

Commission news

New inquiries

On 31 January 2006 the Attorney-General announced that he had signed terms of reference for a Review of the *Privacy Act 1988*, to be completed by 31 March 2008.

On 1–2 June 2006 the ALRC invited members of the general public to provide their views on privacy protection through a National Privacy Phone-In. Over 1,300 people contacted the ALRC over the two-day period, with concerns about telemarketing dominating the issues raised.

The ALRC intends to release an initial Issues Paper on privacy in September 2006.

On 2 March 2006 the Attorney-General announced that he had asked the ALRC to conduct a review of Commonwealth sedition laws, as amended by Parliament during 2005.

The ALRC released an Issues Paper, *Review of Sedition Laws* (IP 30), on 20 March 2006, which posed 24 questions about reform of sedition laws.

Following submissions and consultations on IP 30, on 29 May 2006 the ALRC released a Discussion Paper, *Review of Sedition Laws* (DP 71). DP 71 contains 25 proposals. The ALRC expects to complete a final report during July 2006.

Further information on both these inquiries is available in articles elsewhere in this journal.

Completed inquiries

ALRC 102, NSWLRC 112, VLRC Final Report, *Uniform Evidence Law*, was tabled in the Australian Parliament on 8 February 2006. On the same day, it was also tabled in the Victorian Parliament and released by the Attorney General of New South Wales.

Uniform Evidence Law contains 63 recommendations for reform. The Australian Attorney-General has indicated that a Working Party has been established by the Standing Committee of Attorneys-General (SCAG) to review the recommendations contained in the Report, which is a partial implementation of Recommendation 2–1.

Same Crime, Same Time: Sentencing of Federal Offenders (ALRC 103), the final report of the ALRC's sentencing inquiry, was provided to the Attorney-General on 28 April 2006 and tabled in the Australian Parliament on 22 June 2006.

The sentencing inquiry involved almost two years of extensive research and public consultation. It was the ALRC's second inquiry into the sentencing of federal offenders, following ALRC report 44, *Sentencing*, released in 1988.

ALRC 103 contains 147 recommendations for reform of law and processes relating to the sentencing of federal offenders. Further information on the ALRC's recommendations is provided on page 65.

ALRC Commissioners

The members and staff of the ALRC would like to congratulate ALRC President Professor David Weisbrot, who was made a Member of the Order of Australia on 12 June 2006, for 'service to the law in the areas of law reform, education and access to legal services, and through contributions to research, analysis and policy development on a range of public interest matters'.

On 15 December 2005, the Governor-General appointed Commissioner Brian Opeskin as Deputy President of the ALRC for a term of 3 years. Mr Opeskin had been a full-time Commissioner since 31 July 2000. Sadly, Mr Opeskin has since announced his intention to

resign with effect from 22 September 2006, in order to take up the position of Professor of Law and Head of the Law School at the University of the South Pacific, based in Vanuatu.

Mr Opeskin has made an enormous contribution in his six years as a full-time member of the Commission, including leading or co-leading inquiries into the *Judiciary Act 1903 (The Judicial Power of the Commonwealth)*, ALRC 92, 2001), the protection of human genetic information (*Essentially Yours*, ALRC 96, 2003), gene patenting and human health (*Genes and Ingenuity*, ALRC 99, 2004), and the sentencing of federal offenders (*Same Crime, Same Time*, ALRC 103, 2006). He is currently working on the review of Commonwealth sedition laws.

The staff and members of the ALRC extend their best wishes for the future to Mr Opeskin and his family.

The Commission would like to express sincere thanks to Justice Mark Weinberg (Federal Court of Australia), whose term as a part-time Commissioner expired on 31 March 2006, ending a long formal association with the ALRC.

Justice Weinberg joined the ALRC in April 1998 and worked on a number of inquiries, including those concerning the sentencing of federal offenders, uniform evidence law, the protection of classified and security sensitive information, the *Judiciary Act* and related legislation, the federal civil justice system and the review of the *Marine Insurance Act*.

Australasian Law Reform Agencies Conference 2006

From 10 to 12 April 2006, the Commission hosted an extremely successful Australian Law Reform Agencies Conference (ALRAC) in Manly, Sydney.

Attended by 110 delegates from 25 countries and representing more than 30 law reform agencies, ALRAC 2006 was the largest ever gathering of international law reformers.

The ALRC was grateful to receive funding from AusAID, the Australian Government's overseas aid agency, which allowed the Commission to sponsor the attendance of 11 representatives of law reform agencies in Malawi, Kenya, Tanzania, Lesotho, Sri Lanka, Indonesia, Papua New Guinea, Tonga and Fiji.

A full report on ALRAC 2006 is provided on page 46.

The Kirby Cup Law Reform Competition

As host of ALRAC 2006, the ALRC is responsible for hosting the Kirby Cup Law Reform Competition. The Kirby Cup Law Reform Competition was established to encourage law students to participate in a practical way in the process of law reform. It has taken several forms since its inception, including a debate and an essay competition. In 2006 the ALRC decided to invite law students, in teams of two, to make a submission on a topic relevant to the ALRC's Privacy Inquiry.

Based on written entries, three teams were selected to progress to an Oral Advocacy Round, held in Melbourne in July 2005. These teams were

- Julia Carland and Jonathan Pagan (University of Sydney)
- Brett Le Plastrier and Michael Lyons (University of Queensland)
- Timothy Stutt (Monash University) and Laughlin Nicholls (University of Melbourne)

A summary of the oral advocacy round will be published in the next edition of *Reform*.

International visitors to the ALRC

From 27 March to 28 April 2006 the ALRC was delighted to host Mr Joash Dache, Senior State Counsel with the Kenya Law Reform Commission, who was attached to the ALRC to study the Commission's structure, role and operations. Mr Dache conducted comparative research relevant to the ALRC's Sedition Inquiry, attended ALRAC 2006 and visited the New South Wales Law Reform Commission, the Human Rights and Equal Opportunity Commission, the Administrative Appeals Tribunal and the Consumer, Trade and Tenancy Tribunal (NSW).

A number of delegates to ALRAC 2006 also took the opportunity provided by their visit to Sydney to examine the ALRC's approach to law reform. On 13 April the ALRC hosted a visit by 15 officials from Malaysia, Papua New Guinea, Fiji, Kenya, Tanzania, Macau and the Solomon Islands.

Reform Editorial Advisory committee

The Editorial Advisory Committee for *Reform* has been reformed since production of the last edition of the journal. The Commission warmly thanks Ms Anne Henderson, Mr Michael Ryland and Ms Maisie Warburton for their contribution to the development of the journal over the past few years.

The ALRC welcomes to the Advisory Committee Professor Don Chalmers (University of Tasmania), Ms Tracey McIntosh (Legal Studies Association of NSW) and Dr Caroline West (University of Sydney). They join the Hon Justice Roslyn Atkinson, Mr Philip Selth, Dr David Solomon and Professor Louis Waller, who have kindly agreed to continue as members of the Committee.

The Commission extends congratulations to Dr Solomon, who was also made a Member of the Order of Australia on 12 June, for 'service to journalism as a commentator on legal, political and constitutional law issues, as a contributor to a range of professional organisations concerned with the law, and to education'.

The Commission also congratulates Mr Philip Selth, who was awarded the Medal of the Order of Australia on 26 January 2006, for 'service to the law, particularly through the New South Wales Bar Association, to public administration, and to the community'.

Past Reports Implementation

ALRC 102—*Uniform Evidence Law*

Released in February 2006, the report *Uniform Evidence Law* (ALRC 102, 2005) has already received attention. Even before its tabling SCAG established a working group to examine the Report's recommendations.

The report recommends that the uniform Evidence Acts be amended to provide a qualified professional confidential relationship privilege that would allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given. On the day ALRC 102 was tabled in the federal, Victorian and New South Wales Parliaments, Robert Hulls (Attorney General of Victoria) announced the Victorian Government would legislate to provide protection for journalists refusing to reveal sources but only after consideration of ALRC 102.

In April 2006, the Hon Philip Ruddock MP (Attorney-General of Australia) announced that SCAG will draft model provisions consistent with a number of ALRC 102 recommendations, including the recommendation relating to the professional confidential relationship privilege.

ALRC 99—*Genes and Ingenuity*

The ALRC considered an experimental use exemption in *Genes and Ingenuity: Gene Patenting and Human Health* (ALRC 99, 2004) and recommended that an exemption should be established for acts done to study or experiment on the subject matter of a patented invention (as opposed to research involving the use of the patent). A parallel review on a possible exemption was completed by the Advisory Council on Intellectual Property (ACIP) in October 2005 with the release of the report *Patents and Experimental Use*. The exemption proposed by ACIP differs from the ALRC recommendation. Despite having taken slightly different approaches, both inquiries came to the same broad conclusion—there is a need for an experimental use exception to the *Patents Act* to provide certainty for researchers and thus foster research and innovation.

ALRC 98—*Keeping Secrets*

While many of the recommendations made in *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004) have been implemented by the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), some of the recommendations have been ignored.

The ALRC made a number of recommendations concerning the Australian Government's *Protective Security Manual* (PSM). The PSM details the minimum standards for protection of Australian Government resources (including information, personnel and assets) that agencies must meet in their operations. ALRC 98 recommendations include that the PSM should be in the public domain, that the PSM should provide more detailed guidance on classification decisions, and that the PSM should expressly provide for the reclassification and declassification of information in certain circumstances. In September 2005, the Australian Attorney-General's Department released a revised PSM. Despite consultation with the Department throughout the ALRC's inquiry regarding the review of the PSM, none of the recommendations made in ALRC 98 in relation to the PSM have been implemented.

ALRC 98 also contained recommendations that the basic principle that court or tribunal hearings should be held in public and in the presence of all parties should be adhered to, with closed sessions only where the court considered there were strong reasons for closure. The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) does not include these provisions and instead allows a court to be closed if the information to be disclosed relates to national security or may affect national security. These provisions were considered in the *Lodhi* case before the New South Wales Supreme Court in February 2006. While the Australian Government indicated it would seek to close the court and suppress evidence in *Lodhi's* trial for the purposes of preserving national security, Justice Whealy said the principles of open justice would continue to apply during the trial and that the media or other interests would have the opportunity to make submissions in relation to the suppression of evidence.

ALRC 96—Essentially Yours

As indicated in the last issue of *Reform*, the Australian Government released its response to *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003) in December 2005. The Government Response is generally very supportive of the Report's findings and recommendations, including those relating to the establishment of a statutory body to provide advice to Australian governments about current and emerging issues in human genetics. The proposed body has been established as a Committee of the National Health and Medical Research Council. In January 2006, the Acting Minister for Health and Ageing, the Hon Julie Bishop MP, announced 12 appointments to the Human Genetics Advisory Committee, including ALRC President Professor David Weisbrot. Consistent with ALRC recommendations, the appointments ensure a balanced and broad-based range of expertise, experience and perspectives relevant to the evaluation and delivery of genetic health services, and the use and protection of human genetic information and genetic samples. The Human Genetics Advisory Committee now has its own web page at <www.nhmrc.gov.au/about/committees/hgac/index.htm>.

ALRC 89—Managing Justice

In *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000), the ALRC formed the view that the *Australian Constitution*

prevents the development in Australia of any formal mechanisms for disciplining federal judicial officers by way of interposing a judicial commission or other body which is a creature of the executive branch of government. Given this view, the ALRC recommended that federal Parliament should develop and adopt a protocol governing the receipt and investigation of serious complaints against federal judicial officers.

In May 2006, during Senate Estimates hearings, Senator Chris Ellison (Minister for Justice) indicated that the Government is actively considering a protocol for dealing with complaints about judges, and hoped to form a conclusion on the matter 'in the very near future'.

ALRC 82—Integrity: But Not By Trust Alone

A key feature of the ALRC's report *Integrity: But Not By Trust Alone—AFP & NCA Complaints and Disciplinary Systems* (ALRC 82, 1996) was the recommendation for a new external complaints and anti-corruption authority to cover the Australian Federal Police (AFP) and the National Crime Authority (now the Australian Crime Commission). The ALRC considered that the AFP complaints and disciplinary mechanisms were largely inflexible, formal and adversarial in character. While the option of a new statutory body has been discussed, until recently the approach has been to maintain complaints handling within the organisation combined with external scrutiny of complaints handled by the Commonwealth Ombudsman.

In June 2004, the Government announced its decision to establish an independent body, with the powers of a Royal Commission, to detect and investigate corruption in the AFP and the Australian Crime Commission (ACC). In March 2006, the Government introduced the Law Enforcement Integrity Commissioner Bill 2006 into Parliament. The Bill proposes to create the office of the Australian Commission for Law Enforcement Integrity (ACLEI) and the Integrity Commissioner. The ACLEI would have authority to investigate, using Royal Commission style powers, alleged corruption of the AFP and ACC, though other Commonwealth agencies with law enforcement functions may be brought within its jurisdiction by regulation. The Ombudsman is to have a continuing role in relation to the AFP and the ACC, except in dealing with corruption issues, thus setting up two different investigation processes depending upon the type of complaint.

Also introduced in March 2006, the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 (AFP Professional Standards Bill) provides a new complaints and professional standards framework for the AFP. A review of AFP professional standards was undertaken by Justice William Fisher (the Fisher Review), with a report tabled in the federal parliament in December 2003. Consistent with ALRC 82, Justice Fisher advocated a move away from the traditional complaints and disciplinary system towards a model of managerial responsibility by adopting a graduated professional standards regime according to the seriousness of the matter and the ability of managers or supervisors to deal with performance issues. The AFP Professional Standards Bill implements the bulk of the Fisher Review's recommendations.

In its May 2006 report considering the Bills, the Senate Legal and Constitutional Legislation Committee strongly endorsed the purpose of the Law Enforcement Integrity Commissioner Bill and the associated objectives of the proposed commission, and made a number of recommendations for amendments to the Bill. Similarly, the Committee supported the AFP Professional Standards Bill, but made recommendations for changes which would more completely implement the Fisher Review. At the time of publication, the Bills were still before the House of Representatives without amendment.

ALRC 64—*Personal Property Securities*

The ALRC released an interim report on *Personal Property Securities* (ALRC 64) in 1993. In the report, the ALRC recommended the establishment of a single national system to register and determine priorities between competing personal property security interests and to provide a means of resolving disputes between security interest holders and third parties who purchase property that is under a security arrangement. The report was widely criticised by legal practitioners and the finance industry, particularly in two areas: the use of a functional definition to determine exactly what is a security, and the decision to depart from Article 9 of the United States *Unified Commercial Code*, which had provided the basis for legislative reforms in several other countries.

Since the tabling of the ALRC report, the US law in this area has been revised and similar laws have been introduced in Canada and New

Zealand. It is considered that these new laws have operated effectively in those countries. Support for reform has continued in Australia, in particular, to introduce consistency between the laws of Australia, the US, Canada and New Zealand.

The Hon Philip Ruddock MP (Attorney-General of Australia) has placed personal property security issues on the agenda of SCAG, and in April 2006 SCAG released an Options Paper addressing personal property security issues. The Paper outlines reform options based on the New Zealand *Personal Property Security Act 1999* and a draft bill sponsored by the late Professor David Allan. The Paper refers to the lack of support for the ALRC's 1993 Report. However, in common with ALRC 64, the reform effort remains focused on the need for a single national personal property security register, and the detail on how that register is defined and managed will be the subject of debate. The issue is scheduled for further discussion at the next meeting of SCAG in July.