

10. Minimising Costs

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Introduction

10.1 In this chapter, the ALRC examines the costs of previous Royal Commissions and other public inquiries and discusses some of the key sources of information about these costs.

10.2 The costs of Royal Commissions and other public inquiries must be balanced against the benefits of conducting such inquiries. As noted in Chapter 2, public inquiries have several functions, and their effectiveness may be measured in many ways. In its *Report on Public Inquiries Including Tribunals of Inquiry*, the Law Reform Commission of Ireland (LRCI) observed that public inquiries have intangible benefits such as 'assuaging public disquiet' and deterring 'future negative activities'.¹

10.3 As discussed in Chapter 5, in the submissions received in response to the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the majority of stakeholders expressed the view that Royal Commissions and other public inquiries play an

¹ Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [7.03].

important role in the Australian system of government.² Stakeholders also recognised, however, that such inquiries can be costly.³

10.4 Concern about the high costs of public inquiries, and public criticism about these costs, may be a factor for the Australian Government in considering whether to establish such an inquiry. There are ways, however, to reduce the costs of Royal Commissions and other public inquiries. In this chapter, the ALRC examines various methods for minimising the costs under the proposed new statutory framework for Royal Commissions and Official Inquiries.

Sources of information about costs

10.5 In this section, the ALRC identifies some sources of information about the costs of Royal Commissions and other public inquiries. There is no requirement in the *Royal Commissions Act 1902* (Cth) for the Australian Government to disclose information in relation to the costs associated with individual Royal Commissions. It is possible, however, to obtain information relating to the costs of individual inquiries from a range of public sources.

Reports of Royal Commissions and public inquiries

10.6 In recent times, it has been customary for Royal Commission reports to include some, albeit limited, information about the budget and costs of the inquiry. For example, information relating to the budget and expenditure of the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry) was set out in the final report.⁴ This included information about the initial budget allocated to the inquiry and the increases in that allocation following the extension of the reporting date. A lump sum figure, reflecting total expenditure as at the reporting date, was also included in the report.⁵ This figure would not have been ‘final’ in the sense that it may not have included publication and wind-up costs incurred after the reporting date.

10.7 The *Report of the HIH Royal Commission* also contained information about the funding of the Commission.⁶ Initial funding was provided from the resources of the then Department of Finance and Administration (which was later reimbursed from the Commission’s budget). Subsequently, the Commission was allocated its own budget, which was increased when the reporting date was extended. No increase was sought for a later extension of the reporting date. The report noted that the Australian Government Attorney-General’s Department (AGD) received separate funding to administer

2 See Appendix 1 for a List of Submissions and Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.

3 For example, Community and Public Sector Union, *Submission RC 10*, 22 May 2009; G Millar, *Submission RC 5*, 17 May 2009; I Turnbull, *Submission RC 6*, 16 May 2009.

4 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), 135–136.

5 At the end of October 2006 expenditure was \$9,124,361.00.

6 N Owen, *Report of the HIH Royal Commission* (2003), [2.2].

financial assistance for the legal and related costs of people appearing before the Royal Commission and applications for assistance were dealt with by the department, not the Commission.

10.8 The *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (Clarke Inquiry) contained a brief statement outlining the budget of the Inquiry.⁷ The Clarke Inquiry was funded under the budget appropriation of the AGD. The inquiry administered most of the budget and met all costs directly related to the inquiry such as salary and associated expenses, premises, office services, information technology, transcription services, advertising, report production and printing, hearings, interviews and a public forum. The balance of the inquiry's budget was administered by the AGD, primarily for the provision of financial assistance to members of the public who were asked to provide submissions or statements to the inquiry.⁸

10.9 In contrast, neither the *Report of the Inquiry into the Centenary House Lease* nor the *Report of the Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House*, included any information regarding the budget or expenditure of the inquiry.⁹ Further, no mention was made of budget or costs in the reports of the Equine Influenza Inquiry (2008) or the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005).¹⁰

10.10 As can be seen from the above examples, whether information about the budget of Royal Commissions and public inquiries is published in the final report appears to be a matter left to the discretion of the chairperson of the inquiry with practice varying from inquiry to inquiry. With the exception of the *Final Report of the Royal Commission into the Building and Construction Industry*,¹¹ only general information about the overall budget and expenditure has been made available in reports and the ALRC has not identified any examples of a breakdown of costs being provided in the report.

Departmental resources

10.11 The AGD, which is responsible for administrative support for Royal Commissions and certain other inquiries under the Commonwealth *Administrative Arrangements Order*, may publish information relating to the amounts allocated to individual Royal Commissions and other inquiries in its Portfolio Budget Statements, Additional Estimates Statements and Annual Reports. The figures are estimates only

7 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 292.

8 Ibid.

9 D Hunt, *Report of the Inquiry into the Centenary House Lease* (2004); T Morling, *Report of the Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House* (1994).

10 I Callinan, *Equine Influenza: The August 2007 Outbreak in Australia—Report of the Equine Influenza Inquiry* (2008); M Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005).

11 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, 43–45.

and show the total amount appropriated to each inquiry without any breakdown of costs.

10.12 Lists of contracts published by Australian Government departments are another source of information about amounts paid to contractors engaged to provide legal and other services to Royal Commissions and inquiries. Departments and agencies are required, under the Senate Order on Departmental and Agency Contracts (Senate Order), to publish a list of contracts entered into, which provide for payment of \$100,000 or more.¹² The list must indicate, among other things, the: name of the contractor; amount to be paid under the contract; subject matter of the contract; and commencement and duration of the contract. The Senate Order also requires the list of contracts to be placed on the internet with access provided through the department or agency's website.¹³

10.13 As the Senate Order only requires that access be provided to lists for the previous 12-month reporting period, historical lists of contracts may not be accessible on departmental websites. Further, the description of the subject matter of the contract may be insufficient to identify the services as having been provided to a particular Royal Commission or other inquiry.

Parliamentary materials

10.14 More specific information about the costs of individual Royal Commissions and other inquiries may become public through evidence given at estimates hearings before the Senate¹⁴ and in answers to questions in Parliament. This has occurred in relation to most Royal Commissions and some public inquiries in recent times, as discussed below.

10.15 The costs incurred by the Australian Government in relation to the appointment and conduct of the Commission of Inquiry into the Relations between the CAA and Seaview Air (1996) were the subject of questions in the House of Representatives. The responsible minister provided a detailed breakdown of the total cost of the inquiry, the legal costs met by the Commonwealth in respect of each of the parties involved, sums paid to each of the participating legal firms and costs of a non-legal nature.¹⁵

12 Departmental and agency contracts in Commonwealth, *Standing Orders and Other Orders of the Senate* (2009), 127–128.

13 *Ibid.*

14 Twice each year estimates of proposed annual expenditure of government departments and authorities are referred by the Senate to eight legislation committees for examination and report. These estimates are contained in the main appropriation bills introduced into Parliament as part of the budget (usually in May) and in the additional appropriation bills introduced later in the financial year (usually in February): Parliament of Australia—Department of the Senate, *Senate Brief No 5—Consideration of Estimates by the Senate's Legislation Committees* (2009), 1.

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 1997, 3408–3410 (J Sharp—Minister for Transport and Regional Development).

10.16 The expenditure of the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission) was subject to ongoing and close scrutiny in the Senate estimates process. The executive officers from the Royal Commission and officials from the AGD were called to answer questions at estimates hearings on numerous occasions. At the conclusion of the Commission, a detailed breakdown of expenditure was provided on behalf of the Attorney-General in answer to a question in Parliament. The information included a breakdown of amounts paid in fees and allowances to each of the thirteen counsel engaged to assist the Commission and the total expenditure on the Commissioner's accommodation, Comcar and travel allowances.¹⁶

10.17 Similarly, information relating to the total budgeted costs of the Royal Commission to Inquire into the Centenary House Lease (2004) was provided in answer to a parliamentary question shortly before the Commissioner presented his report. This included specific amounts for the costs of advertisements, office accommodation, information technology, media liaison services, printing, financial assistance and legal costs.¹⁷ Likewise, the Attorney-General provided information in answer to a question in Parliament, regarding the total expenditure on the AWB Inquiry—including total salary and other remuneration paid to the Commissioner and counsel assisting.¹⁸

10.18 More recently, officers from the AGD were called to give evidence during estimates hearings before the Senate Standing Committee on Legal and Constitutional Affairs in relation to the appropriation for the Clarke Inquiry.¹⁹ At the time of the hearing, the inquiry had not yet concluded. Further information regarding the final breakdown and total expenditure has come to light through parliamentary processes²⁰ (and, as noted above, limited information was included in the report of the Inquiry).

Other jurisdictions

10.19 Inquiries legislation in other Australian jurisdictions does not contain provisions for the formal disclosure of costs associated with the inquiry. The requirements in comparable overseas jurisdictions are discussed below.

United Kingdom

10.20 Prior to the enactment of the *Inquiries Act 2005* (UK), there was no statutory obligation to publish information about the costs of an inquiry, although it had become

16 Commonwealth, *Parliamentary Debates*, Senate, 14 May 2003, 11154-11156 (C Ellison—Minister for Justice and Customs).

17 Commonwealth, *Parliamentary Debates*, Senate, 16 November 2004, 101 (C Ellison—Minister for Justice and Customs).

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2007, 180 (P Ruddock—Attorney-General).

19 Commonwealth, *Official Committee Hansard*, Senate Standing Committee on Legal and Constitutional Affairs, 27 May 2008, 91–92.

20 Australian Government Attorney-General's Department, *Senate Standing Committee on Legal and Constitutional Affairs—Answer to Question No 114* (23 February 2009).

the practice to do so.²¹ In its examination of the use of investigatory inquiries by government, the House of Commons Public Administration Select Committee recommended that the responsible minister should announce a broad budget figure fairly early on at the start of an inquiry. Any increases over the announced limits would then need to be explained publicly at the end of the inquiry when final costs were published.²²

10.21 There is now a legislative requirement in s 39(6) of the *Inquiries Act* (UK) that the responsible minister must, within a reasonable time after the end of an inquiry, publish the total amount of what has been paid (or remains liable to be paid) for inquiry expenses.

10.22 The first inquiry established wholly under the *Inquiries Act* (UK)—the Public Inquiry into the September 2005 Outbreak of E.coli O157 in South Wales—did not include any information about the budget or costs of the inquiry in the final report.²³ At the conclusion of the inquiry, however, information about legal fees, travel, hotel accommodation and expenses of counsel assisting was set out in an ‘Expenditure Statement’ published on the inquiry’s website.²⁴

Canada

10.23 The Alberta Law Reform Institute recommended in 1992 that detailed estimates of the cost of a public inquiry should be prepared when the inquiry is established or as soon thereafter as is practicable. The Institute recommended that estimates be tabled and published in the government gazette at the time of approval and that the same procedures apply to any changes in the estimates that were needed from time to time.²⁵ This recommendation has not been adopted in the *Public Inquiries Act 2000* RSA c P-39 (Alberta). Nor does its federal equivalent—the *Inquiries Act 1985* RS c I-11 (Canada)—contain any formal requirements for the disclosure of the costs of public inquiries.

New Zealand

10.24 There is no requirement under the *Commissions of Inquiry Act 1908* (NZ) for the disclosure of the costs of public inquiries either at the time of their establishment or following their conclusion. The Department of Internal Affairs, which administers most public inquiries in New Zealand, receives an approved budgeted amount for each inquiry.²⁶ Accordingly, information about the costs of a specific inquiry could be

21 United Kingdom Department of Constitutional Affairs, *Consultation Paper—Effective Inquiries* (2004), [115].

22 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [127].

23 H Pennington, *The Public Inquiry into the September 2005 Outbreak of E.coli O157 in South Wales* (2009).

24 The Public Inquiry into the September 2005 Outbreak of E.coli O157 in South Wales, *Expenditure Statement*, < <http://wales.gov.uk/ecoliinquiry/?lang=en> > at 26 May 2009.

25 Alberta Law Reform Institute, *Proposals for the Reform of the Public Inquiries Act*, Report No 62 (1992).

26 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [14.7].

ascertained through an examination of the budget documentation for that Department. The Inquiries Bill 2008 (NZ), which is currently before the New Zealand Parliament, does not presently contain any requirements for the disclosure of inquiry budgets or costs.

Ireland

10.25 Under the *Commissions of Investigation Act 2004* (Ireland), the minister responsible for the operation of the commission must ensure that as soon as possible after the terms of reference are set, an accompanying statement is prepared containing an estimate of the costs of the commission and the length of time it will take. This must be published, as soon as possible after the terms of reference are set, in the official Irish gazette and such other publications as the minister considers appropriate.²⁷ Following the establishment of the first Commission under the *Commissions of Investigation Act* in April 2005—which examined the Garda investigation into the Dublin and Monaghan bombings of 1974—a notice published in the gazette estimated legal fees, salaries and other administrative costs would total €604,880 for a six month period.²⁸

10.26 In its present form, the Tribunals of Inquiry Bill 2005 (Ireland) requires a tribunal, in consultation with the responsible minister, to prepare a statement containing, among other things, an estimate of all the costs (including third party legal costs) likely to be incurred by the inquiry. The statement must be prepared within a specified timeframe following the appointment of the tribunal and laid before Parliament by the responsible minister ‘as soon as may be after it has been prepared’.²⁹ Further, when a tribunal of inquiry submits a final or interim report to the responsible minister, it must also provide a financial statement, which is then laid before Parliament.³⁰ The financial statement must specify ‘all known costs incurred in consequence of the inquiry’ including, as separate items:

- the tribunal’s legal costs (excluding third party legal costs);
- the tribunal’s administrative costs; and
- third party legal costs.³¹

Costs of public inquiries

10.27 In this section, the ALRC provides details about the costs incurred by previous Royal Commissions and inquiries. The ALRC has undertaken further research and

27 *Commissions of Investigation Act 2004* (Ireland) s 5(2)(b); Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [1.17].

28 *Iris Oifigiúil, (Commission of Investigation, Dublin and Monaghan Bombings of 1974—Statement of Costs and Timeframe for Investigation)*, 13 May 2005, 477.

29 Tribunals of Inquiry Bill 2005 (Ireland) cl 8 (as amended in the Select Committee on Justice, Equality, Defence and Women’s Rights). The Committee completed its consideration of the Bill on 2 April 2009 and it is presently awaiting the Fourth (Report) Stage in the House of Deputies (Dáil Éireann).

30 *Ibid* cl 10(5).

31 *Ibid* cl 10(8).

analysis of the costs of previous Royal Commissions and public inquiries, building on the estimates provided in IP 35.³² As noted above, there are a number of publicly available sources of information, including budget documentation, annual reports and parliamentary materials. Where possible, actual figures have been used but in some instances only estimates are publicly available. The figures presented in Tables 10.1 and 10.2 have been adjusted to 2008 dollars using the Reserve Bank of Australia's Annual Inflation Calculator.³³

Costs of Royal Commissions

10.28 Justice Ronald Sackville describes the factors that contribute to the high costs of Royal Commissions:

Investigations into factual matters, especially alleged impropriety or misconduct, tend to be time-consuming and to require the services of highly paid professionals. The investigative techniques utilised are often elaborate, especially where the conduct under investigation is clandestine in nature. The cost of hearings at which practising lawyers appear to assist the Commissions and to represent interested parties can be very substantial indeed. Moreover, a Royal Commission incurs start-up costs that an existing agency can usually avoid.³⁴

10.29 The following table provides an indication of the estimated costs of recent Royal Commissions.

Table 10.1: Estimated Cost of Selected Recent Royal Commissions

Name of Royal Commission	Date ³⁵	Estimated cost (adjusted for inflation)
Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme	10 November 2005– 24 November 2006	\$10,539,635 ³⁶

32 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Tables 6.1 and 6.2.

33 Reserve Bank of Australia, *Inflation Calculator* (2009) <<http://www.rba.gov.au/calculator/calc.go>> at 4 August 2009. Where possible, annual expenditure on individual inquiries has been adjusted for inflation according to the year of expenditure, and then combined to reach the total approximate cost of the inquiry in 2008 dollars. Where it is not possible to ascertain annual expenditure on individual inquiries, the total approximate cost of the inquiry has been adjusted for inflation from the year of completion of the inquiry to arrive at the total approximate cost of the inquiry in 2008 dollars.

34 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 286.

35 The listed dates refer to the date on which the terms of reference for the inquiry were issued and the date on which the inquiry reported.

36 This represents total expenditure to 28 February 2007, not including legal assistance to witnesses: Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2007, 180 (P Ruddock—Attorney-General). See also, Australian Government, *Portfolio Budget Statements 2006–2007—Attorney-General's Portfolio* (2006), 36; Australian Government, *Portfolio Budget Statements 2007–2008—Attorney-General's Portfolio* (2007), 44. Note that budget statements often reflect estimated, rather than actual, costs.

Royal Commission to Inquire into the Centenary House Lease	24 June 2004– 6 December 2004	\$4,356,738 ³⁷
Royal Commission into the Building and Construction Industry	29 August 2001– 24 February 2003	\$76,693,726 ³⁸
HIH Royal Commission	29 August 2001– 4 April 2003	\$45,331,958 ³⁹
Commission of Inquiry into the Relations between the CAA and Seaview Air	25 October 1994– 9 October 1996	\$11,224,677 ⁴⁰
Royal Commission into Aboriginal Deaths in Custody	16 October 1987– 9 May 1991	\$50,298,709 ⁴¹

Costs of other ad hoc public inquiries

10.30 Other forms of inquiry are generally less costly than most Royal Commissions. This may be because most forms of inquiry other than Royal Commissions conducted in Australia do not have the same coercive information-gathering powers as Royal Commissions, and often do not hold their hearings in public. This may reduce the

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- 37 This figure comprises the total budgeted costs for the inquiry, including: Attorney-General's Department staff; financial assistance for persons assisting the inquiry; the Royal Commissioner; senior and junior counsel assisting; solicitors assisting; inquiry staff; advertisements; office accommodation; information technology; media liaison services; printing and other services: Commonwealth, *Parliamentary Debates*, Senate, 16 November 2004, 101 (C Ellison—Minister for Justice and Customs); Commonwealth, *Parliamentary Debates*, Senate, 9 December 2004, 118 (C Evans—Leader of the Opposition in the Senate); Australian Government, *Portfolio Additional Estimates Statements 2004–2005—Attorney-General's Portfolio* (2005), 18.
- 38 This figure represents the costs of the Royal Commission to 31 October 2003. In addition future budgeted costs were estimated to be \$750,000 (unadjusted for inflation) comprising lease make good costs, lease arrears, fringe benefits tax liability, outstanding litigation costs and other minor costs: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 2003, 28913 (P Ruddock—Attorney-General). See also, Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2003, 23896 (J Hall); Australian Government, *Portfolio Additional Estimates Statements 2001–2002—Finance and Administration Portfolio* (2002), 14; Australian Government, *Portfolio Budget 2002–2003—Attorney-General's Portfolio* (2002), 32; Australian Government, *Portfolio Budget 2003–2004—Attorney-General's Portfolio* (2003), 39.
- 39 This figure represents the costs of the Royal Commission to 31 October 2003. In addition future budgeted costs were estimated to be \$80,000 (unadjusted for inflation) comprising fringe benefits tax liability, outstanding litigation costs, building and motor vehicle lease arrears, records storage costs and other minor costs: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 2003, 28913 (P Ruddock—Attorney-General). See also, Australian Government, *Portfolio Additional Estimates Statements 2001–2002—Finance and Administration Portfolio* (2002), 13; Australian Government, *Portfolio Budget 2002–2003—Attorney-General's Portfolio* (2002), 32; Australian Government, *Portfolio Budget 2003–2004—Attorney-General's Portfolio* (2003), 39.
- 40 This figure represents the total cost incurred by the Australian Government in relation to the appointment and conduct of the Commission, including an allocation for the instructing solicitors. In addition, \$5,585,660 was spent in providing legal assistance for parties appearing before the Commission. The Department of Transport and Regional Development incurred legal costs totalling \$392,070. A total of \$10,713,424 was paid to the participating legal firms, and costs of a non-legal nature totalled \$918,309.93: Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 1997, 3408 (J Sharp).
- 41 This figure includes running costs, financial assistance and the costs of instructing solicitors incurred by the then Department of Administrative Services. This figure does not include costs incurred as a result of the Royal Commission in other government portfolios: Commonwealth, *Parliamentary Debates*, Senate, 11 April 1991, 2317 (N Bolkus).

duration of the inquiry and the legal costs associated with an inquiry. On the other hand, the lack of information-gathering powers arguably may make inquiry findings less comprehensive.

10.31 The following table provides an indication of the estimated costs of recent non-Royal Commission public inquiries.

Table 10.2: Estimated Cost of Selected Recent non-Royal Commissions

Name of Public Inquiry	Date	Estimated cost (adjusted for inflation)
Inquiry into the Case of Dr Mohamed Haneef	13 March 2008– 21 November 2008	\$2,807,000 ⁴²
Equine Influenza Inquiry	25 September 2007– 12 June 2008	\$8,025,000 ⁴³
Fuel Tax Inquiry	8 July 2001– 15 March 2002	\$4,775,806 ⁴⁴
Independent Review of Energy Market Directions	September 2001– November 2002	\$4,775,806 ⁴⁵
Commission of Inquiry into the Lemonthyme and Southern Forests	8 May 1987– 6 May 1988	\$3,545,091 ⁴⁶

Publication of budgets or expenses

10.32 There is no requirement in the *Royal Commissions Act* for the Australian Government, Royal Commission or other public inquiry to produce information or reports on the predicted, ongoing or final cost of an inquiry. Some Royal Commissions,

42 This figure represents the most recent estimate of the costs of the inquiry provided by the Australian Government: Australian Government Attorney-General's Department, *Senate Standing Committee on Legal and Constitutional Affairs—Answer to Question No 114* (23 February 2009). The total budget allocated to, and administered by, the inquiry was \$3,840,000: Australian Government, *Portfolio Budget Statements 2008–2009—Attorney-General's Portfolio* (2008), 28. An additional \$350,000 was administered by the Attorney-General's Department for the provision of financial assistance: M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 292.

43 Australian Government, *Portfolio Budget Statements 2008–2009—Attorney-General's Portfolio*, 28. The initial budget allocation for the inquiry was \$11,490,000: Australian Government, *Portfolio Additional Estimates Statements 2007–2008—Attorney-General's Portfolio*, 14. Unspent funds were subsequently reappropriated to the Clarke Inquiry into the Case of Dr Mohamed Haneef: Commonwealth, *Official Committee Hansard*, Senate Standing Committee on Legal and Constitutional Affairs, 27 May 2008, 62. Note that the Equine Influenza Inquiry had many of the same powers as commissions established under the *Royal Commissions Act 1902* (Cth), but was established under the *Quarantine Act 1908* (Cth).

44 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 2003, 12413 (B McMullan).

45 Commonwealth, *Parliamentary Debates*, Senate, 21 March 2002, 1269 (N Minchin—Minister for Finance and Administration). This figure represents the total budget allocated to the inquiry rather than actual expenditure.

46 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 1988, 2176 (G Punch). This figure includes costs incurred by the Commission itself as well as expenditure in relation to grants, administrative, legal and publication costs by the Department of the Arts, Sport, the Environment, Tourism and Territories from within departmental appropriations.

as outlined above, have made available some information about costs in the report released as a result of the inquiry.⁴⁷ Some estimates of costs are also available in budgets prepared by Australian Government departments.⁴⁸ To date, however, much of the information in the public domain about actual ongoing or final costs of Royal Commissions and other public inquiries has been made available in Senate Budget Estimates Committee hearings or upon questioning in Parliament of government members. In contrast, Australian Government agencies, or permanent bodies established by statute, generally are required to provide detailed annual reports with information about actual revenue and expenses.⁴⁹

10.33 A requirement for Royal Commissions or other public inquiries to publish budgets or information about costs would provide greater transparency and focus attention on the costs associated with the inquiry and the need to ensure efficiency.⁵⁰ Such a requirement also would be in line with public accountability mechanisms. On the other hand, it has been suggested by the LRCI that the requirement to publish ongoing budget figures may detract from the work of public inquiries.⁵¹

10.34 Professor Enid Campbell has criticised the suggested imposition of a requirement for a detailed breakdown of expenses for a Royal Commission, arguing that

[t]his mode of financial administration is more appropriate to an on-going organisation which is better able, in the light of experience, to estimate its expenditure fairly precisely. It is not appropriate to organisations whose life rarely extends beyond two years.⁵²

10.35 An important question for the ALRC in this Inquiry is whether, in the interests of openness, transparency and accountability in the expenditure of public funds, as well as promoting greater efficiency, the Australian Government should be subject to more formal reporting requirements with respect to Royal Commissions and other public inquiries. In IP 35, the ALRC sought stakeholder views on a number of issues relating to the costs of inquiries, including whether the Australian Government should be required to make publicly available:

47 See, eg, T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10; T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22.

48 See, eg, Australian Government, *Portfolio Budget Statements 2006–2007—Attorney-General’s Portfolio* (2006).

49 See, eg, Australian Law Reform Commission, *Annual Report 2007–08*, 91–117; Commonwealth Ombudsman, *Annual Report 2007–08*, Appendix 5; Human Rights and Equal Opportunity Commission, *Annual Report 2007–08*, 181–213; Inspector-General of Intelligence and Security, *Annual Report 2007–08*, 76–104.

50 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [7.35].

51 *Ibid.*

52 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 345.

- more detailed information about legal fees of counsel and solicitors assisting;⁵³
- at the outset of the Royal Commission or other public inquiry, the proposed budget for the inquiry;⁵⁴
- during the Royal Commission or other public inquiry, interim reports on costs associated with the inquiry;⁵⁵ and
- upon the completion of a Royal Commission or other public inquiry, a breakdown of the costs of the inquiry.⁵⁶

Submissions and consultations

10.36 In consultations, stakeholders generally recognised that there was a need for transparency in the expenditure of public funds by inquiries. The majority of stakeholders supported greater disclosure of the costs of individual Royal Commissions and inquiries. Some expressed the view, however, that it would not be practical to require the Australian Government to publish details of the budget of an inquiry at the time of establishment. This was because it was often difficult for the government and inquiry members to predict the total costs that might be incurred until the inquiry was underway. It was suggested, therefore, that any requirement relating to the publication of budgets and expenses be imposed at the conclusion of an inquiry.⁵⁷

10.37 In relation to the financial accountability of inquiries, Liberty Victoria submitted:

Like government, inquiries should be accountable for the funds they spend. In practice this means that inquiries should have a budget and be required to provide a financial report at the end of the inquiry; including summaries for funds spent on legal advice, administration, witnesses, travel, etc. Although Liberty does not oppose the disclosure of all costs, summary information should suffice ...

Such financial accountability would not only increase public confidence, but would also encourage inquiries to reduce costs and reflect upon the expertise of the inquiry administrator. The use of summary reporting would also avoid privacy concerns except where a summary category was specific to a single person.⁵⁸

10.38 The Construction, Forestry, Mining and Energy Union (CFMEU) supported the introduction of requirements for the Australian Government to provide information

53 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–1.

54 Ibid, Question 6-7(a).

55 Ibid, Question 6-7(b).

56 Ibid, Question 6-7(c).

57 See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.

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

about the proposed budget of an inquiry, interim reports on costs and a breakdown of the costs upon completion of the inquiry.⁵⁹

10.39 In contrast, Graham Millar observed that there are already ‘established parliamentary and other protocols for the publication of the total payments to contractors, and the total of fees paid to individual lawyers and law firms assisting Royal Commissions are invariably published in accordance with these protocols’.⁶⁰

10.40 Similarly, the Australian Government Solicitor (AGS) stated that it was not aware of any clear case for greater disclosure than that which presently occurs with the government’s spending on legal fees in the course of its ordinary business.⁶¹

ALRC’s view

10.41 There are a number of existing sources of information about the costs of individual Royal Commissions and public inquiries. In the ALRC’s view, however, these sources are not readily accessible to the general public. Moreover, information often comes to light in a piecemeal fashion. There is no formal procedure for the disclosure of information about costs of completed Royal Commissions and inquiries. The extent of the information that is made public often depends upon the political process—namely, whether politicians ask questions about the costs of individual inquiries in Parliament or during estimates hearings. Although a substantial amount of information has come to light through these processes, practice has varied from inquiry to inquiry and has been driven, to some degree, by political factors.

10.42 It can be difficult to predict accurately how much a Royal Commission or inquiry will cost at the outset, and factors that can contribute significantly to the costs—for example, the complexity of the issues, the number of inquiry participants, the need for public hearings and the administrative and technological requirements of the inquiry—may not be known until the inquiry is underway. Experience has also shown that inquiries frequently require extensions of their reporting date and, therefore, additional budget allocations. For this reason, a requirement that the Australian Government publish information about the budget of an inquiry and provide interim reports on costs may not be particularly helpful. Further, if the costs of the inquiry are constantly in the public eye, this could negatively affect the conduct of the inquiry and the impact of its findings and recommendations.

10.43 Given the concern about the high costs of inquiries, and the difficulty in accessing existing sources of information about those costs, the ALRC is of the view that the proposed *Inquiries Act* should require the Australian Government to publish summary information about the costs of completed Royal Commissions and Official Inquiries within a reasonable time of the receipt of the final report. Ideally, this could

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

60 G Millar, *Submission RC 5*, 17 May 2009.

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

be done in an expenditure statement published on the inquiry's website. The statement should include a breakdown of the budget and expenditure of the inquiry. At a minimum, summary information should be provided for the following, as separate amounts:

- fees and allowances paid to the head of the inquiry;
- fees and allowances paid to counsel assisting;
- fees and allowances paid to solicitors assisting;
- financial assistance provided to witnesses and other participants for legal and non-legal costs;
- staff costs;
- information technology and communication costs;
- office accommodation; and
- other administrative and operational expenditure.

10.44 It would be appropriate for information on the above matters, and an appropriate timeframe for disclosure, to be included in the proposed *Inquiries Handbook*.

Proposal 10–1 The proposed *Inquiries Act* should provide that the Australian Government publish summary information about the costs of Royal Commissions and Official Inquiries within a reasonable time of the receipt of the final report.

Role of inquiry members

10.45 One way to minimise inquiry costs may be to require inquiry members to monitor or control costs associated with the inquiry. Under the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA), for example, the Commissioner was required to 'seek to adopt procedures that will facilitate a prompt, cost-effective and thorough investigation of any matter relevant to the Inquiry'.⁶² In the Interim Report, Commissioner Mullighan stated that he had attempted to comply with this requirement.⁶³

⁶² *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 5(1)(b).
⁶³ E Mullighan, *Children in State Care Commission of Inquiry—Interim Report* (2005), 43.

10.46 In the United Kingdom, the *Inquiries Act* (UK) provides that the chair of an inquiry must have regard to the need to avoid unnecessary cost (whether to public funds or to witnesses or others) in making decisions as to the procedure or conduct of an inquiry.⁶⁴ Statutory rules made under the *Inquiries Act* include evidentiary and procedural rules that further ‘assist the chairman in controlling oral procedures and prevent extensive and costly cross-examination procedures’.⁶⁵

10.47 Similarly, under the Tribunals of Inquiry Bill 2005 (Ireland), tribunals of inquiry would be required to perform their functions in a manner that is ‘efficient, effective and expeditious’.⁶⁶ The Bill further provides that a ‘tribunal shall not inquire into a relevant matter unless it is satisfied that the cost and duration of the inquiry into the relevant matter are likely to be justified by the importance of the facts that are likely to be established in consequence of such inquiry’.⁶⁷

10.48 The Inquiries Bill 2008 (NZ) also requires that inquiry members, in making a decision as to the procedure or conduct of an inquiry, must ‘have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry’.⁶⁸

Submissions and consultations

10.49 In IP 35, the ALRC sought views on the role inquiry members should play in monitoring and controlling inquiry expenditure, including whether such an obligation should be required by legislation, and the nature and scope of such a requirement.⁶⁹

10.50 In consultations, some stakeholders observed that inquiry members were not always closely involved in matters pertaining to the budget and day-to-day expenditure of the inquiry. As their primary role was to investigate and report on the terms of reference of the inquiry, inquiry members may not possess skills and experience in financial management and administration. As such, the practice had been for the budget and expenditure of inquiries to be overseen by the executive officer or secretary of the inquiry, with input from inquiry members as necessary.⁷⁰

10.51 Millar stated that past Royal Commissioners have taken an ‘active interest in the budget and expenditure to the extent that the budget is adequate to fulfil the terms of reference and that expenditure represents value for money’. As Commissioners were responsible for the strategic management of the inquiry process, Millar submitted that

64 *Inquiries Act 2005* (UK) s 17(3).

65 Explanatory Memorandum, *Inquiry Rules 2006* (UK), [2.1].

66 *Tribunals of Inquiry Bill 2005* (Ireland) cl 21(1).

67 *Ibid* cl 21(2).

68 *Inquiries Bill 2008* (NZ) cl 14(2)(b).

69 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–8.

70 See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.

the day-to-day management of the inquiry budget and expenditure was best left to the senior support staff.⁷¹

ALRC's view

10.52 In the ALRC's view, imposing a statutory obligation on inquiry members to monitor and control expenditure would be of limited use. Inquiries are conducted within the confines of the budget allocated to them by the executive government. Inquiries are financially accountable in their expenditure of public money through a variety of mechanisms. As discussed above, the ALRC proposes that the Australian Government be required to publish summary information about the costs of individual inquiries.⁷² Such a requirement is sufficient to improve transparency and public access to accurate information about the costs of inquiries. It is not clear how imposing an additional statutory obligation upon inquiry members personally to monitor expenditure would lead to any substantial benefit in terms of minimising the costs of inquiries.

10.53 In any event, it would be difficult to measure an individual inquiry member's compliance with a statutory obligation of this nature. It is also difficult to see how such an obligation could be enforced, other than on application for judicial review. As the conduct of an inquiry involves the expenditure of public funds, there may be a large number of people who may have a sufficient interest to seek judicial review remedies. In the past, however, the courts have displayed some reluctance to allow individuals and organisations to challenge these types of spending decisions.⁷³ Challenges would also result in substantial delays to the conduct of an inquiry.

Jurisdiction to award costs

10.54 In Australia, Royal Commissions and other public inquiries do not have the power to order a person to pay costs. In some overseas jurisdictions, however, public inquiries have the power to order that a person pay the costs of an inquiry or a witness appearing before the inquiry. For example, in New Zealand, a Commission of Inquiry:

may order that the whole or any portion of the costs of the inquiry or of any party thereto shall be paid by any of the parties to the inquiry, or by all or any of the persons who have procured the inquiry to be held.⁷⁴

10.55 In its 2008 report, *A New Inquiries Act*, the New Zealand Law Commission (NZLC) noted that the power to order the payment of costs rarely had been used.⁷⁵ The NZLC was of the view that individuals required to participate in inquiries should not bear potential liability for costs related to actions that took place before the start of the

71 G Millar, *Submission RC 5*, 17 May 2009.

72 See Proposal 10–1.

73 *Pape v Commissioner of Taxation* [2009] HCA 23, [49].

74 *Commissions of Inquiry Act 1908* (NZ) s 11. See also the *Tribunals of Inquiry (Evidence) Amendment Act 1997* (Ireland) s 6(1).

75 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [7.4].

inquiry. It also noted that, unlike in civil cases, cost orders in inquiries ‘do not serve the purposes of indemnifying successful litigants; deterring frivolous actions; or encouraging settlement’.⁷⁶

10.56 The NZLC, however, supported the retention of the power to order costs in certain circumstances. It recommended that an inquiry should be able to make an order for the payment of costs if it is satisfied that the conduct of a person has unduly lengthened, obstructed or added undue cost to an inquiry.⁷⁷ In such circumstances, the inquiry member may order that costs be paid at a reasonable rate. Further, some or all of the costs may be paid to another participant in the inquiry.⁷⁸ Such an order may be made regardless of whether hearings have been held in the inquiry.⁷⁹ These recommendations are reflected in cl 29 of the Inquiries Bill 2008 (NZ), which empowers an inquiry to make an award of costs. Once filed in the appropriate court, an award of costs becomes enforceable as a judgment of that court.⁸⁰

Submissions and consultations

10.57 In IP 35, the ALRC asked whether Royal Commissions or other public inquiries should have the power to make an order for costs incurred by the inquiry or a witness appearing before the inquiry and, if so, in what circumstances.⁸¹

10.58 In Liberty Victoria’s view, a non-judicial inquiry should not have the power to make a costs order against a person, but should be able to make certain recommendations, or be able to apply to a court to have such an order made.⁸² Liberty Victoria noted, however, that it may be appropriate for an inquiry to have the power to order a government body or agency to pay certain expenses—for example witness expenses—but only where the power is clearly defined and there is a right of appeal.

10.59 Millar submitted that empowering an inquiry to make costs orders could have the effect that, in some circumstances, those who are required to appear before, or otherwise assist, an inquiry may alter their behaviour in a way that is detrimental to the outcome of the inquiry.⁸³ On the other hand, Millar submitted that there may be advantages in a limited power to make an order for costs against a person or

76 Ibid, [7.5].

77 Ibid, Rec 35.

78 Ibid.

79 Ibid, Rec 36. The NZLC also recommended that such costs orders should be enforceable in any court of competent jurisdiction: Rec 37. For a detailed explanation of the recommendations, see New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Ch 7.

80 Inquiries Bill 2008 (NZ) cl 29(4).

81 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–9.

82 Liberty Victoria, *Submission RC 1*, 6 May 2009. The costs of inquiry participants are discussed in Ch 9.

83 G Millar, *Submission RC 5*, 17 May 2009.

organisation who is obstructing an inquiry, or adding to its costs, or the costs of a party before the inquiry.⁸⁴

10.60 Similarly, Dr Ian Turnbull submitted that inquiries must be able to make costs orders against participants who deliberately delay or otherwise hinder or interfere with the inquiry and such a power must be reviewable.⁸⁵

10.61 The AGS submitted that as Royal Commissions and other ad hoc inquiries impose an unusual burden on those participating in them, any additional burden by way of a costs penalty could be difficult to justify on public policy grounds.⁸⁶

ALRC's view

10.62 The ALRC is not presently persuaded that empowering inquiry members to make costs orders will enhance the efficiency or cost-effectiveness of Royal Commissions and Official Inquiries. The ALRC does not, therefore, propose that a power to award costs against an inquiry participant be incorporated into the proposed *Inquiries Act*.

10.63 The primary function of inquiries is to investigate issues and provide reports and recommendations to government. They do not determine rights and liabilities and their recommendations are not legally binding. In the ALRC's view, this does not sit comfortably with the purposes of the costs indemnity rule—namely, that an unsuccessful party will usually be ordered to pay the legal costs of the successful party. The purposes served by this rule in civil litigation are not applicable in the context of inquiries.⁸⁷

10.64 Another concern is that conferring a power to award costs upon an ad hoc executive body, appointed for the purpose of reporting and recommending action to government, could be open to question on constitutional grounds. If a power to award costs were incorporated into the proposed *Inquiries Act*, provision would have to be made for the enforcement of costs orders by a court in the exercise of its judicial power.⁸⁸ In the ALRC's view, this would be necessary to limit the possibility of constitutional challenge on the ground that the proposed Act purports to confer the judicial power of the Commonwealth on inquiry members. Assuming the power could be drafted in a way that was constitutionally valid, any decision by an inquiry member to award costs against an inquiry participant would entail separate enforcement proceedings in a court and could also be quashed upon judicial review.

84 Ibid.

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

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

87 Those purposes are: to assist parties to finance their litigation; aid the settlement process; help minimise the potential for damages awards to be eroded by the costs of litigation; and deter people from pursuing claims and defences: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [4.1].

88 *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2, [2] (per Gleeson CJ).

10.65 In Chapters 18 and 19, the ALRC proposes the inclusion of several criminal offences relating to non-compliance with the requirements of Royal Commissions or Official Inquiries, and to the disruption of the proceedings of an inquiry. In the ALRC's view, these proposals, if adopted, would be sufficient to deter inquiry participants from engaging in conduct aimed at delaying, obstructing or increasing the cost of inquiries. The ALRC also notes that, in the jurisdictions in which the power to award costs is available, the power has been exercised rarely.

Other methods of minimising costs

10.66 In addition to the proposals made in this chapter, the ALRC proposes measures throughout this Discussion Paper that are intended to encourage greater flexibility, less formality and greater cost-effectiveness in the conduct of inquiries. In particular, the ALRC's proposed new statutory framework for public inquiries would introduce a second tier of inquiry which would provide a more flexible, expeditious and cost-effective form of inquiry.

10.67 In Chapter 6, the ALRC considers issues relating to an inquiry's terms of reference. It is observed that terms that are too wide can lead to unnecessary cost, complexity and delay, and can leave an inquiry 'floundering in a wilderness of possible avenues of investigation'.⁸⁹ Costs considerations should be taken into account when determining whether or not it is appropriate to establish an ad hoc inquiry under the proposed *Inquiries Act* and, if so, the appropriate tier of inquiry.

10.68 An alternative to establishing an inquiry is for the Australian Government to make greater use of the various existing permanent bodies that possess the necessary powers and already have existing infrastructure to carry out certain types of inquiries. In some circumstances, it may be more efficient and cost-effective to refer some inquiries to these existing bodies rather than establishing a Royal Commission or Official Inquiry. For example, the direct costs to the Office of the Inspector-General of Intelligence and Security (IGIS) of the Inquiry into the actions taken by ASIO in 2003 in respect of Mr Izhar Ul-Haque and related matters in 2007–2008 totalled \$215,000.⁹⁰ This is substantially less than the costs of Royal Commissions and other ad hoc public inquiries. While some IGIS inquiries may be more focused in scope than ad hoc inquiries, they deal with complex matters.⁹¹

10.69 A further option for minimising costs discussed in Chapter 5 is for existing bodies, such as the IGIS and the Commonwealth Ombudsman, to enjoy a temporary expansion of powers, functions and resources to conduct some executive inquiries.⁹²

89 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 52.

90 Inspector-General of Intelligence and Security, *Submission RC 2*, 12 May 2009.

91 *Ibid.*

92 See Question 5–1.

10.70 An important aspect of ensuring the cost-effectiveness of inquiries is their administration.⁹³ The ALRC sees merit in formalising arrangements for providing set-up and other administrative support to Royal Commissions and other ad hoc public inquiries. This may streamline processes and reduce costs. In particular, this may be achieved through measures to preserve institutional knowledge acquired from previous Royal Commissions and other inquiries to limit any ‘reinvention of the wheel’ each time an inquiry is established. In this regard the ALRC notes, in Chapter 8, that it would be appropriate for the Australian Government to engage a person who possesses substantial experience in the administration of inquiries to prepare guidance on matters pertaining to their administration for inclusion in the proposed *Inquiries Handbook*.

10.71 In Chapter 9, the ALRC proposes a number of measures for the funding of certain expenses incurred by inquiries and inquiry participants. It is important that the funding of legal representation and other assistance for inquiry participants is monitored carefully throughout the inquiry to ensure that it is provided at an appropriate level and is delivered in the most cost-effective manner. For example, inquiry participants who share a common interest may not require independent legal representation and could be represented by the same lawyers. Further, in determining the required level of skill and expertise of legal practitioners appointed to assist an inquiry, it is appropriate to consider whether the issues in the inquiry require the expertise of Senior Counsel in the role of counsel assisting. An experienced junior counsel may suffice.

10.72 In Chapter 11, the ALRC examines issues relating to the exercise of coercive and other investigatory powers by Royal Commissions and Official Inquiries. The ALRC proposes that inquiry members be able to require information from a person in a form approved by the inquiry. This may facilitate greater emphasis on the use of written statements in inquiries, make proceedings more efficient and reduce the cost of witness examinations. The ALRC also proposes greater flexibility for inquiries to determine the form in which documents and other things are produced, including in electronic format. This may avoid the significant costs associated with converting material from hard copy to digital form (or vice versa).

10.73 In Chapter 14, the ALRC considers issues relating to inquiries and courts. In particular, measures are proposed to enable an inquiry member to refer a question of law to the Federal Court. This mechanism may provide a convenient alternative to judicial review proceedings that are often costly and time-consuming. It may also be a more cost-effective way to resolve issues relating to privilege and public interest immunity without imposing the costs of judicial review proceedings on inquiry participants.

10.74 In Chapter 15, the ALRC examines the types of procedures an inquiry member chooses to employ in conducting an inquiry. The ALRC proposes measures to facilitate

93 The ALRC’s proposals relating to the administration of inquiries are discussed in Ch 8.

a more informal and inquisitorial inquiry process. It is envisaged that inquiry members will take account of the cost-effectiveness of particular methods of investigation and inquiry and thereby avoid unnecessary expenditure of public resources and the resources of inquiry participants.

