

# 11. Powers

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## Contents

Introduction	251
Overview of powers of Royal Commissions and Official Inquiries	252
Submissions and consultations	253
ALRC's view	255
Coercive information-gathering powers	257
Production of documents and attendance to answer questions	257
Powers of arrest	261
Disclosure of an existing summons or notice	264
Power to require information or written statement	267
Authority to inquire granted under foreign law	272
Inspect and copy documents and other things	275
Other investigatory powers	277
Entry, search and seizure powers	277
Submissions and consultations	281
ALRC's view	282
Dealing with intercepted information	283
Other issues	286
Communication of information regarding contraventions of the law	286
Submissions and consultations	289
ALRC's view	290
Concurrent functions and powers under state laws	292
Submissions and consultations	293
ALRC's view	293

## Introduction

11.1 In this Report, the ALRC recommends a new statutory framework for establishing Royal Commissions and Official Inquiries.<sup>1</sup> In this framework, one of the key distinctions between Royal Commissions and Official Inquiries is the type of powers conferred on each tier of inquiry. Broadly speaking, Royal Commissions, as the highest tier, will have conferred on them a wider range of coercive and investigatory powers than Official Inquiries. The recommended *Inquiries Act* should set out the powers available to each tier of inquiry rather than the Australian Government

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<sup>1</sup> The model recommended in this Report is discussed further in Ch 5.

selecting the powers that may be exercised by individual inquiries at the time they are established.<sup>2</sup>

11.2 In this chapter, the ALRC discusses the specific powers that should be conferred on each tier of inquiry under the *Inquiries Act*. The ALRC seeks to ensure that both types of inquiry have sufficient powers to obtain the information required to conduct their investigations and report on their terms of reference. In Chapters 12, 15, 16 and 17, the ALRC makes recommendations regarding the necessary protections of the rights of persons involved in, or affected by, inquiries exercising such powers.

11.3 The chapter commences with an overview of the powers of Royal Commissions and Official Inquiries. It then considers specific coercive information-gathering powers, such as the power to require a person to appear or to produce documents or provide information in other forms. Intrusive investigatory powers, such as entry, search and seizure powers and interception powers, are also considered. The chapter then considers other issues including: evidence and information obtained in a foreign country; the exercise of concurrent functions and powers under Commonwealth and state or territory laws; and the power to communicate information and evidence relating to contraventions of the law to other government bodies.

## **Overview of powers of Royal Commissions and Official Inquiries**

11.4 One of the key differences between Royal Commissions and other types of inquiries and reviews is that Royal Commissions have coercive powers to summon witnesses and gather other evidence.<sup>3</sup> As discussed in Chapter 4, governments can create many other types of boards or inquiries, but unless created under legislation, these will generally lack the coercive powers of a Royal Commission.<sup>4</sup>

11.5 By its very nature, a Royal Commission is a ‘fishing expedition’.<sup>5</sup> It is argued that a Royal Commission requires broad powers to ensure that the issues and facts are fully canvassed.

It would be hard to envisage that the Fitzgerald Commission of Inquiry in Queensland would have uncovered such deep seated corruption in the Police Force and government if Commissioner Fitzgerald did not possess coercive powers. The witnesses he summoned would simply have refused to attend, refused to answer questions that were incriminating or have claimed privilege.<sup>6</sup>

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2 Recommendation 5–2. The option of selecting powers for each tier of inquiry is discussed in Ch 5.

3 J Ransley, ‘The Powers of Royal Commissions and Controls Over Them’ in P Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 22, 22.

4 This is not always the case. For example, the Equine Influenza Inquiry (2008), established under the *Quarantine Act 1908* (Cth), was vested with most of the powers of an inquiry established under the *Royal Commissions Act*.

5 *Ross v Costigan* (1982) 59 FLR 184.

6 H Reed, ‘The “Permanent” Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II’ (1995) 2 *Australian Journal of Administrative Law* 157, 157.

11.6 The extent to which Royal Commissions can call witnesses and require the production of documents is controversial, however, given that they are established by the executive inquiry and are not courts. Dr Janet Ransley has stated that coercive powers

enable Commissions to unearth hidden evidence, but also have significant and sometimes intrusive impact on the affairs of governments and individuals.<sup>7</sup>

11.7 A key issue for the ALRC is whether both tiers of inquiry under the recommended *Inquiries Act* require powers to undertake their investigations and, if so, which powers. Other law reform bodies also have considered the issue of which powers are appropriate for different forms of executive inquiry. The New Zealand Law Commission (NZLC), in a recent review of the equivalent inquiries legislation of New Zealand, noted that coercive powers can mean that not only those being investigated, but also those asked to appear before a commission, can face significant costs in time and money and risk reputational damage.<sup>8</sup> Nonetheless, the NZLC found that the availability of general powers to call witnesses and require the production of documents is an important feature of most major inquiries.

We have encountered no dispute that there is a place for inquiries with coercive powers: in a modern complex society the power to constitute an inquiry with coercive powers is essential.<sup>9</sup>

11.8 The coercive information-gathering and other investigatory powers of various Commonwealth bodies were considered by the Administrative Review Council (ARC) in its 2008 report, *The Coercive Information-Gathering Powers of Government Agencies*.<sup>10</sup> The ARC noted that such powers were important administrative and regulatory devices for government and many agencies used them to compel the provision of information, the production of documents and the answering of questions.<sup>11</sup> The ARC put forward a number of best practice principles to be used as a guide to government agencies to ensure fair, efficient and effective use of coercive information-gathering powers.<sup>12</sup>

### Submissions and consultations

11.9 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether Royal Commissions and other public inquiries required coercive powers and, if so, whether these powers should depend on the nature of the inquiry.<sup>13</sup> In the

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7 J Ransley, 'The Powers of Royal Commissions and Controls Over Them' in P Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 22, 22.

8 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [5.4].

9 *Ibid.*, [5.5].

10 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008).

11 *Ibid.*, ix.

12 *Ibid.*, xi–xviii.

13 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–1.

Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC expressed the view that both tiers of inquiry established under the proposed *Inquiries Act* may require coercive powers.<sup>14</sup>

11.10 As noted in Chapter 5, there was strong support amongst stakeholders for retaining Royal Commissions, which already have a broad range of coercive powers if established under the *Royal Commissions Act 1902* (Cth). In addition, there was support for introducing a statutory basis for non-Royal Commission forms of public inquiry.

11.11 Stakeholders generally agreed that coercive powers were required by inquiries, although these powers needed to be balanced by appropriate protections.<sup>15</sup> For example, Liberty Victoria considered it essential that inquiries have sufficient powers to achieve their purposes, including coercive powers to require information. It recommended that public inquiries have broad powers, which may only be exercised as necessary and reasonable.<sup>16</sup>

11.12 The Law Council of Australia (Law Council) recognised the need for Royal Commissions to have strong, and generally coercive, information-gathering powers to provide robust public scrutiny of matters of public importance, including executive action.<sup>17</sup> The Law Council was concerned, however, that in certain areas the *Royal Commissions Act* did not achieve ‘the appropriate balance between robust public scrutiny and protecting the rights of participating individuals’.<sup>18</sup> Information-gathering powers must be seen as exceptional, particularly when used in executive rather than judicial processes. In its view, the use of such powers was justified only when necessary to achieve a legitimate purpose and only when accompanied by sufficient protection against their overuse or misuse and by provisions to mitigate their adverse impact on individual rights.<sup>19</sup> It submitted that, in future, public inquiries such as the Clarke Inquiry into the Case of Dr Mohamed Haneef, should not be conducted in the absence of suitable powers and protections.<sup>20</sup>

11.13 The Department of Immigration and Citizenship (DIAC) supported retaining Royal Commissions with all the powers and protections in the *Royal Commissions Act*. DIAC submitted that coercive powers should be used only in investigatory inquiries

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14 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [11.16].

15 Community and Public Sector Union, *Submission RC 10*, 22 May 2009; G Millar, *Submission RC 5*, 17 May 2009; D McKenzie, *Submission RC 27*, 28 September 2009.

16 Liberty Victoria, *Submission RC 26*, 27 September 2009; Liberty Victoria, *Submission RC 1*, 6 May 2009.

17 Law Council of Australia, *Submission RC 30*, 2 October 2009.

18 Law Council of Australia, *Submission RC 9*, 19 May 2009.

19 Law Council of Australia, *Submission RC 9*, 19 May 2009. Protections, procedural safeguards, and privileges and immunities are discussed in Chs 12, 15, 16 and 17.

20 The Law Council cited the following as model legislation for such powers and protections: *Special Commissions of Inquiry Act 1983* (NSW); *Commissions of Inquiry Act 1950* (Qld); *Public Sector Management Act 1994* (WA); *Inquiries Act 1991* (ACT); *Inquiries Act 1945* (NT).

that involved major matters of public interest and where there was a strong requirement for public disclosure. In particular, such powers should be used only where there was concern that the inquiry would not otherwise be able to access information.<sup>21</sup>

11.14 The Australian Government Solicitor (AGS) observed that, in many instances, the absence of coercive powers would inhibit the ability of an inquiry to fulfil its terms of reference. The AGS considered that only inquiries which did not involve controversial or contentious matters, or were of a policy nature, would be able to pursue all relevant lines of inquiry in the absence of coercive powers.<sup>22</sup>

11.15 The Law Council, Liberty Victoria and the Community and Public Sector Union (CPSU) also supported the ALRC's view in DP 75 that it was appropriate for more coercive powers to be conferred on Royal Commissions than on Official Inquiries.<sup>23</sup>

### **ALRC's view**

11.16 Both tiers of inquiry under the recommended *Inquiries Act* may require coercive powers to investigate matters effectively and efficiently and report on a particular issue or event. Conferring coercive powers on both Royal Commissions and Official Inquiries ensures that inquiry members have access to all the information necessary to make informed findings and recommendations.

11.17 The ALRC's recommendations are designed to confer powers under the recommended *Inquiries Act* in a manner that is proportionate to the functions performed by Royal Commissions and Official Inquiries. Moreover, the ALRC recognises that it is essential that such powers be exercised only if it is justified by the particular circumstances of the inquiry. The exercise of such powers should only impinge on the rights of individuals in a proportionate and justifiable way.<sup>24</sup> As with other executive bodies that may exercise coercive powers, powers conferred on Royal Commissions and Official Inquiries should be complemented by appropriate rights and protections.<sup>25</sup>

11.18 Official Inquiries may not require the same level of coercive information-gathering and other investigatory powers as Royal Commissions. This reflects the fact that, under the ALRC's recommended statutory model, Royal Commissions would be more likely to investigate major events or problems, while Official Inquiries would be established to inquire into less significant events and be conducted in a more informal setting.

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21 Department of Immigration and Citizenship, *Submission RC 11*, 20 May 2009.

22 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

23 Law Council of Australia, *Submission RC 30*, 2 October 2009; Liberty Victoria, *Submission RC 26*, 27 September 2009; Community and Public Sector Union, *Submission RC 25*, 22 September 2009.

24 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008), 5.

25 These issues are explored in Chs 12, 15, 16 and 17.

11.19 The next section of this chapter discusses the specific powers that the ALRC recommends should be conferred on each tier of inquiry. The distinctions between the recommended powers of Royal Commissions and Official Inquiries, and the application of client legal privilege, the privilege against self-incrimination and direct use immunity, are depicted in Table 11.1.

*Table 11.1: Powers of Royal Commissions and Official Inquiries and associated privileges and immunities*<sup>26</sup>

Description	Royal Commissions	Official Inquiries
<b>Powers</b>		
Require production of documents and other things	Yes	Yes
Require attendance or appearance to answer questions	Yes	Yes
Require information in an approved form	Yes	Yes
Require evidence on oath or affirmation	Yes	Yes
Administer oath or affirmation	Yes	Yes
Inspect, retain and copy any documents or other things	Yes	Yes
Apply to a judge for a warrant to exercise entry, search and seizure powers	Yes	No
Receive intercepted information	Yes	No
Communicate information relating to contravention of a law	Yes	Yes
Exercise concurrent functions and powers under Commonwealth and state or territory laws	Yes	No
Take evidence and make inquiries overseas	Yes	Yes
Apply to a judge for a warrant for the apprehension of a person who fails to appear or attend	Yes	No
<b>Privileges and immunities</b>		
Client legal privilege can be abrogated <sup>27</sup>	Yes	No
Privilege against self-incrimination can be abrogated	Yes	No
Direct use immunity applies	Yes	No

<sup>26</sup> The privilege against self-incrimination and direct use immunity are discussed in Ch 17.

<sup>27</sup> The application of client legal privilege to Royal Commissions was the subject of a recommendation by the ALRC in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), Rec 6–2. The application of client legal privilege to Official Inquiries is discussed in Ch 17.

## Coercive information-gathering powers

11.20 As discussed above, Royal Commissions and other inquiries need to obtain information in order to report on the matters falling within their terms of reference. Information may be obtained on a voluntary basis or by exercising coercive powers.

11.21 A Royal Commission's general powers to obtain information are similar to those of courts. They also are consistent with the statutory powers conferred on many government agencies to enable them to obtain information in order to fulfil their functions.<sup>28</sup> Such powers typically allow officers of the agency to compel the provision of information, the production of documents and the answering of questions.<sup>29</sup>

### Production of documents and attendance to answer questions

11.22 Under the *Royal Commissions Act*, a member of a Royal Commission may summon a person to appear before the Commission at a hearing or to produce documents or other things.<sup>30</sup> A person who fails to attend a hearing or produce the requested documents or things, without reasonable excuse, commits an offence punishable by a maximum penalty of \$1,100 or imprisonment for six months.<sup>31</sup>

11.23 In 2001, the *Royal Commissions Act* was amended to empower a Royal Commissioner or member of a Commission to require persons to produce documents or things by notice. Previously, persons could be required to produce documents to a Commissioner only at a formal hearing. This proved impractical in Commissions which required the collection of large numbers of documents, such as the HIH Royal Commission (2003), the proceedings of which prompted the 2001 amendments.<sup>32</sup> In the *Final Report of the Royal Commission into the Building and Construction Industry (Building Royal Commission Report)*, Commissioner Cole praised these powers for allowing the Commission to compel the production of documents well in advance of hearings, assisting both in the preparation for hearings and identifying avenues for further investigation. That Commission issued 1,692 notices to produce.<sup>33</sup>

28 For example, agencies such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office have coercive information-gathering powers.

29 See Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008), Appendix A.

30 *Royal Commissions Act 1902* (Cth) s 2. This includes the power to require a person to produce a document that is subject to privilege, although the fact that the document is subject to client legal privilege may still be a reasonable excuse for failing to produce the document. Privilege is discussed in Ch 17.

31 *Ibid* s 3. Offences and penalties under the *Royal Commissions Act* are discussed in Chs 19, 20 and 21.

32 Supplementary Explanatory Memorandum, Royal Commissions and Other Legislation Amendment Bill 2001 (Cth), 5.

33 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 25.

11.24 The 2001 amendments also clarified that a Commissioner can summon a person to produce documents or things without requiring them to give oral evidence.<sup>34</sup> This was achieved by amending s 2 of the *Royal Commissions Act* to allow that a person may be summoned to appear before the Commission either to give evidence or produce documents or things (or to do both).

11.25 A Royal Commission may also take sworn evidence and may require a person appearing before it to take an oath or affirmation for that purpose.<sup>35</sup> In public inquiries, oral examinations perform a number of functions, including:

- the identification of relevant facts;
- the disclosure of the existence of documents so that they can be seized or their production required; and
- assisting with the interpretation of documents already obtained.<sup>36</sup>

#### ***Submissions and consultations***

11.26 In IP 35, the ALRC asked for stakeholder views on whether the current powers of a Royal Commission to summon a person to appear before it or to produce documents or things, including by way of notice, were operating effectively in practice and whether other forms of public inquiry should have similar powers.<sup>37</sup>

11.27 In DP 75, the ALRC proposed that both Royal Commissions and Official Inquiries be able to require a person to attend or appear before the inquiry and produce documents or other things.<sup>38</sup> It proposed that inquiry members also be able to require a person to give evidence or answer questions on oath or affirmation.<sup>39</sup>

11.28 Liberty Victoria expressed the view that all levels of inquiry ‘should have a broad discretion (power) in how and what they obtain as evidence’.<sup>40</sup> The power to require a person or organisation to attend an oral hearing or produce documents or information was, in its view, a necessary power. Liberty Victoria expressed support for the ALRC’s proposals in this regard.<sup>41</sup>

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34 *Royal Commissions and Other Legislation Amendment Act 2001* (Cth) s 4A.

35 *Royal Commissions Act 1902* (Cth) s 2(3).

36 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 62.

37 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–3(a).

38 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–1.

39 *Ibid*, Proposal 11–2.

40 Liberty Victoria, *Submission RC 1*, 6 May 2009.

41 Liberty Victoria, *Submission RC 26*, 27 September 2009.

11.29 The AGS noted that the power of a Royal Commission to summon a person to appear before it, or to produce documents, generally appeared to be effective.<sup>42</sup>

11.30 The Law Council recommended that public inquiries be provided with coercive information-gathering powers including the power to compel the attendance of witnesses and the production of documents.<sup>43</sup> It supported the ALRC's proposals in DP 75 that Royal Commissions and Official Inquiries should have powers to compel the attendance of witnesses, the production of documents, and the giving of evidence.<sup>44</sup>

#### *ALRC's view*

11.31 The availability of information-gathering powers is a fundamental and characteristic feature of Royal Commissions. It is necessary for them to possess the power to obtain information relevant to their terms of reference, by requiring the production of documents and other things or by requiring a person to attend an oral examination or hearing to answer questions. It is equally necessary for Official Inquiries to have such powers.

#### *Documents*

11.32 Section 2(3A) of the *Royal Commissions Act*—which empowers the production of documents by written notice—enables an inquiry to gather evidence before the commencement of hearings. Under the recommended new statutory framework, not all inquiries may require formal hearings. In particular, it is envisaged that Official Inquiries will be conducted more informally and perhaps 'on the papers' with a limited number of hearings. To ensure flexibility in the inquiry process, it is appropriate that coercive information-gathering powers may be exercised by way of written notice rather than under summons, which ordinarily requires a person to appear at a particular place at a particular time to produce documents and other things.

11.33 Under the *Royal Commissions Act*, a Royal Commission can also obtain documentary material by summoning a person to appear at a hearing to produce documents or other things specified in the summons.<sup>45</sup> These powers require production only at hearings, and not before. There appears to be no reason to retain the existing distinction between a Royal Commission's power to issue a summons for the production of documents at a hearing and to issue a notice for production of documents by other means. In order to streamline the current procedures, coercive information-gathering powers should be exercisable by written notice. Further, the inquiry member issuing the notice should be able to specify the manner in which documents or other things are to be produced. The notice could require the person to produce the

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42 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

43 Law Council of Australia, *Submission RC 9*, 19 May 2009.

44 Law Council of Australia, *Submission RC 30*, 2 October 2009.

45 *Royal Commissions Act 1902* (Cth) s 2(1)(b).

documents covered by the notice at a specified place, on or before a specified date, or require the person to attend in person to produce the documents at a hearing.<sup>46</sup>

11.34 Documents and other materials are often a valuable source of information to an inquiry. As such, it is desirable that both Royal Commissions and Official Inquiries possess the power to issue a notice for the production of documents or other things. It is also desirable that the power be framed in such a way that allows the information-gathering process to commence at the earliest opportunity and prior to any hearings that may be held.

11.35 Taken together, the definition of ‘document’ in s 1B of the *Royal Commissions Act* and ‘record’ in s 25 of the *Acts Interpretation Act 1901* (Cth) includes information stored or recorded by means of a computer.<sup>47</sup> It is appropriate that similar definitional provisions are incorporated in the *Inquiries Act* and that an inquiry member issuing a notice for production is able to specify how the person is to produce documents or other things—for example, in an electronic format.<sup>48</sup>

### **Oral evidence**

11.36 Oral evidence can be a major source of information for Royal Commissions and other investigatory inquiries. It is recommended, therefore, that both Royal Commissions and Official Inquiries be empowered to require the appearance of a person at a hearing to give oral evidence or require a person’s attendance at an examination to answer questions. The ALRC’s recommendations with respect to the privilege against self-incrimination and direct use immunity are discussed in Chapter 17.

11.37 It is desirable that witnesses cooperate with inquiries and provide truthful evidence. It is inevitable, however, that this will not occur in every case. In the ALRC’s view, it is necessary to retain the power of a Royal Commission to take oral evidence at a hearing or examination on oath or affirmation and for this power to be conferred on Official Inquiries.<sup>49</sup>

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46 An alternative is to provide that a person may produce documents or things before the date specified in the notice and, unless otherwise directed, is not then required to attend the hearing unless he or she is also required to give evidence at the hearing: see *Administrative Appeals Tribunal 1975* (Cth) s 40(IE).

47 Section 1B of the *Royal Commissions Act 1902* (Cth) defines ‘document’ to include ‘any book, register or other record of information, however compiled, recorded or stored’. ‘Record’ is defined in s 25 of the *Acts Interpretation Act* to include ‘information stored or recorded by means of a computer’.

48 The issue of whether a person can be required by notice to produce a document or other thing not otherwise presently in existence—for example, paper copies of electronic records—will depend on the language and construction of the relevant statutory provisions: see *AB Pty Ltd v Australian Crime Commission* (2009) 175 FCR 296, 304.

49 An oath or an affirmation may be administered by an inquiry member, or a person authorised by an inquiry member: *Royal Commissions Act 1902* (Cth) s 2(3). The power to take evidence on oath or affirmation is also essential to ensure that offences in the *Crimes Act 1914* (Cth) apply. This is discussed in Ch 19.

11.38 The ALRC has considered whether persons other than inquiry members, for example inquiry staff or legal practitioners assisting an inquiry, should be authorised to exercise coercive information-gathering powers in some circumstances. The ALRC has reached the view that this would not be appropriate. The exercise of coercive powers may give rise to penalties for non-compliance and should be exercised only by a person who is sufficiently experienced and, importantly, has ultimate responsibility for the conduct of the inquiry.

**Recommendation 11–1** The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to issue notices requiring a person to:

- (a) attend or appear before the inquiry; and
- (b) produce documents or other things.

**Recommendation 11–2** The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to require a person appearing before the inquiry to give evidence or answer questions to swear an oath or make an affirmation. An inquiry member, or a person authorised by an inquiry member, should be empowered to administer an oath or an affirmation to that person.

### Powers of arrest

11.39 Section 6B of the *Royal Commissions Act*, originally inserted in 1912,<sup>50</sup> empowers the president or chair of a Royal Commission to issue a warrant for the apprehension of a person who has failed to attend in answer to a summons. Such a warrant authorises the apprehension of a person so that they can be brought before the Royal Commission and detained in custody for that purpose until they are released by order of the president or chair.<sup>51</sup> The apprehension of a person under s 6B of the Act does not relieve that person of any liability for offences or penalties relating to non-compliance with a Royal Commission.<sup>52</sup>

11.40 In New South Wales (NSW), Western Australia and the ACT, Royal Commissions and some public inquiries are empowered to issue arrest warrants on their own motion.<sup>53</sup> In South Australia, the chair of a Royal Commission may issue an arrest warrant or may apply to a magistrate for such a warrant.<sup>54</sup> In Queensland, the chair may make an ex parte application to a magistrate for the issue of a warrant for the

50 *Royal Commissions Act 1912* (Cth) s 7.

51 *Royal Commissions Act 1902* (Cth) s 6B(2).

52 *Ibid* s 6B(4).

53 *Special Commissions of Inquiry Act 1983* (NSW) s 22; *Royal Commissions Act 1923* (NSW) s 16; *Royal Commissions Act 1968* (WA) s 16; *Royal Commissions Act 1991* (ACT) s 35 (cf *Inquiries Act 1991* (ACT), which does not confer any arrest powers on boards of inquiry).

54 *Royal Commissions Act 1917* (SA) ss 11, 11A.

apprehension of a person who has failed to comply with a summons.<sup>55</sup> The chair may also issue a warrant on his or her own motion for the apprehension of a person who has failed, or probably will fail, to attend before the inquiry.<sup>56</sup>

11.41 In contrast to other state and territory jurisdictions, a Commission of Inquiry in Tasmania cannot, on its own motion, issue an arrest warrant. It must apply to a magistrate for a warrant to have a person apprehended and brought before the Commission.<sup>57</sup>

11.42 The powers of a federal Royal Commission in relation to arrest are somewhat different from those of permanent investigatory bodies such as the Australian Crime Commission (ACC). The ACC can only obtain an arrest warrant on application to a judge of the Federal Court of Australia or of the Supreme Court of a state or territory.<sup>58</sup> A person apprehended pursuant to such a warrant must be brought before a judge who may make orders as to whether they should be admitted to bail, continue in detention or be released.<sup>59</sup>

11.43 The Australian Securities and Investments Commission (ASIC) does not have the power to issue or apply for an arrest warrant. If a person fails to comply with its requirements, however, ASIC may certify the failure to the Federal Court of Australia, which may then inquire into the case and make orders for compliance by that person.<sup>60</sup> This procedure allows the court to use its contempt powers to coerce compliance with ASIC requirements, as any failure to comply with a court order would be punishable as a contempt.<sup>61</sup> Other permanent inquiry bodies, such as the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security (IGIS), do not have any powers to obtain an arrest warrant, although their enabling legislation establishes a number of non-compliance offences for those who refuse or fail to provide information, produce documents or answer a question when required.<sup>62</sup>

11.44 A modern approach to arrest powers in Commonwealth legislation is outlined in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (Guide to Framing Commonwealth Offences)* published by the Australian Government Attorney-General's Department.<sup>63</sup> Generally speaking, it is considered inappropriate to confer such powers on officers of a regulatory agency unless there is a

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55 *Commissions of Inquiry Act 1950* (Qld) s 5A(1).

56 *Ibid* ss 8, 9A.

57 *Commissions of Inquiry Act 1995* (Tas) s 27.

58 *Australian Crime Commission Act 2002* (Cth) s 31(1).

59 *Ibid* s 31(3).

60 *Australian Securities and Investments Commission Act 2001* (Cth) s 70.

61 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [2.59].

62 *Ombudsman Act 1976* (Cth) s 36; *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18.

63 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007).

clearly demonstrated need. Legislation conferring such powers should require that an apprehended person be delivered to a police officer or judicial officer.<sup>64</sup>

### ***Submissions and consultations***

11.45 In DP 75, the ALRC proposed that only Royal Commissions, and not Official Inquiries, be conferred with arrest powers. In addition, the ALRC expressed the view that an inquiry member should not be able to issue an arrest warrant on his or her own motion. Instead, the ALRC proposed that inquiry members be required to apply to a judge for a warrant.<sup>65</sup>

11.46 Both the Law Council and Liberty Victoria supported the ALRC's proposal.<sup>66</sup> In particular, the Law Council welcomed the ALRC's proposal that only judges should be empowered to issue an arrest warrant. The Law Council also agreed that such a power should not be conferred on Official Inquiries as such inquiries were less likely to require arrest powers to elicit the cooperation of those required to appear.

### ***ALRC's view***

11.47 The ALRC notes that there is an inconsistency between the power of a Royal Commission to issue an arrest warrant on its own motion and the entry, search and seizure powers of a Royal Commission, which may be exercised only under a warrant issued by a judge.<sup>67</sup> Further, Commonwealth investigatory bodies, including those that investigate serious crime, are generally not empowered to issue arrest warrants and must instead obtain such a warrant from a judge.

11.48 Given the potential for the rights and liberties of individuals to be adversely affected by arrest powers, it is appropriate that these be subject to certain limits and safeguards. The ALRC recommends, therefore, that the power in s 6B of the *Royal Commissions Act* should be redrafted in the recommended *Inquiries Act*. Royal Commissions should be required to apply to a judge to issue a warrant for the apprehension and immediate delivery of a person to a police officer or judicial officer.

11.49 It is envisaged that Official Inquiries will be established to inquire into less significant events or problems. It is less likely that arrest powers would be required to elicit the cooperation of those required by notice to appear before an Official Inquiry to give evidence or answer questions. If it is anticipated that a particular inquiry will need such a power, the Australian Government should consider establishing a Royal Commission rather than an Official Inquiry. Alternatively, if that need becomes clear

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64 Ibid, 106.

65 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–3.

66 Law Council of Australia, *Submission RC 30*, 2 October 2009; Liberty Victoria, *Submission RC 26*, 27 September 2009.

67 The ALRC recommends that these powers be retained for Royal Commissions but not extended to Official Inquiries: Recommendation 11–7.

only after an inquiry has commenced, that inquiry can be converted to a Royal Commission under the conversion power recommended by the ALRC in Chapter 5.<sup>68</sup>

11.50 In addition, the ALRC notes that other bodies that conduct inquiries, such as the Commonwealth Ombudsman and the IGIS, appear able to perform their functions in the absence of arrest powers. Other sanctions for non-attendance, which are the subject of recommendations in Chapters 19 and 20, will be available to Official Inquiries under the recommended *Inquiries Act*.

11.51 Arrest powers recommended for Royal Commissions, therefore, should not be extended to Official Inquiries under the recommended *Inquiries Act*.

**Recommendation 11–3** The power in s 6B of the *Royal Commissions Act 1902* (Cth), which enables a Royal Commission to issue a warrant for the apprehension of a person who fails to appear before it, should be redrafted in the recommended *Inquiries Act*. Royal Commissions should be required to apply to a judge to issue a warrant for the apprehension and immediate delivery of a person to a police officer or judicial officer. This power should not be conferred on Official Inquiries.

### **Disclosure of an existing summons or notice**

11.52 In the *Building Royal Commission Report*, Commissioner Cole recommended that the *Royal Commissions Act* be amended to empower a Commission:

by appropriate notice attached to a summons or notice to produce, to prohibit a person from disclosing the fact that he, she or it had received a summons or notice or had spoken with a Royal Commission investigator, subject only to the right to disclose this information for the purpose of obtaining legal advice, with contravention of such a prohibition to be a criminal offence punishable by a fine of \$2000 or imprisonment for one year.<sup>69</sup>

11.53 When drafting this recommendation, Commissioner Cole relied on comparable provisions from ss 29A and 29B of the *National Crime Authority Act 1984* (Cth), which have been retained in the corresponding sections of the *Australian Crime Commission Act 2002* (Cth).<sup>70</sup> Why such a power was deemed necessary was not articulated in the report.

11.54 Section 29A provides that an examiner issuing a summons or notice may include a notation prohibiting or restricting disclosure of information about the

68 Recommendation 5–3.

69 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 80.

70 *Australian Crime Commission Act 2002* (Cth) ss 29A, 29B. See also *Corruption and Crime Commission Act 2003* (WA) s 167.

summons or notice, or any official matter connected with it. The notation can be included only if the examiner is satisfied that failure to do so would reasonably be expected to, or might, prejudice the safety or reputation of a person; the fair trial of a person; the effectiveness of an operation or investigation; or if failure to do so might otherwise be contrary to the public interest. The notation must be accompanied by a written statement setting out the rights and obligations conferred or imposed by s 29B. The notations are cancelled if, after the conclusion of the operation or investigation, there is no evidence of an offence; a decision has been taken not to prosecute; or criminal proceedings have begun. In that case, the Chief Executive Officer of the Australian Crime Commission must serve a written notice of the fact of the cancellation.

11.55 Section 29B then provides that a person served with a summons or notice containing such a notation must not disclose the existence of, or any information about, the summons or notice or any official matter connected with it. The section does not apply if the notation has been cancelled, or after five years from the issue of the summons or notice. The maximum penalty for contravention of the prohibition is 20 penalty units (currently \$2,200) or imprisonment for one year.

11.56 The person may, however, disclose information about a summons or notice in accordance with any circumstances specified in the notation, to a legal practitioner for the purpose of obtaining legal advice or representation, or to a legal aid officer for the purpose of obtaining assistance.<sup>71</sup>

11.57 If the person is a body corporate, the person may disclose information about a summons or notice to an officer or agent of the body corporate for the purpose of ensuring compliance with the summons or notice.<sup>72</sup> If the person is a legal practitioner, and they are required to answer a question or produce a document at an examination that is protected from disclosure by client legal privilege, the legal practitioner may disclose it to the person who communicated the information or document in order to obtain his or her agreement that the legal practitioner may comply with the requirement.<sup>73</sup> Those to whom such disclosures have been made are also subject to the same criminal sanctions in case of a subsequent disclosure, with similar provisions allowing disclosure for the purpose of ensuring compliance or obtaining legal advice or representation, or legal aid.<sup>74</sup>

11.58 These provisions were first introduced in 1991, and were explained as follows:

The major reform contained in the Bill will prevent the disclosure of the existence of process issued by the [National Crime Authority] in the course of its investigations. It will also prevent disclosure of any information about the reference, the investigation or any hearings or proceedings to which the process relates. Previously some

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71 *Australian Crime Commission Act 2002* (Cth) s 29B(2)(a)–(c).

72 *Ibid* s 29B(2)(d).

73 *Ibid* s 29B(2)(e).

74 *Ibid* s 29B(3).

recipients of [National Crime Authority] summonses or notices, such as financial institutions, felt obliged to inform their clients of the receipt of these documents. This has resulted in suspects being alerted to [National Crime Authority] investigations and concealing or destroying evidence or going into hiding. The amendment will help to prevent this happening again, and will clarify the legal position of these institutions.

In addition to this, the amendment will serve to protect the reputation of suspects at a time when the allegations have not been properly investigated. The recipients of the summons or notice have to be given sufficient details about the suspects so that they can determine what information is required. The potential for damage to the reputation of these people through disclosure of the existence of the summons or notice could be significant.<sup>75</sup>

11.59 The ALRC notes that the power to prohibit disclosure of the existence of a summons or notice is uncommon even in the context of anti-corruption bodies or standing crime commissions. Further, the ACC is a permanent body specifically charged with investigating serious crime for the purposes of subsequent legal proceedings. That agency is held accountable in a number of ways, such as through supervisory processes, as well as monitoring by its own Board, and inter-governmental and parliamentary committees.

11.60 In DP 75, the ALRC noted that it was not inclined to recommend that such a power be conferred upon Royal Commissions and Official Inquiries, especially in the absence of any demonstrated need and because investigations of serious crime and corruption could be undertaken at the federal level by other bodies such as the ACC and the Australian Commission for Law Enforcement Integrity (ACLEI). The ALRC did, however, invite stakeholder views on the issue.<sup>76</sup>

### ***Submissions and consultations***

11.61 Some stakeholders thought that the power to prohibit the disclosure of the existence of a notice would be a useful mechanism for Royal Commissions and Official Inquiries.<sup>77</sup> The ACLEI suggested that consideration be given to allowing the person establishing the inquiry (either the relevant minister or the Governor-General) to determine whether the power should be conferred on inquiries on a case by case basis.<sup>78</sup>

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75 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1991, 1293 (M Duffy—Attorney-General).

76 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 11–1.

77 Liberty Victoria, *Submission RC 26*, 27 September 2009; I Turnbull, *Submission RC 22*, 21 September 2009.

78 Australian Commission for Law Enforcement Integrity, *Submission RC 18*, 14 September 2009. ACLEI referred to equivalent provisions in the *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 90, 91.

**ALRC's view**

11.62 The power to prohibit the disclosure of a summons or notice is exceptional. A person served with a notice who discloses the existence of, or any information about, the notice, or any matter connected with it, may be prosecuted. This would, for example, criminalise any communications between a person summoned and his or her spouse or immediate family members. In the ALRC's view, the powers conferred on inquiries should be proportionate to the functions and duties they perform. In the majority of inquiries, it is unlikely that the disclosure of the mere existence of a notice would prejudice the investigations of a Royal Commission or Official Inquiry. If it were considered that such prejudice could occur in the context of a particular inquiry, the Australian Government could seek to confer such a power through the enactment of legislation specific to that inquiry.

11.63 The ALRC is of the view that it would be difficult for an inquiry to monitor a person's compliance with a prohibition on the disclosure of the existence of a notice. If a breach was suspected, the matter would have to be referred to the Commonwealth Director of Public Prosecutions for prosecution through the courts. The ALRC notes that, in recent years, no charges have been brought for offences relating to the disclosure of the existence of a summons under the *Australian Crime Commission Act*.<sup>79</sup>

11.64 The ALRC does not recommend that inquiries established under the *Inquiries Act* be conferred with powers comparable to those found in ss 29A and 29B of the *Australian Crime Commission Act*. Further, for the reasons discussed in Chapter 5 relating to the selection of powers, the ALRC is of the view that the person establishing the inquiry should not be able to confer such a power on an inquiry on a case by case basis. Any such conferral should be done by enacting legislation specific to that inquiry.

**Power to require information or written statement**

11.65 In 2003, the Royal Commission into the Building and Construction Industry (Building Royal Commission) recommended that the *Royal Commissions Act* be amended to empower a Commission to require a person to provide a written statement about a specified matter.<sup>80</sup> In Commissioner Cole's view, the power would have enabled the Commission to avoid the time and expense of using oral hearings to obtain evidence that could have been presented in written form.

On one occasion, for example, the Commission sought information from a person who refused to speak to the Commission investigators or provide a statement. The

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79 For example, in 2007–08, the ACC issued 895 summonses. No charges were laid in respect of unauthorised disclosure of the existence of a summons. In contrast, eight charges were laid for failure to answer questions, seven for giving false or misleading evidence and two for failing to attend an examination: Australian Crime Commission, *Annual Report 2007–08*, 38–39.

80 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Rec 1(a).

Commission issued a summons to that witness, convened a hearing in Melbourne, and flew the witness to Melbourne from Perth for the hearing, only to have the witness state in the witness box that he didn't know anything about the matter under investigation. The waste of public time and resources is obvious, and would have been avoided if the witness could have been required to provide a statement.<sup>81</sup>

11.66 In 1976, Professor Enid Campbell also raised questions about whether express provision should be made to permit a person appearing as a witness to give evidence by a sworn written statement or by sending a written statement, verified in such manner as allowed by the Royal Commission.<sup>82</sup>

11.67 A number of Commonwealth statutes empower regulators to require a person to provide information in answer to a notice.<sup>83</sup> Legislation governing the operation of inquiries in overseas jurisdictions also allows a witness to give evidence by way of a written statement. For example, under the *Commissions of Investigation Act 2004* (Hong Kong), Commissions have the power—to the extent that the Commission considers proper—to examine or cross-examine a witness on oath or affirmation or by use of statutory declaration or written interrogatories.<sup>84</sup> Section 19 of the *Inquiries Act 2005* (UK) provides that the inquiry chair may direct a person by notice to provide evidence in the form of a written statement. As indicated in the Explanatory Notes, the potential witnesses normally would be first asked to give information voluntarily and the power of compulsion only used where a person was unwilling to comply with an informal request for information, or a person was willing to comply, but concerned about the consequences of disclosure if they were not compelled to do so.<sup>85</sup>

11.68 Greater emphasis on the use of written statements in Royal Commissions may make proceedings more efficient and reduce the cost of witness examinations. Professor Scott Prasser notes that the emphasis on taking evidence from witnesses in hearings is part of the reason why Royal Commissions 'take so long and cost so much'.<sup>86</sup>

11.69 The use of written statements, however, raises the concern that counsel will be unable to cross-examine witnesses and test evidence. This could be overcome by a Royal Commission making witness statements available early in proceedings where possible. Evidence in the Federal Court is often provided in written witness statements, particularly in trade practices and intellectual property cases. In these cases, the court may make orders for the filing and exchange of witness statements between the parties. When proceedings commence, the witness is sworn, handed a copy of his or her witness statement, asked to identify it and verify that the contents are correct. The

81 Ibid, vol 2, 24.

82 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 342.

83 *Superannuation Industry (Supervision) Act 1993* (Cth) ss 254, 264; *Life Insurance Act 1995* (Cth) s 131.

84 *Commissions of Investigation Act 2004* (Hong Kong) s 16(1)(c), (d).

85 Parliament of United Kingdom, *Explanatory Notes to Inquiries Act* (2005), 13.

86 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 24.

document is then tendered as the witness's evidence in chief, subject to any objections made on the basis of admissibility. A witness may then be cross-examined on the contents of the statement.<sup>87</sup>

### ***Submissions and consultations***

11.70 In IP 35, the ALRC asked whether Royal Commissions and other inquiries should be empowered to direct a person to make a written statement.<sup>88</sup> Some stakeholders thought it was a sensible requirement. It was noted that under the recently enacted *Coroners Act 2008* (Vic), a person can be required to prepare a statement for the purposes of a coronial investigation addressing matters specified by the coroner.<sup>89</sup>

11.71 Other stakeholders expressed reservations about whether such a requirement would operate effectively in practice. Some described the power as 'exceptional' noting that it went beyond the powers conferred on courts. As such, it would require more justification than simply saving the expense of calling a witness to give evidence at a hearing.

11.72 In its submission, the Construction, Forestry, Mining and Energy Union (CFMEU) strongly opposed the proposition that an inquiry should have the power to direct a person to provide a written statement. First, it submitted that the requirement to provide a written statement would represent a further erosion of the principle against self-incrimination. Secondly, the requirement went well beyond the coercive powers traditionally available to any investigatory bodies. It was argued that there was no justification for imposing such a requirement when a person could already be compelled to answer questions and produce documents.<sup>90</sup>

11.73 On balance, the AGS had some doubts that Royal Commissions or other public inquiries should have the power to compel individual witnesses to provide written statements of their proposed evidence. First, the AGS doubted that it would achieve the desired purpose because some potential witnesses would 'comply' by providing only a very brief statement which gave no real indication of the evidence they would give if subjected to reasonably rigorous cross-examination. Further, depending on the circumstances, such a task could be extremely onerous and beyond the capabilities of many witnesses.

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87 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), Ch 7. In an earlier report, the ALRC observed that the provision of witness statements in Federal Court matters was seen to be cost-effective by many practitioners: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [7.198].

88 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7-4.

89 *Coroners Act 2008* (Vic) s 42.

90 Construction, Forestry, Mining and Energy Union, *Submission RC 8*, 17 May 2009.

11.74 The AGS considered that a Royal Commission or inquiry should be prepared to receive written statements from witnesses who wish, or are prepared, to provide them. Such a course could assist the Royal Commission or inquiry to receive and deal with evidence in an efficient way. Also, such a course could assist a witness to address relevant issues in an efficient and comprehensive way. The AGS also suggested that consideration be given to extending the protections in s 6DD of the *Royal Commissions Act* to written witness statements provided to a Royal Commission.<sup>91</sup>

11.75 In contrast, Dr Ian Turnbull stated that written statements were appropriate for most witnesses and far more efficient than oral examination.<sup>92</sup>

11.76 Similarly, the CPSU submitted that where coercive powers were available to inquiries, those powers should also include the power to direct a person to provide a written statement. The CPSU described this as a sensible proposal, which was likely to save time and money in the conduct of Royal Commission proceedings.<sup>93</sup>

11.77 In DP 75, the ALRC proposed that inquiry members be empowered to issue a notice requiring a person to provide information in an approved form, such as a written statement. If that person did not provide the information, he or she would be required to attend the inquiry as if he or she had been issued with a notice to appear.<sup>94</sup>

11.78 All stakeholders who addressed this proposal expressed their support for it.<sup>95</sup> Mr Graham Millar supported such a proposal, but submitted that it would be better to reframe it so that attendance by a person was only required if the inquiry member, after receipt or non-receipt of the information, specified that attendance was required. Millar considered that this could avoid unnecessary attendances at the inquiry in cases where there had been only minor non-compliance with the notice that could be addressed through informal contact between inquiry staff and the person required to provide the information.<sup>96</sup>

### ***ALRC's view***

11.79 Inquiry members should be empowered under the recommended *Inquiries Act* to issue a notice requiring a person to provide information in a form approved by the inquiry.<sup>97</sup>

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91 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

92 I Turnbull, *Submission RC 6*, 16 May 2009.

93 Community and Public Sector Union, *Submission RC 10*, 22 May 2009.

94 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–4.

95 Liberty Victoria, *Submission RC 26*, 27 September 2009; I Turnbull, *Submission RC 22*, 21 September 2009.

96 G Millar, *Submission RC 21*, 21 September 2009.

97 The ALRC notes the position in New Zealand where Commissions of Inquiry are empowered to require a person to provide any 'information or particulars' in any form it dictates: *Commissions of Inquiry Act 1908* (NZ) s 4C(1). The NZLC has recently reviewed this power and recommended that it remain largely unchanged: New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 81–82.

11.80 Written statements have been used extensively in previous inquiries. In the HIH Royal Commission, for example, a large number of witnesses provided written statements but were not requested by counsel assisting or any of the parties' counsel to give oral evidence.<sup>98</sup> Similarly, the majority of those who provided statements and statutory declarations to the Equine Influenza Inquiry did not present oral evidence.<sup>99</sup> The Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry) heard oral evidence from 75 witnesses, but received statements from a further 130 witnesses.<sup>100</sup>

11.81 It is unlikely that these inquiries would have been able to accommodate such a large number of witnesses providing oral evidence at hearings, which are costly and time consuming. Notwithstanding the reservations of the kind expressed by the AGS, the power to require information in the form of a written statement may contribute significantly to the evidence-gathering process and to more rigorous and comprehensive factual findings. Obtaining information other than by way of oral evidence may reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry procedures.

11.82 While it is desirable that information be provided to an inquiry willingly—and past experience indicates that this will often be the case—it is the ALRC's view that the recommended *Inquiries Act* should also confer a power on inquiry members to compel the provision of information if that is justified in the circumstances. It is envisaged that, where appropriate, an inquiry member could require any person to provide information to the inquiry in a form approved by the inquiry. This enables the flexibility to require information to be provided in the form of a written statement or answers to a list of questions or free-form responses to certain matters of interest to the inquiry. In exercising such a power, an inquiry member should take into account relevant considerations such as whether providing information in the form requested would be overly burdensome or beyond a person's capabilities, or proportionate and justified for the performance of the inquiry's functions.

11.83 Information provided in compliance with a notice could be circulated to counsel assisting and other inquiry participants in order to determine whether the person providing it should be required to give further evidence orally. If further examination is not required, the information could be accepted as evidence in the inquiry without the necessity of calling the person. If further examination is to take place, the inquiry member should call the witness and follow a procedure similar to that used in the Federal Court with respect to witness statements, as outlined above.<sup>101</sup> This could provide an incentive for those from whom information is sought to use their best

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98 N Owen, *Report of the HIH Royal Commission* (2003), Appendix C.

99 I Callinan, *Equine Influenza: The August 2007 Outbreak in Australia—Report of the Equine Influenza Inquiry* (2008), Appendix D.

100 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), vol 1, [7.14].

101 Cross-examination of witnesses is discussed in Ch 15.

endeavours to comply—as an alternative to being required to give oral evidence. It is recommended that corresponding protections for a person providing information in this manner be incorporated into the recommended *Inquiries Act*.<sup>102</sup>

11.84 The ALRC agrees with Millar that if a person refuses to provide the information, or does not provide it within the period specified, an inquiry member should then be able to require him or her to attend the inquiry as if he or she had been issued with a notice to appear before the inquiry. If a person does not attend, that person would be liable for offences and penalties imposed for non-compliance with the directions of the inquiry.<sup>103</sup>

11.85 In the ALRC's view, the power to require information in an approved form does not represent a significant extension of the existing powers under the *Royal Commissions Act* to summon a person to appear or produce documents or other things. Analogous powers are available to investigatory bodies under other Commonwealth legislation and to overseas inquiries. The ALRC considers that the power to require information in an approved form should be available to both Royal Commissions and Official Inquiries under the recommended *Inquiries Act*.

**Recommendation 11–4** The recommended *Inquiries Act* should empower a member of a Royal Commission or Official Inquiry to issue a notice requiring a person to provide information in a form approved by the inquiry, failing which the member can require the person to attend the inquiry as if he or she had been issued with a notice to attend or appear before the inquiry.

### **Authority to inquire granted under foreign law**

11.86 Section 7A of the *Royal Commissions Act* provides that where the Australian Government has entered into appropriate arrangements with a foreign country for a Royal Commission to be granted an authority under the law of that country to take evidence and conduct inquiries in relation to the subject matter of the Commission, the information and evidence so obtained may be dealt with as if it had been obtained in Australia. This includes the use of that evidence for the purpose of the Royal Commission's report to the Governor-General.<sup>104</sup>

11.87 Section 7B of the *Royal Commissions Act* enables a Royal Commission to take evidence on oath or affirmation outside Australia where arrangements have been made with a foreign country. Evidence so obtained may be dealt with as if it had been taken

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102 Recommendation 17–2. The use immunity that applies to evidence given to an inquiry is discussed in more detail in Ch 17.

103 Offences and penalties are discussed in detail in Chs 19, 20 and 21.

104 *Royal Commissions Act 1902* (Cth) s 7A. Sections 7A, 7B and 7C were inserted into the *Royal Commissions Act* by the *Statute Law (Miscellaneous Amendments) Act (No 1) 1982* (Cth).

in Australia. Any statement or disclosure made by a witness in the course of giving evidence under the above provisions is not admissible against them in civil or criminal proceedings in Australia.<sup>105</sup>

11.88 Sections 16(2) and (3) of the *Royal Commissions Act* enable certificates to be issued by appropriate ministers as evidence of the existence of arrangements entered into with a foreign country pursuant to ss 7A and 7B of the Act.<sup>106</sup> These certificates can then be used as evidence in related legal proceedings.

11.89 In past Royal Commissions, the practice of obtaining information and evidence from overseas sources has often differed from the procedures set out in the *Royal Commissions Act*.

11.90 In the AWB Inquiry, one source of information was the United Nations, which had established procedures for certain overseas bodies seeking access to information and documents from the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (ICC).<sup>107</sup> The AWB Inquiry was granted access, subject to certain conditions, to documents held by the United Nations. In addition, the United Nations authorised the giving of a formal statement and evidence by one of the staff members of the ICC.<sup>108</sup>

11.91 In the HIH Royal Commission evidence was sought, unsuccessfully, from overseas sources. The Commission encountered difficulties when it sought production of HIH-related documents from parties in the United Kingdom and the United States. Those parties did not respond.<sup>109</sup> A Hong Kong firm said it could not comply with any of the Commission's requests for documents because of the impact of local ordinances.<sup>110</sup> In his Report, Commissioner Owen noted that, since he could not exercise powers of compulsion outside Australia, the lack of cooperation from these overseas sources significantly curtailed the Commission's ability to investigate thoroughly matters related to HIH in those jurisdictions.<sup>111</sup>

11.92 It appears that neither Royal Commission sought to use the powers and procedures in ss 7A and 7B of the *Royal Commissions Act*, which provide for inquiries to be made and evidence to be taken in foreign countries.

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105 *Royal Commissions Act 1902* (Cth) s 7C.

106 Explanatory Memorandum, Statute Law (Miscellaneous Amendments) Bill (No 1) 1982 (Cth).

107 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 4.

108 *Ibid.*, vol 1, [7.11]. The statement was tendered in evidence: Exhibit No EXH\_0965, *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <[www.oilforfoodinquiry.gov.au/](http://www.oilforfoodinquiry.gov.au/)> at 4 August 2009.

109 N Owen, *Report of the HIH Royal Commission* (2003), vol 1, [2.6].

110 *Ibid.* No further information about these ordinances was included in the Report.

111 *Ibid.*

### **Submissions and consultations**

11.93 In IP 35, the ALRC asked whether the framework for making inquiries and obtaining evidence overseas in ss 7A, 7B and 7C of the *Royal Commissions Act* is operating effectively and should be extended to public inquiries other than Royal Commissions.<sup>112</sup> In DP 75, the ALRC proposed that the current framework for making inquiries and obtaining evidence overseas in ss 7A, 7B, 7C, 16(2) and 16(3) of the *Royal Commissions Act* be retained in the recommended *Inquiries Act* and be available to both Royal Commissions and Official Inquiries.<sup>113</sup>

11.94 In its response to IP 35, the AGS queried the extent to which any mutual assistance arrangements between Australian and a foreign country would be available to a Royal Commission that was pursuing terms of reference relating to a law enforcement matter.<sup>114</sup> Such an investigation would not involve a prosecution and probably would not amount to a criminal investigation necessary to engage mutual assistance arrangements.<sup>115</sup>

11.95 In consultations, it was suggested that the provisions—which require the Australian Government to enter into appropriate arrangements with foreign countries—are too cumbersome to be used routinely in the conduct of Royal Commissions, which are subject to reporting deadlines and cost constraints. It was also suggested that the framework was time consuming and required significant resources.

11.96 Liberty Victoria was the only stakeholder to address the ALRC's proposal to retain the current framework for making inquiries and obtaining evidence overseas. It expressed support for the proposal.<sup>116</sup>

### **ALRC's view**

11.97 There are constraints on Royal Commissions and other government agencies exercising investigatory powers outside Australia. There is limited scope to address these constraints in legislation other than to introduce provisions that apply extraterritorially.<sup>117</sup> Even then, it would be difficult in respect of persons and

112 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–3(b).

113 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–5.

114 Mutual assistance is the process countries use to provide and obtain assistance from overseas governments in criminal investigations and prosecutions and is also used to recover the proceeds of crime: Australian Government Attorney-General's Department, *Extradition and mutual assistance—What is mutual assistance?* <[www.ag.gov.au](http://www.ag.gov.au)> at 20 July 2009.

115 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

116 Liberty Victoria, *Submission RC 26*, 27 September 2009.

117 Restrictions on Commonwealth legislative power arising under the common law extraterritoriality doctrine were removed by s 3 of the *Statute of Westminster 1931* (Imp). Since *Polyukhovic v Commonwealth* (1991) 172 CLR 501 (*War Crimes Act Case*) the external affairs power is understood to authorise the enactment of Commonwealth laws relating to any matter that is geographically external to Australia and a connection with Australia may not even be required: see *Horta v Commonwealth* (1994) 181 CLR 183, 194.

organisations based overseas, especially those with no physical presence or connection to Australia. The ALRC has not otherwise identified any legislative means to improve the current procedures that enable Royal Commissions to make inquiries and gather evidence overseas. The ALRC recommends, therefore, that the existing procedures for Royal Commissions be retained under the recommended *Inquiries Act*, and their application extended to Official Inquiries.

11.98 Issues relating to foreign evidence and mutual assistance are also of significance to courts, law enforcement bodies and other agencies, and are not unique to Royal Commissions and inquiries. The Australian Government could give consideration to streamlining the current procedures—through the development of protocols and expedited processes for making arrangements with foreign countries—to ensure that the existing powers can be exercised more effectively in practice by Royal Commissions and Official Inquiries. The ALRC recognises that such arrangements may depend, in large part, upon Australia’s foreign policy and relations with foreign countries and has not therefore made a recommendation in this regard.

**Recommendation 11–5** The recommended *Inquiries Act* should contain provisions, applicable to both Royal Commissions and Official Inquiries, equivalent to those in ss 7A, 7B, 7C, 16(2) and 16(3) of the *Royal Commissions Act 1902* (Cth), which concern the making of inquiries and taking of evidence outside Australia.

### **Inspect and copy documents and other things**

11.99 The *Royal Commissions Act* allows a Commission, member of a Commission, or other authorised person to inspect, retain and copy any documents or other things produced to the Commission. Section 6F entitles a Commission to retain documents or things ‘for so long as is reasonably necessary for the purposes of the inquiry’. A person may request that a document or other thing be returned to them, where retention ceases to be necessary for the purposes of the inquiry.<sup>118</sup>

### **Submissions and consultations**

11.100 In IP 35, the ALRC asked whether the power under the *Royal Commissions Act* to inspect, retain and copy documents was operating effectively.<sup>119</sup> In DP 75, the ALRC proposed that powers to inspect, copy and retain documents, similar to those in s 6F *Royal Commissions Act*, be included in the *Inquiries Act*.<sup>120</sup>

118 *Royal Commissions Act 1902* (Cth) s 6F.

119 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–3(c).

120 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–6.

11.101 The Victorian Society for Computers and the Law (VSCL) observed that the short time frames in which inquiries are established could create inefficiencies in the way information is handled. The VSCL cited the example of ‘hundreds of boxes of hard copy documents arriving on the doorstep of the Commission’, many of which had ‘in fact been printed out of the source organisation’s computer systems’. The VSCL noted the costs incurred by the inquiry of scanning this material back into digital form, in an attempt to deal with the large volumes of information delivered. It also noted that, due to the short timeframes involved, inquiries often needed to pay higher than market costs to ensure documents were processed in time to meet the inquiry’s deadlines.<sup>121</sup>

11.102 The VSCL suggested that in order to overcome these problems, guidelines or other explanatory material could be created to assist future inquiries and agencies and parties required to produce information to them.

11.103 The Australian Intelligence Community submitted that the *Australian Government Protective Security Manual* (PSM) detailed appropriate steps which ought to be taken by inquiries in handling national security information. It submitted that the inspection, retention and copying of such material should be done in accordance with the PSM.<sup>122</sup>

11.104 Liberty Victoria submitted that inquiries should only take and retain items if that were absolutely necessary. Further, inquiries should compensate or otherwise ensure that individuals and organisations were not unduly inconvenienced by the retention of documents and things by inquiries.<sup>123</sup>

#### ***ALRC’s view***

11.105 The powers of Royal Commissions to inspect, retain and copy documents produced to it are generally operating effectively and should be extended to both tiers of inquiry under the *Inquiries Act*. Royal Commissions and Official Inquiries require flexibility in how they deal with and manage documents and other things produced to them, including powers of inspection, retention and reproduction.

11.106 The ALRC notes the concerns of Liberty Victoria regarding the circumstances in which inquiries may retain documents or other things produced in compliance with a notice. The existing provisions, which should be retained in the *Inquiries Act*, make it clear that retention is only permitted if it remains ‘reasonably necessary’ for the purposes of the inquiry. In addition, a person is entitled to request the return of documents once these are no longer required by an inquiry. In the ALRC’s view, these provisions adequately protect the interests of participants.

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121 Victorian Society for Computers and the Law, *Submission RC 3*, 12 May 2009.

122 Australian Intelligence Community, *Submission RC 28*, 28 September 2009. Issues relating to the handling of national security information by inquiries are discussed in detail in Chapter 13.

123 Liberty Victoria, *Submission RC 26*, 27 September 2009.

11.107 These powers should be clarified, however, to enable Royal Commissions and Official Inquiries to require that documents be produced in a format approved by the inquiry. This may include production by electronic means. These matters are addressed in the ALRC's recommendation regarding the production of documents and other things. It would be appropriate for guidance on these issues to be included in the *Inquiries Handbook*.

**Recommendation 11–6** The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to inspect, retain and copy any documents or other things produced to an inquiry in terms equivalent to those in s 6F of the *Royal Commissions Act 1902* (Cth).

## Other investigatory powers

### Entry, search and seizure powers

#### *Current arrangements*

11.108 Historically, Royal Commissions have taken evidence primarily through the use of oral hearings.<sup>124</sup> The numerous state and federal Royal Commissions in the 1980s that dealt with organised crime, corruption and financial scandals, however, created a need for powers that allowed Royal Commissions access to new forms of evidence such as computer records, audio and visual surveillance, and telephone taps.<sup>125</sup>

11.109 In the Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (1984) (Costigan Royal Commission), for example, the traditional methods of collecting and testing evidence by public hearing were ineffective in countering the 'culture of silence' that surrounded the allegations of corruption under consideration in that inquiry.<sup>126</sup> In an interim report, Commissioner Costigan recommended that a Royal Commissioner should have the power to issue a search warrant.<sup>127</sup>

124 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 350.

125 J Ransley, 'The Powers of Royal Commissions and Controls Over Them' in P Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 22, 24.

126 F Costigan, *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984), vol 2.

127 F Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union Interim Report No 4* (1982), 8.

11.110 The Australian Government accepted this recommendation and amended the *Royal Commissions Act* in 1982, subject to the qualification that the warrant must be granted by an independent judicial officer.<sup>128</sup> It also limited the power to apply for warrants to ‘relevant Commissions’ designated as such in the Letters Patent.<sup>129</sup> In 2001, the Act was amended further to allow the Commission to authorise a police officer, who is assisting the Commission, to apply to a judge for a warrant.<sup>130</sup>

11.111 Under s 4(1A) of the *Royal Commissions Act*, a relevant Commission may authorise a member of the Commission, a member of the Australian Federal Police, or a member of the police force of a state or territory to apply for search warrants in relation to matters into which it is inquiring. A relevant Commission or authorised person may apply for a search warrant where there are:

- (a) ... reasonable grounds for suspecting that there may be, at that time or within the next following 24 hours, upon any land or upon or in any premises, vessel, aircraft or vehicle, a thing or things of a particular kind connected with a matter into which the relevant Commission is inquiring ... ; and
- (b) the relevant Commission, or the person, believes on reasonable grounds that, if a summons was issued for the production of the thing or things, the thing or things might be concealed, lost, mutilated or destroyed ...<sup>131</sup>

11.112 Where a judge is satisfied that there are reasonable grounds to issue the warrant, he or she may authorise police officers or other persons named in the warrant to use such assistance or force as is deemed necessary to enter the premises, vessel, aircraft or vehicle and seize anything relevant.<sup>132</sup>

11.113 Royal Commissions may also obtain search warrants under Part 1AA of the *Crimes Act 1914* (Cth). The *Crimes Act* provisions, however, require that there be a suspicion that an offence has occurred before a warrant can be issued. A suspicion that evidence may be destroyed or tampered with may not satisfy this requirement.<sup>133</sup>

11.114 Although entry, search and seizure powers in the *Royal Commissions Act* have been used relatively infrequently in past Royal Commissions, such powers have been described as ‘a necessary complement’ to the coercive information-gathering powers of Royal Commissions—in particular, because documents or things may be at risk of destruction if a notice or summons is issued requiring their production.<sup>134</sup>

128 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security); *Royal Commissions Amendment Act 1982* (Cth).

129 *Royal Commissions Act 1902* (Cth) s 1B.

130 *Ibid* s 4(1A). The amendment was inserted by the *Royal Commissions and Other Legislation Amendment Act 2001* (Cth), sch 1, item 4B.

131 *Royal Commissions Act 1902* (Cth) ss 4(1)(a), 4(1)(b).

132 *Ibid* s 4(3).

133 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 74.

134 *Ibid*, 73.

### ***State and territory legislation***

11.115 Most state legislation governing public inquiries contains similar provisions to the *Royal Commissions Act*.<sup>135</sup> In NSW, Royal Commissioners do not have a specific power to apply for a search warrant, but may use police officers seconded to a Commission to make an application under the *Search Warrants Act 1985* (NSW).<sup>136</sup>

11.116 Under the *Inquiries Act 1945* (NT), no warrant is required. Section 8 of that Act provides that a member of a Commission, or any authorised person, may have access to

all buildings, places, goods, books, documents and other papers for the purposes of the inquiry in respect of which the Board or Commissioner is appointed, and for that purpose may make extracts from or copies of any such books, documents or papers.

11.117 Section 19A of the *Commissions of Inquiry Act 1950* (Qld) grants a Royal Commissioner, rather than a court, the power to issue a search warrant.<sup>137</sup> Under that section, the inquiry chair can issue a search warrant if he or she is satisfied on reasonable grounds that the premises may contain things relevant to the inquiry, or that there may be evidence of an offence.<sup>138</sup>

11.118 The Tasmania Law Reform Institute (TLRI) considered the issue of search warrants in its 2003 report on Commissions of Inquiry.<sup>139</sup> It noted that the need for a magistrate's authority to issue a warrant operated as a check on the investigatory powers of a commission of inquiry to ensure the power of search and seizure was neither flaunted nor violated.<sup>140</sup> It concluded that there should not be an extension of the existing powers of search and seizure to enable a commission of inquiry in Tasmania to enter, search and seize documents or things without the need for a warrant.<sup>141</sup>

### ***Should inquiries be empowered to issue search warrants?***

11.119 The issue of a search warrant is not exclusively an exercise of judicial power, and therefore, a federal Royal Commissioner may be given the power to issue a warrant on his or her own motion.<sup>142</sup> The inclusion of such a power, however, may be contrary to the established policy of the Australian Government. The *Guide to Framing Commonwealth Offences* states that the power to issue a warrant to enter and search

135 See *Evidence Act 1958* (Vic) s 19E; *Royal Commissions Act 1968* (WA) s 18; *Commissions of Inquiry Act 1995* (Tas) s 24.

136 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 410.

137 A similar provision is also contained in the *Royal Commissions Act 1917* (SA) s 10, and the *Royal Commissions Act 1991* (ACT) s 25(1).

138 *Commissions of Inquiry Act 1950* (Qld) s 19B.

139 Tasmania Law Reform Institute, *Report on the Commissions of Inquiry Act 1995* (2003).

140 *Ibid.*, 9.

141 *Ibid.*, 10.

142 This issue is discussed in greater detail below.

premises should be conferred on magistrates acting in their personal capacity, and not ministers or departmental officers. It also states that ‘the greater independence of magistrates and the fact they are not responsible for enforcement outcomes ensures appropriate rigour in the warrant issuing process’.<sup>143</sup>

11.120 A number of overseas law reform bodies have considered whether the powers to search premises and seize documents or things are required by executive inquiries. The NZLC recommended that search and seizure powers should not be conferred on inquiries under the new Act recommended in its report.<sup>144</sup> In its view, public inquiries in New Zealand should not have a role in investigating the sort of criminal or regulatory activity that would require such powers. The NZLC noted, however, the historical differences between Australia and New Zealand in this regard, and in particular, the role that Australian Royal Commissions have played in investigating corruption, and the subsequent creation of permanent anti-corruption bodies.<sup>145</sup> The Law Reform Commission of Ireland also did not recommend the inclusion of a search warrant power in its report on public inquiries.<sup>146</sup>

11.121 In its report on public inquiries in 1992, the Ontario Law Reform Commission recommended enacting a stronger set of criteria for determining whether a search could be authorised. It recommended that a search warrant should be authorised in an inquiry only where:

- the documents or things are material to the subject matter of the inquiry;
- the public interest in obtaining access to the documents or things outweighs the privacy interests of the individual who holds them; and
- there are reasonable grounds to believe the documents or things would not be produced to the inquiry under a normal summons.<sup>147</sup>

11.122 Justice Ronald Sackville has argued that the granting of such extensive powers to Royal Commissions has unduly impacted on the rights of citizens without necessarily being effective in exposing the types of criminal behaviour under investigation.<sup>148</sup> Although search and seizure powers were introduced into the *Royal Commissions Act* to assist the Costigan Royal Commission, Prasser suggests that it was not those additional powers that produced clear evidence of tax evasion and corruption.

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143 Australian Government Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), [9.7].

144 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 20.

145 *Ibid.*, 83.

146 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005).

147 Ontario Law Reform Commission, *Report on Public Inquiries* (1992), Rec 8. This recommendation has not been adopted.

148 R Sackville, ‘Royal Commissions in Australia: What Price Truth?’ (1984) 60(12) *Current Affairs Bulletin* 3, 12.

Rather, it was the Commission's focus on broader research methods and the adoption of a computer information system that allowed disparate data to be analysed.<sup>149</sup>

11.123 In the Building Royal Commission, search warrants were used but they were not a major source of information. According to the Report, six search warrants were issued pursuant to the *Royal Commissions Act* and the information obtained advanced the investigations of the Commission.<sup>150</sup>

### Submissions and consultations

11.124 In IP 35, the ALRC asked whether members of Royal Commissions and other public inquiries should have the power to apply for a warrant to search for and seize a document or other thing, or issue such a warrant on his or her own motion, and if so, in what circumstances.<sup>151</sup>

11.125 Liberty Victoria submitted that invasive coercive powers such as search and seizure may sometimes be necessary, but must be balanced against civil liberties. Further, any such powers should be subject to judicial review. Liberty Victoria endorsed the current provisions of s 4 of the *Royal Commissions Act*, which require an application for a search warrant to be made to a judge, and did not support inquiries having inherent search and seizure powers.<sup>152</sup>

11.126 The AGS observed that it appeared out of step with existing policy for a Royal Commissioner to have search and seizure powers and endorsed the position that he or she must seek the issue of a warrant from a judicial officer.<sup>153</sup>

11.127 The AGS also discussed the possibility of extending the grounds upon which a search warrant could be issued, beyond instances in which documents might be concealed, lost, mutilated or destroyed. The AGS had reservations about such an extension. In particular, it noted that the privilege against self-incrimination did not apply to documents seized under warrant and would not be covered by the direct use immunity under s 6DD of the *Royal Commissions Act*.<sup>154</sup> This would mean that documents seized under warrant would be treated differently to documents produced under a summons or notice.<sup>155</sup> Under the Act as presently framed, where documents are seized under warrant, there is no constraint on the availability of those documents for use in evidence against the person from whom they were seized.

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149 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 203.

150 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 20.

151 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–5.

152 Liberty Victoria, *Submission RC 1*, 6 May 2009.

153 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

154 The use immunity is discussed in Ch 17.

155 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

11.128 In DP 75, the ALRC proposed that Royal Commissions, but not Official Inquiries, be empowered to apply to a judge for a warrant to exercise entry, search and seizure powers.<sup>156</sup> The Law Council generally supported Royal Commissions having wider powers than Official Inquiries, including entry, search and seizure powers.<sup>157</sup> Liberty Victoria submitted that it was appropriate for Royal Commissions to apply to a judge for a warrant to exercise such powers.<sup>158</sup>

### ALRC's view

11.129 Under the current regime, a Royal Commission cannot enter or search premises or seize documents or things without a search warrant having been issued by a judge. Similarly, the power to issue a search warrant under Part IAA of the *Crimes Act* is reserved for magistrates.<sup>159</sup> This serves as an important check on a Royal Commission's entry, search and seizure powers.

11.130 In the ALRC's view, a Royal Commissioner should not be empowered to issue search warrants on his or her own motion. Instead, entry, search and seizure powers of Royal Commissions should remain exercisable only under warrant issued by a judge. It is preferable to have a judicial officer, independent from the inquiry, determining that the requirements to issue a warrant have been met.

11.131 As noted above, the *Guide to Commonwealth Framing Offences* states that the power to issue warrants to enter and search premises should normally be conferred on magistrates, acting in their personal capacity.<sup>160</sup> Similarly, the exercise of seizure powers is said to require authorisation under warrant.<sup>161</sup> The approach taken in the *Guide to Framing Commonwealth Offences* to the issue of warrants for entry, search and seizure is broadly consistent with the recommendations made by the Senate Committee for the Scrutiny of Bills in its 2000 and 2006 reports on entry, search and seizure provisions in Commonwealth legislation.<sup>162</sup>

11.132 The ALRC notes that ss 4 and 5 of the *Royal Commissions Act*, as presently drafted, do not provide that the power to issue search warrants—which is generally regarded as involving the exercise of non-judicial power—is conferred on judges in

156 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–7.

157 Law Council of Australia, *Submission RC 30*, 2 October 2009.

158 Liberty Victoria, *Submission RC 26*, 27 September 2009.

159 *Crimes Act 1914* (Cth) s 3C. A search warrant may also be issued by a justice of the peace or other person employed in a court of a state or territory who is authorised to issue search warrants or warrants for arrest, as the case may be.

160 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), [9.7].

161 *Ibid.*, [9.6].

162 Parliament of Australia—Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2000—Entry and Search Provisions in Commonwealth Legislation* (2000). The Committee conducted a further inquiry into the Government's response to its 2000 report, entry and search provisions made since the report and provisions that authorise the seizure of material: Parliament of Australia—Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2006—Entry, Search and Seizure Provisions* (2006).

their personal and voluntary capacity. It is desirable that this be made clear in the recommended *Inquiries Act* for constitutional reasons.

11.133 Conferring non-judicial functions or powers on a judge or magistrate in their capacity as the court or a member of the court to which they belong would be contrary to the independence of the judiciary under the separation of powers doctrine enshrined in Chapter III of the *Australian Constitution*. A judge of the Federal Court or a Federal Magistrate may agree to exercise a non-judicial function if the power is vested in the judge's or magistrate's personal capacity, separate from the court they constitute.<sup>163</sup>

11.134 In the ALRC's view, entry, search and seizure powers should not be conferred on Official Inquiries. The use of such powers by Royal Commissions has been relatively infrequent, and Official Inquiries are even less likely to require this power. Secondly, entry, search and seizure powers are exceptional powers. Their exercise can be highly intrusive. It is appropriate that they be reserved for Royal Commissions as the highest tier of public inquiry. Thirdly, if it is anticipated that a particular inquiry will need entry, search and seizure powers, the Australian Government could establish a Royal Commission instead of an Official Inquiry. If the need for these powers only became clear after an Official Inquiry had commenced, it could be converted into a Royal Commission.<sup>164</sup>

11.135 Finally, the *Royal Commissions Act* does not presently extend the use immunity in s 6DD to material seized under a search warrant. In Chapter 17, the ALRC expresses the view that the immunity should not extend further than the purpose of the privilege against self-incrimination warrants—that is, it should extend only to protect a person from being compelled to testify against him or herself, for example, through the production of documents or the giving of evidence before an inquiry. The ALRC does not recommend, therefore, the extension of the use immunity to material obtained in exercise of entry, search and seizure powers by a Royal Commission.

**Recommendation 11–7** The recommended *Inquiries Act* should contain provisions for a Royal Commission, but not an Official Inquiry, to apply to a judge for a warrant to exercise entry, search and seizure powers equivalent to those in ss 4 and 5 of the *Royal Commissions Act 1902* (Cth). The *Inquiries Act* should provide that, if an application for a warrant is made to a judge of a federal court, the judge issues the warrant in his or her personal capacity.

### Dealing with intercepted information

11.136 Royal Commissions have no power to initiate the interception of telecommunications. The *Telecommunications (Interception and Access) Act 1979*

<sup>163</sup> See, eg, *Grollo v Palmer* (1995) 184 CLR 548.

<sup>164</sup> In Ch 5, the ALRC recommends a mechanism for the conversion of inquiries: Recommendation 5–3.

(Cth)<sup>165</sup> was amended in 2001, however, to enable a declared Commonwealth Royal Commission to receive information which has been lawfully intercepted by other agencies, and to use that information in the performance of its functions.<sup>166</sup> A number of Commonwealth and state law enforcement and investigatory agencies are permitted to receive and use such information. The Royal Commission into the New South Wales Police Service was likewise permitted to receive and use such information during its operation.<sup>167</sup>

11.137 In order to receive intercepted information under the provisions of the *Telecommunications (Interception and Access) Act*, a Royal Commission must first be declared eligible by the relevant minister. In making such a declaration, the minister must be satisfied that a Royal Commission is likely to inquire into matters that may involve the commission of a prescribed offence.<sup>168</sup>

11.138 In Queensland, the chair of a commission of inquiry may apply to a Supreme Court judge for approval to use a listening device.<sup>169</sup> The judge must consider a number of factors relating to privacy and public interest before granting approval.<sup>170</sup>

11.139 The use of listening devices by commissions of inquiry was considered by the TLRI in its 2003 report. It was noted that, while such devices may assist the investigations of some commissions, their use was

a clear invasion of privacy that can constitute a criminal offence. If a person or body is to be granted the power to use such devices then that grant of power must be strictly monitored.<sup>171</sup>

11.140 Notwithstanding this view, the TLRI recommended that a commission of inquiry be able to apply to a magistrate for a warrant to use listening devices, subject to the magistrate being satisfied that there are reasonable grounds for the belief that the use of such a device is necessary and appropriate to obtain evidence relating to a matter relevant to the inquiry. The TLRI also recommended that a magistrate have regard to other factors in granting the warrant, including the extent to which the privacy of any person is likely to be affected, any alternative means of obtaining the evidence sought and the evidentiary value of that evidence.<sup>172</sup>

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165 In 2001, the Act was called the *Telecommunications (Interception) Act 1979* (Cth). The current name of the Act was introduced by the *Telecommunications (Interception) Amendment Act 2006* (Cth).

166 The amendments were made by the *Royal Commissions and Other Legislation Amendment Act 2001* (Cth) ss 8–29.

167 Supplementary Explanatory Memorandum, Royal Commissions and Other Legislation Amendment Bill 2001 (Cth).

168 A prescribed offence is defined in subsection 5(1) of the *Telecommunications (Interception and Access) Act 1979* (Cth) and includes an offence punishable by a maximum penalty of a least three years imprisonment.

169 *Commissions of Inquiry Act 1950* (Qld) s 19C.

170 *Ibid* s 19C(3).

171 Tasmania Law Reform Institute, *Report on the Commissions of Inquiry Act 1995* (2003), 9–13.

172 *Ibid*, 11–12.

11.141 The use of intercepted information by Royal Commissions appears to be infrequent. In the Building Royal Commission, for which the 2001 amendments were introduced, information relating to one investigation was received from another agency. Further, the intercepted information had been acquired as a result of telecommunications interceptions conducted by and for the purposes of that agency.<sup>173</sup>

### ***Submissions and consultations***

11.142 In DP 75, the ALRC asked whether the provisions in the *Telecommunications (Interception and Access) Act* that permit the communication of intercepted information to Royal Commissions in certain circumstances should also apply to Official Inquiries.<sup>174</sup>

11.143 The Law Council generally supported greater powers being available to Royal Commissions than to Official Inquiries.<sup>175</sup> Liberty Victoria submitted that it was appropriate only for Royal Commissions, as the highest form of inquiry, to receive intercepted information.<sup>176</sup>

11.144 Turnbull described intercepted information as ‘very good evidence’ and supported both Royal Commissions and Official Inquiries being permitted to receive such information. Turnbull queried whether the receipt of intercepted information by an inquiry would prejudice future criminal proceedings and suggested that such evidence not be covered by use immunity.<sup>177</sup>

11.145 ACLEI noted that it was authorised under the *Telecommunications (Interception and Access) Act* to receive intercepted information about any corruption issue involving the Australian Federal Police or the ACC that may be identified by other integrity agencies or police forces as a result of their telecommunications interception activities.<sup>178</sup>

### ***ALRC’s view***

11.146 The ALRC does not recommend that Royal Commissions or Official Inquiries should be empowered to initiate the interception of telecommunications. The ALRC does recommend, however, that the existing provisions in the *Telecommunications (Interception and Access) Act*—which permit a body to receive intercepted information from other agencies—be retained in relation to Royal Commissions established under the *Inquiries Act*.

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173 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 20.

174 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 11–2.

175 Law Council of Australia, *Submission RC 30*, 2 October 2009.

176 Liberty Victoria, *Submission RC 26*, 27 September 2009.

177 I Turnbull, *Submission RC 22*, 21 September 2009. Use immunity is discussed in detail in Ch 17.

178 Australian Commission for Law Enforcement Integrity, *Submission RC 18*, 14 September 2009.

11.147 Although intercepted information has been used infrequently by Royal Commissions, there may be circumstances in which it will advance the investigations of a Commission—for example:

- an inquiry is investigating serious misconduct, corruption or criminal conduct;
- an inquiry has been asked to inquire into and report on potential contraventions of the law; or
- those under investigation will not cooperate with the inquiry, or will subvert access to or conceal documents or other material sought by the inquiry.

11.148 It is appropriate that the handling and use of intercepted information by a Royal Commission continue to be strictly regulated by the *Telecommunications (Interception and Access) Act*, including the detailed provisions relating to the admissibility of such information as evidence in legal proceedings.<sup>179</sup>

11.149 Official Inquiries should not be permitted to receive intercepted communications from other agencies. The ALRC does not anticipate that access to intercepted information will be necessary for, or proportionate to, the types of investigations likely to be undertaken by Official Inquiries. If there is a genuine need for a particular inquiry to access intercepted information in order to complete its investigations, it should be constituted as, or converted to, a Royal Commission.<sup>180</sup>

**Recommendation 11–8** The provisions in the *Telecommunications (Interception and Access) Act 1979* (Cth) that allow for the communication of intercepted information in certain circumstances should apply to Royal Commissions, but not Official Inquiries, established under the recommended *Inquiries Act*.

## Other issues

### Communication of information regarding contraventions of the law

11.150 Under s 6P of the *Royal Commissions Act*, a Royal Commission may communicate information or evidence it obtains relating to a contravention of a law of the Commonwealth, or of a state or territory, to certain specified people and bodies—such as the ACC,<sup>181</sup> the Law Enforcement Integrity Commissioner,<sup>182</sup> the Director of

179 A ‘proceeding’ for the purposes of the *Telecommunications (Interception and Access) Act 1979* (Cth) would include a Royal Commission as it is a body that has power to hear and examine evidence: s 5.

180 Recommendation 5–3.

181 *Royal Commissions Act 1902* (Cth) s 6P(2A).

182 *Ibid* s 6P(2B).

Public Prosecutions<sup>183</sup> and ‘the authority or person responsible for the administration or enforcement of that law’.<sup>184</sup>

11.151 Section 6P was inserted in 1982 and later amended in 1983 to permit a Commission to communicate information or furnish evidence or a document acquired by it to another Royal Commission, where such evidence is considered relevant.<sup>185</sup> Further amendments added the Director of Public Prosecutions to the list.<sup>186</sup> These amendments, which followed the Costigan Royal Commission and the Royal Commission of Inquiry into Drug Trafficking (1983) (Stewart Royal Commission), were intended to assist the prosecution process at the conclusion of a Commission investigating criminal activity.<sup>187</sup>

11.152 In 2001, the breadth of the discretion to refer information was widened to include information relating to contraventions of a law rather than information relating only to the commission of an offence. The amendment, therefore, captured conduct which was unlawful and not only conduct which constituted an offence under Commonwealth, state or territory law.<sup>188</sup> The Act was also amended to extend the provision to a contravention of a law that may attract a civil or administrative penalty, rather than only criminal offences.<sup>189</sup> These amendments were made to facilitate the exchange of information between the HIH Royal Commission and the concurrent investigation by ASIC into HIH’s market disclosure.<sup>190</sup> The HIH Royal Commission exercised the referral power on several occasions. Before any such referral, the individuals or entities affected by it were given the opportunity to make submissions.<sup>191</sup>

11.153 In addition to the referral power in s 6P of the *Royal Commissions Act*, the terms of reference may indicate that contraventions of the law should be considered by the Royal Commission and referred to the appropriate authorities. For example, in the HIH Royal Commission the terms of reference directed inquiry into several matters, including:

whether those decisions or actions might have constituted a breach of any law of the Commonwealth, a State or a Territory and, if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency ...

183 Ibid s 6P(1)(aa).

184 Ibid s 6P(1)(e).

185 Ibid s 6P(2) inserted by *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth) s 3.

186 *Royal Commissions Act 1902* (Cth) s 6P(1)(aa) inserted by the *Director of Public Prosecutions (Consequential Amendments) Act 1983* (Cth) s 30.

187 *Director of Public Prosecutions (Consequential Amendments) Act 1983* (Cth) ss 28–31; Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1983, 2883 (L Bowen—Attorney-General).

188 N Hancock, *Bills Digest No 42—Royal Commissions and Other Legislation Amendment Bill 2001*, Department of the Parliamentary Library, Information and Research Services, 9.

189 *Royal Commissions Act 1902* (Cth) s 6P(1A) inserted by *Royal Commissions and Other Legislation Amendment Act 2001* (Cth) s 7.

190 Explanatory Memorandum, *Royal Commissions and Other Legislation Amendment Bill 2001* (Cth), 2.

191 N Owen, *Report of the HIH Royal Commission* (2003), vol 1, [2.8].

11.154 In the *Report of the HIH Royal Commission*, Commissioner Owen indicated that he had approached this aspect of the terms of reference by first looking at whether there might have been a breach of the law and, if so, by going on to consider whether the matter should be referred to an agency. In doing so, Commissioner Owen took into account a number of factors including:

- the relative seriousness of the conduct in the context of the failure of HIH;
- the role and involvement of the person concerned in the management and failure of HIH;
- what factors—including the availability of admissible evidence—might impinge on the likelihood (without determining the question) of the agency being able to establish the referred matter to the criminal or civil standard, as the case may be;
- whether any personal or peculiar factors called for special consideration; and
- the public interest in, and regulatory effect of, a successful action.<sup>192</sup>

11.155 This aspect of the terms of reference meant that findings as to possible contraventions and recommended referrals—which were numerous—could be set out in the report instead of adhering to the referral procedure in s 6P of the *Royal Commissions Act*. The *Report of the HIH Royal Commission* recommended that 56 possible breaches of the *Corporations Act 2001* (Cth) and the *Crimes Act 1900* (NSW) be referred to either ASIC or the NSW Director of Public Prosecutions for further investigation.<sup>193</sup> This approach contemplated the transfer of evidence and documents to the relevant authorities at the conclusion of the Royal Commission. Ultimately, however, separate legislation was required to facilitate the transfer of these records.<sup>194</sup> This overcame the requirement to give notice of the transfer to the owners of the documents and enabled ASIC to obtain custody of the Royal Commissions records.<sup>195</sup> As discussed in Chapter 8, the *Royal Commissions Act* was subsequently amended to incorporate similar provisions—now in s 9 of the Act—for the retention and use of records in all Royal Commissions.<sup>196</sup>

11.156 In 2003, the Building Royal Commission recommended that s 6P be amended to enable Royal Commissions to communicate evidence or information

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192 Ibid, vol 1, [1.2.7].

193 S Dudley, *Bills Digest No 181—HIH Royal Commission (Transfer of Records) Bill 2003*, Department of the Parliamentary Library, Information and Research Services, 1.

194 *HIH Royal Commission (Transfer of Records) Act 2003* (Cth).

195 The procedural fairness requirements arose as a result of the High Court decision in *Johns v Australian Securities Commission* (1993) 178 CLR 408.

196 Section 9 of the *Royal Commissions Act 1902* (Cth) was inserted by the *Royal Commissions Amendment (Records) Act 2006* (Cth). Issues relating to custody, use and access to records of completed Royal Commissions are discussed in Ch 8.

relating to a contravention of any law to ‘any agency or body of the Commonwealth, a State or a Territory prescribed by the regulation’.<sup>197</sup> In Commissioner Cole’s view, the scope of s 6P(1)(e) in its present form, which enables the communication of information relating to a contravention of a law to ‘the authority or person responsible for the administration or enforcement of that law’, is uncertain.<sup>198</sup> In particular, Commissioner Cole thought that there may be a problem with passing the information to a state crime commission or similar body, as there may be a distinction between bodies which enforce the law and bodies which investigate breaches of a law.

### Submissions and consultations

11.157 In IP 35, the ALRC asked whether Royal Commissions and other public inquiries should be able to communicate information relating to a contravention of a law to law enforcement bodies in addition those listed in the *Royal Commissions Act* and, if so, which additional bodies.<sup>199</sup>

11.158 In its response to IP 35, Liberty Victoria submitted that inquiries should be able to communicate information to other bodies, but only where it would not breach a person’s civil liberties or where adequate protections were in place. Further, information obtained by an inquiry that revealed criminal conduct should be referred to police for further investigation but, depending on how it was obtained, should not be admissible in later proceedings. Liberty Victoria considered that this would ensure that a person would not withhold information from an inquiry based on a fear that information could be used against him or her at a later date.<sup>200</sup>

11.159 The AGS made a number of comments about the practical operation of the referral power in s 6P of the *Royal Commissions Act*.<sup>201</sup> Referrals had to be made during the currency of the Royal Commission as the power was not exercisable once the report had been delivered. Further, referrals under s 6P required the Commissioner to decide that it was appropriate to refer each piece of evidence or item of information and did not contemplate a ‘global’ referral of evidence or information. If a particular Royal Commission possessed significant amounts of evidence or information relating to contraventions of the law, the process of making referrals could be time consuming and require significant resources.

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197 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Rec 1(c).

198 Ibid.

199 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–8.

200 Liberty Victoria, *Submission RC 1*, 6 May 2009.

201 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

11.160 The AGS also noted that, where large amounts of evidence are involved, it may not be possible for all referrals to be made before submission of the final report. Further, an affected person would normally have to be put on notice and given the opportunity to make submissions for reasons of procedural fairness.<sup>202</sup>

11.161 The AGS submitted that the interaction between the regime in s 9 of the *Royal Commissions Act*—which provides for the custody and use of records of a Royal Commission—and the scope of the referrals power in s 6P had become complicated and required review and simplification.

11.162 In DP 75, the ALRC expressed the view that both Royal Commissions and Official Inquiries should be able to communicate information about contraventions of the law to agencies responsible for the administration and enforcement of the law. The ALRC was of the view that those agencies should be prescribed by regulation made under the recommended *Inquiries Act*.<sup>203</sup>

11.163 Liberty Victoria supported this proposal.<sup>204</sup> ACLEI submitted that Royal Commissions and Official Inquiries should be empowered to communicate such information to the Integrity Commissioner if it relates to a corruption issue under the *Law Enforcement Integrity Commissioner Act 2006* (Cth). ACLEI also proposed an amendment to the *Law Enforcement Integrity Commissioner Act* to empower the Integrity Commissioner to volunteer information to Royal Commissions and Official Inquiries.<sup>205</sup>

### **ALRC's view**

11.164 Royal Commissions and Official Inquiries established under the recommended new statutory framework should have powers to enable inquiry members to refer evidence or information about contraventions of the law to appropriate law enforcement authorities. The existing referral power in the *Royal Commissions Act*, however, requires clarification in a number of respects before it is incorporated into the recommended *Inquiries Act*.

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202 See *Johns v Australian Securities Commission* (1993) 178 CLR 408. The principles of procedural fairness are discussed in Ch 15.

203 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–8.

204 Liberty Victoria, *Submission RC 26*, 27 September 2009.

205 Australian Commission for Law Enforcement Integrity, *Submission RC 18*, 14 September 2009.

11.165 First, the referral power should be drafted in a way that does not have the effect of requiring inquiry members to make referral decisions in respect of individual items of evidence and information if that is not necessary in the particular circumstances. The recommended *Inquiries Act* could, for example, enable an inquiry member to refer evidence or information that relates to the contravention of any law ‘in any manner that he or she considers appropriate’. This would allow a more flexible approach to referrals of information and remove present doubts about the operation of s 6P of the *Royal Commissions Act*. For example, it would enable an inquiry member to decide to refer a class of documents, rather than individual items of evidence or information. In this regard, the ALRC does not recommend that the abrogation of procedural fairness obligations in the context of the transfer of the records of completed Royal Commissions be extended to referrals of information made during the currency of an inquiry.<sup>206</sup>

11.166 Secondly, to avoid doubt, any referral power in respect of information or evidence obtained by a Royal Commission should operate subject to the protections in respect of statements made by witnesses or documents produced to a Royal Commission and the application of client legal privilege. This would ensure consistency with the existing framework for the transfer of records in s 9 of the *Royal Commissions Act*. In particular, s 9(12) preserves the operation of s 6DD of the Act, which provides that certain statements by a witness before a Royal Commission are not admissible in evidence against the witness.<sup>207</sup>

11.167 Thirdly, the referral power should specify the persons and agencies to which information or evidence may be communicated. In the ALRC’s view, the *Inquiries Act* should provide that Royal Commissions and Official Inquiries be empowered to communicate information to bodies or persons responsible for the administration or enforcement of the law as prescribed by regulations under the Act. This would enable the list of agencies of bodies to be updated from time to time without requiring legislative amendment of the Act. This approach would still ensure parliamentary oversight through the usual procedures for scrutiny of delegated legislation. Under this approach, ACLEI could be included as a prescribed agency under the regulations.

11.168 Such a process may also remove the need to make specific provision for referrals of information in the terms of reference of an inquiry, although it would not preclude the Australian Government from doing so.

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206 The removal of the obligation to accord procedural fairness to a person who could be adversely affected if documents obtained by a completed Royal Commission are subsequently transferred to other persons or agencies and used for other purposes is contained in s 9(11) of the *Royal Commissions Act 1902* (Cth). Issues relating to the custody, transfer and use of records of completed Royal Commissions are discussed in Ch 8.

207 See Explanatory Memorandum, *Royal Commissions Amendment (Records) Bill 2006* (Cth). Section 6DD of the Act is discussed in Ch 17.

**Recommendation 11–9** The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to communicate information that relates to a contravention, or evidence of contravention, of a law of the Commonwealth or of a state or territory, to bodies or persons responsible for the administration or enforcement of the law as prescribed by regulations under the Act.

### Concurrent functions and powers under state laws

11.169 By issuing complementary Letters Patent, federal and state governments may establish a joint Royal Commission.<sup>208</sup> There have been a number of such Commissions in Australia including: the Stewart Royal Commission; the Royal Commission into the Activities of the Australian Building Construction Employees' and Builders Labourers' Federation (1982); and the Royal Commission into Aboriginal Deaths in Custody (1991).

11.170 Royal Commissions may gain access to documents and other material by the use of state legislation in the case of joint inquiries. The Stewart Royal Commission was able to search and seize documents under the *Criminal Code* (Qld) and the *Health Act 1937* (Qld).

11.171 Section 7AA of the *Royal Commissions Act* allows a federal Royal Commission to accept powers and functions given to it by a state government in the Letters Patent of joint Royal Commissions. It was inserted in the Act in 1982 following the decision in *R v Winneke: Ex parte Gallagher*.<sup>209</sup> In that case, the court found that a commissioner could rely on both the federal *Royal Commissions Act* and the relevant state legislation in issuing a summons to a witness where the matter under inquiry fell within both terms of reference.<sup>210</sup> The enactment of s 7AA was intended to remove any doubt about this matter.<sup>211</sup>

11.172 While the coercive powers granted under the *Royal Commissions Act* may be exercised throughout Australia, the powers possessed by a state commission may be exercised only in that state. Campbell notes that during a joint commission, the federal Royal Commission must be careful not to use a state power outside of that state, even where the power is being used in a way that is relevant to the state inquiry.<sup>212</sup> This does not appear to be affected by s 7AA.

208 E Campbell, *Contempt of Royal Commissions* (1984), 9.

209 *Royal Commissions Amendment Act 1982* (Cth); *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211.

210 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 219.

211 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security). In *Sorby v Commonwealth*, Gibbs CJ noted that the enactment of s 7AA was unnecessary, given the decision in *Re Winneke: Sorby v Commonwealth* (1983) 152 CLR 281, 248.

212 E Campbell, *Contempt of Royal Commissions* (1984), 11.

11.173 There also may be issues where subsequent legal proceedings arise from a Commission. In *Giannarelli v The Queen*, two witnesses who had given evidence to the Costigan Royal Commission were charged with perjury. The proceedings were brought in the Supreme Court of Victoria under the *Crimes Act 1958* (Vic). Transcripts of their evidence in the Royal Commission were used as evidence in the case. The High Court overturned the conviction on the basis that the transcripts from the federal Royal Commission should not have been admitted as evidence because s 6DD of the *Royal Commissions Act* does not allow a statement of a witness to be used in evidence against a witness in criminal or civil proceedings in any Australian court.<sup>213</sup>

### Submissions and consultations

11.174 In IP 35, the ALRC sought stakeholder views on the exercise of coercive powers by a Royal Commission or other public inquiry established jointly by the Australian Government and the government of a state or territory.<sup>214</sup> In DP 75, the ALRC proposed that only Royal Commissions and not Official Inquiries may have concurrent functions and powers conferred under the *Inquiries Act* and state and territory laws.<sup>215</sup>

11.175 In response to IP 35, the AGS noted that there would always be the prospect of challenges of the type that was involved in *R v Winneke; Ex parte Gallagher*.<sup>216</sup> The AGS observed that close consultation and cooperation between the Australian Government and state or territory governments involved should ensure that the arrangements worked in a way that limits the scope for challenge.<sup>217</sup>

11.176 Turnbull, the only stakeholder to address the ALRC's proposal in relation to concurrent inquiries in DP 75, queried the distinction made between Royal Commissions and Official Inquiries in this proposal.<sup>218</sup>

### ALRC's view

11.177 The subject matter of a Royal Commission may have a multi-jurisdictional character or involve events occurring throughout Australia. As such, the ALRC recommends that the power to confer concurrent functions and powers on federal Royal Commissions under state law should be retained in the recommended *Inquiries Act* subject to the following comments. The ALRC has not identified any reason in

213 *Giannarelli v The Queen* (1983) 154 CLR 212; see P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 631. However, s 6DD does not apply to admissibility of evidence in proceedings for an offence under the *Royal Commissions Act 1902* (Cth).

214 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–9.

215 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–9.

216 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211.

217 Australian Government Solicitor, *Submission RC 15*, 18 June 2009.

218 I Turnbull, *Submission RC 22*, 21 September 2009.

principle why these provisions should not also enable the conferral of powers under the law of a territory.

11.178 It is possible that the concurrent sources of power of joint Royal Commissions may give rise to legal complexities from time to time. For example, it may not always be clear whether federal or state powers are being exercised. While these complexities cannot be remedied easily in Commonwealth legislation, the inter-governmental agreement establishing the joint Royal Commission should clarify such issues and ensure that both the terms of reference of the Commonwealth and of the state or territory are—subject to any constitutional or other legal limitations—coextensive.

11.179 In the ALRC's view, only Royal Commissions should be able to exercise concurrent functions and powers under state and territory laws. Under the ALRC's recommended statutory framework, it is envisaged that Official Inquiries will have a limited range of coercive information-gathering and investigatory powers. In contrast, some state and territory legislation confers entry, search and seizure powers and arrest powers on Royal Commissions and other public inquiries.<sup>219</sup> It would not be appropriate to enable the limitations on the powers of Official Inquiries to be sidestepped by the conferral of wider powers under state and territory inquiries legislation.

11.180 As noted in relation to other types of powers in this chapter, a particular inquiry could be constituted as a Royal Commission if coercive powers are also to be conferred by a state or territory. If such powers were to be conferred on an Official Inquiry that had already commenced, the inquiry could be converted to a Royal Commission in accordance with the ALRC's recommendation in Chapter 5.<sup>220</sup>

**Recommendation 11–10** The recommended *Inquiries Act* should provide that Royal Commissions, but not Official Inquiries, may have concurrent functions and powers conferred under the Act and state and territory laws.

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219 In relation to entry, search and seizure powers, see: *Evidence Act 1958* (Vic) s 19E; *Royal Commissions Act 1968* (WA) s 18; *Commissions of Inquiry Act 1995* (Tas) s 24. In relation to arrest powers, see: *Special Commissions of Inquiry Act 1983* (NSW) s 22; *Royal Commissions Act 1923* (NSW) s 16; *Royal Commissions Act 1968* (WA) s 16; *Royal Commissions Act 1991* (ACT) s 35.

220 Recommendation 5–3.