Rule of Law

Institute of Australia

2011 Annual Report
ABBREVIATIONS USED IN THIS REPORT

ACCC – Australian Competition and Consumer Commission
ADF - Australian Defence Force
AFP – Australian Federal Police
AFR – Australian Financial Review
AMC – Australian Military Court
ANAO - Australian National Audit Office
ALRC – Australian Law Reform Commission
APRA – Australian Prudential Regulation Authority
ARC – Administrative Review Council
ASIC – Australian Securities and Investments Commission
CEB – Clean Energy Bill
CERB – Clean Energy Regulator Bill
CEO – Chief Executive Officer
Cth – Commonwealth
DMP – Director of Military Prosecutions
FWA – Fair Work Australia
HiiL – The Hague Institute for the Internationalisation of Law
HRoLN - The Hague Rule of Law Network
JPCCFS - Joint Parliamentary Committee on Corporations and Financial Services
NCOs - Non-commissioned Officers
NSWCC – New South Wales Crime Commission
OLSC - Office of Legal Services Coordination
RoLIA – Rule of Law Institute of Australia
SCOA – Statutory Cause of Action
SMH – Sydney Morning Herald
SSB - Senate scrutiny of Bills Committee
SU – Sydney University
UNSW – University of New South Wales
UTS – University of Technology Sydney
UQ – University of Queensland
VET - Vocational Education and Training
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1. **The Rule of Law Institute of Australia**

The Rule of Law Institute of Australia (RoLIA) is an independent not-for-profit body established under the *Associations Incorporation Act 2009* (NSW).

Its objectives are to promote and protect the rule of law in Australia. This is done in various ways including

- Addressing the relevance and significance of the rule of law in the community, universities and high schools.

- Participating in public debate on rule of law issues.

- Reviewing new legislation being enacted by the Parliaments throughout Australia for compliance with the rule of law.

- Monitoring government agencies’ compliance with the rule of law, including the model litigant rules, coercive powers, investigations and transparency.

- Supporting the independence of the judiciary, particularly from unjustified criticisms.

The Institute receives no government funding. It has an active Governing Board, all of whom act pro bono. It has a part time Chief Executive Officer. Its activities are carried out on a pro bono basis, with events largely self-funded.

**Patron**

The Hon. James Spigelman AC QC (former Chief Justice of New South Wales)

**Governning Board**

Mr Robin Speed (President)

Mr Malcolm Stewart (Vice-President)

Mr Richard McHugh SC

Dr Melissa Perry QC

Emeritus Professor Geoffrey Walker

Mr Ben Giles (Secretary/Treasurer)
CHIEF EXECUTIVE OFFICER

Mr Richard Gilbert

The Institute is well established to address its objectives and is an active participant in the national dialogue on rule of law issues.

THE RULE OF LAW IN AUSTRALIA

Rule of law in Australia does not mean rule by law. Sir Ninian Stephen identified four of the principles which are embodied in the spirit of the rule of law when he said:

"The first of the four principles is that government should be under law, that the law should apply to and be observed by government and its agencies, those given power in the community, just as it applies to the ordinary citizen; the second is that those who play their part in administering the law, judges and solicitors and barristers alike, should be independent and uninfluenced by government in their respective roles so as to ensure that the rule of law is and remains a working reality and not a mere catch phrase; the third is closely associated with the second, it is that there should be ready access to the courts of law for those who seek legal remedy and relief; the fourth is that the law of the land, which rules us, should be certain, general and equal in its operation."

Source: 1999 Annual Lawyers Lecture St James Ethics Centre.

PRINCIPAL ISSUES OF CONCERN FOR AUSTRALIA ON THE RULE OF LAW

The principle issues of concern for Australia on the rule of law are:

- Lack of understanding of the relevance and significance of the rule of law in Australia in the 21st century.

- Attacks on the rule of law with regard to such basic human rights as freedom of expression, freedom of the press, presumption of innocence, independence of the judiciary, and invasion of privacy by government agencies and oppressive conduct by government and its agencies on ordinary Australians.
2. **Addressing the Relevance and Significance of the Rule of Law in Australia**

One of the main concerns is the lack of understanding in Australia of the relevance and significance of the rule of law in the 21st century.

To address this concern RoLIA, at various forums in the community, universities and high schools, seeks to explain the relevance and significance of difference aspects of the rule of law.

**In The Community**

**Rule of Law Conference 2010**

RoLIA successfully held its second rule of law conference on Saturday 6 November 2010 with lead speaker being the Hon. Justice John Dyson Heydon of the High Court of Australia. The conference was again jointly organised with the New South Wales Bar Association.

The topic was “*The rule of law, the courts and constitutions*”. The location was the James Cook Ballroom at the Intercontinental Hotel, Sydney NSW. RoLIA was pleased that our Patron, then the Hon. James Spigelman AC of the Supreme Court of NSW chaired the conference and also made the opening and closing remarks.

The following speakers presented:

- The Hon. Justice John Dyson Heydon AC, Justice of the High Court of Australia
- The Hon. Justice Paul Brereton AM RFD, Justice of the Supreme Court of NSW
- Dr Melissa Perry QC, Sixth Floor Selborne/Wentworth Chambers
- Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions
- Professor George Williams, University of NSW
- The Right Honourable Lord Goldsmith QC PC, European Chair of Litigation, Debevoise & Plimpton LLP and the United Kingdom’s Attorney-General from 2001-2007
- Mr Robin Speed, President of RoLIA and Mr Richard McHugh SC, Banco Chambers chaired the two panel sessions.
Former New South Wales Supreme Court Chief Justice the Hon. James Spigelman AC addresses the conference with the Right Honourable Lord Goldsmith QC PC (to the right of Spigelman CJ) and RoLIA CEO Richard Gilbert (far right).

Former NSW Director of Public Prosecutions Nicholas Cowdery AM QC answers a question from the audience. Richard McHugh SC is on the far left and Professor George Williams is on the far right.

The first panel answers questions from the audience: From the New South Wales Supreme Court, The Hon. Justice Paul Brereton AM RFD, Dr Melissa Perry QC and Mr Robin Speed.
The Hague Conference in session
RoLIA was a sponsor for the University of New South Wales (UNSW) Conference entitled ‘Media, Democracy and The Rule of Law’ looking at democracies (new and old), the rule of law, independent media and a functional public sphere. The Conference was officially opened by retired High Court Justice, the Hon. Michael Kirby AC CMG, and included speakers and attendees from Australian and overseas universities, and representatives of the media industry. Speaking at the conference on behalf of RoLIA, RoLIA’s CEO Richard Gilbert gave a presentation which outlined RoLIA’s advocacy on the rule of law including comments on the need to protect journalist sources and the need for caution in legislating for a tort of privacy (these matters were covered in a paper written by RoLIA’s President, Robin Speed).
RoLIA also supported and sponsored a conference convened by the Centre for Legal Governance at Macquarie Law School and the Australian Academy of Law on the regulation and disclosure of information. Among a list of high profile speakers was Julian Assange’s London solicitor, Jennifer Robinson. The conference included discussion on governance and regulation, legal developments relating to whistle blowing, censorship and classification, and the interaction between journalism and the public interest.
JUDICIAL REFLECTIONS ON THE RULE OF LAW

Vice-Chair of RoLIA, Malcolm Stewart, interviewed former Chief Justice of New South Wales, the Hon. James Spigelman AC QC on 13 May 2011 just prior to his retirement. The interview comprised of his reflections on the rule of law and was televised on Sky Television on Thursday, 28 July 2011 and is now posted on YouTube.

WEBSITE

RoLIA maintains the website: www.ruleoflaw.org.au. The website contains all of RoLIA’s published documents, videos and sound bites as well as those of others who have published important works and made statements on the rule of law. The two most important tabs are the Key Documents and the Media Centre tabs.

‘Key Documents’ contains RoLIA documents such as the Regulator Survey; RoLIA Submissions; RoLIA’s rule of law ‘Essential Reading’ suggestions; and rule of law journal articles and speeches that RoLIA advises contacts to read.

The ‘Media Centre’ tab contains media clips, transcripts and letters which involve RoLIA and RoLIA press releases. During the period under review RoLIA made 16 press releases. In addition 50 media clips in which RoLIA featured were posted on our site.

In 2011 RoLIA added a new section, ‘Legal Studies’, to the website. This new addition provides year 11 and 12 legal studies teachers and students with RoLIA authored resources such as slide presentations. RoLIA intends to extend this program in 2012 and include varied mediums such as YouTube videos and Prezi presentations to the resource library.

TWITTER

In April 2011, RoLIA joined the social networking site Twitter. We have been using this site to update our network contacts about RoLIA activities, as well as to meet electronically and contact international organisations also concerned about rule of law issues. RoLIA has tweeted on media independence, funding of the Australian Law Reform Commission (ALRC), model litigant rules, internet privacy and the scrutiny of
government agencies. Thus far RoLIA has made more than 53 tweets in commenting on rule of law issues and announcing key events and developments.

The page can be viewed at http://www.twitter.com/RoLAustralia

**EMAIL NETWORK**

RoLIA has developed an extensive email network of more than 1,400 contacts in the community, the legal profession, parliaments, universities and the media. Participants are notified of the posting of important new documents to the RoLIA website and other relevant news items. During the period under review RoLIA sent more than 20 news emails to the contact network.
Universities

UNIVERSITY LAW SCHOOLS

Sydney University (SU)

In October 2011 RoLIA and the SU Law Faculty made a joint announcement of the appointment of retired Federal Court Justice the Hon. Kevin Lindgren QC as Rule of Law Adjunct Professor in the Law Faculty at the University of Sydney. The Rule of Law Adjunct Professor will deliver a series of lectures on the rule of law to undergraduate and post graduate students, and also provide advice to the Faculty on rule of law curriculum matters.

In addition RoLIA and the University will work together in identifying opportunities within the University to promote the rule of law in convening conferences, workshops and publishing papers relating to the lecture series. The projects and activities will be developed and released at the commencement of each calendar year.

University of New South Wales (UNSW)

RoLIA sponsored and assisted UNSW in the development of its Media, Democracy and the Rule of Law Conference which was convened on 6 September 2011. RoLIA congratulates the Law Faculty at UNSW on its initiative and foresight in convening this conference, which included a range of quality speakers from the media, Australian universities and overseas institutions, and coincided with a major national debate on the role of the media and whether it should be the subject of additional regulation. Some weeks after the Conference the Federal Government made two announcements on the media - one on whether there should be a statutory tort for invasions of privacy and the other was the establishment of an inquiry into the print media to be chaired by a retired Federal Court judge, The Hon. Raymond Finkelstein QC.

University of Queensland (UQ)

RoLIA is collaborating with the UQ on two key matters to enhance teaching on the rule of law in the Law Faculty.

In April 2012 RoLIA and UQ with the support of the Queensland Bar will convene a rule of law conference. Two themes will be covered – the rule of law and the duty to the court and the rule of law and land and vegetation management laws in Queensland.

In 2012 RoLIA will sponsor a rule of law essay prize for UQ students studying the Constitutional Law unit.
RoLIA’s letter to the Editor regarding the Heinz Case was published in the Australian Financial Review on 11 June 2010 and was used by the UTS as the context for a law essay for students. The essay question was:

In March 2010 the Australian Competition and Consumer Commission (ACCC) required H J Heinz Company Australia Limited to donate cans of pineapple to charity as recompense for misleading and deceptive conduct.

Commenting on this decision Mr. Richard Gilbert, Chief Executive of the Rule of Law Institute of Australia wrote: ‘Everyone should be equal before the law and subject to the same range of penalties fixed by Parliament as determined by a court.’ Richard Gilbert, letter published in The Australian Financial Review, 11 June 2010. Critically evaluate this statement with reference to either the history of the rule of law or current rule of law issues.

The Institute looks forward in 2012 to working further with Universities and increasing the number of collaborative initiatives to engage students on the relevance and significance of the rule of law in Australia.
**HIGH SCHOOLS**

In 2011 RoLIA added a new section to its website “Legal Studies”.

In this section the Institute provides materials for school students to learn about the rule of law and how it interacts with the Australian legal system. RoLIA has created and maintained relationships with key legal studies teaching bodies in Australia to facilitate and encourage the use of RoLIA resources in the classroom.

Richard Gilbert, RoLIA’s CEO, was invited to attend the 2011 NSW Legal Studies Conference and presented a speech and slides on the topic of ‘Case Studies on the Rule of Law and Their Relevance to Legal Studies’. Those slides were then arranged as a set of materials with student questions, for High School legal studies students for years 11-12, applicable to each state in Australia.

The slides were published on the RoLIA website, and covered crucial rule of law issues such as: the history of the rule of law, the flood of legislation, scrutiny of legislation, the rule of law in relation to Stern Hu, Ark Tribe and Paul Hogan, as well as journalistic privilege and shield laws.

RoLIA released a document and set of slides on Henry VIII clauses, a type of clause which allows subordinate legislation (regulations) to amend primary legislation (Acts), in effect allowing laws to be made by whomever is tasked with defining the regulations, generally the Executive. This entails a shift of legislative power from the Legislature and is detrimental to the separation of powers in Australia. RoLIA argues for the reduced use of these clauses. After observing the multiple introductions of these clauses noted almost monthly by the Senate Scrutiny of Bills Committee, it is clear that more work needs to be done in this area.

RoLIA also has published slides on the ‘Outlaw Motorcycle Gang case; Wainohu v New South Wales’ which explains the rule of law implications of the Crimes (Criminal Organisations Control) Act 2009 (NSW) in controlling and monitoring Motorcycle gang members. In addition, RoLIA has published slides on the ability for accused persons in NSW to request a Judge only trial, raising trial by jury issues related to the rule of law.

RoLIA has made contact with States and Territory Education authorities and teacher associations offering to assist with educational materials and resources for Legal Studies teachers. In 2012 RoLIA anticipates supporting the professional teacher associations in a number of states in relation to student rule of law essay topics and awards and teacher excellence awards. Consequently, we plan to support Excellence Awards in the teaching of legal studies in NSW and Victoria, and offer prizes for excellence in rule of law essay writing in Queensland. We will liaise with other states where legal studies is taught with a view to offering similar assistance.
3. **Specific Issues**

**Model Litigant Rules**

In civil litigation the Federal Government or its agencies such as the Australian Taxation Office (ATO), the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) are subject to a duty to act as a model litigant. This is a result of the vast disparity between the financial, informational and human resources available to the Federal Government and its agencies.

The obligation on the Commonwealth to act as a model litigant can be traced to *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333. However it is now enshrined by legislation.

Following amendments made to the *Judiciary Act* in 1999 the Attorney General has the ability to issue Directions relating to the litigation of civil cases by Government agencies,¹ under this power the Attorney General drafted the Model Litigant Rules. The Directions established the Office of Legal Services Coordination ‘to assist [the Attorney General] in discharging [his] First Law Officer role’.²

Under section 55ZH of the *Judiciary Act 1903* (Cth) the Attorney-General enacted the *Legal Services Directions 2005 Appendix B, The Model Litigant Rules*. The Model Litigant rules place an obligation on the Commonwealth to act as a model litigant. The rules “require more than merely acting honestly and in accordance with the law and court rules”.³

RoLIA has for some time been concerned about the Model Litigant Rules, and their impact on Commonwealth litigation strategies, during its routine monitoring of the media commentary as well as Federal Court and AAT decisions, some of which were extremely critical of the Commonwealth litigation practices. RoLIA has called on the Government to review these Rules as it considers that both the rules and their administration need to be amended to ensure greater adherence of Commonwealth agencies to best practice litigation.

The Office of Legal Services Coordination (OLSC), established within the Attorney-General’s Department, assists ‘the Attorney-General in relation to his responsibilities for

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¹ Section 55ZF *Judiciary Act 1903*
² Ibid.
³ Model Litigant Rules Note Number 2. See also the Joint Committee Corporations and Financial Services, Hansard 11 March 2011, CFS 12.
legal services to the Commonwealth providing guidance notes and educational functions. The OLSC becomes aware of breaches through self-reporting by government agencies, judicial comments, media reports or complaints made directly to the OLSC. The OLSC’s role is to investigate alleged breaches of the Rules and brief the Attorney-General on the details of any substantiated breaches. The Attorney General can impose sanctions for breaches of the Rules. There is no indication in the Legal Services Directions what amounts to a ‘sanction’. Part 3 of the Legal Services Directions provides the only indication. It states;

‘The Attorney-General may impose sanctions for non-compliance with the Directions’. Note: Examples demonstrating the range of sanctions and the manner in which OLSC approaches allegations of a breach of the Directions are set out in the Compliance Strategy for Enforcement of the Legal Services Directions. Complaints alleging a breach of the Directions may be made to OLSC at olsc@ag.gov.au.

However, according to the OLSC website they are ‘currently reviewing the Compliance and Enforcement Strategy’.

Furthermore, under the Directions section 14.2 states that where the Commonwealth enters into contracts for legal services:

‘Agencies are to include a provision stating that the contract includes appropriate penalties in the event of a breach of the Directions to which the legal services provider has contributed, including the termination of the contract in an appropriate case’.

In both cases, there is no information available on the sanctions imposed by the Attorney-General. The contracts for legal services are not public documents and RoLIA is concerned about the lack of transparency of the enforcement strategies for breaches of the Rules.

The issue of non-compliance cannot be raised in proceedings, except by, or on behalf of, the Commonwealth and this means there is a heavy onus on the Attorney General’s department to investigate and enforce compliance.

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4 Explanatory Memorandum, Judiciary Amendment Bill 1998 (Cth), 8.
5 Joint Committee on Corporations and Financial Services, Hansard 11 March 2011, CFS 12.
6 Joint Committee on Corporations and Financial Services, 11 March 2011, CFS 17.
8 s55ZG (2) of Judiciary Act 1903.
9 Part 3 of the Legal Services Directions 2005.
11 s55ZG(3) Judiciary Act 1903.
During the Joint Committee on Corporations and Financial Services, Hansard 11 March 2011, CFS 12 the Attorney Generals Department was asked about the role of the OLSC to investigate breaches. A representative from the Department stated:

‘we are a smaller regulator... The general kind of staffing profile in the office would be about 14 people...In terms of the way we approach compliance with the directions, we have to very much be selective in our approach’ (Italics added).12

‘it is not really that productive for us to scan newspapers and then ring agencies...We kind of put our efforts into the front end of trying to help people understand how to comply’.13

RoLIA is concerned with the adequacy of OLSC resources to investigate breaches and the impact this may be having on the overall perception of the importance of the Model Litigant Rules.

The office [of Legal Services Coordination] ...was originally staffed by only three people. Given that the Commonwealth manages some 15,000 pieces of litigation per year, it was and continues to be our concern that this function could not be adequately performed with the resources allocated. Now the Government has said that it will apply six staff to this function. However, it is fair to say that our concerns...still remain in respect of the administration of the directions under this part of the government’s proposal’.14

‘In essence, model litigant rules will become meaningless if there is inadequate means to enforce them...the Government should agree to increase the resources of the Office of Legal Services Coordination to ensure it can meet the full range of functions intended for it’.15

The Attorney-General’s Department Annual Reports publish statistical data on breaches to the Directions.16 From 2003 to 2009 the Annual Reports provided information on the number of breaches investigated per year, as shown in Table 1 below. It is important to note that the 2009-2010 Annual Report did not disclose data or make any statement on compliance with the Legal Services Directions. Following media articles prompted by RoLIA on this change in practice, the Department released data for 2009-2010 and 2010-2011. However, the data is in a different format which does not allow direct comparison with earlier years as per the data in the following chart reported by RoLIA.

12 Ibid.
13 Ibid, CFS15.
14 Senator Bolkus Second Reading Speech, 8th March 1999, Senate Hansard, 2402.
15 Ibid, 2403.
16 OLSC, Guidance Note No 3, see above n 14.
Number of Breaches of the Legal Services Directions as reported in the Attorney-General Department Annual Reports 2003-2004 to 2009-2010:

An Australian National Audit Office (ANAO) Report stated that the OLSC relies heavily on reporting either by agencies or by complaints from other sources.\(^{17}\) However, it is important to note that there is no formalised complaints system. ANAO further reported that the Office does not commonly discover breaches,\(^{18}\) (as opposed to breaches being reported by agencies) and ‘does not proactively monitor agency's compliance with the Directions’.\(^{19}\)

The Blunn Krieger ‘Review of Commonwealth Legal Services Procurement’\(^{20}\) noted ‘[T]he Legal Services Directions...provide little in the way of assistance to those agencies in achieving the delivery of efficient and effective legal services’.\(^{21}\)

*The Australian* published an article titled ‘Fed Agencies accused of cover-up of breaches’ (12 Aug 2011) which reported on RoLIA’s research into the failure of the Attorney-General’s Department to report on the model litigant breaches in the 2009-2010 annual report. The article further reported that the Attorney-General Robert McClelland had

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\(^{17}\) ANAO *Legal Services Arrangements in the Australian Public Service* Audit Report No 52 (2005), 5.12.

\(^{18}\) Ibid.

\(^{19}\) Ibid.


\(^{21}\) Ibid, 27 [para 47].
said ‘I have requested urgent briefings from my department as to the cases raised by the Rule of Law Institute and to the reporting of these breaches’. RoLIA stated that the issues that were uncovered justified a review by the Australian Law Reform Commission or the Administrative Review Council.

RoLIA will continue to advocate on the need for a thorough review of the substance and administration of the Model Litigant Rules.
**Privacy and Freedom of Expression**

**Invasion of Privacy**

In response to the Federal Government release of an Issues Paper on a Commonwealth Statutory Cause of Action (SCOA) for Serious Invasion of Privacy (September 2011) RoLIA made a detailed submission on its views. Also RoLIA, wrote to the Minister for Privacy and Freedom of Information, the Hon Brendan O’Connor MP, seeking examples of instances where there had been serious invasions of privacy which had given cause for the Government to release its Issues Paper. The Minister responded advising RoLIA that:

‘In relation to your proposal for an analysis of media articles, the Government does not propose to undertake such an identification exercise. As I have noted publicly, a SCOA would be directed at providing remedies for serious invasions of privacy, rather than at the media or at printed news articles in particular. In any event, it would not be possible to identify circumstances or articles that would be ‘caught’ by a SCOA until the elements of the cause of action are determined. At this stage the Government is seeking comment upon the proposals for those elements. As you and your Institute would also appreciate, it would not be appropriate for the executive government to adjudge which cases would be caught by any SCOA that may be pursued.’

Without practical examples of where the statutory tort would operate it is difficult to see the need or required content of a statutory tort.

The RoLIA submission on the Issues paper noted that privacy is notoriously hard to define because it covers a range of different issues and human rights i.e. freedom of expression and freedom of the press.

The major issue is the extraordinary growth in the electronic storage of private information and the ability to electronically transmit that information. This has created a major challenge to the privacy of ordinary Australians.

That challenge can only be properly dealt with on a comprehensive basis by Federal legislation which covers:

- Ensuring robust security for the storage of the private information.
- Limiting the collection of private information.
- Limiting access to electronically stored private information.
- Limiting the use of electronically stored private information.
- Progressive deleting of electronically stored private information.
- Compulsory notifying individuals of what private information about them is electronically stored.
It is no answer to simply confer a statutory tort to sue after the event.

The other privacy issues require tailored solutions and it is considered that the conferral of a statutory privacy tort is also not one of them.

At best, a statutory privacy tort is a blunt instrument for a limited number of wealthy or famous Australians, who have the time, fortitude and the resources to go to court; all of which the public underwrites by funding the high cost of our court system.

A privacy tort necessarily entails an individual going to court with all of the litigation consequences:

- uncertainty
- risks of losing
- high legal costs
- court delays
- time of the party concerned
- use of expensive and limited court resources

and perhaps more importantly, with privacy litigation, the prospect of greater publicity to the matter which the person concerned wants to keep private.

RoLIA considers that Australia should agree with the 2010 Report of New Zealand Law Reform Commission and leave the development of a privacy tort to the courts for the reasons that:

- The common law has the great advantage that in a fast moving area judges can make informed decisions on actual cases as they arise.

- Privacy is particularly fact-specific. As has been said in the UK each case requires an intense focus on the individual circumstances. The common law is well suited to that task.

- The common law is flexible and can thus develop with the times.

- A statutory privacy tort has the risk that what is enacted today may be out of date tomorrow (with the long waiting time for the enactment of new legislation in Australia, this presents a major problem to quickly amend a statutory privacy tort to address changed circumstances).

- To avoid the problem of statutory privacy tort being quickly out of date, it would have to be drafted in open-ended terms and this might end up being a straight jacket for judicial development or judicial censorship of the freedom of expression and the media.
There is no evidence that the current state of Australian common law is causing practical difficulties to anyone.

Further to this, RoLIA notes that a statutory tort of privacy would further constrict the right to free speech. The proposed Bill makes no reference to freedom of the press or freedom of speech and only states that the protection of privacy must be balanced against other important interests. If the Bill passes in its current form it is likely that not only would the press be stifled but individuals would be liable to damages and injunctions for disclosing literal truths. It would be immaterial that the discloser acted bona fide in making the disclosure, the information was not confidential, the information may already have been made public as long as the individual whom the disclosure was made in reference to would not have reasonably expected the information to be disclosed in the circumstances.

**SENATE INTERNET PRIVACY INQUIRY**

On 29 September 2010 RoLIA made a submission to the Senate Standing Committee on Environment, Communications and the Arts inquiry into the adequacy of internet privacy protections of Australians, specifically on media reports that the Government would introduce a mandatory internet data retention proposal. RoLIA called on the Committee to report on the veracity of this development and also to recommend on greater transparency and accountability in both the formulation and delivery of internet privacy and regulation policy.

RoLIA notes that some evidence to this committee was given in-camera. Whilst there might be good reasons for in-camera hearings and evidence, RoLIA believes that generally committees should refrain from taking evidence in this form, as the proceedings of Parliament should be held in public as Parliament itself is an extension of a community whose political discourse should occur in an open and transparent manner.

The Committee report was released on 7 April 2011 and was followed by a media release in which RoLIA commended the Committee, especially for its five step requirement contained in Recommendation 9 that the Government would need to complete before it could consider the data retention proposal. The five step requirement would bring enhanced transparency if there is a decision for retention.

*The Committee report at Page 64, in response to the RoLIA arguments on the proposed data retention, stated:*

4.52 The importance of accountability and appropriate oversight was also emphasized by the Rule of Law Institute.
**Freedom of the Press**

In March-April 2011 it was reported that the New South Wales Crime Commission (NSWCC) had required two Sydney Morning Herald (SMH) journalists to surrender their mobile phones, SIM cards and telephone records. This was apparently in response to *SMH* allegations that the NSWCC had been conspiring inappropriately with criminals and that the Police Integrity Commission had launched an investigation. The NSWCC had apparently begun proceedings to prevent the PIC from investigating.

On March 23 2011, the *SMH* published an opinion piece by RoLIA President Mr Robin Speed, detailing the importance of freedom of the press for free speech in Australia and also discussing the new Federal laws aimed at protecting journalistic privilege and their lack of meaningful protection. RoLIA then published background material to the article on our website and sent a copy to our email contacts.

The Federal *Evidence Amendment (Journalists Privilege) Act 2011* provides for disclosure of a source if a court is satisfied that having regard to the issues to be determined in the proceedings before it the public interest in the disclosure of the identity of the source outweighs:

- any likely adverse effect on the source and anyone else; and

- the public interest in the communication of facts and opinion to the public by the media and the ability of the media to access the sources of facts.

RoLIA believes the disclosure exception is too broadly based and lacks any certainty. A source gets no comfort from knowing that disclosure depends upon a court ultimately deciding whether disclosure is in the public interest. The source is not even a party to the proceedings to the court and how can he or she be effectively represented (and who pays for all that)? In the view of the Institute, the Act should be immediately amended to provide that disclosure should only be ordered where national security is at stake.

RoLIA advocates that the NSWCC should not be able to continue without additional independent scrutiny. It has no parliamentary oversight committee, and no committee has any responsibility for it. In a letter to the *SMH* of 12 April 2011, RoLIA CEO, Richard Gilbert followed up on his 6 April appearance on *SkyNews Business Channel LawTV* and called for amendments to the Evidence Act to protect informants as well as a parliamentary review of the NSWCC to determine whether it needs an overhaul and oversight committee. The *SMH* had also published an earlier 19 March letter of RoLIA CEO, Richard Gilbert on the initial *SMH* reporting of the NSWCC demands.
**Lack of Proper Review of New Legislation**

**Senate scrutiny of Bills Committee (SSB)**

RoLIA has resubmitted its submission in the inquiry into the future of the SSB Committee. The inquiry had stalled during consideration of the new Joint Parliamentary Human Rights Committee. Our submission was published on 18 March 2011, and was comprised of information from our two previous submissions dated 24 June and 6 April 2010.

The SSB Committee has one of the most onerous of committee responsibilities in the Parliament as it scrutinises all of the Bills which are introduced into Parliament. The Committee examines whether bills:

(i) trespass unduly on personal rights and liberties;
(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
(iv) inappropriately delegate legislative powers; or
(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The Committee tables a large number of reports commenting on provisions which are contrary to good law, most of the identified provisions are also not in line with the rule of law. It has identified numerous instances of Henry VIII clauses in Bills. As a consequence of this, RoLIA published a brief on Henry VIII clauses which is now available on the RoLIA website. RoLIA also commended the Committee in its extensive work on the National Vocation Education and Training Regulator Bill 2010 in a media release on 8 March 2011, and cited the SSB Committee report in our two submissions to the Senate Education, Employment and Workplace Relations Committee on the Bills.

**RoLIA Senate Estimates Reports**

RoLIA published a third report on the Senate Estimates hearings, covering the October 2010 hearings, and maintains an active interest in Estimates matters.

Again, RoLIA has recorded that the agencies continually fail to return their answers on notice by the date as set by Senate Orders. RoLIA believes that regulatory agencies need to respond to parliamentary questions with the same degree of rigour, accountability and punctuality which they expect from those organisations and individuals who are the subjects of regulation. RoLIA notes that there have been some improvements in the accountability and transparency domain, viz:

- ASIC and the ATO have now published data on their use of coercive powers in answers to estimates questions.
Some agencies now return answers before the dates set under Senate Orders

**Attendance of public officials at senate enquiries**

On 28 October 2009 the Senate passed a resolution requiring the then President of Fair Work Australia, The Hon. Justice Geoffrey Giudice, to appear and answer questions at all future estimates hearings held by the Senate Education, Employment and Workplace Relations Legislation Committee. At the Budget Estimates Hearings on 1 June 2010 Justice Giudice requested that the Senate reconsider its order requiring his attendance. In a statement tendered to the Committee Justice Giudice stated that he did not possess appropriate control and authority to answer questions and claimed that the Senate's resolution 'put the independence of Fair Work Australia (FWA) at serious risk' due to the inherently political nature of the questions during estimates. The FWA President commented on the offences under the *Fair Work Act 2009* which 'guarantee...freedom from outside influence in the performance of functions'.

Under the rule of law it is important that government agencies are held accountable for their actions. Senate Estimates Committee hearings provide 'wide ranging scrutiny of the operations of government agencies...seen as an effective and essential means of ensuring accountability'. The Institute considers that the President of FWA is accountable to the Parliament under s652 of the *Fair Work Act 2009* in his duty to provide Annual Reports to the Minister, likewise, the Senate 'estimates process is for the purpose of seeking explanations relating to items of proposed expenditure'. The Clerk of the Senate stated that Justice Giudice's statement suggested that he should 'be protected from the 'disturbance' of appearing before a parliamentary committee' and 'could not be seriously argued'.

**Regulators Pleading Immunity From Answering Questions**

During the Senate Standing Committee on Economics 31 May -2 June 2011 Senator Bushby asked the Australian Prudential Regulation Authority (APRA) eleven questions relating to the MTAA superannuation fund. The questions related to ‘how much APRA had paid for the consultant to review MTAA, and what powers it had conferred’. APRA refused to answer nine of the questions. ‘APRA said it was precluded from [answering...
questions] under the secrecy provision of its parent Act’. APRA provided written answers stating:

‘Pursuant to section 56 of the Australian Prudential Regulation Authority Act 1998 (APRA Act), APRA is precluded from disclosing information disclosed or obtained under or for the purposes of a prudential framework law and relating to the affairs of a regulated entity. APRA is not even able to comment on whether or not the press speculation is accurate or not’.

Section 56 of the APRA Act sets out the general obligations of APRA officers to confidential information. However, the law of parliamentary privilege confers absolute immunity on a person who provides information to a House or Committee in the course of proceedings in parliament. Therefore APRA would not breach the APRA Act in answering questions at the committee.

Where there is a valid public interest immunity ground, the Senate cannot demand an answer, but, reliance on this provision needs to be made before the Senate can decide whether it is a reasonable claim. An example of this occurred in the Senate Standing Committee on Education Employment and Workplace Relations, FWA raised a public interest immunity claim stating that answers to questions ‘would be harmful to the public interest’ as they might prejudice an ongoing investigation.

The Clerk of the Senate advised Senator Bushby that ‘it is well established that a general secrecy provision [which the APRA statute has] does not prevent the provision of information to a House or committee of the Parliament in the absence of an express statement to the contrary. In other words, the inquiry powers of the Houses are not affected by secrecy provisions’.

RoLIA is concerned about that regulators are accountable to Parliament and as transparent as possible in answering questions.

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33 Money Management, Senator Bushby 11 August 2011
34 Resolution 13 May 2009 Senate
35 Senate Standing Committee Questions on notice, additional estimates 2010-2011, SQ11-00129, Hansard page 58, Senator Ronaldson 23 Feb 2011
36 Money Management Article
EXCESSIVE COERCIVE POWERS CONFERRED ON GOVERNMENT AGENCIES

PRESENTATION TO JOINT COMMITTEE 15 JUNE 2011

On 15 June 2011 the Joint Parliamentary Committee on Corporations and Financial Services (JPCCFS) invited RoLIA to give evidence on the coercive powers of the Australian Securities and Investments Commission (ASIC). RoLIA CEO, Mr Richard Gilbert argued for greater transparency and accountability of the Commonwealth regulators, making the following points:

• Commonwealth regulators need to respond to the recommendations of the 2008 Administrative Review Council report which included 20 well-formulated best practice principles for the regulators.
• There is no consistency of approach for regulators to report to Parliament on the use of their coercive powers. Some agencies do it well, others not at all;
• Regulators should be more open in the administration of their powers. They need to publish detailed annual statistics on the use of their powers in their annual reports. The JPCCFS needs to access data on key regulatory indicators as this data could assist the committee and ASIC to assess whether the regulatory risk quotient might be on the rise and/or signal the need for tougher regulation;
• In the absence of reliable data, regulators and their parliamentary overseers will be prone to making decisions on hunches rather than on facts. In relation to ASIC’s enhanced and keenly-sought additional surveillance powers (search and wire taps) which the Parliament passed in November 2010, it was discovered at the June Estimates 2011 that these powers had not be used since they took effect in December 2010.
• Regulators should be required to publish policy statements on how they use their powers - some have these on their web sites, but most do not;
• Regulators need to develop decision-making procedures which include at least some separation of powers between the officer making a recommendation on an exercise of coercion and the officer who makes the final decision;
• Agencies should be careful when conducting market intelligence projects, and avoid "fishing expeditions", as these can be costly for businesses and, at the same time, diminish the respect which those regulated have for their regulators;
• In the new age of open and accountable corporate governance it is time for all of the key economic regulators to take the lead of APRA and publish codes of practice and governance. There should be disclosure of material interests for those who preside over our regulatory agencies, and statements of compliance should be included in annual reports to parliament.
In a move which RoLIA applauds, ASIC wrote to the Committee on the day of RoLIA’s appearance and reported on its review of its powers, which included consultations with external stakeholders. Importantly, ASIC reported that it complies with 18 of the 20 ARC best practice rules, and that it was working towards full compliance by addressing the transparency and accountability principles. ASIC has now posted on its website a plain English guide on how it uses its powers. It will also design and deliver new training programs, and it will provide statistics on the use of its powers in its 2011 Annual Report to Parliament.

The PJCCFS’s oversight of ASIC is both proactive and diligent. It reflects well on a Committee which does its business in a non-partisan manner. By signing up to the ARC report, ASIC has provided leadership to other regulators who now need to be more proactive in this domain.

On 19 October 2010 RoLIA President Mr Robin Speed had published a detailed letter in the Australian Financial Review (AFR) explaining the abuse that can come from exercise of coercive powers, including interrogations where the examinee is in a very vulnerable position, and also from the unknown sharing of information between agencies. RoLIA CEO, Richard Gilbert appeared on SkyNews Business Channel LawTV the next day, 20 October, to reinforce the points made in this letter. RoLIA takes the view that some agencies’ coercive powers are draconian and to reinforce our previous and maintained position, especially those made in our media release of 8 September 2010 that an inquiry into these powers is necessary by the ALRC.

**AUSTRALIAN TAXATION OFFICE (ATO)**

RoLIA focused on the ATO treatment of Paul Hogan in the latter part of 2010. Our media release of 8 September 2010 discusses the raid on Mr Hogan’s advisor’s residence. These types of raids are unnecessary and overly damaging to persons raided. Mr Robin Speed, President of RoLIA, submitted a detailed letter to the Australian Financial Review (AFR) calling for an immediate judicial inquiry into this raid and other misuses of coercive powers. The letter was published on 8 September 2010, the same day as the RoLIA media release and also RoLIA CEO, Richard Gilbert’s appearance on radio station 2GB and Channel 9 News regarding this matter.

Another important lesson to come from the Hogan case is the concern that the ATO is too liberal with its use of Departure Prohibition Orders. The RoLIA media release of 30 August 2010 details the need to review the ATO power to issue these orders. Mr Hogan was prevented from leaving Australia by the ATO, although the order was later lifted. On 31 August 2010 Thomson Reuters published an article covering the RoLIA views on this subject in their ‘Tax Practice Update’.
RoLIA made two submissions to the Senate Education, Employment and Workplace Relations Committee inquiry into three Bills which had been introduced to form a new federal education regulator. RoLIA was alerted to the problems in the Bill by the report of the Senate Scrutiny of Bills Committee, which had detected the following rule of law problems:

- Insufficient definition of powers;
- Natural justice issues;
- Inappropriate delegation of power;
- Unjustified penalties;
- Trespass on rights and liberties;
- Retrospectivity of provisions; and
- Henry VIII clauses.

RoLIA's first submission supported the SSB Committee findings, and notified the Education, Employment and Workplace Relations Legislation Committee to the existence of the Administrative Review Council's 2008 report on coercive powers and their appropriate transparency. RoLIA encouraged the Committee to recommend amendments to the Bills amending the rule of law issues and making provision for greater transparency.

After further analysis, RoLIA made a supplementary submission to the inquiry. RoLIA was concerned that coercive gathering powers as well as civil and criminal penalties greatly exceeded those of current state education regulators. RoLIA called on the Committee to consider why this increase in power was necessary. RoLIA raised the following points on the information gathering powers:

- There is no mandatory reporting on the use of powers;
- There is no provision for legal professional privilege over documents;
- The comparatively lower standard a decision-maker must reach before an order for documents is issued.
- It should be specified that it must be a senior Commission member who is the decision maker.
- The time period of notice given before documents/information can be required is generally 14 days for regulators, for the Vocational Education and Training (VET) regulator it can be as low as 24 hours, a much shorter period.
Regarding the new search warrants for entry of premises, RoLIA made the following points:

- An ‘authorised officer’ of the VET regulator is able to conduct the search, while other federal regulators have members of the Australian Federal Police (AFP) conducting the search.
- ‘Necessary and reasonable force’ is allowed, which should be further defined.
- An ‘authorised officer’ can question a person inside the premises and RoLIA is concerned this is an unsupervised and inadequately transparent method of conducting an interview compared with other regulators’ formal statutory interview processes.

The Committee endorsed the Senate Scrutiny of Bills Committee report, and noted the seriousness of concerns. However, as amendment to the Bill would have meant referring states might withdraw, the Bill was recommended to be passed in its current form.\footnote{Education, Employment and Workplace Relations Legislation Committee, National Vocation Education and Training Regulator Bill 2010 & Ors Report, p 30.} An improved Explanatory Memorandum was recommended and consideration of changes to the Legislation Handbook to strengthen Explanatory Memoranda was left to the Senate Scrutiny of Bills Committee.\footnote{Ibid.}

Page 28-29, in response to RoLIA’s concerns over the proposed search, seizure and entry powers:

3.49 The Rule of Law Institute of Australia drew attention to other concerns with the powers. These include the following:

\[
\text{The time period for federal regulators wishing to conduct an interview or require information is generally 14 days. The VET Regulator does have the 14 day requirement to require documents/information, but if they consider}\]

[Page 29]
it ‘reasonably necessary’ they can reduce it to as low as 24 hours, which appears to be out of line with other notice periods.

[...]

RoLIA is concerned that an ‘authorised officer’ may exercise a warrant or enter by consent. An ‘authorised officer’ is a person appointed by the Chief Commissioner from the staff of the VET Regulator under s 89. Therefore, unlike ASIC and other federal regulators, the Australian Federal Police do not conduct the search. RoLIA strongly disagrees with this, as there is no reason for the VET Regulator to not be required to operate in the same way as other regulators. Safety of authorised officers may become a problem and their training may be called into question.

[...]

Whilst executing a warrant, an authorised officer can question the occupier on, among other things, information regarding the operation of the Act or information provided under the Act. There is no mention of whether a lawyer can be present or whether the principle against self-incrimination is in operation (the provision on self-incrimination included in the Bill only applies to the section on information requests). This gives the impression of being a potential method of gathering evidence not subject to the controls over interviews applicable for regulators such as ASIC, ABCC, ACCC and the ATO. RoLIA is very concerned about this particular issue.47

3.50 The Institute recommended that the NVR Bill be amended to require the regulator to include in its annual reports information about the use of the powers under Part 5, and for this report to be tabled in Parliament.48

[Footnote 47 attributing quote to RoLIA Supplementary Submission, pp 2-3; footnote 48 attributing source to RoLIA Supplementary Submission, p 2]

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

The Corporations Law Amendment (No.1) Bill 2010 proposed to give greater coercive powers to ASIC. RoLIA provided two submissions to the Senate Economics Committee inquiry into the Bill and RoLIA Vice-President Malcolm Stewart gave evidence at the Committee hearing.

Under these provisions ASIC obtained serious search warrant powers as well as telecommunications interception powers. RoLIA objected to the new search warrant powers, submitting that ASIC already had sufficient powers in these areas and that the new warrant power was insufficiently defined. RoLIA also argued that the proposed threshold for exercise of the search warrant powers was too low. RoLIA’s initial submission noted the extensive use of other coercive powers and the lack of transparency in how these powers were used. In a letter dated 18 November 2010, ASIC promised to report on the use of the new search warrant and telecommunications
interception powers in its forthcoming annual reports. RoLIA’s submission was supported by the NSW Council for Civil Liberties.

3.26 The New South Wales Council for Civil Liberties commented in its submission that:

It is alarming to observe the extent of function creep of powers, originally justified in relation to terrorist offences and those that threaten life or serious bodily harm, to lesser crimes. The proposed change would permit the full range of warrants to be issued to interception agencies, for offences concerning insider trading and market manipulation. It is paradoxical for a bill which seeks to protect the privacy of shareholders in one respect to then allow such intrusions. CCL shares the concern raised in their submission by the Rule of Law Institute on this matter.22

RoLIA’s second submission addressed claims made by ASIC at the Committee hearing. RoLIA reiterated its previous arguments and reinforced the point that ASIC already had sufficient investigative powers to suit their needs. The Bill was eventually passed without amendments.

THE CLEAN ENERGY REGULATOR

Through the operation of the Clean Energy Bill 2011 (CEB) and the Clean Energy Regulator Bill 2011 (CERB) (each Bill has been passed by both Houses of Parliament) a new regulatory system has been created to enforce the new carbon pricing regime. The CEB created a new Commonwealth enforcement agency, the Clean Energy Regulator (the Regulator) which has extensive search and entry powers. Staff of the Regulator or the Australian Federal Police (AFP) may be appointed as an inspector to search premises. RoLIA would like there to be subsequent amendments to this regime as in its current state it impinges significantly on the rule of law. The amendments that RoLIA desires include:

- The Regulator be required to provide numerical and qualitative data, annually to Parliament, on the sharing of private information to external agencies, bodies or individuals. This will enhance the accountability and transparency of the Regulator. RoLIA is concerned that private information obtained by the Clean Energy Regulator in the exercise of their powers could be used in evidence by another department, or other agency as might be provided for in the Regulations, in absence of any knowledge or express consent of a citizen.

- The Regulator adopt a Code of Conduct, that requires the disclosure of material interests and implement a complaints procedure. Currently there is no need to undertake such action.
• The Regulator be required to provide numerical and qualitative reports to Parliament on the use of their coercive powers and this information should be readily available. This is one method of ensuring it becomes a ‘best practice’ Regulator.
In the previous financial year, and our 2009-2010 Annual Report, RoLIA highlighted the plight of the ARC as follows:

‘The Administrative Review Council has gradually had its resources diminished over the years, at one stage in 2010 down to having no president and no dedicated secretariat. Their reports have gone from 3-4 per year to at least one per year. There has not been a report since November 2008 and its crucial 'Admin Review' report was not published for 3 years until May 2010. The ARC provides advice to government departments and agencies, and in 2008-09, the Council provided only one formal letter of advice (compared to six in 2007-08).’

RoLIA has continued this commitment in 2010-11 by referring to the ARC, and its importance, in our submission to the Senate Legal and Constitutional Affairs References Committee inquiry into the ALRC.

RoLIA was invited by the ARC to advise on what issues they should be addressing in its future work. RoLIA’s key points to the ARC were that it should examine whether all regulators should develop codes of ethics and conduct and also that they should review the administration of the Model Litigant Rules.

RoLIA welcomes the appointment by the Attorney General of a new chairman for the ARC, Colin Neeve. Furthermore, RoLIA supports the ARC continuing as an active and well resourced body to ensure that administrative law and administration in Australia is conducted in accordance with longstanding constitutional principles.
RoLIA noted in our previous Annual Report our concern for the future of the ALRC. To this end, RoLIA supported and welcomed an inquiry by the Senate Legal & Constitutional Affairs Committee, which began on 23 November 2010 when the Senate referred the inquiry, and concluded when the report was tabled on 8 April 2011.

RoLIA made a submission to the inquiry on 27 January 2011 and CEO, Mr Richard Gilbert, and Secretary/Treasurer, Mr Ben Giles appeared as witnesses on 11 February 2011 to give oral evidence.

RoLIA's submission focused on the problems the withdrawal of funding would cause, as well as stating its concern on the lack of scrutiny when legislation was passed to radically alter the structure and governance of the ALRC. In this regard RoLIA submitted that the Financial Framework Legislation Amendment Bill 2010 was improperly titled, as although it changed the financial structure for several agencies including the ALRC, a large section of the Bill was devoted to changing the ALRC management structure including its board, the number of commissioners, the requirement of a deputy president, and the appointment of the board/commissioners. No other agency's management was altered in this way in the text of the Bill, and the Explanatory Memoranda only briefly mentioned the ALRC changes. No debate took place in the Houses of Parliament on this section of the Bill and by all accounts the changes passed 'under the radar'.

The Bill reduced the independence of the ALRC by making the Attorney-General responsible for appointing a Management Advisory Committee, replacing the Board of Management which consists of ALRC Commissioners. The Attorney-General can dissolve the Committee at any time and also can issue policy directions to the ALRC on administrative matters. The Committee advises on important strategic decisions for the ALRC, and it is imperative it be independent.

The size of the ALRC is now limited to six members plus a president; and the office of Deputy-President has been abolished. The Attorney-General is now in the position of appointing part-time commissioners, where as before the Governor-General had that power. In RoLIA's opinion, the Attorney-General now wields too much control over the ALRC. Apart from the President, there is now no minimum number of commissioners.

The ALRC has been led by such distinguished persons as former High Court Justice, the Hon. Michael Kirby AC CMG, former Family Court Chief Justice, the Hon. Elizabeth Evatt AO, Alan Rose AO, former Federal Court Justice, the Hon. Murray Wilcox and Emeritus Professor David Weisbrot AM. It is now led by Professor Rosalind Croucher.
Below are the Committee references to RoLIA in its Inquiry Report:

*Page 16, paragraph 3.12 in response to RoLIA’s submission that Attorney-General control over the ALRC is too great:*

3.12 One of the potential impacts of the ALRC’s governance changes highlighted to the committee is that the ALRC would be subject to increased control by the Attorney-General. For example, the Rule of Law Institute of Australia (RoLIA) noted the following changes as potentially compromising the independence of the ALRC:

- the powers of the Attorney-General in relation to the dissolution of the management advisory committee;
- the power of the Attorney-General to appoint part-time Commissioners; and
- the provision that the CEO of the ALRC must act in accordance with any policies determined and comply with any directions given, in writing, by the Attorney-General.\(^{12}\)

3.13 In its discussion of the proposed governance changes, the ALRC’s submission noted that the Revised Explanatory Memorandum addresses the issue of the independence of the ALRC and the role of the management advisory committee:

The management advisory committee will not possess executive powers or decision-making authority and may not compromise the intellectual independence or impartiality of the [ALRC]. The intent of this provision is that the management advisory committee will provide support for the President on the management of the [ALRC] in a non-binding manner, within a relationship where the committee is subordinate to the President. The [ALRC] will continue to report to the Attorney-General on the results of any reviews and to include in those reports, any recommendations it may wish to make... Additionally, the President of the [ALRC] may decide matters about the management advisory committee that are not provided for in the ALRC Act, such as the timing and conduct of meetings.\(^{13}\)

3.14 Despite the explanation in the Revised Explanatory Memorandum, RoLIA stated that the relevant provision is still an extension of executive control over the ALRC.\(^{14}\)
3.17 Aside from the content of the changes in the FFLA Act, a specific area of concern raised with the committee is the apparent lack of scrutiny over the amendments contained in the FFLA Act. RoLIA expressed the opinion that the FFLA Act was not subjected to adequate scrutiny when it was considered by the Parliament, particularly in light of the significant changes that it made to the ALRC:

One would have expected these changes to have occasioned heated debate in parliament, but that was not the case. Not a single member of the House of Representatives, nor any senator, commented on the changes to the ALRC in the second reading debate. There was no opposition to the amendments. Maybe that was because the name of the bill, the Financial Framework Legislation Amendment Bill 2010, gave no indication of the dramatic changes proposed to the commission structure or because the proposed changes were buried in the text of the bill and within an explanatory memorandum over 40 pages long. Maybe it was because the explanatory memorandum glossed over the changes by saying they were necessary to achieve greater flexibility. No doubt parliamentarians are very busy during sittings of parliament and the changes to the commission's structure may have been overlooked. That is unfortunate but unavoidable when so many thousands of pages of legislation are proposed and passed every year.\(^\text{13}\)

Page 26, on the Board of Management issue, where RoLIA pointed out that the Board is currently comprised of only one member and the legality of this conduct:

4.17 In its submission, RoLIA provided a copy of legal advice that it has obtained on this issue. While the legal advice concurs with the Department's assessment that the ALRC is properly constituted when it has only one member, the RoLIA's legal advice raised concerns about the operation of the Board:

For the Commission to have a full time Commissioner as President, but no Deputy President and no other full time members, in my opinion, does not result in the Commission ceasing to exist as a matter of law.

However...for the Commission to have a lone full time Commissioner as President, but no Deputy President and no other full time members, leaves uncertainty about whether the President acting alone, purporting to act as a Board, can properly satisfy the requirements of sections 30 and 31 in exercising the Commission's powers and performance of its functions.\(^\text{17}\)

\(^{13}\) Committee Hansard, 11 February 2011, p. 18. See also: Rule of Law Institute of Australia, Submission 14, p. 13, which advocated the appointment of at least one additional full-time commissioner.

\(^{14}\) Committee Hansard, 11 February 2011, p. 23.

\(^{15}\) ALRC Act, sections 27-29.

\(^{16}\) Senate Legal and Constitutional Legislation Committee, Additional Estimates Hearings, Committee Hansard, 18 October 2010, pp 44-45.

\(^{17}\) Submission 14, p. 11.
Page 35, in response to RoLIA’s submission on high staff turnover, and the loss of Reform Journal:

4.50 The committee also questioned the Department on the observation contained in the RoLIA submission that, while the ALRC has been losing staff, there has been an increase in staff in the Department, from 760 to 1550, over the period 2004-2009.\(^{55}\) The Department indicated that its staffing levels increased as it took on new responsibilities:

I am sure you would be aware that most of that succeeded the events of September 11, after which the department took on significant new responsibilities for national security. These matters were of significant concern to the previous government and continue to be for this government. Those new functions for first, national security and then later for emergency management naturally came with resources.

...I think that the comparisons neglected to take into account that the commission has continued to have one function throughout that time, which is to do two references a year, whereas we have had significant new functions for which we have been resourced.\(^{56}\)

5.4 RoLIA noted that former High Court judge, and inaugural President of the ALRC, the Hon. Justice Michael Kirby, AC CMG, has described Reform as ‘vital reading for the modern lawyer’.\(^{2}\) RoLIA also highlighted that Reform was an important source of revenue for the ALRC:

Reform was a subscription journal so brought the only other source of income in for the ALRC other than Government funding. Reform was the means to save money in the reserve fund and as the reserve fund is currently being spent, the ALRC is left with reduced independence from the government.\(^{3}\)

Page 42, in response to RoLIA’s argument that a separate discussion paper must be retained for each ALRC inquiry:

Page 42

5.12 Mr Benjamin Giles, Secretary and Treasurer of RoLIA, described the process as appropriate to the role of the ALRC because it is ‘not a hasty approach to law reform’.\(^{10}\) Mr Warwick Soden, Registrar of the Federal Court of Australia, highlighted the important role that the discussion paper played. According to Mr Soden, the discussion paper stage is the opportunity for the ‘elephants in the room’ to be discussed, and for urban myths to be tested and either confirmed or abolished.\(^{11}\)
Page 47, in response to RoLIA’s arguments for greater government response to ALRC recommendations:

Government responses to ALRC reports

5.33 As noted in Chapter 3, the implementation rate of ALRC reports is very high. However, there is no formal process in place for the government to respond to ALRC reports. This issue was commented on by a number of submissions. For example, in its submission, RoLIA advocated for greater transparency in government consideration of ALRC reports in order to avoid the wastage of [scarce] law reform resources. The Law Council of Australia’s submission highlighted the need for timely responses to ALRC reports:

The ability of the ALRC’s reports and recommendations to effect legislative change and address weaknesses or deficiencies in the law is dependent upon those reports and recommendations being considered and acted upon by the Commonwealth Government in a timely fashion.

5.34 The Law Council of Australia’s submission suggested amending the ALRC Act to provide a statutory timeframe for government responses. The committee notes that the Secretary of the Department stated that he did not have a view on the tabling in Parliament of government responses to ALRC reports within a certain timeframe. However, the Secretary warned that such requirements may become ‘just sort of bureaucratic form’:

All you will do is force in some cases the government to respond arbitrarily or in a pre-emptory fashion to something that requires more consideration.

5.35 Other jurisdictions have mechanisms which provide for government responses to law reform reports. RoLIA’s submission explained that new legislation in the

37 Submission 14, p. 6.
38 Submission 5, p. 12.
39 Submission 3, p. 12. See also Mr Bill Rowlings, Civil Liberties Australia, Committee Hansard, 11 February 2011, pp 15-16; Mr Richard Gilbert, RoLIA, and Mr Benjamin Giles, RoLIA, Committee Hansard, 11 February 2011, p. 45; and PIAC, Submission 21, p. 9.
40 Committee Hansard, 11 February 2011, pp 104-105.

Page 53, also in response to RoLIA’s expressed disappointment in scrutiny of the Bill:

United Kingdom requires the government to table in parliament each year a document outlining its response to proposals of the Law Commission of England and Wales.

41 See, for example, RoLIA, Submission 14, p. 25.
RoLIA thoroughly agrees with the Committee majority report (there is a dissenting report by Government Senators) recommendations, and discussed them further in our media release of 8 April 2011:

**Recommendation 1**

6.28 The committee recommends that the Australian Government restore the ALRC’s budget cuts for the period 2010-11 to 2013-14 as a matter of urgency.

**Recommendation 2**

6.29 The committee recommends that the ALRC Act be amended to provide for a minimum of two standing, fixed-term (not inquiry-specific), full-time commissioners.

**Recommendation 3**

6.30 The committee recommends that an additional full-time commissioner be appointed, for each additional inquiry referred to the ALRC, in circumstances where the ALRC already has two or more ongoing inquiries.

**Recommendation 4**

6.31 The committee recommends that the ALRC’s public information and education services program be resumed immediately.

**Recommendation 5**

6.32 The committee recommends that the ALRC be provided with all necessary resources to enable it to continue to travel to undertake face-to-face consultations as part of its inquiry processes.

RoLIA commends the Senate inquiry under the leadership of Senator Barnett for its work in evidence gathering which was objective and balanced. RoLIA further commends the Committee for its well formulated conclusions and recommendations which were based on the evidence gathered. RoLIA notes that the Government
responded to the enquiry on 8 July 2011. The response was disappointing in that it rejected all the Committee’s recommendations, but in doing so, in most cases, did not provide a detailed and cogent statement of reasons for not adopting the Committee’s recommendations. It is instructive to compare previous government responses to reports by parliamentary committees into the ALRC, which provided detailed arguments for agreement or disagreement with committee recommendations.

The government response included the following comments:

- As with other Australian Government agencies, the Commission is required to meet the efficiency dividend (2).
- The purpose of [the reform removing mandated numbers of commissioners] is to allow the ALRC to use its appropriation more flexibly in responding to work it has on hand...(3)
- It is a matter for the President to determine the best use of the ALRC’s resources to undertake inquiries into matters referred to it by the Attorney-General. While the Government agrees that there is value in face-to-face consultations, the ALRC’s innovative use of online consultation practices demonstrates the variety of ways in which a law reform body can reach stakeholders (4).
**The Rule of Law in War**

The rule of law is particularly relevant in respect of acts or omissions done by members of Australian armed forces at a time of war. The question is, to what extent should they be subject to the rule of law?

At the 2010 RoLIA/NSW Bar Association Conference, the Hon. Justice Paul Brereton AM RFD spoke on this topic, which stimulated several media articles. The speech is published on the RoLIA website on the ‘Key Documents’ tab. The tab ‘Legal Studies” contains slides on the rule of law and military justice.

During November 2010 it was indicated that three serving members, an officer and two non-commissioned officers (NCOs), in Afghanistan were to be prosecuted for manslaughter and other offences. This was an almost unprecedented step to take and generated considerable media interest.

The charges related to an incident on February 12, 2009, when six Afghans were killed during a raid targeting an insurgent leader in Uruzgan province. Five children were killed in the raid along with a suspected Taliban insurgent. Two more children and two adults were also injured.

The Director of Military Prosecutions (DMP), an independent office that operates outside the Australian Defence Force (ADF) chain of command, charged the two NCOs, identified only as Sergeant J and Lance Corporal D, with manslaughter and in the alternative, two counts of dangerous conduct with negligence as to consequence.

During the pre-trial directions hearing in May 2011, Chief Judge Advocate, Brigadier Ian Westwood, dismissed the case and ruled that the case against the pair would not proceed to a court martial that was scheduled for July 2011. The basis for the decision was the charges "did not disclose service offences" and that it had to be established that the soldiers had a duty of care before it could be decided whether or not they’d been negligent. Brigadier Westwood found an "absence of plain words" on any duty of care to non-combatants.

Brigadier Westwood then referred to the Director of Military Prosecutions, Brigadier Lyn McDade, who was to decide whether to bring further charges or seek a review of the decision in the Federal Court. Subsequently, Brigadier McDade decided not to pursue any further prosecution of these soldiers in this matter and indicated she would not seek a review of the ruling.
In relation to the officer, on 20 August 2011 the Defence Minister announced that:

"I've received advice from the Director of Military Prosecutions that at that directions hearing she will indicate to the court that she's not proposing to bring evidence against the officer concerned....As a consequence of that, while it's entirely a matter for the court, for the military tribunal, there's now an expectation that the matter won’t proceed. She’s given that advice to me and she has advised the parties concerned, in particular the officer concerned and his legal representatives."

**THE MILITARY COURTS**

In recent years there have been a number of significant changes in relation to military justice in Australia. The first major change was the establishment of The Australian Military Court (AMC) on 1 October 2007. However, in a landmark decision *Lane v Morrison* [2009] HCA 29, on 26 August 2009 the High Court of Australia declared the provisions for the AMC invalid and this effectively removed the AMC from the military discipline structure. Consequently the pre 1 October 2007 court arrangements were temporarily reinstated.

The 2010-2011 Annual Report of the Defence Department advised that a permanent set of arrangements under the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2011 (MCoA (TP&CA) Bill) is under development and consultation.
OPEN JUSTICE AND REASONS FOR DECISIONS

WAINOHU v THE STATE OF NEW SOUTH WALES [2011] HCA 24

Under the Crimes (Criminal Organisations Control) Act 2009 NSW the Police Commissioner was able to seek an order from the Supreme Court to restrict the movement and participation in employment activities of members of Motorcycle gangs. The members of a ‘declared organisation’ were ‘controlled members’ and it became illegal for them to associate with one another and work in numerous occupations (s27).

Mr Wainohu was declared to be a ‘controlled member’ and he appealed to the High Court on the grounds that the law was constitutionally invalid. The court held that the law was invalid as there was no obligation for the Judge, in making the control order, to give reasons for their declaration which was ‘repugnant to, or incompatible with, the institutional integrity of the Supreme Court’. The requirement for a Judge to give reasons is an expression of the open court principle and also provides the defendant with the basis to lodge an appeal.

RoLIA developed slides for legal studies students on this issue.

HOGAN v HINCH [2011] HCA 4

Hinch was charged under s42 of Serious Sex Offenders Monitoring Act 2005 (Vic) for naming a convicted sex offender who had been released from jail and into the community.

A ‘suppression order’ was made by the Victorian Supreme Court under s42(1) of the Serious Sex Offenders Monitoring Act 2005 to restrict publication of any information that might enable the identification of offenders who were the subject of post-custodial extended supervision orders under the Act. The Court ordered the suppression order for 15 years.39

Hinch lodged a constitutional challenge to the validity of s42 arguing that the section infringed on the institutional integrity of the Courts, contrary to principle of open justice implied in Ch III of the Constitution and infringed on the implied freedom of political communication.40

According to the common law open-court principle anybody may publish a fair and accurate report of the proceedings however; there are a wide variety of cases where suppression has been required and essential for the administration of justice. The High

39 Justice French para 16.
40 Justice French CJ, para 2.
41 French 22
Court in rejecting Hinch’s submission that the suppression order breached the principle of open justice cited the categories where suppression orders are seen as promoting the administration of justice.\textsuperscript{42} Cases involving blackmail victims, undercover police officers, national security, confidentiality were cited, although, it was noted that the categories of cases ‘will not lightly be extended’.\textsuperscript{43} The Hon. Chief Justice Robert French AC stated that there was ‘inherent jurisdiction or implied power in limited circumstances to restrict the publication of proceedings conducted in open court. The exercise of the power must be justified by reference to the necessity of such orders in the interests of the administration of justice’.\textsuperscript{44}

Hinch argued that the suppression order operated as a government silencing of public discussion or protests about the release of offenders into the community without their knowledge. The High Court argued that the Court is not the mouthpiece for the executive and in making the suppression orders the court must consider the effect on the offender’s prospects of rehabilitation.\textsuperscript{45} Another concern for Hinch was that the order made by the court under s42 did not require the court to give reasons. The High Court responded by stating ‘not every judicial decision attracts a duty to give reasons’.\textsuperscript{46}

The High Court rejected Hinch’s submission that s42 impinged on the freedom of political communication and stated that the legislation aimed to protect the community and rehabilitate serious sex offenders and s42 was ‘a reasonable means of achieving those object...The making of orders under s42 requires consideration by the court of the public interest in light of the purposes of the Act, the open-court principle, the common law freedom of speech and the freedom of expression referred to in the Charter’.\textsuperscript{47}

The Institute is concerned that suppression orders may in practice be made in the absence of proper inquiry or agreement. Further, RoLIA notes that only limited progress has been made by the Commonwealth and the States in achieving a consistent approach to this matter which upholds the ‘Open Justice’ principle. Accordingly RoLIA calls on these parties to have a consistent approach to disclosing data on suppression orders. Currently, some jurisdictions have reasonable records, and even send out media alerts about each suppression order, whereas limited information is available in other jurisdictions.

\textsuperscript{42} French para 21
\textsuperscript{43} French 21
\textsuperscript{44} French 26.
\textsuperscript{45} French 32
\textsuperscript{46} French 42
\textsuperscript{47} French 50.
4. **RoLIA Submissions**

- **RoLIA Submission on 'Discussion Paper- Privilege in relation to tax advice'**
  27 July 2011
- **RoLIA Submission and evidence on 15 June 2011 to the Parliamentary Joint Committee on Corporations and Financial Services re ASIC oversight**
  15 June 2011
- **RoLIA Submission of 3 June 2011 to the House of Representatives Economics Committee inquiry into price signaling**
  3 June 2011
- **RoLIA Submission to the Senate on the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011**
  30 May 2011
- **RoLIA supplementary submission re National Vocation Education and Training Regulator Bill 2010**
  14 March 2011
- **RoLIA submission re National Vocational Education and Training Regulator Bill 2010 & ors**
  9 March 2011
- **RoLIA submission re Australian Law Reform Commission**
  27 January 2011
- **RoLIA supplementary submission re Corporations Law Amendment (No.1) Bill 2010. View ASIC’s letter responding to coercive powers disclosure requirements & relevant Hansard**
  8 November 2010
- **Transcript of RoLIA’s Vice President Malcolm Stewart’s oral submissions at Economics Committee hearing re Corporations Law Amendment (No.1) Bill 2010**
  3 November 2010
- **RoLIA submission re Corporations Law Amendment (No.1) Bill 2010**
  18 October 2010
- **RoLIA submission re The adequacy of protections for the privacy of Australians online**
  29 September 2010

- **Model Litigant Rules: Key Facts and Cases (Draft)**
  12 August 2011
- **Regulator Power and Accountability Presentation to BFSLA Conference 5 August 2011 By Richard Gilbert**
  5 August 2011
- **Journalist Shield Laws - Sydney Morning Herald and the NSW Crime Commission by Robin Speed**
  April 2011
- **Henry VIII Clauses & the rule of law PowerPoint slides**
  April 2011
- **Henry VIII Clauses & the rule of law (Draft)**
  April 2011
- Legal Studies State Conference slides  
  March 2011
- Richard Gilbert ASIC Summer School slides  
  February 2011
- RoLIA Senate Estimates Survey #3  
  January 2011
- RoLIA Legislative Output Indicator  
  January 2011
- RoLIA 2010 Annual Report  
  October 2010
- RoLIA Senate Estimates Survey on ACMA and TGA  
  October 2010
- RoLIA Senate Estimates survey on the economic regulators No.2  
  August 2010
- Commonwealth Model Litigant provisions  
  Added August 20
5. **Advisory Council**

The following are the members of the Advisory Council to RoLIA:

- Professor Martin Krygier, Law Faculty University of New South Wales
- Professor David Weisbrot AM, Macquarie University Law Faculty
- Nicholas Cowdery AM QC, Former Director of Public Prosecutions for NSW
- Michael D Wyles SC, Aickin Chambers
- Russell Stewart (former Minter Ellison Partner specialising in corporate and trust law)

RoLIA thanks the Advisory Committee for their assistance from time to time during RoLIA's second year of operations.

6. **Acknowledgements**

RoLIA acknowledges our Patron, the Chief Justice of NSW Jim Spigelman. We also acknowledge the generosity of the speakers at our two conferences, all of whom gave of their time pro bono. Also we acknowledge the support of Katie Hall and Chris D'Aeth at the NSW Bar Association in convening the joint Rule of Law in Australia conferences and National Australia Bank for providing production of our televised interview with JJ Spigelman AC QC.

RoLIA would also like to acknowledge all of the numerous supporters who wrote letters and emails encouraging us to continue our work and submitting issues for our consideration.

7. **Comments**

RoLIA would be happy to comment on any part of this report. Please contact RoLIA CEO Richard Gilbert on (02) 9251 8000.

8. **Contact Us**

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