

15. Procedures: General Aspects

Contents

Introduction	372
Methods of inquiry	372
Processes of Royal Commissions	373
Measures to encourage flexibility	374
Statutory list of available procedures	374
Guidance on the selection of procedures	375
ALRC's view	376
Procedural fairness	376
Aspects of procedural fairness	377
Guidance on procedural fairness	379
Submissions and consultations	380
ALRC's view	382
The Salmon Principles	383
Principle 1—Involving a person in an inquiry	384
Principle 2—Putting witnesses on notice	384
Principle 3—Legal assistance and representation	385
Principles 4 and 6—Examination and cross-examination	385
Principle 5—Calling of witnesses	386
Submissions and consultations	386
ALRC's view	387
Leave to appear and be represented	387
Criteria for authorisation	388
Legal representation	389
Submissions and consultations	390
ALRC's view	391
Examination and cross-examination	392
Cross-examination	393
Submissions and consultations	394
ALRC's view	396
Publication of responses to adverse findings	396
Submissions and consultations	398
ALRC's view	398

Introduction

15.1 The types of procedures an inquiry member chooses to employ will be extremely important to the effectiveness and efficiency of an inquiry. When making this choice, an inquiry member will need to consider a range of matters, including: the purposes of an inquiry; the types of information needed to fulfil the terms of reference; the accessibility, quality and means of obtaining the information; and the impact of the methods of information-gathering on affected parties. In particular, when an inquiry is required to investigate allegations of misconduct or serious mismanagement, an inquiry member will have to balance the wider interest in exposing wrongdoing and ensuring transparency against the individual rights and interests that may be affected.

15.2 In this chapter, the ALRC examines a number of general issues relating to the procedures adopted by inquiries. First, it examines the types of procedures available to conduct an inquiry. Secondly, it examines the requirement that the procedures adopted comply with the principles of procedural fairness, and whether the obligations of procedural fairness should be extended to include the right to appear and be represented, and a right to cross-examine a witness. The next chapter addresses particular aspects of procedures which affect the interests of individuals participating in an inquiry.

Methods of inquiry

15.3 There are many possible methods of inquiring into a matter. The *Royal Commissions Act 1902* (Cth) itself does not prescribe any particular method of conducting an inquiry, and Royal Commissions have wide powers to regulate their own proceedings. The procedures adopted will necessarily vary from inquiry to inquiry, because of ‘the infinite variety of circumstances that may give rise to the need for a major public inquiry’.¹ In determining the procedures, inquiry members need to balance the objectives of effectiveness, fairness, efficiency, and economy.²

15.4 Methods of conducting an inquiry include: the use of written submissions; the conducting of informal and confidential interviews; the analysis of documentary information; meetings with stakeholders; expert reports; and the use of public and private hearings. These methods may be combined in one inquiry and, in fact, most Royal Commissions have combined a number of these methods.

15.5 For example, as well as requiring information by notice or summons and conducting public hearings, the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission) invited written submissions from stakeholders, met with industry participants, researched and published discussion papers for comment, and hosted a conference on workplace health and safety. Further,

1 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [2.3].

2 Ibid, [2.3]–[2.9].

it obtained information from government agencies through memorandums of understanding, received telephone interception information from other agencies, obtained ‘overview evidence’ intended to inform the Commission about issues in the building industry, and conducted private hearings.³

15.6 Methods of inquiry often are categorised as adversarial or inquisitorial. Adversarial procedures are used in the courts of common law countries—that is, parties identify the issues and present the case as they think fit, and the judge acts as an umpire deciding between the cases put by the parties. In contrast, ‘the essential role of an inquisitorial body is to gather evidence, question witnesses and determine the process and direction of the inquiry’.⁴ Although this distinction has its uses, in practice inquiry procedures tend to include elements of both adversarial and inquisitorial methods. It is difficult, therefore, ‘to draw an absolutely hard and fast distinction between the inquisitorial and adversarial modes’.⁵

Processes of Royal Commissions

15.7 The processes of Royal Commissions and other forms of inquiry were the subject of significant comment in consultations. As many stakeholders observed, the public expectation and the usual practice is that Royal Commissions are conducted in a manner similar to courts, with public hearings consisting of opening statements, examination and cross-examination of witnesses, and closing statements. The *Royal Commissions Act* uses terms such as witnesses, evidence, formal hearings, cross-examination, and appointment of counsel assisting, which may reinforce the use of a court-like procedure.⁶

15.8 Some stakeholders observed that such procedures may not be the most appropriate or efficient method of investigation. The use of court-like procedures may inhibit cooperation from witnesses, and tends to encourage an adversarial rather than an inquisitorial process, which may be inappropriate for an investigation such as a Royal Commission. Such procedures are also time consuming and costly. Further, such procedures may cause significant and irreparable harm to the reputations of witnesses who may endure a form of ‘trial by media’.⁷

15.9 In the opinion of many stakeholders, the undue focus on public hearings and court-like procedures is the product of a number of factors. These include: public expectations as to the conduct of a Royal Commission; media pressure for public hearings; the time pressures experienced by Royal Commissions; and the legal training of most Royal Commissioners. The cumbersome and costly nature of the typical Royal

3 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 17–29.

4 G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 39–40.

5 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.3].

6 See, eg, *Royal Commissions Act 1902* (Cth) ss 2, 3, 6, 6FA.

7 The issue of public access to hearings is discussed in Ch 16.

Commission is, in the view of many stakeholders, a principal motivation behind the increased use of non-statutory inquiries. This is so even though nothing in the *Royal Commissions Act* itself requires adversarial processes.

15.10 Stakeholders observed that the conduct of non-statutory forms of public inquiries tended to be more inquisitorial. Such inquiries tend to rely on more flexible procedures such as meetings with stakeholders, investigations based on analysis of documentary records, and written submissions. This, it was suggested, resulted in more efficient inquiries which were able to report quickly, and cost less than Royal Commissions.⁸ A number of stakeholders expressed concern that a statutory structure may limit this procedural flexibility.

Measures to encourage flexibility

15.11 Throughout this Report, the ALRC has recommended measures that encourage greater flexibility in the appointment of inquiries. As discussed in Chapter 5, the ALRC recommends that there should be another form of statutory inquiry, called an Official Inquiry.

15.12 The use of Official Inquiries is a key mechanism for increasing flexibility. It is expected that Official Inquiries will use more informal procedures than Royal Commissions, since the public expectations that apply to Royal Commissions are less likely to apply to Official Inquiries. Further, the Australian Government may be more likely to appoint non-judicial members to conduct an Official Inquiry, as is presently the case with non-statutory inquiries. In addition, in Chapter 6, the ALRC recommends that the *Inquiries Act* should provide for the appointment of an expert or experts in any field to assist inquiry members.⁹ As expert advisors may be appointed to advise on legal matters, this may also encourage the appointment of members with other types of expertise to both Royal Commissions and Official Inquiries.

Statutory list of available procedures

15.13 Some stakeholders suggested that a legislative provision emphasising the wide variety of procedures available to inquiries may provide a degree of support for inquiry members who wish to adopt a different kind of procedure, and encourage inquiry members to consider other forms of procedure.

15.14 In its report, *A New Inquiries Act*, the New Zealand Law Commission (NZLC) recommended the inclusion of such a provision to address similar concerns about the appropriateness of court-like procedures.¹⁰ Clause 14(3) of the resulting Inquiries Bill 2008 (NZ) provides that inquiries ‘may determine matters such as’:

- (a) whether to conduct interviews, and if so, who to interview;

8 This is discussed also in the context of public hearings in Ch 16.

9 Recommendation 6–9.

10 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 14.

- (b) whether to call witnesses, and if so, who to call;
- (c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held;
- (d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry;
- (e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions; and
- (f) whether to allow or restrict cross-examination of witnesses.

15.15 This clause is expressed so as not to limit the general power of an inquiry to ‘conduct its inquiry as it considers appropriate’, subject to the Act, or the inquiry’s terms of reference.¹¹ The NZLC considered that such a provision would help inquiry participants, inquiry members and the public to understand the scope of the inquiry’s powers.¹²

15.16 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed a provision along the lines of the New Zealand model.¹³ The Law Council of Australia (Law Council) supported such a provision,¹⁴ as did Liberty Victoria.¹⁵

Guidance on the selection of procedures

15.17 The use of a handbook on how to conduct an inquiry is another way to encourage flexibility. As noted in Chapter 6, the ALRC recommends the publication of an *Inquiries Handbook*, which provides information on the establishment, conduct and administration of inquiries.¹⁶ A similar handbook is published in New Zealand, which includes a section on the selection of appropriate procedures.¹⁷ This section includes guidance on: the issues inquiry members may need to consider in selecting procedures; deciding who has an interest in an inquiry; the treatment of witnesses and evidence; the holding of hearings; a standard format for hearings; and the requirements of procedural fairness.

15.18 In consultations, a number of stakeholders supported the use of the *Inquiries Handbook* to provide guidance on matters of procedure. In DP 75, the ALRC proposed that the *Inquiries Handbook* should address the suitability and use of different kinds of procedures, including the manner in which hearings are conducted and, as discussed

11 Inquiries Bill 2008 (NZ) cl 14(1).

12 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [4.11].

13 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–1.

14 Law Council of Australia, *Submission RC 30*, 2 October 2009; Civil Liberties Australia, *Submission RC 17*, 19 May 2009.

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

16 Recommendation 6–1.

17 New Zealand Government Department of Internal Affairs, *Setting Up and Running Commissions of Inquiry* (2001), Ch 20.

later in this chapter, the ways in which procedural fairness may be accorded. The Law Council supported this proposal, as did a number of stakeholders in consultations.¹⁸

ALRC's view

15.19 In the ALRC's view, a provision similar to cl 14(3) of the Inquiries Bill (NZ) should be included in the *Inquiries Act*. This would reinforce the fact that Royal Commissions may adopt a wide variety of procedures when conducting an inquiry. Since procedural flexibility is desirable with respect to both Royal Commissions and Official Inquiries, such a provision should apply to both types of inquiry.

15.20 Another power, which is not included in cl 14(3) of the New Zealand Bill, is the power of an inquiry to adjourn or suspend its work. As discussed in Chapter 14, this power is especially important when an inquiry is being conducted at the same time as related court proceedings. In light of the importance of this power, the ALRC recommends that it also be included in the *Inquiries Act*.

15.21 In addition, it would be useful for the *Inquiries Handbook* to address the selection and use of different procedures. The procedures adopted in an inquiry may be critical to its success. Since some inquiry members may not have conducted an inquiry before, or may be unfamiliar with the variety of procedures that may be adopted, information on these matters may be useful. This also may encourage greater use of more inquisitorial methods of inquiry. The New Zealand handbook would be a useful model in this regard.

Procedural fairness

15.22 While the *Royal Commissions Act* does not impose any limitations on the kinds of procedures that may be adopted, the common law imposes an overall obligation that these procedures be fair.

15.23 If an inquiry may operate to 'destroy, defeat or prejudice a person's rights, interests or legitimate expectations',¹⁹ it is required to observe the principles of procedural fairness. That is, it is under a duty to observe fair procedures when making decisions affecting those rights, interests or legitimate expectations.²⁰ Reputation, both personal and commercial, is an interest that attracts the protection of the principles of procedural fairness.²¹ Therefore, any inquiry that may affect the reputation of

18 Law Council of Australia, *Submission RC 9*, 19 May 2009; Law Council of Australia, *Submission RC 30*, 2 October 2009.

19 *Annetts v McCann* (1990) 170 CLR 596, 598.

20 This conclusion has been reached in other countries: see, eg, *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)* [1997] 3 SCR 440, [55]; *R v Lord Saville*; *ex parte A* [1999] 4 All ER 860, 872–873, affirmed in *Lord Saville of Newdigate v Widgery Soldiers* [2001] EWCA Civ 2048, [7].

21 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578; *New South Wales v Canellis* (1994) 181 CLR 309, 330.

individuals and corporations, which would include all inquiries investigating misconduct, is obliged to observe the principles of procedural fairness.

Aspects of procedural fairness

15.24 There are two main aspects of procedural fairness: the requirement that a person who is liable to be affected by a decision must be given notice of all relevant matters, and given an opportunity to put his or her case (the ‘hearing rule’); and the requirement that a decision maker is not biased, or seen to be biased (the ‘bias rule’). What these principles require in a particular case will depend on the circumstances, however, they do not impose many limitations on the procedures that may be adopted by inquiries.²²

15.25 The test for the bias rule is whether the conduct in the circumstances would give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the inquiry member will not discharge his or her task impartially.²³ The rule has a limited operation in the context of inquiries, however, because those conducting inquiries necessarily begin with suspicions before they commence their investigations,²⁴ and inquiry members inevitably play an active role in investigating the issues.²⁵

Adverse findings

15.26 The main requirement of procedural fairness in the context of an inquiry is that the inquiry ‘cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding’.²⁶ Typically, such a finding would arise where a person is identified as having been responsible for misconduct, although findings of guilt or innocence, or of professional misconduct, should not be made.²⁷ An ‘adverse finding’ in this context does not extend to ‘any finding of disputed fact, or any criticism of a party, or the exposure of evidence or material which might reflect badly on a person’.²⁸

22 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 53.

23 *Carruthers v Connolly* [1998] 1 Qd R 339, 371.

24 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 147.

25 *Karounos v Corporate Affairs Commission* (1989) 50 SASR 484, 488.

26 *Annetts v McCann* (1990) 170 CLR 596, 600–601.

27 In *Brinsmead v Commissioner Tweed Shire Council Public Inquiry* [2007] NSWSC 246, it was held that an inquiry which applied provisions of the *Royal Commissions Act 1923* (NSW) could not validly make such findings. In general, Royal Commissioners have taken the view that they should not express conclusions of guilt or recommend prosecution: T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), [57]. See also *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440.

28 *Royal Commission into Productivity in the Building Industry in NSW* (1992) vol 7, 129.

15.27 The general duty is to provide ‘an opportunity to be heard on the matters which pose a potential risk of adverse findings’,²⁹ so that a person is not ‘left in the dark’ as to the risk of adverse findings.³⁰ This requirement does not mean that an inquiry has to give notice of any possible adverse matter at the time it is disclosed.³¹ Rather, the duty arises when an inquiry ‘has reached the stage of contemplating the making of an unfavourable finding against [a] person’.³² Further, the person does not have the right to be heard on the general subject of an inquiry, only on the subject matter of the potential adverse findings.³³

15.28 This duty can be met in a number of ways. Typically, in a Royal Commission, this may include counsel assisting giving notice of adverse matters through the identification of issues and possible adverse findings in an opening and closing statement. Further, notice of adverse matters may be provided through the publication of evidence, the use of public hearings and the provision of transcripts of evidence to the person affected.³⁴

15.29 Providing draft adverse findings is another way of ensuring notice is given of such findings. For example, in the Building Royal Commission, Commissioner Cole directed counsel assisting to set out, in submissions available to any person who might be adversely affected, the findings of fact which counsel assisting contended should be made, along with references to the supporting and contrary evidence, and the conclusions to be drawn from those findings of fact.³⁵ There is, however, no duty at common law requiring an investigation to disclose its findings or recommendations and invite comments upon them.³⁶ A procedure of circulating draft findings has been criticised as ‘difficult and time-consuming’,³⁷ although others have considered it ‘impeccably fair’ where there is no legal representation or cross-examination.³⁸

15.30 The detail of the notice of adverse matters that is required will depend on the nature of the inquiry itself. For example, an inquiry may not ‘lend itself to the making of precise allegations as to conduct’.³⁹ The key is that the person should ‘be kept in the

29 M Harris, ‘Fairness and the Adversarial Paradigm: An Australian Perspective’ [1996] *Public Law* 508, 516.

30 *Mahon v Air New Zealand Ltd* [1984] AC 808, 821.

31 N Owen, *Report of the HIH Royal Commission* (2003), [1.4.2].

32 *Annetts v McCann* (1990) 170 CLR 596, 610.

33 *Ibid.*, 601.

34 N Owen, *Report of the HIH Royal Commission* (2003).

35 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, [40].

36 M Harris, ‘Fairness and the Adversarial Paradigm: An Australian Perspective’ [1996] *Public Law* 508, 517.

37 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.11].

38 M Harris, ‘Fairness and the Adversarial Paradigm: An Australian Perspective’ [1996] *Public Law* 508, 523.

39 *Ibid.*, 523.

picture as to the nature of the inquiry ... the direction in which it is proceeding and the issues upon which it is focusing'.⁴⁰

15.31 A person may be given a reasonable opportunity to respond to these matters if an adverse matter is put to them in examination, or a person is re-examined or given the opportunity to cross-examine. Further, the opportunity to provide written statements and submissions in response to evidence, closing statements and draft findings may constitute a reasonable opportunity to respond.⁴¹ The person has no right at common law, however, to call further evidence in response.⁴²

Guidance on procedural fairness

15.32 The *Royal Commissions Act* does not refer to the principles of procedural fairness. Inquiry members usually are given no guidance on the matter, although members with legal training are likely to be aware of the requirements of procedural fairness. One issue for this Inquiry is whether it would be useful to provide some guidance on the application of those principles. One way to provide such guidance is through the use of the *Inquiries Handbook*, as discussed above. Such guidance also could be provided for by statute.⁴³ For example, the NZLC was of the view that the rules regarding adverse comment should be set out in statute to 'give clear direction to those conducting and participating in inquiries'.⁴⁴ It recommended that legislation should provide that, where a person or body will be the subject of adverse comment or findings by an inquiry, the inquiry must:

- give prior notice of allegations, proposed adverse findings or the risk or likelihood of adverse findings;
- disclose the relevant material relied upon, and state the reasons on which the finding or allegation is based;
- give the person or body reasonable time and reasonable opportunity to refute or respond to the proposed findings or allegations; and
- give proper consideration to those representations.⁴⁵

15.33 The NZLC observed that, where there are no hearings, the requirement of prior notice could be fulfilled by the circulation of extracts of the draft report,⁴⁶ and that the

40 Ibid, 517.

41 N Owen, *Report of the HIH Royal Commission* (2003).

42 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), [50]–[53].

43 See, eg, *Commissions of Inquiry Act 1995* (Tas) s 18; *Inquiries Act 1985* RSC c I-11 (Canada) s 13.

44 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 15, 71.

45 Ibid, Rec 15, 71.

46 Ibid, [4.38].

opportunity to respond need not be in the form of an oral hearing.⁴⁷ While the common law does not require the inquiry member to state reasons, the NZLC considered that it was ‘axiomatic’ that the inquiry member should give reasons since the purpose of an inquiry was to ‘find out what happened, not to adjudicate’.⁴⁸

15.34 Clause 17 of the Inquiries Bill (NZ), resulting from the NZLC’s inquiry, does not follow exactly the NZLC’s recommendation.⁴⁹ It provides that an inquiry must not make any finding adverse to a person in a report unless the inquiry has taken all reasonable steps to:

- (i) give that person reasonable notice of the intention to make the finding; and
- (ii) disclose to that person the contents of the proposed finding, the relevant material relied on for that finding, and the reasons on which it is based; and
- (iii) give that person a reasonable opportunity to respond to the proposed finding.

15.35 Clause 17(b) also requires that the inquiry give proper consideration to any response given. While the resulting clause is similar, it does not include notice of ‘the risk or likelihood of adverse findings’. It does require circulation of the contents of the proposed finding, and an indication of an intention to make the finding. This would appear to preclude adequate notice of the potential for an adverse finding being given through the use of public hearings and evidence.

15.36 Section 35A of the *Royal Commissions Act 1991* (ACT) goes further than the Inquiries Bill 2008 (NZ) by requiring that an inquiry provide a copy of the proposed comment, together with a written notice allowing for the party to respond within a specified period of at least 14 days.⁵⁰

Submissions and consultations

15.37 In IP 35, the ALRC asked what rights of witnesses, in addition to those in the *Royal Commission Act*, should be protected in the proceedings of inquiries.⁵¹ In DP 75, the ALRC proposed that a provision similar to cl 17 of the Inquiries Bill (NZ) should be included in the *Inquiries Act*,⁵² and that the *Inquiries Handbook* should address matters of procedural fairness.⁵³

47 Ibid, [4.43].

48 Ibid, [4.40].

49 At the time of writing in October 2009, this Bill was before the New Zealand Parliament.

50 See also the more prescriptive procedure in the Tribunals of Inquiry Bill 2005 (Ireland) cll 37–43, which requires circulation of extracts of draft reports to any person identified or identifiable in a report, and enables them to apply to amend the report and empowers an inquiry to apply to the High Court for directions in this regard.

51 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 8–12.

52 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–3.

53 Ibid, Proposal 15–2.

15.38 The Law Council supported both proposals.⁵⁴ It submitted that:

it is the compulsory nature of attendance before an executive body which gives considerable force to this call for statutory protection of witnesses. The common law rules of procedural fairness, and particularly their content in any given situation, are too discretionary and uncertain to afford sufficient protection to witnesses compelled to attend, give evidence, and be cross examined by the executive and its representatives, and then be subject of possibly adverse comment or findings.⁵⁵

15.39 On the other hand, the Law Council recognised the dangers of putting the obligations of procedural fairness into statutory form, and noted that

enacting general law principles into statutory form can risk shifting the debate from the application of a principle to the construction of an opaque phrase (such as ‘reasonable opportunity’ to respond to an adverse finding or assertion). There is also potential for statutory provisions to interrupt proceedings for non-compliance with a mandatory requirement even if no unfairness results, and conversely, the potential for unfair procedures to slip through on the basis that formal compliance with a mandatory requirement occurred.⁵⁶

15.40 On balance, however, the Law Council endorsed a provision similar to cl 17 of the Inquiries Bill (NZ).⁵⁷

15.41 The Construction, Forestry, Mining and Energy Union (CFMEU) also supported a statutory provision,⁵⁸ citing in support the views of Dr Janet Ransley, who has stated:

[C]ontrols over commissions and their use of powers could be improved by clearly imposing upon them, through legislation, general duties of procedural fairness, together with an obligation to base their findings on probative evidence. This could be supplemented by statutory guidelines as to appropriate procedures to achieve such fairness. ... These measures would spell out the legal position of commissions, make them clearly amenable to review by the courts, and still subject them to the dynamic development of the common law doctrines of procedural fairness ...⁵⁹

15.42 The Community and Public Sector Union (CPSU) specifically supported the inclusion of a provision similar to s 35A of the *Royal Commissions Act* (ACT).⁶⁰ In its submission in response to DP 75, it stated that:

the provision of natural justice to participants is particularly important. Where there may be adverse findings found against a person, that person should be afforded rights in the process, be given the opportunity to respond to those potential findings and where the findings are made, their response, at least in summary form, should be

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

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

56 *Ibid.*

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

58 Construction, Forestry, Mining and Energy Union, *Taking Liberties—The Cole Royal Commission into the Building and Construction Industry* (2004).

59 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, 31.

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

included in the final report. Given that the final report of a Royal Commission or Official Inquiry will be a public document the provision of these rights is integral in affording inquiry participants natural justice.⁶¹

15.43 Liberty Victoria also expressed support for a provision stipulating that all reasonable steps should be taken to give that person a right of reply before the publication of a report making an adverse finding against them.⁶²

15.44 Mr Graham Millar, however, expressed reservations:

I agree that all reasonable steps should be taken to give a person notice of the possibility of adverse findings, the details and basis of those findings and an opportunity to respond. ... In my view, however, the members of inquiries should have the prerogative to reserve their final position on any adverse findings for their reports. Adoption of [the ALRC's proposal for a statutory procedural fairness provision] has the potential to add substantial process to an inquiry, involving additional time and cost, particularly in cases where there may be a number of possible adverse findings.⁶³

ALRC's view

15.45 The rules of procedural fairness are critical to the lawfulness of the conduct of an inquiry, and indeed to the legitimacy of an inquiry. It is desirable, therefore, that inquiry members be given guidance on the application of those rules. This may benefit, in particular, inquiry members who are not legally trained, and provide those participating in inquiries with guidance as to their rights.

15.46 It is difficult to generalise about the requirements of procedural fairness in the conduct of inquiries, because of the wide variety of circumstances in which procedural fairness issues might arise. Further, the concept continues to evolve. One clear obligation, however, is the right to be given an opportunity to respond before an adverse finding is made.

15.47 This obligation can usefully be set out in legislation in similar terms to cl 17 of the Inquiries Bill (NZ). This provision is preferable to the equivalent section in the *Royal Commissions Act (ACT)*, because the New Zealand provision sets out a more flexible procedure for discharging the obligation. The ALRC recommends, however, that 'risk or likelihood' of a proposed adverse finding also should be included, to clarify that notice need not be given of the contents of the proposed finding, or an intention to make that finding. For example, if an inquiry participant is legally represented, the hearings are in public, and all the evidence is published, normally there would be adequate notice of the nature of the proposed adverse finding and the material on which it is likely to be based, without an additional requirement that the inquiry circulate the contents of findings.

61 Community and Public Sector Union, *Submission RC 25*, 22 September 2009.

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

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

15.48 Later in this chapter, the ALRC recommends that the application of other matters relating to procedural fairness should be dealt with in the *Inquiries Handbook*.⁶⁴ Matters that could be addressed include: the circumstances in which issues of procedural fairness may arise; when and how prior notice should be given; what needs to be disclosed in order to allow a fair opportunity to respond; the methods by which people can respond to allegations; and the manner in which such responses should be considered. Some of the specific issues discussed later in this and the next chapter are also relevant to these matters. The New Zealand handbook provides a useful model in this respect.

Recommendation 15–1 The recommended *Inquiries Act* should provide that reports of Royal Commissions and Official Inquiries should not make any finding that is adverse to a person, unless the inquiry has taken all reasonable steps to give notice of proposed adverse findings or the risk or likelihood of adverse findings, and disclosed the relevant material relied upon and the reasons on which such a finding might be based. Further, the inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and the inquiry should properly consider any response given.

The Salmon Principles

15.49 The common law requirement of procedural fairness protects, to some degree, the rights and interests of affected parties in inquiries. As noted above, what is required by procedural fairness will vary from inquiry to inquiry. Should any additional procedural measures be required (whether by legislation or otherwise) to ensure fairness in an inquiry?

15.50 The issue of procedural protections in inquiries was considered in the United Kingdom (UK) by the Royal Commission on Tribunals of Inquiry (1966) (Salmon Royal Commission), which recommended that six principles—now commonly referred to as the Salmon Principles—should be followed to protect the interests of affected parties.

15.51 The Salmon Principles were not intended to operate as statutory rules, but rather as guidelines for the proceedings of inquiries, and in particular for inquiries established under the *Tribunals of Inquiry (Evidence) Act 1921* (UK).⁶⁵ Nevertheless, they have been given statutory form in the *Commissions of Inquiry Act 1995* (Tas).⁶⁶

⁶⁴ Recommendation 15–5.

⁶⁵ Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [3.4]; G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 63.

⁶⁶ *Commissions of Inquiry Act 1995* (Tas) ss 17, 18, 36. Israel has also enacted the Salmon Principles in statutory form: G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 65.

15.52 The Salmon Principles have been criticised as ‘problematic and not altogether helpful’.⁶⁷ The concern is that the Principles do not satisfy a number of other objectives of public inquiries, such as the desirability of more informal proceedings, the need for proceedings to be conducted as efficiently as possible, and the need for the costs of inquiries to be kept within reasonable bounds.⁶⁸

Principle 1—Involving a person in an inquiry

15.53 The first Salmon Principle states that before persons become involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect those persons and which the Tribunal proposes to investigate. This is designed to ‘prevent the potentially hurtful consequences of involvement in an Inquiry being visited on individuals with no real connection with the Inquiry’s terms of reference’.⁶⁹ Sir Richard Scott has noted, however, that this ‘should not be applied so as to prevent the Inquiry from questioning persons for the purpose of ascertaining whether they have any relevant information to give’.⁷⁰ After all, ‘it is impossible to make the exercise of the inquisitorial powers conditional upon the existence of evidence probative of the very facts that a tribunal is required to investigate’.⁷¹ In his view, this principle should be qualified by saying that an Inquiry should not *publicly* involve anyone until the Inquiry is satisfied there are circumstances which affect them.⁷²

Principle 2—Putting witnesses on notice

15.54 The second Salmon Principle requires that, before persons who are involved in an inquiry are called as witnesses, they should be informed of any allegations which are made against them and the substance of the evidence in support of the allegations. This principle is informed by the policy underlying the law requiring notice of potential adverse findings, although it is concerned with notice being given before the giving of evidence, rather than before the making of adverse finding.

67 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [103], citing Lord Laming. For a fuller discussion of the controversies, see G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 40–65.

68 In particular, the Salmon Principles have been criticised by Sir Richard Scott in one high-profile inquiry: R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996), Part 4, Section K; R Scott, ‘Procedures at Inquiries—the Duty to be Fair’ (1995) 111 *Law Quarterly Review* 596. Subsequently, the (then) Council on Tribunals was requested to provide guidance on these recommendations: Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996). The Council on Tribunals has been replaced by the Administrative Justice and Tribunals Council. More recently, the UK government responded to the observations of a parliamentary committee by agreeing that the Salmon Principles needed to be ‘re-interpreted’ by focusing on ‘how to preserve the underlying aim of ensuring fairness, without introducing costly, adversarial elements’: UK Government, *Government Response to the Public Administration Select Committee’s First Report of the 2004–2005 Session: ‘Government by Inquiry’* Cm 6481 (2005).

69 R Scott, ‘Procedures at Inquiries—the Duty to be Fair’ (1995) 111 *Law Quarterly Review* 596, 601.

70 R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996), K1.4.

71 G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 44.

72 R Scott, ‘Procedures at Inquiries—the Duty to be Fair’ (1995) 111 *Law Quarterly Review* 596, 602.

15.55 There is a difficulty with implementing this principle in practice as there will be no ‘allegations’ at the outset in an inquiry, and notice of a ‘case’ against a person is inappropriate in the context of an inquiry.⁷³ In the view of both Scott and the Council on Tribunals in the UK, in practice the principle requires the following steps:

- before a witness gives evidence, the witness should be ‘made aware of the inquiry’s areas of concern and the respects in which, in the light of the information so far available, he may be vulnerable to criticism’;⁷⁴
- a witness against whom damaging evidence has already been given should, unless there is some special reason to the contrary, be referred to the damaging evidence and to relevant background documents;⁷⁵ and
- if damaging evidence or allegations emerge after a person has already given evidence, the witness should be given an opportunity to respond, and usually the person also should be told the source of the allegations.⁷⁶

Principle 3—Legal assistance and representation

15.56 The third Salmon Principle provides that those involved in an inquiry should be given an adequate opportunity to prepare their case and be assisted by their legal advisers. Further, their legal expenses should normally be met out of public funds.⁷⁷ This clearly extends beyond the present common law requirement of procedural fairness.⁷⁸ The funding of legal assistance and representation is discussed in Chapter 9, and authorisation to appear and be legally represented is discussed further below.

Principles 4 and 6—Examination and cross-examination

15.57 The fourth Salmon Principle provides that witnesses should be examined by their own solicitor or counsel and have the opportunity to state their case in public—for example, in a public hearing. This principle was, however, strongly criticised by a later inquiry member:

[T]his ... seems to me to represent a quite unnecessary importation into inquisitorial proceedings of procedures designed for those of an adversarial character. Every witness ... is the Inquiry’s witness. ... For the purposes of an inquisitorial hearing

73 Ibid, 602–603; Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.9]. See also G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 45–46.

74 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.9].

75 R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996), K1.4.

76 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.10].

77 The issue of funding for legal representation is discussed in Ch 9.

78 *New South Wales v Canellis* (1994) 181 CLR 309. On the other hand, *R (Wagstaff) v Secretary of Health* [2001] 1 WLR 292 indicated that a decision not to accord publicly funded representation in particular circumstances may not be rational.

conducted before an Inquiry ... the distinction between examination-in-chief, cross-examination and re-examination is meaningless. ... If, however, in order to provide some particular context in which his answers to the Inquiry's questions should, in his view, be considered, the witness wants to provide additional evidence, going beyond the Inquiry's questions, or to make some particular comments, he must, of course, be given the opportunity of doing so. ... But it is not necessary that preliminary or supplementary statements by witnesses should be elicited in question and answer mode by lawyers.⁷⁹

15.58 The sixth Salmon Principle requires that persons should have the opportunity of testing any evidence which may affect them by cross-examination conducted by their own solicitor or counsel. The issue of cross-examination is addressed further below.

Principle 5—Calling of witnesses

15.59 The fifth Salmon Principle provides that, if persons involved in an inquiry wish a material witness to be called, that witness should, if reasonably practicable, be heard. Both Scott and the Council on Tribunals considered that this principle was sound, subject to the qualification that written evidence could suffice.⁸⁰

Submissions and consultations

15.60 In IP 35, the ALRC discussed the Salmon Principles and asked whether these or other rights of witnesses should be protected in the proceedings of inquiries.⁸¹ In DP 75, the ALRC expressed the view that there should not be any statutory extension of procedural rights along the lines of the Salmon Principles.⁸²

15.61 The Law Council, which was the only stakeholder to address this issue in submissions, observed that the Salmon Principles took 'the concepts of procedural fairness beyond the point that the common law has reached', referring specifically to the requirements to put 'any allegations' to a potential witness before they are called, the payment of legal expenses out of public funds, and the opportunity to call witnesses.⁸³

15.62 The Law Council noted that it was most likely that these procedures would be required by procedural fairness only in 'exceptional cases', and submitted that there was 'therefore some force in the criticisms of the Salmon Principles as being inconsistent with other objectives of public inquiries'.⁸⁴ Such principles, however,

79 R Scott, 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596, 605.

80 *Ibid.*, 607; Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.16].

81 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [8.89], Question 8–12.

82 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [15.50].

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

84 *Ibid.*

might appropriately guide a Royal Commissioner when seeking to adequately protect the interests of a particular witness, subject to considerations including the nature of the particular commission and its terms of reference, the nature of the evidence given, and the access of the witness to proper legal representation.⁸⁵

15.63 The Law Council suggested that there was scope to include in legislation a ‘guided discretion’. This may provide that, at any stage of an inquiry, if a witness is able to make a case that his or her reputation might be adversely affected, certain balanced protective steps might be taken, such as protecting information from publication until a certain date. The Law Council noted that while such a power already exists, ‘it is the linking of it to the protection of reputation of witnesses that needs further consideration’.⁸⁶

ALRC’s view

15.64 The Salmon Principles provide useful guidance on the kinds of procedural measures that may improve the fairness of inquiry procedures. As the discussion above illustrates, however, the application of these principles may not be appropriate or practicable in every inquiry.

15.65 In the ALRC’s view, any codification of the Salmon Principles would be too prescriptive. It would fail to recognise competing interests, such as the desirability of flexibility and efficiency in the conduct of inquiries, and would promote an overly judicial approach to inquiries.

15.66 It would be of more practical benefit to include a discussion of the Salmon Principles, including the useful advice of the Council on Tribunals, in the *Inquiries Handbook*. This would enable a more detailed and nuanced discussion of the types of procedural measures addressed by the Salmon Principles. This approach is reflected in Recommendation 15–5, set out at the end of this chapter.

Leave to appear and be represented

15.67 Two procedural measures encompassed by the Salmon Principles are the ability of a person to ‘state their case’ at an inquiry, and the ability to access legal assistance and representation. Presently, under s 6FA of the *Royal Commissions Act*, interested parties and their legal representatives may only participate with the authorisation of the Royal Commission. This section provides that any person authorised to appear before a Commission, or any legal practitioner authorised to appear before a Commission for the purpose of representing a person, may, ‘so far as the Commission thinks proper’, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry.

85 Ibid.

86 Ibid.

Criteria for authorisation

15.68 Section 6FA does not identify, however, the factors that are relevant to the decision of a Royal Commission to allow a person to appear before it.⁸⁷ In contrast, in some jurisdictions legislation addresses the issue of determining which individuals or groups should have the right to appear. In the UK, the chair of an inquiry may designate a person as a ‘core participant’ in the inquiry, having particular regard to whether:

- (a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;
- (b) the person has a significant interest in an important aspect of the matters to which the inquiry relates; or
- (c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.⁸⁸

15.69 Core participants are entitled to have their legal representatives designated as a ‘recognised legal representative’. These representatives are entitled to apply to the chair for leave to ask questions of a witness giving oral evidence, and make opening and closing statements.⁸⁹

15.70 The NZLC recommended adopting a similar provision which would entitle a core participant to give evidence and make submissions, subject to any directions of the inquiry relating to such matters.⁹⁰

15.71 The provisions in the *Inquiries Act 2005* (UK) and the *Inquiries Bill 2008* (NZ) list factors which guide the exercise of the inquiry’s discretion in determining who should have the right to appear. In the Building Royal Commission, Commissioner Cole suggested a similar list of relevant factors for granting an application for authority to appear before the applicant.⁹¹ Additionally, Commissioner Cole noted that an application may be granted if a person would be in a better position to assist the Royal Commission in carrying out its inquiry if he or she were authorised to appear. All general grants of authority to appear were made subject to a number of conditions.⁹²

87 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 31.

88 *Inquiries Rules 2006* (UK) r 5.

89 *Inquiries Rules 2006* (UK) rr 6, 10(4), 11.

90 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 16. This was incorporated in cl 18 of the *Inquiries Bill 2008* (NZ).

91 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 31–32.

92 *Ibid*, vol 2, 32.

Legal representation

15.72 At common law, inquiries ‘may hear Counsel or not, as they please’.⁹³ This is, however, subject to the common law requirements of procedural fairness. In particular inquiries, such as where a person is the subject of serious allegations of misconduct which, if proven, would constitute serious criminal offences, it may be that procedural fairness requires legal representation.⁹⁴ For example, it has been said that:

where the sole object of the inquiry is to investigate the conduct of an individual ... [i]n such an inquiry, or in one where questions of law are involved, Commissioners would no doubt welcome the appearance of counsel, and one might imagine inquiries of such a nature that it could not fairly be said that a party cited or a person interested has been ‘heard’ in any proper sense of the word unless he has had the assistance of counsel.⁹⁵

15.73 In most jurisdictions, the statutes governing inquiries provide that legal representation is at the discretion of the inquiry member.⁹⁶ In some jurisdictions, however, the statutes provide a right to legal representation if a person is granted standing by an inquiry, or if the person is the subject of allegations.⁹⁷ In practice, it is usual for legal representation to be allowed for those authorised to appear before Royal Commissions, although representation by a particular legal practitioner could be refused where an investigation could be prejudiced for reasons such as a conflict of interest.⁹⁸

15.74 Whether there should be a right to legal representation in inquiries is controversial.⁹⁹ On the one hand, it may be argued that the effect on reputation, the exercise of coercive powers, the complexity of an inquiry, and the use by an inquiry of its own lawyers may justify an entitlement to legal representation.¹⁰⁰ On the other hand, legal representation may be considered undesirable because it may increase the formality of proceedings, undermine the inquisitorial nature of an inquiry, and add to its length and cost. For example, Sir Louis Blom-Cooper, an experienced inquiry member, has said that:

all that lawyers do is bring all their expertise of the legal system into the inquiry room, and that simply increases the costs. ... The trouble is that lawyers who are

93 *Jellicoe v Haselden* (1903) 22 NZLR 343, 359.

94 See, eg, *Re Public Inquiries Act and Shulman* [1967] OR 375.

95 *Re Royal Commission on the State Services* [1962] NZLR 96, 117. A decision to refuse to permit legal representation could also be reviewed by a court as being irrational: *R (Wagstaff) v Secretary of Health* [2001] 1 WLR 292.

96 H Grant, ‘Commissions of Inquiry—Is There a Right to be Legally Represented?’ [2001] *Public Law* 377, 380–381.

97 *Ibid*, 380–382.

98 *National Crime Authority v A, B, and D* (1988) 18 FCR 439; *R v Whiting* [1994] 1 Qd R 561; *Australian Securities Commission v Bell* (1991) 32 FCR 517; *Bonan v Hadgkiss* (2006) 160 FCR 10.

99 See generally H Grant, ‘Commissions of Inquiry—Is There a Right to be Legally Represented?’ [2001] *Public Law* 377.

100 H Grant, ‘Commissions of Inquiry—Is There a Right to be Legally Represented?’ [2001] *Public Law* 377, 388.

representing parties will behave as they behave in the court room and they will be adversarial, and that is fatal.¹⁰¹

15.75 As noted above, the issue of legal representation was addressed by the Salmon Principles. The Council on Tribunals noted that it was generally agreed that legal assistance should be available to those involved, both at the stage of giving evidence and at the stage of responding to criticisms.¹⁰² There was, however, ‘a consensus among those commenting on the Scott inquiry procedures that legal representation in this sense should not be regarded as an absolute entitlement’ and that written evidence could be an adequate substitute for oral evidence in an inquiry.¹⁰³

15.76 The Council observed that it ‘may be counterproductive to start from the position that legal representatives will only be heard exceptionally’, since it should not be assumed that hearing legal representatives would add significantly or at all to the length and associated costs of an inquiry.¹⁰⁴ Nevertheless:

strict adherence to the Salmon principles regarding legal representation [in some inquiries] ... has led to the inquiry being excessively prolonged. It is clearly undesirable that there should be mass legal representation throughout the course of an inquiry. The inquiry chairman should have power to authorise persons to be represented, either at public expense or privately, for part only of the inquiry, having regard to the extent to which their interests are involved in what the inquiry is currently investigating. Joint representation of witnesses with a similar interest is to be strongly encouraged.¹⁰⁵

Submissions and consultations

15.77 In DP 75, the ALRC proposed that inquiries continue to have the discretion to allow a person, or a person’s legal representative, to participate in an inquiry, to the extent that inquiry members consider appropriate. It also proposed that, in making that decision, inquiry members may consider a number of factors, based on the factors recognised in previous inquiries and in overseas legislation.¹⁰⁶

15.78 Few stakeholders addressed the issue of authorisation of leave to appear in either submissions or consultations to the Inquiry. Liberty Victoria stated that all levels of inquiries ‘should have a broad discretion ... in how and what they obtain as evidence’, including the ability to authorise persons or organisations to appear before

101 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [102].

102 R Scott, ‘Procedures at Inquiries—the Duty to be Fair’ (1995) 111 *Law Quarterly Review* 596, 604; Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.13].

103 *Ibid.*, [7.13]–[7.14].

104 *Ibid.*, [7.14].

105 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.15].

106 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–5.

it.¹⁰⁷ The Australian Government Solicitor (AGS) noted that the power in s 6FA of the *Royal Commissions Act* to authorise leave to appear was generally effective.¹⁰⁸

15.79 The Law Council, the only stakeholder to address this proposal, expressed support for it, noting that the proposed criteria ‘appear to be appropriate for the exercise of that discretion’.¹⁰⁹

ALRC’s view

15.80 It would be useful to set out in statutory form the power of an inquiry to determine who should be able to participate in the inquiry and, in a non-exhaustive list, the factors that are relevant to this decision. This would provide clear guidance to both inquiry members and participants.

15.81 The ALRC is concerned, however, that the language of ‘core participants’ adopted in the UK and New Zealand legislation, as well as the present language of ‘authorisation to appear’ in s 6FA of the *Royal Commissions Act*, may encourage court-like procedures. Further, it is concerned that the designation of ‘core participants’—which emphasises the rights of a participant to legal representation—is not ultimately helpful, since the inquiry exercises the discretion to designate who is, or who is not, a ‘core participant’.

15.82 Instead, the ALRC recommends that an inquiry member should be able to allow any person, or any person’s legal representative, to participate in an inquiry, to the extent that the inquiry member considers appropriate. In making that decision, inquiry members may have regard to factors including: any direct or special interest a person may have in the matters relevant to an inquiry; the probability that an inquiry may make a finding adverse to that person’s interests; and the ability of a person to assist an inquiry.

15.83 Legal representation may be an important measure for ensuring fairness to inquiry participants, and it may be required in particular circumstances to achieve procedural fairness. Nevertheless, in the ALRC’s view a statutory entitlement to legal representation would be unduly inflexible. Circumstances in which it would ordinarily be appropriate to authorise legal representation may be addressed in the *Inquiries Handbook*. This is reflected in Recommendation 15–5, set out at the end of this Chapter.

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

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

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

Recommendation 15–2 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may allow any person or a person’s legal representative to participate in an inquiry to the extent that inquiry members consider appropriate. In making that decision, inquiry members may have regard to factors including:

- (a) any direct or special interest a person may have in the matters relevant to an inquiry;
- (b) the probability that an inquiry may make a finding adverse to that person’s interests; and
- (c) the ability of a person to assist an inquiry.

Examination and cross-examination

15.84 It is usual in Royal Commissions for witnesses to be examined or cross-examined in the course of a hearing. Section 6FA of the *Royal Commissions Act* provides that counsel assisting, or legal representatives appearing before a Commission, may ‘so far as the Commission thinks proper’ examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry.¹¹⁰

15.85 The procedures adopted for the examination or cross-examination of witnesses can vary significantly according to the nature of the Royal Commission and the type of evidence being presented.¹¹¹ In each Commission, procedures for cross-examination may be determined by directions or guidelines developed by the Commission, or rulings of the Commissioner on applications to cross-examine.¹¹²

15.86 For example, the Building Royal Commission early in its inquiry released a practice note outlining principles for examination and cross-examination. The note advised that any witness who was legally represented would be first examined by counsel assisting the Commission, and then allowed to be examined by his or her own legal representative. That witness could then be cross-examined by or on behalf of any person considered by the Commission to have sufficient interest in so doing. Re-examination by the person’s representative or counsel assisting the Commission would then be allowed.¹¹³

110 The *Inquiry Rules 2006* (UK) r 10 similarly grants inquiries the discretion of allowing examination or cross-examination, in slightly greater detail.

111 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 661.

112 *Ibid.*

113 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 37.

15.87 A slightly different process was employed in the HIH Royal Commission (2003). In that inquiry, if a witness was represented or was connected with a party who was represented, counsel for the witness or party was given leave to lead the evidence from the witness. The usual practice was for the witness's written statement to be adopted where one had been provided. Counsel assisting the inquiry was then able to ask questions of the witness, with other parties then able to cross-examine if given leave. Re-examination was then allowed.¹¹⁴

Cross-examination

15.88 The directions given by a Royal Commission as to when cross-examination may occur can be contentious and may raise issues of procedural fairness. For example, the question of when a party to an inquiry is entitled to cross-examine a witness received significant attention during the Building Royal Commission.

15.89 In a second practice note, Commissioner Cole indicated that leave to cross-examine would be given only in limited circumstances. In particular, persons other than counsel assisting would not be permitted to cross-examine a witness unless they provided counsel assisting with a signed statement of evidence advancing material contrary to the evidence of that witness.¹¹⁵ In practice, this meant cross-examination could not occur except where there was direct evidence challenging the witness.

15.90 The other guiding principles used by Commissioner Cole to decide when leave to cross-examine would be given were as follows. Cross-examination was allowed if there was a disputed issue of fact relevant to a matter regarded as material to any issue that had to be determined and, overriding all other considerations, if there were grave allegations against a person which may have been diminished or eliminated by an attack on the credit of the witness giving evidence. Cross-examination was not allowed in relation to adverse evidence where that evidence was not denied; if the evidence contesting earlier evidence did not raise a factual conflict but rather commented upon the earlier evidence; or if the person wishing to contest the fact stated that he or she had no recollection of a fact about which a person had given evidence, and there were no surrounding circumstances casting doubt upon the truth of that evidence.¹¹⁶

15.91 The conditions on cross-examination were challenged by the CFMEU on the basis that the rules of procedural fairness include the right to cross-examine a witness who is giving evidence adverse to an affected person's interests. In *Kingham v Cole*, Heerey J rejected this argument, holding that the direction on cross-examination 'on its face seems rationally and reasonably related to the efficient performance of the obligations of the Commissioner'.¹¹⁷ He held that the *Royal Commissions Act*

114 N Owen, *Report of the HIH Royal Commission* (2003), [2.12.2].

115 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 39.

116 *Ibid.*

117 *Kingham v Cole* (2002) 118 FCR 289, 293.

contemplated the imposition of limitations on cross-examination, and this was not inconsistent with the rules of procedural fairness. While it did not bestow on a Commissioner unfettered discretion to impose any conditions he or she wished, conditions which had a reasonable connection with the function of a Commissioner under the Act or the Letters Patent were valid. In particular, Heerey J noted that the principles of procedural fairness did not confer a general right to cross-examination in inquiries.¹¹⁸ There may, however, be a requirement to permit cross-examination in some circumstances, such as when the reputation of a third person or organisation is in issue.¹¹⁹

15.92 Other inquiry members have similarly sought to confine the use of cross-examination. For example, in the HIH Royal Commission, Commissioner Owen indicated that cross-examination would be allowed only where ‘it would help ... ascertain the facts on which’ the final report would be based.¹²⁰ Scott observed that, while there would be circumstances in which fairness required an opportunity to cross-examine, he ‘unhesitatingly reject[ed] the proposition’ that all persons affected by the evidence of a witness should be able to cross-examine that witness.¹²¹ In his view, that ‘would be likely in many Inquiries to be inimical to, perhaps destructive of, the efficient conduct of the Inquiry’.¹²² Rather, alternatives should be sought, such as copying transcripts of adverse evidence and inviting written responses or recalling witnesses.

Submissions and consultations

15.93 In IP 35, the ALRC asked whether any changes were required to the powers of a Royal Commissioner to examine or cross-examine witnesses, and also whether there should be a statutory right to cross-examine witnesses.¹²³ In DP 75, the ALRC expressed the view that there should be no statutory right to cross-examine witnesses, but that it may be useful to address the issue of examination and cross-examination in the *Inquiries Handbook*.¹²⁴

118 Ibid, 295. See also *Bakewell v MacPherson* (Unreported, Full Court of the Supreme Court of South Australia, King CJ, Olsson and Mullighan JJ, 25 September 1992), 26; *Edwardes v Kyle* (1995) 15 WAR 302, 317.

119 *Badger v Whangarei Commn of Inquiry* [1985] 2 NZLR 688, Barker J at 705. See also *Edwardes v Kyle* (1995) 15 WAR 302, 317.

120 N Owen, *Report of the HIH Royal Commission* (2003), [2.12.3].

121 R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996), K.14.

122 Ibid, K.14.

123 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Questions 8–1, 8–2.

124 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [15.82]–[15.83].

15.94 In submissions to the Inquiry, there was some support for a legislative entitlement to cross-examination. For example, the CFMEU stated:

First, legislative provision should be made that before any evidence can be used to found an adverse finding, it may be the subject of cross-examination by a legal representative in the same way as in the courts. Cross examination in the courts can be curtailed if it is repetitive, unnecessary or oppressive. Such limitations are sufficient in the interests of fairness in a royal commission or inquiry.¹²⁵

15.95 The CPSU also supported a right to cross-examine if adverse evidence was given. It observed that cross-examination ‘should allow parties represented in the proceedings to refute allegations made against them in a timely way, but similarly not impede the timely and efficient conduct of proceedings’.¹²⁶ It noted the concern of some of its members that they had been subject to unnecessarily lengthy and repetitive cross-examination in Royal Commission proceedings. In the CPSU’s view:

where the party’s interests are affected by evidence, there should be a right to cross-examine. Where a party’s interests are not affected by the evidence, the Commissioner should refrain from allowing cross-examination by that party’s representatives. ...

For the reasons set out above, and in the interests of natural justice, a party whose interests are adversely affected by a witness’ evidence should have the opportunity to cross-examine that witness. To ensure that proceedings are not unduly delayed, the Commissioner should have to make a finding that the party’s interests were adversely affected and the cross-examination can only go to that evidence deemed to be detrimental to the party.

In the interests of fairness, this should occur as promptly as possible so the injured party has an opportunity to correct the public record. If the party is not afforded this right and afforded it in a timely manner, their interests will be harmed by the public reporting of allegations made against them without any fair opportunity to respond.¹²⁷

15.96 Other stakeholders, however, rejected the idea of a legislative entitlement to cross-examination. Dr Ian Turnbull submitted that leave to cross-examine should not be allowed, because such inquiries were inquisitorial and not adversarial. Rather, there should be an opportunity to provide written questions to counsel assisting to put to the witness, at his or her discretion, even where there was a signed statement of contradictory evidence.¹²⁸

15.97 In its submission, the AGS doubted whether ‘a Commissioner’s powers to determine how a witness may be examined and cross-examined should be further

125 Construction, Forestry, Mining and Energy Union, *Taking Liberties—The Cole Royal Commission into the Building and Construction Industry* (2004).

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

127 *Ibid.*

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

prescribed'.¹²⁹ In its experience, the existing discretion had proven to be effective in practice.

15.98 In consultations, the majority of stakeholders suggested that normally it would be appropriate to allow cross-examination where evidence adverse to a party's interests was given. They noted, however, that inquiry members must have the ultimate discretion to control cross-examination for the efficient conduct of the inquiry. Further, it was the majority view that no statutory right to cross-examination should be conferred.

ALRC's view

15.99 The process of examination and cross-examination is only one way of conducting an inquiry. An inquiry is not a court, and its inquisitorial character means that the adversarial procedures used in courts will not always be appropriate, or will require modification. Inquiries should have considerable flexibility in adopting appropriate procedures, and should weigh carefully the advantages and disadvantages of adopting court-like procedures. Further, inquiries require considerable procedural discretion in order to achieve the objectives of fairness, speed and economy.

15.100 The ALRC, therefore, does not recommend any change to the present statutory position. An inquiry member should have discretion to allow examination or cross-examination, subject to the requirements of procedural fairness. This is reflected in Recommendation 15-4, set out at the end of this chapter.

15.101 The issue of examination or cross-examination, however, may be addressed usefully in the *Inquiries Handbook*. For example, guidance in the *Inquiries Handbook* might address the importance of cross-examination as a method of achieving procedural fairness. It should be noted that, if the inquiry is conducted by way of hearings, there generally should be an opportunity to cross-examine a person giving evidence adverse to the interests of another.

Publication of responses to adverse findings

15.102 As discussed earlier in this chapter, procedural fairness may require that a person should be given an opportunity to respond to a potential adverse finding, or a risk or likelihood of such a finding being made. One issue for this Inquiry is whether a person's response to such an adverse finding should be published.

15.103 For example, s 35A(4) of the *Royal Commissions Act* (ACT) provides:

A copy of a submission made, or statement given, in relation to the [adverse] comment within the time allowed, must be included in the commission's report of the inquiry.

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

15.104 Section 35A(5) provides, however, that if

the board is satisfied on reasonable grounds that a submission made, or statement given, in relation to the comment is excessively long or contains defamatory or offensive language, the board may include a fair summary of the submission or statement in the report of the inquiry instead of the submission or statement.

15.105 Similar provisions can be found in other legislation relating to the publication of reports. The nature of these legislative requirements differs. For example, under the *Coroners Act 1997* (ACT), coroners may report on inquests and inquiries into the deaths of people, and may hold hearings, and compel evidence. Under that Act, if the coroner is to make a finding adverse to an identifiable person, the coroner must give a copy of the finding and invite submissions or written statements on it. In addition, the coroner must publish any written statement provided in response, or a fair summary of it, if the person so requests.¹³⁰

15.106 Both the Inspector-General of Intelligence and Security (IGIS), and the federal Auditor-General, are empowered by legislation to report on certain matters relating to the conduct of Australian Government agencies, and are required to provide draft reports to those agencies for comment.¹³¹ The Auditor-General also may provide draft reports to anyone it considers to have a 'special interest' in the report.¹³² The IGIS is required to include 'relevant' comments made in response to its draft reports, while the Auditor-General is required to include 'all written comments' received from those persons who are given a draft report.¹³³

15.107 The publication of responses to possible adverse findings would enable a person affected by such findings to have his or her comments in response put on the public record, and enable members of the public to make up their own minds about the reasoning process employed by an inquiry. In a court, a person's response to allegations would form part of the evidence before the court and, in many cases, also would be recorded in the judge's written reasons.

15.108 A similar effect would be achieved in a Royal Commission conducted predominantly in public. The person usually would be given an opportunity to respond to evidence in support of adverse findings and that response would form part of the evidence before the inquiry. Further, in at least some Royal Commissions, those at risk of an adverse finding have been given an opportunity to provide written responses to

130 *Coroners Act 1997* (ACT) s 55(3). See also *Transport Safety Investigation Act 2003* (Cth) s 25(3); *Private Health Insurance Act 2007* (Cth) s 241.60(5); *Occupational Health and Safety Act 1991* (Cth) s 53(3).

131 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 21; *Auditor-General Act 1997* (Cth) s 19.

132 *Auditor-General Act 1997* (Cth) s 19(3).

133 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 21(2); *Auditor-General Act 1997* (Cth) s 19(5). This latter provision was recently added to the Act by the *Auditor-General Amendment Act 2009* (Cth) Sch 1, cl 20, in response to a recommendation made by the Commonwealth Parliament's Joint Committee of Public Accounts and Audit, *Review of the Auditor-General Act 1997* (2001), Rec 3.

submissions of counsel assisting the Commission, and these written responses have been published as exhibits on inquiry websites.¹³⁴

Submissions and consultations

15.109 In DP 75, the ALRC asked whether a provision similar to s 35A(4) of the *Royal Commissions Act* (ACT)—requiring that a response or a summary of a response to a draft adverse finding be included in a report—should be included in the *Inquiries Act* recommended in this Report.¹³⁵

15.110 The CPSU supported the inclusion of responses in a report, at least in summary form.¹³⁶ Liberty Victoria also supported such a provision.¹³⁷ Turnbull also supported a provision of this nature, subject to the consent of the person and the wording of any summary.¹³⁸

15.111 Millar opposed the inclusion of such a provision, stating:

I do not see a need for a requirement for such responses to be included in the report. Where an inquiry is open to the public, it is currently common practice for the transcript of evidence and much of the tendered evidence to be published on the inquiry website. That material is not usually included in the report but is retained on the website after the report is released.¹³⁹

ALRC's view

15.112 Generally, a person's response to a potential adverse finding should be on the public record. As noted above and in the next chapter, the publicity that often accompanies an inquiry means that an adverse finding can cause significant damage to a person's reputation. This is even more important in an age where such findings are readily accessible and stored for a long time on the internet. It is only fair that a person potentially subject to such a finding has the right to have their side of the story published, even if it is not ultimately accepted by an inquiry.

15.113 Since the primary purpose of an inquiry is to find out what happened, not to adjudicate on issues in dispute,¹⁴⁰ it is essential that the reasons for the findings of an inquiry are open to public scrutiny. This is an important aspect of ensuring the

134 See, eg, Exhibit 2074, 2077 published on the Building Royal Commission's website: *Royal Commission into the Building and Construction Industry* (2003) <www.pandora.nla.gov.au/pan/24143/20040427-0000/www.royalcombc.gov.au/index.html> at 4 August 2009; Witness Statement WITS.0305.001 published on the website of the HIH Royal Commission: *The HIH Royal Commission* (2003) <www.pandora.nla.gov.au/pan/23212/20030418-0000/www.hihroyalcom.gov.au/index.html> at 4 August 2009.

135 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 15–1.

136 Community and Public Sector Union, *Submission RC 25*, 22 September 2009.

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

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

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

140 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [4.40].

accountability and transparency of inquiries. This can be enhanced by making publicly available the responses of those potentially subject to adverse findings. Even if the inquiry decides not to make an adverse finding, the response will form part of the inquiry record and, therefore, also should be available for public scrutiny.

15.114 In general, therefore, a response to a potential adverse finding should be published. In the view of the ALRC, however, the requirements in the *Royal Commissions Act* (ACT) are too prescriptive, and may impose an undue administrative burden on an inquiry. The objectives of ensuring fairness to an affected person and facilitating public scrutiny may be met in a number of different ways. In the context of a Royal Commission conducted largely in public by way of formal hearings, a person may respond by giving further evidence, in which case the obligation to publish would be discharged by publishing such evidence in the form of transcripts or exhibits on the internet, as has been common practice in recent times.

15.115 In the event an inquiry decides not to hold public hearings, but instead invites oral or written responses to proposed adverse findings, it is desirable that those responses should also form part of the public record. This may be achieved, for example, by appending a response to a report, or by publishing such responses on the inquiry website. The latter would be a relatively small administrative burden.

15.116 There may be circumstances, however, in which it is inappropriate to publish an entire response or parts of a response. For example, there may be concerns over the privacy of third parties, potential damage to the reputation of third parties, or confidential or sensitive information. Similar concerns are discussed in Chapter 16 in the context of prohibitions or restrictions on public access to hearings or material before an inquiry. Further, it may be that a person providing such a response wishes it to remain confidential. The ALRC recommends, therefore, that the inquiry should have a broad discretion to summarise responses, and that the obligation to publish should only arise if a person requests the publication. The ways in which this information may be provided by an inquiry are discussed in the next chapter.

Recommendation 15–3 The recommended *Inquiries Act* should include a provision that, when an inquiry gives an opportunity to a person to respond to potential adverse findings made against him or her in a report, that response, or where appropriate a summary of it, should be published, at the request of that person.

Recommendation 15–4 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may conduct inquiries and gather information as members consider appropriate, subject to any other provisions in the Act and the requirements of procedural fairness. For example, an inquiry may:

- (i) conduct interviews;
- (ii) hold hearings;
- (iii) call witnesses;
- (iv) obtain and receive information in any manner it sees fit;
- (v) allow or restrict the questioning of witnesses; and
- (vi) adjourn an inquiry.

Recommendation 15-5 The recommended *Inquiries Handbook* should address the suitability and use of different kinds of procedures that may be employed by inquiries. For example, the *Inquiries Handbook* may address the manner in which hearings are conducted, the ways in which people may participate in an inquiry, the provision of information to inquiry participants about procedures, and how to accord procedural fairness in the context of different types of inquiry.