or two full-time people and the others would come in depending on the area of law that was being examined and reformed.

Justice Hammond—Yes. Let me give you an example of where that might arise at the moment. There is great concern to overhaul our securities law. A very specialised area of the law, you need a senior commercial lawyer. I have to talk to the MED, which is the Ministry of Economic Development, and maybe the Reserve Bank and others about that. You might use a consultant. That highly specialised kind of thing could conceivably be dealt with that way.

Senator CROSSIN—And you do not have any part-time commissioners or any capacity for part-time commissioners?

Justice Hammond—We have not for some time. We have in the past occasionally had them. My own observation would be that it suffers from the difficulty that I mentioned before: we try to work in a relatively intense way; if we take this on, it is going to be done in the foreseeable future, and it has been negotiated with government, who are expecting us to get it done because they are waiting for it.

Senator CROSSIN—Can you give me an idea of how many quality of law reforms, areas or reports you might produce a year?

Justice Hammond—I am trying to think what the exact figure was last year. At any given time, we have got about 10 projects on. From memory, I think four were finished, and two or three were almost finished last year and have been finished this year. We would have very little that sticks out much past a year.

Senator CROSSIN—I suppose it is a difficult question because some areas of law reform you might be able to do in six months and some might take 18 months.

Justice Hammond—That is exactly right. I said to my minister, and it has been my modus operandi both here and in North America, that about 75-80 per cent of the work we do is what you might call hard law—it has some direct application. Some people might call it black letter law. You have to have a policy capacity, and about 20 per cent of the work is more long term. One example is that we have been given a reference to review regulatory gaps and the new media—problems with the internet and things like that. That is going to have to be longer term. Nobody has a good handle on that yet. Oddly enough, with our Burial and Cremation Act, dying in New Zealand is apparently a bit difficult, and reviewing that could take a long time because of native or Indigenous interests. The bulk of the work is what my minister calls black letter law, I am afraid. Some law reformers would not agree with that.

Senator CROSSIN—How do you operate with the inquiries? Do you have an issues paper and then, separate to that, a discussion paper, or do you roll them into one and have issues and discussion all as one, or does it vary?

Justice Hammond—We have two categories—issues papers and final reports. Issues papers are a bit broader than they sound. I have just done one on whether there should be a register of judges' pecuniary interests, which I started in December. It is going to the minister tomorrow. It is about 80 pages long, from memory, and that ends up with the questions we want asked. It has the background in as well. We will issue a final report later in the year when we have consulted.

Senator CROSSIN—In our first public hearings we had some discussion about a different way of operating. I think in the past the Law Reform Commission has produced an issues paper and then a discussion paper and then done its work and consulted and then there would be a final hearing. There is a tendency now to put issues, discussions, call them what you will, in the one document and move, as you do in New Zealand, to just having two stages.

Justice Hammond—Indeed, I happened to be talking to our Chief Justice the other day about this because she was at one time a law commissioner here. She asked why all these earlier papers are consolidated into one issues paper, and my short answer was that it was just efficiency—you have two or three chapters on the background, the present law, and what you want to end up with is what really has to be answered here. Then of course you consult and there is a separate final report. But there are only two.

Senator CROSSIN—Can I ask you about your core work program versus liaison with departments versus getting out and about in New Zealand and holding broad community consultation. What would be the workload percentages?

Justice Hammond—I meet regularly with the deputy secretary of policy and justice, and we compare what is being done in Justice and elsewhere and what is being done by us. There is a high degree of collaboration there. That was instigated by both sides. With respect, the Secretary for Justice and the minister have

encouraged that. I meet at least two or three times a year with the responsible minister, who also comes down here at least a couple of times a year to be seen here and to encourage staff and that sort of thing.

Senator CROSSIN—Before I finish I do want to personally pass onto you and your colleagues and any other of your colleagues in the law fraternity in New Zealand my deepest sympathy and thoughts for the people of New Zealand and particularly the people of Christchurch. We reeled in shock and horror when we saw the television footage of what your people were going through, so I want to place on record my thoughts for all of you over there.

Justice Hammond—Thank you very much for that. We are truly grateful for the support we have had from across the Tasman. It has been absolutely splendid. Thank you very much.

CHAIR—Justice Hammond, as I said at the beginning, our thoughts and prayers, sympathies and condolences are with you. Finally, thank you again for taking the time to write your submissions and then give us your valuable time today over the telephone. We very much appreciate it. On behalf of the committee, thank you.

[5.16 pm]

WEISBROT, Professor David, Private capacity

Evidence was taken via teleconference—

CHAIR—Welcome, Professor. Thank you very much for giving evidence to the committee. Is there anything you would like to say about the capacity in which you are giving evidence today?

Prof. Weisbrot—I am appearing as an individual citizen although based on my previous experience as president of the Australian Law Reform Commission from 1999 to 2009. I am currently a professor at Macquarie University and at Sydney University.

CHAIR—We appreciate that, and that is why we are on the phone to you today, in light of that experience and background. You have lodged a submission, submission No. 16 with the committee. Do you wish to make any amendments or alterations to the submission?

Prof. Weisbrot—No. In fact, I think it has stood up very well following all of the other people and organisations that have made submissions or testified. I am not aware of any factual errors or anything that needs to be changed or corrected.

CHAIR—Thank you. That is an important point you make and I have taken it into account. I now invite you to make a short opening statement, at the conclusion of which we will have questions from members of the committee.

Prof. Weisbrot—I start by apologising for not being available when the committee had its earlier in-person hearings. As you are aware, I was overseas at the time, but I have since had the opportunity to read the transcripts and I was very pleased that the committee is taking this work so seriously and well. I would like to make a few points before you ask me questions. One of them is in relation to the Beale review. There was maybe a little bit of confusion in my written submission about which review I was talking about. I think it was actually corrected by Roger Wilkins, appropriately. But there were two really that moved in and out. One of them was the Beale review, which seems to have unduly guided the attitude of the Attorney-General's Department to law reform. The other was the Uhrig review, which I also believe unduly guided the department's approach to management, governance and financial management. Let me take those one at a time.

The Beale review was of the department, and it is quite appropriate for a new government coming in to have a senior experienced public servant have a look at structures and seek to amend them in a way that supports the government's agenda. What I thought was quite extraordinary, though, was that the audit concluded that there was 'at least a prima facie case' that the ALRC should be replaced with another body which would 'be brought into the corporate centre'. The evidence base for this was zero. In fact, the little extract from the Beale review, the audit, says:

Because of the constraints of time and budget, the Audit has consulted neither with the ALRC, nor with external stakeholders. Nor has it examined ALRC reports and the action taken on them.

I find that quite extraordinary—no research, no evidence, no complaints that it is starting from, no institutional or stakeholder consultation. And it is followed by a very radical recommendation that a very successful 35-year-old organisation be fundamentally changed—and I do mean 'fundamentally'. This relevant bit of the Beale report appears under the title 'Enlivening Law Reform' which I thought had a nice Orwellian touch to it—presumably you enliven things by eviscerating them. This phrase 'enlivening law reform' is then repeated in the department of the A-G's annual report for 2009/2010, although without any reference to the ALRC itself. I am still trying to work out why any of this has happened. Neither the Attorney nor the department has ever explained why they made these major changes or what was broken that needed fixing. I have never believed it was about the money. The budget cuts were significant for a small agency to endure in one hit, but they do not even amount to a rounding error in the A-G's portfolio budget statements. We can all point to things like the $45 million that was used for the World Cup bid and other extravagances that make those tiny cuts in the relative scheme of things pale into significance.

I do not think it was about politicisation, and that is at least one good thing. In previous times and other places, the Victorian Law Reform Commission, the Law Reform Commission of Canada got themselves into trouble for being perceived to have gotten too close to the government of the day. I do not actually accept that that was the case in either situation but that was the perception, and the perception was that they thereby lost

independence. No-one ever made that criticism of the ALRC—not for the whole of the 35 years and certainly not during my tenure over the last 10 years. In fact just a few years ago the shadow Attorney-General Nicola Roxon praised 'the scrupulously non-partisan ALRC' in a speech in parliament. So the ALRC has had bipartisan support. It was created by Whitlam and Murphy in 1973 but was subsequently embraced by Fraser and Ellicott and has maintained multiparty confidence ever since. So I do not think that has been an issue.

Does it have a poor record? It has been regarded as a world leader in law reform; I think that is uncontroversial to say. It has been highly productive and even more productive in recent years in terms of getting through major inquiries in a period of one year or two years rather than the seven or nine it may have taken in much earlier days; IT and other things have helped that. It has used its resources extremely efficiently. I have never heard a criticism from Senate estimates during the last 10 years. It has received high praise from the current Attorney and Senator Faulkner and others when they were launching major ALRC reports like the privacy report.

I am still struggling to find out why all of these major disruptive changes needed to be made. I can only surmise that there is no value placed on genuine research and evidence based policy making and that there is no much value placed on community engagement participation or consultation. Really that has been the sine qua non of the ALRC since it was founded. Michael Kirby famously said, and we have repeated it ever since, that 'law reform is much too important to be left to the experts'. That is why the ALRC has always gone to exceptional lengths to involve the community in its law reform processes.

Sadly, I think, no value is place on independence either. It even comes through in some of the trying-to-be-more-kindly evidence of members of the Attorney-General's Department, when they keep saying things like, 'We will help the ALRC on this' or 'We will make a supplementary appropriation' or 'We will try to work with them on various things' or 'We will get them a commissioner appointed'. I think the commission should be independent and it should have an adequate budget to do those things itself rather than have to rely on the department.

In terms of the Uhrig review, that was conducted to find good governance models for very large, parastate corporations—like Medicare, the NHMRC, the ABC—bodies with multi hundred-million dollar budgets and thousands of staff. I think it is a poor governance model for a very small organisation like the ALRC and especially for one that operates in the public domain. My reasons for this were set out in a letter to the department to Mr Marc Mowbray-d'Arbela, which has since been tabled by the Attorney-General's Department; it is attachment B to its answer to questions on notice. And I will just very briefly say what my serious concerns were.

I think the new model diminishes the real and perceived independence of the ALRC. It provides a much less effective governance model. It provides a number of serious financial inflexibilities in relation to staffing, the maintenance of reserves and good budgeting practices and it imports a lot of extra compliance work, which will have to come at the expense of reference work. So I do not think it is a good model, and the changes that were made to the ALRC act in effect to bring it in I think is not a good change. Not every reform is a good reform.

In terms of the staffing of the organisation, the ALRC is very much a people organisation. It relies on the quality of its staff and on their continuity, and it has hurt me deeply that in just over a year, in the year and a bit since I left, there has been more than 100 per cent turnover of legal staff. In other words, all but one person has left, and two people who arrived more recently have also left. And it is a legal staff that I think was exceptionally talented and admired in international law reform circles. The previous head of the New Zealand Law Commission, Justice Bruce Robertson, the predecessor of the gentleman you were just speaking to, used to compliment the ALRC staff all the time and was pretty clear on why he thought we were doing such great work. It is now the case that only one legal officer remains at the ALRC with more than one year's experience. In other words, there has been an almost complete loss of institutional memory and experience over that period. Again, I cannot see how any of that amounts to improving or enlivening law reform and I cannot see what the problems were that led to all this change. I will leave it there.

CHAIR—Thank you very much, Professor. Can I just indicate to you that we are also joined by Senator Louise Pratt, just so you know who is in the room here. Your opening remarks are very useful. If you have seen the transcript from Mr Wilkins and others who appeared before our committee a few weeks ago, would you like to clarify or respond to his evidence regarding your comments on page 4 of your submission—towards the bottom, where you talk about the meet and greet, the Rolls Royce luxury operation and the fact that you never had an exit interview. Can you just clarify for us or respond in any way to that evidence.

Prof. Weisbrot—I do not think he actually challenged any of that. I did not mean 'meet and greet' in any negative way. I thought it was just a standard policy for a new minister or a new senior person in a department to come and meet the staff. On the day Mr Wilkins initially attended, I was asked by the Attorney-General to be at another meeting, which was a Standing Committee of Attorneys-General meeting on harmonisation of laws. I was one of three people representing the Commonwealth at that meeting. There were three or four people representing each of the states and territories. Because of that, Mr Wilkins came back to the commission a second time to talk to me. I did not mean anything pejorative in that, and I do not think he took it that way. It was simply an opportunity to talk. But I think everything I recounted in that conversation was accurate, and I do not think he challenged any of it. Last night, going back through my ALRC files, I found the notes of that meeting, which I had not had before me at the time I prepared my submission. They do not add anything, but they certainly confirm my recollection of the meeting.

CHAIR—Thanks very much for that. I just wanted to get that on the record and to provide an opportunity for a response. Were you consulted on the Financial Framework Legislation Amendment Act prior to its being prepared and introduced?

Prof. Weisbrot—No. I am embarrassed to say that I was unaware of it until this inquiry brought it to light, and there are very few closer followers of parliamentary process than myself, other than members of parliament and their staff. I think I was misled by the title and did not realise it was in the works. I did not see anything on the front page of the ALRC's website that alerted me to it. It was only this Senate inquiry that alerted me to the fact that this had happened—although, as the testimony on the previous occasion makes clear, I did have a number of discussions and negotiations over the years I was president with the A-G's Department and also the Department of Finance and Administration, as it was at that time. Not to put too fine a point on it, but my preferred option was to drag my feet as strongly as possible, for all the reasons I mentioned in my opening comments about why I thought this was a very bad thing for the commission.

Privately, senior members of the department and the Attorney-General shared my view, I think, and they were not in any great rush to do this. So although we were put on notice of the Uhrig review and its implementation—and no-one from the Uhrig review ever consulted with the ALRC, by the way—again, we thought it was something that was really only going to affect those really large departments or large entities. Nothing actually eventuated during the several more years I was president. I think the letter that is tabled as attachment B in the AGD's response to questions on notice sets out the tenor of that conversation with senior members of the department of finance quite well.

If I could just put a summary on that, I will say that they did not disagree with any of my concerns. I should say that it was a multiparty meeting. There was me, Professors Croucher and McCrimmon from the ALRC via teleconference as well as Ms Wynn, the executive director, and Ms Zacharia, our finance manager. And then there were several people on the other end of the line from the department of finance. They did not disagree with any of those concerns I had about financial inflexibilities, staffing problems or management problems. As you will see from my confirming letter back to the department of finance, basically what they said was that they would find a 'patch' or a 'fix' or an exception in each of these cases, which led to the rather strange conclusion, as I said at the time, that they were determined to 'Uhrig the ALRC'. In fact, it was going to be a Clayton's Uhrig, because they were going to find an exception for the ALRC in each case. It did not seem to me to be a sensible exercise to pursue, but I understood that they were under pressure to fulfil a broad mandate that every entity would come under this Uhrig model.

CHAIR—All that goes to say that it was a surprise to you that the legislation was implemented with the amendments affecting the ALRC accordingly. I should note here that Richard Gilbert of the Rule of Law Institute of Australia made those sorts of comments at the previous hearing as well. Is that the import of what you are saying?

Prof. Weisbrot—That is right. I was not aware of it and I was surprised to learn of it. I was disappointed at the outcome that a lot of those exceptions, caveats and special pleading things that were supposed to be done for the ALRC seem to have fallen by the wayside. All of those concerns I had actually came to fruition in the new legislation.

CHAIR—I just want to move on to another area in your submission where you say there is a critical need for a cohort of commissioners. I want to delve into that a little bit and put you on the spot about whether there is a minimum number of commissioners, whether they have to be full-time commissioners and what the importance of having a cohort is. I just want to take you to the example that at the moment we have a full-time commissioner and the minister has announced a special full-time commissioner for the inquiry into the

classification system. That person is to start in the near future and will have special skills in that area. Could you describe and outline your response to those issues.

Prof. Weisbrot—In my initial submission I cover that ground. One essential thing is to have a full-time commissioner leading each reference. There is simply no way around that. So the number of full-time commissioners you need is largely a product of how ambitious the work program is. During the time I was at the ALRC the number of full-time commissioners was either three or four at all times. That was because some of the projects were especially large and we had the budget flexibility to include a fourth full-time commissioner so they could double up in some areas. But you need at least one person driving it. The staff that the commission has, or had, are exceptionally talented and hardworking, but in the nature of things the roles are relatively more junior and they need the firm guidance of an experienced commissioner and research manager and also someone who can see across the whole portfolio, if I can call it that, or the whole reference. Each of the legal officers works in their own little area that they are assigned to and of course somebody has to look across the top.

As you would have seen from my earlier submission, I do not believe in the expert commissioner for the single reference model. It is not the end of the world and it works well in many cases, but I do not think it is the optimal model. I gave examples there of expert commissioners who were brought in for a particular purpose but then stayed at the ALRC for a number of years. For example, Professor Les McCrimmon was brought in to do the evidence inquiry and did a superb job of that, but then did an even more remarkable job in the privacy inquiry. I gave similar examples in relation to other commissioners who have been there such as Brian Opeskin, who was brought in as a public lawyer to look at the judicature act and yet made probably even more sterling contributions in relation to genetic information, gene patenting and then sentencing. I think that is because it is not a little expert operation the way it might have been if you were doing purely black letter law.

These are big socio-legal issues. They require big research projects and they require a lot of community consultation and management of stakeholders. By community there I do not mean invariably members of the general community; it may be dealing with the Australian Medical Association, consumer groups, the Law Council of Australia, different government bodies, the private sector and so on. So you learn how to do that. It may be easiest to learn how to do that when you do not have to master the law. You are working in the area you already feel comfortable in. It has certainly been my strong impression that the commissioners' performance improves over time when they have mastered the process of how you balance all of that, how you manage a huge research undertaking, how you develop pretty sophisticated implementation strategies for your recommendations and all of that. I think the commissioner who comes and goes leaves the commission without remaining there to provide all of that experience.

Now we have a very junior and inexperienced staff at the ALRC. I think that is a double whammy. Who there is going to say to the commissioner, 'You know, we had that kind of problem three references back, and this is how we handled it,' or, 'Two references back, this organisation was especially useful to us and this one wasn't so good; they just gave us the standard work.' I am sorry for being a bit long-winded there, but I think that is why, I believe, the ALRC over the 30-odd years had developed quite an effective model—one that was respected around the world and which almost every other law reform commission has sought to emulate subject to the availability of resources. I think the New Zealand Law Commissioner, when he spoke earlier, provided only that caveat as well. He thought you needed the cohort and you needed the full-time commissioners, and it was really only resources that sometimes provided a constraint.

CHAIR—I have one last question in light of the timing before I pass to other senators. My question relates to the office premises and the need to relocate the LRC, at the direction of the department, to a sub-licensed premises with the Australian Government Solicitor's offices. Could you indicate your views on the impact of that move and any related response you may wish?

Prof. Weisbrot—All of this has happened after I left the ALRC, so I am not privy to the exact facts and figures, but broadly I can say that the ALRC negotiated an exceptionally good deal in the premises that it currently inhabits. Part of that was good negotiating skill. Part of it was luck: we happened to find a building where one of the law firms—the anchor tenant, which had many floors—was about to leave, and the owners were a bit desperate and happy to give us a deal that was below market rates It is a much lower level of rent than, for example, what ASIC or the ACCC are paying per square foot—they are just nearby. So I think it is a very good deal. They are custom built premises that were very good for morale and collegiality. They provide adequate meetings rooms—again, a lot of what the ALRC does is engage in constant rounds of smaller and

larger meetings to work with stakeholders through the process. So I am not sure why they are being forced to move, and I think it is a very penny-wise, pound-foolish kind of move.

In terms of the premises they have now, all I know about that is what I read in the evidence that was given previously. I know that the commission's current lease, which I negotiated, expires in September 2012, so there is a gap of about 18 months between now and then. I think the subletting will be problematic, because another entity coming in will not have much security of tenure. They will not want to invest much money in refitting, so they would have to be able to use the exact space for their exact purposes without much change. Whether they can do that or not, I have no idea. I think it is risky, and it is one of those things where I wonder: 'Why do that now? Why put the commission in a position where it may lose hundreds of thousands of dollars 18 months before the very good lease expires?'

CHAIR—Thank you for that.

Senator CROSSIN—Good afternoon.

Prof. Weisbrot—Hi.

Senator CROSSIN—I do not have too many questions for you—I think Senator Barnett has covered a lot of the areas—but I am a little bit confused and am wondering if you can again take me through your rebuttal of the *Hansard* you would have read containing the comments of the Secretary of the Attorney-General's Department and your role in the Financial Framework Legislative Amendment Act. Are you saying you were not consulted about that or, if you were, you were not aware of the detail or implications of that act?

Prof Weisbrot—Neither. There is really no reason I should have been consulted. The legislation occurred after I was no longer a member of the ALRC. The changes that were made in the most recent legislation occurred after I was at the ALRC and the department did not consult me, and I was not asked for my advice by the present leadership of the ALRC—and there is no reason I should have been. What I was referring to is the previous discussions that had happened over quite some years in which the previous government and then the current one was looking at steadily rolling the Uhrig recommendations across the whole of the public sector, and that is where I indicated that, from the beginning, I had a number of quite serious concerns. In working with the department, I thought I had got them to accept all of those concerns. So my problem now is that when I look at the ultimate legislation it does not seem that those concerns have now been picked up. My previous grave concerns remain.

Senator CROSSIN—The Beale review was a review that was given to the Attorney-General's Department which is something quite different to the Uhrig review, is it not?

Prof Weisbrot—Yes. I have not seen that document until it was tabled before the inquiry. As I understand it, that was something that the new head of the Attorney-General's Department commissioned in taking over government. That is a perfectly proper thing for them to have a review of structures and so on. Again, my concern now is not what it did to the department which may or may not be effective; it was what was done to the ALRC. And it is confirmed by that that we were never consulted and no issues or concerns were raised with us. It really comes out of the blue that there would be a recommendation at the end of the Beale review that very fundamental changes should be made and then many of those very fundamental changes have been made, even though I am not sure there is direct cause and effect.

Senator CROSSIN—Thank you. I have no further questions.

CHAIR—Senator Pratt?

Senator PRATT—No.

CHAIR—You mention in your submission and in your concluding remarks that there has been a savage blow to morale from the sheer loss of numbers et cetera. Do you know whether that is still the case? How do you surmise that?

Prof Weisbrot—That was from direct communication. I spent most of the last year on that. I could have listed my full-time job as writing referee's reports for members of ALRC staff. I do not know what the situation is right now because almost everybody I worked with have left. There is a new crew there. I hope they are happy to be there. I also do not want to cast any aspersions on them. By all accounts, it is a very talented, young, new staff. People still want to work at the Australian Law Reform Commission. My concern has only been that these changes created an atmosphere in which the existing staff felt they were not properly appreciated, that their style of working was not going to continue into the future, that they were not going to get the leadership of full-time commissioners working with them and that the opportunities for community

consultation were being severely reduced, so they were all looking to go. I think losing one or two people a year out of 10 or 12 is fine—in fact, it is healthy—but losing all but one of the legal officers in a single year is not a good thing for any organisation. I think that is common sense.

CHAIR—Thank you very much. You have covered it very well. We appreciate your submission and your willingness to be on the line with us today.

Prof Weisbrot—It has been my pleasure. Good luck with the rest of your work.

CHAIR—Thank you. That is appreciated. This hearing is now adjourned.

Committee adjourned at 5.49 pm