

11. Powers

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Introduction

11.1 As discussed in Chapter 5, the ALRC is proposing that one of the key distinctions between Royal Commissions and Official Inquiries under the proposed *Inquiries Act* will be the powers conferred on each tier of inquiry. Broadly speaking, Royal Commissions, as the highest tier, will be conferred with a wider range of coercive powers than Official Inquiries. The approach proposed by the ALRC is that the proposed *Inquiries Act* set out the powers available to each tier of inquiry rather

than the Australian Government selecting the powers that may be exercised by individual inquiries at the time they are established.¹

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

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

Overview of powers of Royal Commissions and Official Inquiries

11.4 One of the key differences between Royal Commissions and other types of inquiries and reviews, is that Royal Commissions have coercive powers to summon witnesses and gather other evidence.² As discussed in Chapter 4, governments can create a multitude of other types of boards or inquiries, but these will generally lack the coercive powers of a Royal Commission.³

11.5 By their very nature, Royal Commissions are a 'fishing expedition'.⁴ It is argued that they require broad powers to ensure that the issues and facts are fully canvassed.

It would be hard to envisage that the Fitzgerald Commission of Inquiry in Queensland would have uncovered such deep seated corruption in the Police Force and government if Commissioner Fitzgerald did not possess coercive powers. The

1 The option of selecting powers for each tier of inquiry is discussed in Ch 5.

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

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

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

witnesses he summoned would simply have refused to attend, refused to answer questions that were incriminating or have claimed privilege.⁵

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

These powers enable Commissions to unearth hidden evidence, but also have significant and sometimes intrusive impact on the affairs of governments and individuals.⁶

11.7 A key consideration for the ALRC is whether both tiers of inquiry under the proposed *Inquiries Act* require similar powers to undertake their investigations. Other law reform bodies also have considered the issue of what powers are appropriate for different forms of executive inquiry. The New Zealand Law Commission (NZLC), in a recent review of the equivalent inquiries legislation of New Zealand, noted that coercive powers can mean that not only those being investigated, but also those asked to appear before a commission, can face significant costs in time and money and risk reputational damage.⁷ Nonetheless, it found that the availability of general powers to call witnesses and require the production of documents are an important feature of most major inquiries.

We have encountered no dispute that there is a place for inquiries with coercive powers: in a modern complex society the power to constitute an inquiry with coercive powers is essential.⁸

11.8 The coercive information-gathering and other investigatory powers of various Commonwealth bodies were considered by the Administrative Review Council (ARC) in its 2008 report, *The Coercive Information-Gathering Powers of Government Agencies*.⁹ The ARC noted that such powers were important administrative and regulatory devices for government and many agencies used them to compel the provision of information, the production of documents and the answering of questions.¹⁰ The ARC put forward a number of best practice principles to be used as a guide to government agencies, to ensure fair, efficient and effective use of coercive information-gathering powers.¹¹

5 H Reed, 'The "Permanent" Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II' (1995) 2(3) *Australian Journal of Administrative Law* 157, 157.

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

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

8 *Ibid.*, [5.5].

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

10 *Ibid.*, ix.

11 *Ibid.*, xi–xviii.

Submissions and consultations

11.9 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether Royal Commissions and other public inquiries required coercive powers and whether this should depend on the nature of the inquiry.¹² As noted in Chapter 5, there was strong support amongst stakeholders for retaining Royal Commissions, which are the highest statutory form of public executive inquiry and already have a broad range of coercive powers under the *Royal Commissions Act 1902* (Cth). In addition, there was support for introducing a statutory basis for non-Royal Commission forms of public inquiry.

11.10 Liberty Victoria pointed out that the use of coercive powers by government (including by public inquiries) often raised civil liberties concerns.¹³ It acknowledged, however, that unless an inquiry could obtain the information it needed, it could not achieve the purpose for which it was created. Liberty Victoria considered it essential that to achieve their purposes inquiries have sufficient powers, including coercive powers to require information. It recommended that public inquiries have broad powers, which may only be exercised as necessary and reasonable.

11.11 The Law Council of Australia (Law Council) recognised the need for Royal Commissions to have strong, and generally coercive, information-gathering powers but was concerned that in certain areas the *Royal Commissions Act* did not achieve ‘the appropriate balance between robust public scrutiny and protecting the rights of participating individuals’.¹⁴ The Law Council expressed the view that information-gathering powers must be seen as exceptional, particularly when used in executive rather than judicial processes, given their intrusive impact on individual rights. Its view was that the use of such powers was justified only when necessary to achieve a legitimate purpose and only when accompanied by sufficient protection against their overuse or misuse and by provisions to mitigate their adverse impact on individual rights.¹⁵ It submitted that, in future, public inquiries such as the Clarke Inquiry into the Case of Dr Mohamed Haneef (Clarke Inquiry), should not be conducted in the absence of suitable powers and protections.¹⁶

11.12 The Department of Immigration and Citizenship (DIAC) supported retaining Royal Commissions with all the powers and protections in the *Royal Commissions Act*. DIAC submitted that coercive powers should only be used in investigatory inquiries that involved major matters of public interest and where there was a strong requirement

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

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

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

15 *Ibid.* Protections, procedural safeguards, and privileges and immunities are discussed in Chs 12, 15 and 16 respectively.

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

for public disclosure. This was particularly the case where there was concern that the inquiry would not otherwise be able to access information.¹⁷

11.13 The Australian Government Solicitor (AGS) observed that, in many instances, the absence of coercive powers would inhibit the ability of an inquiry to fulfil its terms of reference. The AGS considered that it would only be in those inquiries which did not involve controversial or contentious matters, or were of a policy nature, that the absence of coercive powers would not unduly affect the ability of the Royal Commission or inquiry to pursue all relevant lines of inquiry. The AGS did not see any significant shortcomings with the present approach, which allows for Royal Commissions and other ad hoc inquiries to be conducted by reference to the powers and procedures in the *Royal Commissions Act* and for permanent inquiries to be conducted by reference to specific statutory powers.¹⁸

11.14 According to the Community and Public Sector Union (CPSU), the significance of Royal Commissions justified their powers to compel the production of documents and the attendance of witnesses.¹⁹ The CPSU submitted that the granting of coercive powers was very significant and restricted the rights of witnesses and others. As such, it would be inappropriate for such powers to be conferred on other forms of public inquiry in any wholesale manner.²⁰

11.15 Graham Millar submitted that coercive powers were an essential feature of Royal Commissions and, except in special circumstances, an inquiry not requiring coercive powers—such as an inquiry restricted to policy issues—did not need to be a Royal Commission.²¹

ALRC's view

11.16 In the ALRC's view, both tiers of inquiry under the proposed *Inquiries Act* may require coercive powers to investigate effectively and efficiently and report on a particular issue or event. Conferring coercive powers ensures that inquiry members have access to all the information necessary to make informed findings and recommendations.

11.17 The ALRC's proposals are designed to confer powers under the proposed *Inquiries Act* in a manner that is proportionate to the functions performed by Royal Commissions and Official Inquiries. Moreover, the ALRC recognises that it is essential that such powers only be exercised if it is justified by the particular circumstances of the inquiry. The exercise of such powers should only impinge on the rights of

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

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

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

20 Ibid.

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

individuals in a proportionate and justifiable way.²² As with other executive bodies that possess coercive powers, powers conferred on Royal Commissions and Official Inquiries should be complemented by appropriate rights and protections.²³

11.18 As noted above, the ALRC proposes that the powers available to each tier of inquiry be set out in the proposed *Inquiries Act*. Such an approach ensures an appropriate level of transparency in the inquiry's process and procedure. It may also improve the perception of independence of the inquiry that may not be achieved if the Australian Government is able to select the powers when the inquiry is appointed. The ALRC notes that a similar approach has been adopted in inquiries legislation in most Australian states and territories, existing alongside legislation enabling the appointment of Royal Commissions.

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

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

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

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

Table 11.1: Powers of Royal Commissions and Official Inquiries and associated privileges and immunities

Description	Royal Commissions	Official Inquiries
Powers		
Require production of documents and other things	Yes	Yes
Require attendance or appearance to answer questions	Yes	Yes
Require information in an approved form	Yes	Yes
Require evidence on oath or affirmation	Yes	Yes
Administer oath or affirmation	Yes	Yes
Prohibit disclosure of the existence of a notice	*	*
Inspect, retain and copy any documents or other things	Yes	Yes
Apply to a judge for a warrant to exercise entry, search and seizure powers	Yes	No
Receive intercepted information	Yes	*
Communicate information relating to contravention of a law	Yes	Yes
Exercise concurrent functions and powers under Commonwealth and state or territory laws	Yes	No
Take evidence and make inquiries overseas	Yes	Yes
Apply to a judge for a warrant for the apprehension of a person who fails to appear or attend	Yes	No
Privileges and immunities²⁴		
Client legal privilege can be abrogated	Yes	No
Privilege against self-incrimination can be abrogated	Yes	No
Direct use immunity applies	Yes	No
* This Discussion Paper asks questions about these powers but does not make any proposals.		

24 The privilege against self-incrimination and direct use immunity are discussed in Ch 16. The application of client legal privilege to Royal Commissions was the subject of a recommendation by the ALRC in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), Rec 6–2. The application of client legal privilege to Official Inquiries is discussed in Ch 16.

Coercive information-gathering powers

11.21 Royal Commissions and other inquiries need to obtain information in order to report on the matters falling within their terms of reference. For the purpose of performing their investigatory and associated functions, Royal Commissions and other inquiries may obtain information on a voluntary basis. Royal Commissions also have the ability to obtain information by using a range of coercive powers. These information-gathering powers can be exercised in relation to persons who are directly the target of a Commission's inquiry or persons who happen to have information or documents relevant to the inquiry.

11.22 A Royal Commission's general powers to obtain information are similar to those of courts.²⁵ They also are consistent with the statutory powers conferred on many government agencies to enable them to obtain information in order to fulfil their functions.²⁶ Such powers typically allow officers of the agency to compel the provision of information, the production of documents and the answering of questions.²⁷

11.23 It is envisaged that both tiers of inquiry under the proposed *Inquiries Act* will require some form of coercive information-gathering powers. There are two main types: the power to require a person to give oral evidence or to provide information in some other way; and the power to require a person to produce documents or other physical things.²⁸

Production of documents and attendance to answer questions

11.24 Under the *Royal Commissions Act*, a member of a Royal Commission may summon a person to appear before the Commission at a hearing or to produce documents or other things.²⁹ A person who fails to attend a hearing or produce the requested documents or things, without reasonable excuse, commits an offence punishable by a maximum penalty of \$1,100 or imprisonment for six months.³⁰

11.25 In 2001, the *Royal Commissions Act* was amended to enable, among other things, a Commissioner or member of a Commission to require persons to produce documents or things by notice. Previously, persons could be required to produce documents to a Commissioner only at a formal hearing. This proved impractical in

25 Examples of court processes include the issuing of subpoenas and notices to produce and the summoning of witnesses.

26 For example, agencies such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office.

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

28 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 50.

29 *Royal Commissions Act 1902* (Cth) s 2. This includes the power to require a person to produce a document that is subject to privilege, although the fact that the document is subject to client legal privilege may still be a reasonable excuse for failing to produce the document. Privilege is discussed in Ch 16.

30 *Ibid* s 3. Penalties under the *Royal Commissions Act* are discussed in Ch 20.

Commissions which required the collection of large numbers of documents, such as the HIH Royal Commission (2003), the proceedings of which prompted the 2001 amendments.³¹ In the *Final Report of the Royal Commission into the Building and Construction Industry (Building Royal Commission Report)*, Commissioner Cole praised these powers for allowing the Commission to compel the production of documents well in advance of hearings, assisting both in the preparation for hearings and identifying avenues for further investigation. That Commission issued 1,692 notices to produce.³²

11.26 The 2001 amendments also clarified that a Commissioner can summon a person to produce documents or things without requiring them to give oral evidence.³³ This was achieved by amending s 2 to allow that a person may be summoned to appear before the Commission either to give evidence or produce documents or things (or to do both).³⁴

11.27 A Royal Commission may also take sworn evidence and may require a person appearing before it to take an oath or affirmation for that purpose.³⁵

Submissions and consultations

11.28 In IP 35, the ALRC asked for stakeholder views on whether the current powers of a Royal Commission to summon a person to appear before it or to produce documents or things, including by way of notice, were operating effectively in practice and whether other forms of public inquiry should have similar powers.³⁶

11.29 Liberty Victoria believed that all levels of inquiry ‘should have a broad discretion (power) in how and what they obtain as evidence’.³⁷ The power to require a person or organisation to attend an oral hearing or produce documents or information was, in Liberty Victoria’s view, a necessary power.

11.30 The AGS noted that the power of a Royal Commission to summon a person to appear before it, or to produce documents, generally appeared to be effective.³⁸

11.31 The Law Council noted that non-statutory inquiries were often unable to generate the same level of support as their statutory equivalents.³⁹ In the case of the

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

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

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

34 There are penalties for non-compliance with a summons. These are discussed in Ch 20.

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

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

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

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

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

Clarke Inquiry, this related primarily to the lack of information-gathering powers, which in turn raised concerns that non-statutory inquiries may not have all the information necessary to make the best recommendations. The Law Council stated that further consideration should be given to investing Commonwealth public inquiries with statutory powers. For example, it recommended that such inquiries be provided with coercive information-gathering powers including the power to compel the attendance of witnesses and the production of documents. It also proposed that inquiries have the power to issue warrants for the apprehension of witnesses to bring them before the inquiry.⁴⁰

ALRC's view

11.32 The availability of information-gathering powers is the fundamental and characteristic feature of Royal Commissions.⁴¹ Having regard to the experience of Royal Commissions and other inquiries, it is necessary for them to possess the power to obtain information relevant to their terms of reference, by requiring the production of documents and other things or by requiring a person to attend an oral examination or hearing to answer questions.

Documents

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

11.34 Under the current Act, a Royal Commission can also obtain documentary material by summoning a person to appear at a hearing to produce documents or other things specified in the summons.⁴² These powers require production only at hearings, and not before. There appears to be no reason to retain the existing distinction between a Royal Commission’s power to issue a summons for the production of documents at a hearing and to issue a notice for production of documents by other means. In order to streamline the current procedures, coercive information-gathering powers should be exercisable by written notice. Further, the inquiry member issuing the notice should be able to specify the manner in which documents or other things are to be produced. The notice could require the person to produce the documents covered by the notice at a

40 Ibid.

41 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 31.

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

specified place, on or before a specified date, or require the person to attend in person to produce the documents at a hearing.⁴³

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

11.36 Taken together, the definition of ‘document’ in s 1B of the *Royal Commissions Act* and ‘record’ in s 25 of the *Acts Interpretation Act 1901* (Cth)⁴⁴ includes information stored or recorded by means of a computer. It is appropriate that similar definitional provisions are incorporated in the proposed *Inquiries Act* and that an inquiry member issuing a notice for production is able to specify how the person is to produce documents or other things, for example, an electronic form of a document that is reliable and readily accessible.

Oral evidence

11.37 In the context of Royal Commissions and other inquiries, oral examinations perform a number of functions, including:

- the identification of relevant facts;
- the disclosure of the existence of documents so that they can be seized or their production required; and
- assisting with the interpretation of documents already obtained.⁴⁵

11.38 Oral evidence can be a major source of information for Royal Commissions and other investigatory inquiries. It is proposed, therefore, that both Royal Commissions and Official Inquiries be empowered to require the appearance of a person at a hearing to give oral evidence or require a person’s attendance at an examination to answer questions. The ALRC’s proposals with respect to the privilege against self-incrimination and direct use immunity are discussed in Chapter 16.

11.39 It is desirable that witnesses cooperate with inquiries and provide truthful evidence. It is inevitable, however, that this will not occur in every case. In the

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

44 Section 1B of the *Royal Commissions Act 1902* (Cth) defines ‘document’ to include ‘any book, register or other record of information, however compiled, recorded or stored’.

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

ALRC's view, it is necessary to retain the power of a Royal Commission to take oral evidence at a hearing or examination on oath or affirmation and that this power be conferred on Official Inquiries.⁴⁶

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

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

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

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

Powers of arrest

11.41 Section 6B of the *Royal Commissions Act*, originally inserted in 1912,⁴⁷ empowers the president or chair of a Royal Commission to issue a warrant for the apprehension of a person who has failed to attend in answer to a summons. Such a warrant authorises the apprehension of a person so that they can be brought before the Royal Commission and detained in custody for that purpose until they are released by order of the president or chair.⁴⁸ The apprehension of a person under s 6B of the Act does not relieve that person of any liability for offences or penalties relating to non-compliance with a Royal Commission.⁴⁹

46 An oath or an affirmation may be administered by an inquiry member, or a person authorised by an inquiry member: *Royal Commissions Act 1902* (Cth) s 2(3). The power to take evidence on oath or affirmation is also essential to ensure that offences in the *Crimes Act 1914* (Cth) apply. This is discussed in Ch 18.

47 *Royal Commissions Act 1912* (Cth).

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

49 *Ibid* s 6B(4).

11.42 In New South Wales, Western Australia and the Australian Capital Territory, Royal Commissions and some public inquiries are empowered to issue arrest warrants on their own motion.⁵⁰ In South Australia, the chair of a Royal Commission may issue an arrest warrant or may apply to a magistrate for such a warrant.⁵¹ In Queensland, the chairperson may make an ex parte application to a magistrate for the issue of a warrant for the apprehension of a person who has failed to comply with a summons.⁵² The chairperson of an inquiry may also issue a warrant on his or her own motion for the apprehension of a person who has failed, or probably will fail, to attend before the inquiry.⁵³

11.43 In contrast to other state and territory jurisdictions, a Commission of Inquiry in Tasmania cannot, on its own motion, issue an arrest warrant and must apply to a magistrate for a warrant to have a person apprehended and brought before the Commission.⁵⁴

11.44 The powers of a federal Royal Commission in relation to arrest are somewhat different from those of permanent investigatory bodies such as the Australian Crime Commission (ACC). The ACC can only obtain an arrest warrant on application to a judge of the Federal Court of Australia or of the Supreme Court of a state or territory.⁵⁵ A person apprehended pursuant to such a warrant must be brought before a judge who may make orders as to whether they should be admitted to bail, continue in detention or be released.⁵⁶

11.45 The Australian Securities and Investments Commission (ASIC) does not have the power to issue or apply for an arrest warrant. If a person fails to comply with its requirements, however, ASIC may certify the failure to the Federal Court of Australia, which may then inquire into the case and make orders for compliance by that person.⁵⁷ This procedure allows the court to use its contempt powers to coerce compliance with ASIC requirements, as any failure to comply with a court order would be punishable as a contempt.⁵⁸ Other permanent inquiry bodies, such as the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, do not have any powers to obtain an arrest warrant, although their enabling legislation establishes a number of non-compliance offences for those who refuse or fail to provide information, produce documents or answer a question when required.⁵⁹

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

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

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

53 *Ibid* ss 8, 9A.

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

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

56 *Ibid* s 31(3).

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

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

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

11.46 A modern approach to arrest powers in Commonwealth legislation is outlined in the Australian Government Attorney-General's Department *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (Guide to Framing Commonwealth Offences)*.⁶⁰ Generally speaking, it is considered inappropriate to confer such powers on officers of a regulatory agency unless there is a clearly demonstrated need. Legislation conferring such powers should require that an apprehended person be delivered to a police officer or judicial officer.⁶¹

ALRC's view

11.47 The ALRC notes that there is an inconsistency between the power of a Royal Commission to issue an arrest warrant on its own motion and the entry, search and seizure powers of a Royal Commission, which may only be exercised under a warrant issued by a judge.⁶² Further, Commonwealth investigatory bodies, including those that investigate serious crime, are generally not empowered to issue arrest warrants and must instead obtain such a warrant from a judge.

11.48 Given the potential for the rights and liberties of individuals to be adversely affected, it is appropriate that arrest powers be subject to certain limits and safeguards. The ALRC proposes, therefore, that the power in s 6B of the *Royal Commissions Act*, which enables Royal Commissions to issue warrants for the apprehension of a person who fails to appear, be amended in the proposed *Inquiries Act*. Royal Commissions should be required to apply to a judge to issue a warrant for the apprehension and immediate delivery of a person to a police officer or judicial officer.

11.49 It is envisaged that Official Inquiries will inquire into less significant events or problems. It is less likely that arrest powers would be required to elicit the cooperation of those required by notice to appear before an Official Inquiry to give evidence or answer questions. The preliminary view of the ALRC is that the arrest powers proposed for Royal Commissions should not be extended to Official Inquiries under the proposed *Inquiries Act*. The ALRC notes that comparable bodies, such as the Commonwealth Ombudsman and the IGIS, appear able to perform their inquiry functions in the absence of arrest powers. Other sanctions for non-attendance, which are the subject of proposals in Chapters 18 and 19, will be available to Official Inquiries under the proposed *Inquiries Act*. The ALRC, however, is interested in stakeholder views on this issue.

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

61 *Ibid*, 106.

62 The ALRC proposes that these powers be retained in the proposed *Inquiries Act*: Proposal 11-7.

Proposal 11–3 The power in s 6B of the *Royal Commissions Act 1902* (Cth), which enables a Royal Commission to issue a warrant for the apprehension of a person who fails to appear before it, should be redrafted in the proposed *Inquiries Act*. Royal Commissions should be required to apply to a judge to issue a warrant for the apprehension and immediate delivery of a person to a police officer or judicial officer.

Disclosing an existing summons or notice

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

by appropriate notice attached to a summons or notice to produce, to prohibit a person from disclosing the fact that he, she or it had received a summons or notice or had spoken with a Royal Commission investigator, subject only to the right to disclose this information for the purpose of obtaining legal advice, with contravention of such a prohibition to be a criminal offence punishable by a fine of \$2000 or imprisonment for one year.⁶³

11.51 Commissioner Cole drew those provisions from ss 29A and 29B of the *National Crime Authority Act 1984* (Cth), which have been retained in the corresponding sections of the *Australian Crime Commission Act 2002* (Cth).⁶⁴

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

11.53 Section 29B then provides that a person served with a summons or notice containing such a notation must not disclose the existence of, or any information about, the summons or notice or any official matter connected with it. The section does not apply if the notation has been cancelled, or after five years from the issue of the

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

64 See also *Corruption and Crime Commission Act 2003* (WA) s 167.

summons or notice. The maximum penalty is 20 penalty units (currently \$2,200) or imprisonment for one year.

11.54 The person may, however, disclose information about a summons or notice in accordance with any circumstances specified in the notation, to a legal practitioner for the purpose of obtaining legal advice or representation, or to a legal aid officer for the purpose of obtaining assistance.⁶⁵

11.55 If the person is a body corporate, the person may disclose to an officer or agent of the body corporate for the purpose of ensuring compliance with the summons or notice.⁶⁶ If the person is a legal practitioner, and they are required to answer a question or produce a document at an examination that is protected from disclosure by client legal privilege, they may disclose it to the person who communicated the information or document in order to obtain his or her agreement that the legal practitioner may comply with the requirement.⁶⁷ Those to whom such disclosures have been made are also subject to the same criminal sanctions in case of a subsequent disclosure, with similar provisions allowing disclosure for the purposes of ensuring compliance or obtaining legal advice or representation, or legal aid.⁶⁸

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

The major reform contained in the Bill will prevent the disclosure of the existence of process issued by the [National Crime Authority] in the course of its investigations. It will also prevent disclosure of any information about the reference, the investigation or any hearings or proceedings to which the process relates. Previously some recipients of [National Crime Authority] summonses or notices, such as financial institutions, felt obliged to inform their clients of the receipt of these documents. This has resulted in suspects being alerted to [National Crime Authority] investigations and concealing or destroying evidence or going into hiding. The amendment will help to prevent this happening again, and will clarify the legal position of these institutions.

In addition to this, the amendment will serve to protect the reputation of suspects at a time when the allegations have not been properly investigated. The recipients of the summons or notice have to be given sufficient details about the suspects so that they can determine what information is required. The potential for damage to the reputation of these people through disclosure of the existence of the summons or notice could be significant.⁶⁹

11.57 The *Building Royal Commission Report* does not specify the circumstances that led to its recommendation regarding the disclosure of the existence of a summons or notice. Such a power is uncommon even in the context of anti-corruption or standing crime commissions. The ALRC notes that the power in ss 29A and 29B of the

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

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

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

68 *Ibid* s 29B(3).

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

Australian Crime Commission Act is conferred on a standing agency specifically charged with investigating serious crime for the purposes of subsequent legal proceedings. That agency is held accountable in a number of ways, such as through the usual processes of supervision, as well as monitoring by its own Board, Inter-Governmental Committee and Parliamentary Committee.

11.58 In the absence of any demonstrated need for such a power, the ALRC is not presently inclined to propose that it be conferred upon Royal Commissions, particularly since investigations of serious crime and corruption can be undertaken at the federal level by the Australian Crime Commission and the Australian Commission for Law Enforcement Integrity. The ALRC is interested in stakeholder views on the question, however, as it was not specifically raised in IP 35.

Question 11–1 Should the proposed *Inquiries Act* include a power comparable to that found in ss 29A and 29B of the *Australian Crime Commission Act 2002* (Cth), which would allow an inquiry member to prohibit the disclosure of the existence of a notice, or a matter connected with it?

Power to require information or written statement

11.59 In 2003, the Royal Commission into the Building and Construction Industry (Building Royal Commission) recommended that the *Royal Commissions Act* be amended to empower a Commission to require a person to provide a written statement about a specified matter.⁷⁰ In Commissioner Cole's view, the power would have enabled the Commission to avoid the time and expense of using oral hearings to obtain evidence that could have been presented in written form.

On one occasion, for example, the Commission sought information from a person who refused to speak to the Commission investigators or provide a statement. The Commission issued a summons to that witness, convened a hearing in Melbourne, and flew the witness to Melbourne from Perth for the hearing, only to have the witness state in the witness box that he didn't know anything about the matter under investigation. The waste of public time and resources is obvious, and would have been avoided if the witness could have been required to provide a statement.⁷¹

11.60 This was not the first time that the use of written statements in the context of Royal Commissions had arisen. In 1976, Professor Enid Campbell raised questions about whether express provision should be made to permit a person appearing as a

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

71 *Ibid.*, vol 2, 24.

witness to give evidence by a sworn written statement or by sending a written statement, verified in such manner as allowed by the Royal Commission.⁷²

11.61 A number of Commonwealth statutes empower regulators to require a person to provide information in answer to a notice.⁷³ Legislation governing the operation of inquiries in overseas jurisdictions also allows a witness to give evidence by way of a written statement. For example, under the *Commissions of Investigation Act 2004* (Hong Kong), Commissions have the power—to the extent that the Commission considers proper—to examine or cross-examine a witness on oath or affirmation or by use of statutory declaration or written interrogatories.⁷⁴ Section 19 of the *Inquiries Act 2005* (UK) provides that the chairperson may direct a person by notice to provide evidence in the form of a written statement. The Explanatory Notes to s 19 state that it was intended that potential witnesses normally would be first asked to give information voluntarily and the power of compulsion only used where a person was unwilling to comply with an informal request for information, or a person was willing to comply, but concerned about the consequences of disclosure if they were not compelled to do so.⁷⁵

11.62 Greater emphasis on the use of written statements in Royal Commissions may make proceedings more efficient and reduce the cost of witness examinations. Dr Scott Prasser notes that the emphasis on taking evidence from witnesses in hearings is part of the reason why Royal Commissions ‘take so long and cost so much’.⁷⁶

11.63 The use of written statements, however, raises the concern that counsel will be unable to cross-examine witnesses and test evidence. This could be overcome by a Royal Commission making witness statements available early in proceedings where possible. Evidence in the Federal Court is often provided in written witness statements, particularly in trade practices and intellectual property cases. In these cases, the court may make orders for the filing and exchange of witness statements between the parties. When proceedings commence, the witness is sworn, handed a copy of his or her witness statement, asked to identify it and verify that the contents are correct. The document is then tendered as the witness’s evidence in chief, subject to any objections made on the basis of admissibility. A witness may then be cross-examined on the contents of the statement.⁷⁷

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

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

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

75 Explanatory Notes, *Inquiries Bill 2005* (UK), 13.

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

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

Submissions and consultations

11.64 The ALRC heard a broad range of views from stakeholders as to whether Royal Commissions and other public inquiries should have the power to require a person to provide information by way of a written statement. Some thought it was a sensible requirement. It was noted that under the recently enacted *Coroners Act 2008* (Vic), a person can be required to prepare a statement for the purposes of a coronial investigation addressing matters specified by the coroner.⁷⁸

11.65 Other stakeholders expressed reservations about whether such a requirement would operate effectively in practice. Some described the power as ‘exceptional’ noting that it went beyond the powers conferred on courts. As such, it would require more justification than simply saving the expense of calling a witness to give evidence at a hearing.⁷⁹

11.66 In its submission, the Construction, Forestry, Mining and Energy Union (CFMEU) strongly opposed the proposition that an inquiry have the power to direct a person to provide a written statement. First, it submitted that the requirement to provide a written statement would represent a further erosion of the principle against self-incrimination. Secondly, the requirement went well beyond the coercive powers traditionally available to any investigatory bodies. It was argued that there was no justification for imposing such a requirement when a person could already be compelled to answer questions and produce documents.⁸⁰

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

11.68 The AGS considered that a Royal Commission or inquiry should be prepared to receive written statements from witnesses who wish, or are prepared, to provide them. Such a course could assist the Royal Commission or inquiry to receive and deal with evidence in an efficient way. Also, such a course could assist a witness to address relevant issues in an efficient and comprehensive way. The AGS also suggested that consideration be given to amending the protections in s 6DD of the *Royal Commissions Act* to extend them to written witness statements provided to a Royal Commission.⁸¹

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

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

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

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

11.69 In contrast, Dr Ian Turnbull stated that written statements were appropriate for most witnesses and far more efficient than oral examination.⁸²

11.70 Similarly, the CPSU submitted that where coercive powers were available to inquiries, those powers should also include the power to direct a person to provide a written statement. The CPSU described this as a sensible proposal, which was likely to save time and money in the conduct of Royal Commission proceedings.⁸³

ALRC's view

11.71 It is the ALRC's preliminary view that inquiry members should be empowered under the proposed *Inquiries Act* to issue a notice requiring a person to provide information in a form approved by the inquiry, failing which the person must attend the inquiry as if he or she had been issued with a notice to attend or appear before the inquiry.

11.72 The ALRC notes the position in New Zealand where Commissions of Inquiry are empowered to require a person to provide any 'information or particulars' in any form it dictates.⁸⁴ The NZLC has recently reviewed this power and recommended that it remain largely unchanged.⁸⁵

11.73 Written statements have been used extensively in previous inquiries. In the HIH Royal Commission, for example, a large number of witnesses provided written statements but were not requested by counsel assisting or any of the parties' counsel to give oral evidence.⁸⁶ Similarly, the majority of those who provided statements and statutory declarations to the Equine Influenza Inquiry did not present oral evidence.⁸⁷ The Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry) heard oral evidence from 75 witnesses, but received statements from a further 130 witnesses.⁸⁸

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

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

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

84 *Commissions of Inquiry Act 1908* (NZ) s 4C(1).

85 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 81–82.

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

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

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

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

11.76 Information provided in compliance with a notice could be circulated to counsel assisting and other inquiry participants in order to determine whether the person providing it should be required to give further evidence orally. If further examination is not required, the information could be accepted as evidence in the inquiry without the necessity of calling the person. If further examination is to take place, the inquiry member should call the witness and follow a procedure similar to that used in the Federal Court with respect to witness statements, as outlined above.⁸⁹ This could provide an incentive for those from whom information is sought to use their best endeavours to comply—as an alternative to being required to give oral evidence. It is proposed that corresponding protections for a person providing information in this manner be incorporated into the proposed *Inquiries Act*.⁹⁰

11.77 If a person refuses to provide the information required by the inquiry, or does not provide it within the period specified, the proposed *Inquiries Act* should provide for that person to attend the inquiry as if he or she had been issued with a notice to appear. If a person does not attend, that person would be liable for offences and penalties imposed for non-compliance with the requirements of the inquiry.⁹¹

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

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

90 Proposal 16–2. The use immunity that applies to evidence given to an inquiry is discussed in more detail in Ch 16.

91 Offences and penalties are discussed in detail in Chs 18, 19 and 20.

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

Authority to inquire granted under foreign law

11.79 Section 7A of the *Royal Commissions Act* provides that where the Australian Government has entered into appropriate arrangements with a foreign country for a Royal Commission to be granted an authority under the law of that country to take evidence and conduct inquiries in relation to the subject matter of the Commission, the information and evidence so obtained may be dealt with as if it had been obtained in Australia. This includes use of that evidence for the purpose of the Royal Commission's report to the Governor-General.⁹²

11.80 Section 7B of the *Royal Commissions Act* enables a Royal Commission to take evidence on oath or affirmation outside Australia where arrangements have been made with a foreign country. Evidence so obtained may be dealt with as if it had been taken in Australia. Any statement or disclosure made by a witness in the course of giving evidence under the above provisions is not admissible against them in civil or criminal proceedings in Australia.⁹³

11.81 Sections 16(2) and (3) of the *Royal Commissions Act* enable certificates to be issued by appropriate ministers in relation to any legal proceedings that may arise concerning activities undertaken by a Royal Commission pursuant to ss 7A and 7B of the Act.⁹⁴

Submissions and consultations

11.82 In IP 35, the ALRC asked whether the framework for making inquiries and obtaining evidence overseas in ss 7A, 7B and 7C of the *Royal Commissions Act* is operating effectively and should be extended to public inquiries other than Royal Commissions.⁹⁵

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

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

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

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

11.83 The AGS queried the extent to which any mutual assistance arrangements⁹⁶ between Australian and a foreign country would be available to a Royal Commission that was pursuing a term of reference relating to a law enforcement matter, given that it would not involve a prosecution and probably would not amount to a criminal investigation.⁹⁷

ALRC's view

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

11.85 In the AWB Inquiry, one source of information was the United Nations, which had established procedures for certain overseas bodies seeking access to information and documents from the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (ICC).⁹⁸ The AWB Inquiry was granted access, subject to certain conditions, to documents held by the United Nations.⁹⁹ In addition, the United Nations authorised the giving of a formal statement and evidence by one of the staff members of the ICC.¹⁰⁰

11.86 In the HIH Royal Commission evidence was sought, unsuccessfully, from overseas sources. The Commission encountered difficulties when it sought production of HIH-related documents from parties in the United Kingdom and the United States, but those parties did not respond.¹⁰¹ A Hong Kong firm said it could not comply with any of the Commission's requests for documents because of the impact of local ordinances.¹⁰² In his Report, Commissioner Owen noted that, since he could not exercise powers of compulsion outside Australia, the lack of cooperation from these overseas sources significantly curtailed the Commission's ability to investigate thoroughly matters related to HIH in those jurisdictions.¹⁰³

11.87 It appears that neither Royal Commission sought to use the powers and procedures in ss 7A and 7B of the *Royal Commissions Act*, which provide for inquiries to be made and evidence to be taken in foreign countries. This may indicate that the provisions—which require the Australian Government to enter into appropriate

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

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

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

99 *Ibid.*, vol 1, [7.11].

100 *Ibid.*, vol 1, [7.11]. The statement was tendered in evidence: Exhibit No EXH_0965, *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry.gov.au/> at 4 August 2009.

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

102 *Ibid.*

103 *Ibid.*

arrangements with foreign countries—are too cumbersome to be used routinely in the conduct of Royal Commissions, which are subject to reporting deadlines and cost constraints. It may be time-consuming and require significant departmental resources for the Australian Government to make formal requests on behalf of a Royal Commission to overseas governments.

11.88 There are constraints on Royal Commissions and other government agencies exercising investigatory powers outside Australia. There is limited scope to address these constraints in legislation other than to introduce provisions that apply extraterritorially, the legitimacy of which is open to question. The ALRC has not otherwise identified any legislative means to improve the current procedures that enable Royal Commissions to make inquiries and gather evidence overseas. The ALRC therefore proposes that the existing procedures for Royal Commissions be retained under the proposed *Inquiries Act*, and their application extended to Official Inquiries.

11.89 The Australian Government could give consideration to streamlining the current procedures—through the development of protocols and expedited processes for making arrangements with foreign countries—to ensure that the powers can be exercised more effectively in practice. The ALRC recognises that such arrangements may depend, in part, upon Australia’s foreign policy and relations. Moreover, issues relating to foreign evidence and mutual assistance are of significance to courts, law enforcement bodies and other agencies, and are not unique to Royal Commissions and inquiries. Given the broad ranging significance of these issues, the ALRC does not make any proposals for government action in this area.

11.90 The ALRC notes the comments of the AGS in relation to mutual assistance in the context of inquiries. For the reasons expressed above, the ALRC does not make any specific proposals on this matter. Due to its limitation to ‘criminal matters’, the ALRC notes, however, that the *Mutual Assistance in Criminal Matters Act 1987* (Cth) would appear not to facilitate a request for international assistance on behalf of a Royal Commission.¹⁰⁴ That Act would not, however, preclude the Australian Government from invoking the existing procedures under the *Royal Commissions Act* in matters involving potentially criminal conduct.¹⁰⁵

104 *Mutual Assistance in Criminal Matters Act 1987* (Cth) ss 3, 10.

105 *Ibid* s 6. The Australian Government has also released an Exposure Draft of the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009 (Cth). Schedule 3 of Part 6 of the Bill proposes, among other things, to clarify that the *Mutual Assistance in Criminal Matters Act* does not affect the provision or obtaining of forms of international assistance in criminal matters that are not covered by the Act.

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

Inspect and copy documents and other things

11.91 The *Royal Commissions Act* allows a Commission, member of a Commission, or other authorised person to inspect, retain and copy any documents or other things produced to the Commission. A person may request that a document or other thing be returned to them, where retention ceases to be necessary for the purposes of the inquiry.¹⁰⁶

Submissions and consultations

11.92 In IP 35, the ALRC sought the views of stakeholders as to whether the power under the *Royal Commissions Act* to inspect, retain and copy documents was operating effectively.¹⁰⁷ The ALRC did not receive any feedback on this issue other than from the Victorian Society for Computers and the Law (VSCL).¹⁰⁸

11.93 The VSCL observed that the short timeframes in which inquiries are established could create inefficiencies in the way information is handled. The VSCL cited the example of ‘hundreds of boxes of hard copy documents arriving on the doorstep of the Commission’, many of which had ‘in fact been printed out of the source organisation’s computer systems’.¹⁰⁹ The VSCL noted the costs incurred by the inquiry of scanning this material back into digital form, in an attempt to deal with the large volumes of information delivered. It also noted that due to the short timeframes involved, inquiries often needed to pay higher than market costs to ensure documents were processed in time to meet the inquiry’s deadlines.

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

ALRC’s views

11.95 The powers of Royal Commissions to inspect, retain and copy documents produced to it are generally operating effectively and should be extended to both tiers of inquiry under the proposed *Inquiries Act*. Royal Commissions and Official Inquiries

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

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

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

109 *Ibid.*

require flexibility in how they deal with and manage documents and other things produced to them, including powers of inspection, retention and reproduction.

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

Proposal 11–6 The proposed *Inquiries Act* should provide that Royal Commissions and Official Inquiries are empowered to inspect, retain and copy any documents or other things produced to an inquiry.

Other investigatory powers

Entry, search and seizure powers

11.97 Historically, Royal Commissions have taken evidence primarily through the use of oral hearings.¹¹⁰ The numerous state and federal Royal Commissions in the 1980s that dealt with organised crime, corruption and financial scandals, however, created a need for powers that allowed Royal Commissions access to new forms of evidence such as computer records, audio and visual surveillance, and telephone taps.¹¹¹

11.98 In the Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (1984) (Costigan Royal Commission), for example, the traditional methods of collecting and testing evidence by public hearing were ineffective in countering the 'culture of silence' that surrounded the allegations of corruption under consideration in that inquiry.¹¹² In an interim report, Commissioner Costigan recommended that a Royal Commissioner should have the power to issue a search warrant.¹¹³

11.99 The Australian Government accepted this recommendation and amended the *Royal Commissions Act* in 1982, subject to the qualification that the warrant must be granted by an independent judicial officer.¹¹⁴ It also limited the power to apply for

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

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

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

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

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

warrants to ‘relevant Commissions’ designated as such in the Letters Patent.¹¹⁵ In 2001, the Act was amended further to allow the Commission to authorise a police officer, who is assisting the Commission, to apply to a judge for a warrant.¹¹⁶

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

- (a) ...reasonable grounds for suspecting that there may be, at that time or within the next following 24 hours, upon any land or upon or in any premises, vessel, aircraft or vehicle, a thing or things of a particular kind connected with a matter into which the relevant Commission is inquiring ... ; and
- (b) the relevant Commission, or the person, believes on reasonable grounds that, if a summons was issued for the production of the thing or things, the thing or things might be concealed, lost, mutilated or destroyed; ...¹¹⁷

11.101 Where a judge is satisfied that there are reasonable grounds to issue the warrant, he or she may authorise police officers or other persons named in the warrant to use such assistance or force as is deemed necessary to enter the premises, vessel, aircraft or vehicle and seize anything relevant.¹¹⁸

11.102 Royal Commissions may also obtain search warrants under Part 1AA of the *Crimes Act 1914* (Cth). The *Crimes Act* provisions, however, require that there be a suspicion that an offence has occurred before a warrant can be issued. A suspicion that evidence may be destroyed or tampered with may not satisfy this requirement.¹¹⁹

11.103 Most state legislation governing public inquiries contains similar provisions to the *Royal Commissions Act*.¹²⁰ In New South Wales, Royal Commissioners do not have a specific power to apply for a search warrant, but may use police officers seconded to a Commission to make an application under the *Search Warrants Act 1985* (NSW).¹²¹

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

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

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

118 *Ibid* s 4(3).

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

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

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

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

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

11.105 Section 19A of the *Commissions of Inquiry Act 1950* (Qld) grants a Royal Commissioner, rather than a court, the power to issue a search warrant.¹²² Under that section, a chairperson can issue a search warrant if he or she is satisfied on reasonable grounds that the premises may contain things relevant to the inquiry, or that there may be evidence of an offence.¹²³

11.106 The Tasmania Law Reform Institute (TLRI) considered the issue of search warrants in its 2003 report on Commissions of Inquiry.¹²⁴ It noted that the need for a magistrate's authority to issue a warrant operated as a check on the investigatory powers of a commission of inquiry to ensure the power of search and seizure was neither flaunted nor violated.¹²⁵ It concluded that there should not be an extension of the existing powers of search and seizure to enable a commission of inquiry in Tasmania to enter, search and seize documents or things without the need for a warrant.¹²⁶

11.107 There is nothing to prevent a federal Royal Commissioner from being given the power to issue a warrant on his or her own motion.¹²⁷ The inclusion of such a power, however, may be contrary to the established policy of the Australian Government. The *Guide to Framing Commonwealth Offences* states that the power to issue a warrant to enter and search premises should be conferred on magistrates acting in their personal capacity, and not ministers or departmental officers. It also states that 'the greater independence of magistrates and the fact they are not responsible for enforcement outcomes ensures appropriate rigour in the warrant issuing process'.¹²⁸

11.108 While the role of a Royal Commissioner is quite different from that of a departmental officer, it may still be preferable to have a person independent from the inquiry determining that the requirements to issue a warrant have been met.

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

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

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

125 *Ibid.*, 9.

126 *Ibid.*, 10.

127 This is because the issue of a search warrant is not exclusively an exercise of judicial power.

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

11.109 A number of overseas law reform bodies have considered whether the powers to search premises and seize documents or things are required by executive inquiries. The NZLC recommended that search and seizure powers should not be conferred on inquiries under its proposed new Act.¹²⁹ In its view, public inquiries in New Zealand should not have a role in investigating the sort of criminal or regulatory activity that would require such powers. The NZLC noted, however, the historical differences between Australia and New Zealand in this regard, and in particular, the role that Australian Royal Commissions have played in investigating corruption, and the subsequent creation of permanent anti-corruption bodies.¹³⁰ The Law Reform Commission of Ireland also did not recommend the inclusion of a search warrant power in their report on public inquiries.¹³¹

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

- the documents or things are material to the subject matter of the inquiry;
- the public interest in obtaining access to the documents or things outweighs the privacy interests of the individual who holds them; and
- there are reasonable grounds to believe the documents or things would not be produced to the inquiry under a normal summons.¹³²

11.111 Justice Ronald Sackville has argued that the granting of such extensive powers to Royal Commissions has unduly impacted on the rights of citizens without necessarily being effective in exposing the types of criminal behaviour under investigation.¹³³ Although search and seizure powers were introduced for the Costigan Royal Commission, Prasser suggests that it was not those additional powers that produced clear evidence of tax evasion and corruption, but rather the Commission's focus on broader research methods and the adoption of a computer information system that allowed disparate data to be analysed.¹³⁴

11.112 In the Building Royal Commission, search warrants were used but they were not a major source of information. According to the Report, six search warrants were

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

130 *Ibid.*, 83.

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

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

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

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

issued pursuant to the *Royal Commissions Act* and the information obtained advanced the investigations of the Commission.¹³⁵

Submissions and consultations

11.113 In IP 35, the ALRC asked whether an inquiry member should have the power to apply for a warrant to search for and seize a document or other thing, or issue such a warrant on his or her own motion, and if so, in what circumstances.¹³⁶

11.114 Liberty Victoria submitted that invasive coercive powers such as search and seizure may sometimes be necessary, but must be balanced against civil liberties. Further, any such powers should be subject to judicial review. Liberty Victoria endorsed the current provisions of s 4 of the *Royal Commissions Act*, which require an application for a search warrant to be made to a judge, and did not support inquiries having inherent search and seizure powers.¹³⁷

11.115 The AGS observed that it appeared out of step with existing policy for a Royal Commissioner to have search and seizure powers and endorsed the position that he or she must seek the issue of a warrant from a judicial officer.¹³⁸

11.116 The AGS also raised the possibility of extending the grounds upon which a search warrant could be issued, beyond instances in which documents might be concealed, lost, mutilated or destroyed. The AGS had reservations about such an extension. In particular, it noted that the privilege against self-incrimination did not apply to documents seized under warrant and would not be covered by the direct use immunity under s 6DD of the *Royal Commissions Act*.¹³⁹ This would mean that documents seized under warrant would be treated differently to documents produced under a summons or notice.¹⁴⁰ Under the Act as presently framed, where documents are seized under warrant, there is no constraint on the availability of those documents for use in evidence against the person from whom they were seized.

ALRC's view

11.117 Should entry, search and seizure powers equivalent to those in ss 4 and 5 of the *Royal Commissions Act* be incorporated in the proposed *Inquiries Act*? Although these powers have been used relatively infrequently in past Royal Commissions, such powers have been described as 'a necessary complement' to the coercive information-gathering powers of Royal Commissions—in particular because documents or things

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

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

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

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

139 Protections and immunities in the context of entry, search and seizure powers are discussed in Ch 16.

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

may be at risk of destruction if a notice or summons is issued requiring their production.¹⁴¹

11.118 Under the current regime, a Royal Commission cannot enter or search premises or seize documents or things without a search warrant having been issued by a judge. Similarly, the power to issue a search warrant under Part IAA of the *Crimes Act* is reserved for magistrates.¹⁴² This serves as an important check on a Royal Commission's entry, search and seizure powers.

11.119 Stakeholders did not express support for a Royal Commissioner having power to issue a search warrant on his or her own motion. As noted above, the *Guide to Commonwealth Framing Offences* states that the power to issue warrants to enter and search premises should normally be conferred on magistrates, acting in their personal capacity.¹⁴³ Similarly, the exercise of seizure powers is said to require authorisation under warrant.¹⁴⁴ The approach taken in the *Guide to Framing Commonwealth Offences* to the issue of warrants for entry, search and seizure, is broadly consistent with the recommendations made by the Senate Committee for the Scrutiny of Bills in its 2000 and 2006 reports on entry, search and seizure provisions in Commonwealth legislation.¹⁴⁵

11.120 The ALRC is not currently persuaded that a Royal Commissioner should be empowered to issue search warrants on his or her own motion. The ALRC proposes that the entry, search and seizure powers of Royal Commissions remain exercisable only under warrant issued by a judge.

11.121 The ALRC notes that ss 4 and 5 of the *Royal Commissions Act*, as presently drafted, do not provide that the power to issue search warrants—which is generally regarded as involving the exercise of non-judicial power—is conferred on judges in their personal and voluntary capacity. It is desirable that this be made clear in the proposed *Inquiries Act* for constitutional reasons.¹⁴⁶

141 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 73.

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

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

144 *Ibid.*, [9.6].

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

146 Conferring non-judicial functions or powers on a judge or magistrate in their capacity as the court or a member of the court to which they belong would be contrary to the independence of the judiciary under the separation of powers doctrine enshrined in Ch III of the *Australian Constitution*. A judge of the Federal Court or Federal Magistrate may agree to exercise a non-judicial function if the power is vested in the judge's or magistrate's personal capacity, separate from the court they constitute (see, eg, *Grollo v Palmer* (1995) 184 CLR 548).

11.122 A further issue that the ALRC has considered is whether the proposed *Inquiries Act* should confer entry, search and seizure powers on Official Inquiries as well as Royal Commissions. In the ALRC's view, such powers should not be conferred on Official Inquiries. Official Inquiries are less likely to require search and seizure powers to complete their investigations. The use of such powers by Royal Commissions has been relatively infrequent. Secondly, entry, search and seizure powers are to be regarded as exceptional. Their exercise can be highly intrusive. It is appropriate that they be reserved for Royal Commissions as the highest tier of public inquiry.

11.123 Finally, the *Royal Commissions Act* does not presently extend the use immunity in s 6DD to material seized under a search warrant. The ALRC proposes, in Chapter 16, that the use immunity in 6DD of the *Royal Commissions Act* should clarify that the immunity protects the same material as would be protected by the privilege against self-incrimination. For this reason, the ALRC does not propose the extension of the use immunity to material obtained in exercise of search and seizure powers by a Royal Commission.

Proposal 11–7 The proposed *Inquiries Act* should contain provisions for a Royal Commission to apply to a judge for a warrant to exercise entry, search and seizure powers equivalent to those in ss 4 and 5 of the *Royal Commissions Act 1902* (Cth). The proposed *Inquiries Act* should provide that, if an application for a warrant is made to a judge of a federal court, the judge issues the warrant in his or her personal capacity.

Dealing with intercepted information

11.124 Royal Commissions have no power to initiate the interception of telecommunications. The *Telecommunications (Interception and Access) Act 1979* (Cth)¹⁴⁷ was amended in 2001, however, to enable a declared Commonwealth Royal Commission to receive information which has been lawfully intercepted by other agencies, and to use that information in the performance of its functions.¹⁴⁸ A number of Commonwealth and state law enforcement and investigatory agencies are permitted to receive and use such information. The Royal Commission into the New South Wales Police Service was likewise permitted to receive and use such information during its operation.¹⁴⁹

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

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

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

11.125 In order to receive intercepted information under the provisions of the *Telecommunications (Interception and Access) Act*, a Royal Commission must first be declared eligible by the relevant minister. In making such a declaration, the minister must be satisfied that a Royal Commission is likely to inquire into matters that may involve the commission of a prescribed offence.¹⁵⁰

11.126 In Queensland, the chairperson of a commission of inquiry may apply to a Supreme Court judge for an approval to use a listening device.¹⁵¹ The judge must consider a number of factors relating to privacy and public interest before granting approval.¹⁵²

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

a clear invasion of privacy that can constitute a criminal offence. If a person or body is to be granted the power to use such devices then that grant of power must be strictly monitored.¹⁵³

11.128 Notwithstanding this view, the TLRI recommended that a commission of inquiry be able to apply to a magistrate for a warrant to use listening devices, subject to the magistrate being satisfied that there are reasonable grounds for the belief that the use of such a device is necessary and appropriate to obtain evidence in relation to a matter relevant to the inquiry. The TLRI also recommended that a magistrate have regard to other factors in granting the warrant, including the extent to which the privacy of any person is likely to be affected, any alternative means of obtaining the evidence sought and the evidentiary value of that evidence.¹⁵⁴

11.129 The use of intercepted information by Royal Commissions appears to be infrequent. In the Building Royal Commission, for which the 2001 amendments were introduced, information was received from another agency in relation to one investigation, which had been acquired as a result of telecommunications interceptions conducted by and for the purposes of that agency.¹⁵⁵

11.130 The ALRC does not propose that Royal Commissions or Official Inquiries should possess the power to initiate the interception of telecommunications. The ALRC does propose, however, that the existing provisions in the *Telecommunications (Interception and Access) Act*, that allow the communication of intercepted information

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

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

152 *Ibid* s 19C(3).

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

154 *Ibid*, 11–12.

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

to Royal Commissions, be retained in relation to Royal Commissions established under the proposed *Inquiries Act*. Further, the ALRC welcomes stakeholder views in relation to any issues that arise from the receipt of intercepted information by Royal Commissions, and whether relevant provisions in the *Telecommunications (Interception and Access) Act* should be extended to Official Inquiries.

Question 11–2 Should the provisions in the *Telecommunications (Interception and Access) Act 1979* (Cth), that allow the communication of intercepted information to Royal Commissions in certain circumstances, also apply to Official Inquiries?

Other issues

Communication of information regarding contraventions of the law

11.131 Under s 6P of the *Royal Commissions Act*, a Royal Commission may communicate information or evidence it obtains relating to a contravention of a law of the Commonwealth, or of a state or territory, to certain specified people and bodies—such as the Australian Crime Commission,¹⁵⁶ the Law Enforcement Integrity Commissioner,¹⁵⁷ the Director of Public Prosecutions¹⁵⁸ and ‘the authority or person responsible for the administration or enforcement of that law’.¹⁵⁹

11.132 Section 6P was first amended in 1983 to permit a Commission to communicate information or furnish evidence or a document acquired by it to another Royal Commission, where such evidence is considered relevant.¹⁶⁰ Further amendments added the Director of Public Prosecutions to the list.¹⁶¹ These amendments, which followed the Costigan Royal Commission and the Royal Commission of Inquiry into Drug Trafficking (1983) (Stewart Royal Commission), were intended to assist the prosecution process at the conclusion of a Commission investigating criminal activity.¹⁶²

11.133 In 2001, the breadth of the discretion to refer information was widened to include information relating to contraventions of a law rather than information relating only to the commission of an offence. Thus, the amendment captured conduct which was unlawful and not only conduct which constituted an offence under

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

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

158 *Ibid* s 6P(1)(aa).

159 *Ibid* s 6P(1)(e).

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

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

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

Commonwealth, state or territory law.¹⁶³ The Act was also amended to extend the provision to a contravention of a law that may attract a civil or administrative penalty, rather than only criminal offences.¹⁶⁴ These amendments were made to facilitate the exchange of information between the HIH Royal Commission and the concurrent investigation by ASIC into HIH's market disclosure.¹⁶⁵ The HIH Royal Commission exercised the referral power on several occasions. Before any such referral, the individuals or entities affected by it were given the opportunity to make submissions.¹⁶⁶

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

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

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

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

11.136 This aspect of the terms of reference meant findings as to possible contraventions and recommended referrals, which were numerous, could be set out in

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

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

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

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

the report instead of adhering to the referral procedure in s 6P of the *Royal Commissions Act*. The *Report of the HIH Royal Commission* recommended that 56 possible breaches of the *Corporations Act 2001* (Cth) and the *Crimes Act 1900* (NSW) be referred to either ASIC or the New South Wales Director of Public Prosecutions for further investigation.¹⁶⁷ This approach contemplated the transfer of evidence and documents to the relevant authorities at the conclusion of the Royal Commission. In the event, however, separate legislation was required to facilitate the transfer of these records.¹⁶⁸ This overcame the requirement to give notice of the transfer to the owners of the documents and enabled ASIC to obtain custody of the Royal Commissions records.¹⁶⁹ As discussed in Chapter 8, the *Royal Commissions Act* was subsequently amended to incorporate similar provisions—now in s 9 of the Act—for the retention and use of records in all Royal Commissions.¹⁷⁰

11.137 In 2003, the Building Royal Commission recommended that s 6P be amended to enable Royal Commissions to communicate evidence or information relating to a contravention of any law to ‘any agency or body of the Commonwealth, a State or a Territory prescribed by the regulation’.¹⁷¹ In Commissioner Cole’s view, the scope of s 6P(1)(e) in its present form, which enables the communication of information relating to a contravention of a law to ‘the authority or person responsible for the administration or enforcement of that law’, is uncertain.¹⁷² In particular, Commissioner Cole thought that there may be a problem with passing the information to a state crime commission or similar body, as there may be a distinction between bodies which ‘enforce’ the law and bodies which investigate breaches of a law.

11.138 It is not clear whether a referral—whether under s 6P, or the terms of reference or as a natural concomitant of the power to report—could encompass referral of the conduct of a member of a profession to a relevant disciplinary tribunal.

Submissions and consultations

11.139 In IP 35, the ALRC asked whether Royal Commissions and other public inquiries should be able to communicate information relating to a contravention of a law to law enforcement bodies in addition those listed in the *Royal Commissions Act* and, if so, which additional bodies.¹⁷³

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

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

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

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

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

172 *Ibid.*

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

11.140 Liberty Victoria submitted that inquiries should be able to communicate information to other bodies, but only where it would not breach a person's civil liberties or where adequate protections were in place. Further, information obtained by an inquiry that revealed criminal conduct should be referred to police for further investigation but, depending on how it was obtained, should not be admissible in later proceedings. Liberty Victoria considered that this would ensure that a person would not withhold information from an inquiry due to a fear of how that information could be used at a later date.¹⁷⁴

11.141 The AGS made a number of comments about the practical operation of the referral power in s 6P of the *Royal Commissions Act*.¹⁷⁵ If referrals are to be made, resources must be allocated in advance and should be timetabled alongside the preparation of the final report. Referrals had to be made during the currency of the Royal Commission as the power was not exercisable once the report had been delivered. Further, referrals under s 6P required the Commissioner to decide that it was appropriate to refer each piece of evidence or item of information and did not contemplate a 'global' referral of evidence or information. If a particular Royal Commission possessed significant amounts of evidence or information relating to contraventions of the law, the process of making referrals could be time consuming and require significant resources.

11.142 The AGS also noted that where large amounts of evidence are involved it may not be possible for all referrals to be made prior to delivery of the final report. Further, an affected person would normally have to be put on notice and given the opportunity to make submissions for reasons of procedural fairness.¹⁷⁶

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

ALRC's view

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

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

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

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

11.145 First, the referral power should be drafted in a way that does not have the effect of requiring inquiry members to make referral decisions in respect of individual items of evidence and information if that is not necessary in the particular circumstances. The proposed *Inquiries Act* could, for example, enable an inquiry member to refer evidence or information that relates to the contravention of any law ‘in any manner that he or she considers appropriate’. This would allow a more flexible approach to referrals of information and remove present doubts about the operation of s 6P of the *Royal Commissions Act*. For example, it would enable an inquiry member to decide to refer a class of documents, rather than individual items of evidence or information. In this regard, the ALRC does not propose that the abrogation of procedural fairness obligations in the context of the transfer of the records of completed Royal Commissions be extended to referrals of information made during the currency of an inquiry.¹⁷⁷

11.146 Secondly, for the avoidance of doubt, any referral power in respect of information or evidence obtained by a Royal Commission should operate subject to the protections in respect of statements made by witnesses or documents produced to a Royal Commission and the application of client legal privilege. This would ensure consistency with the existing framework for the transfer of records in s 9 of the *Royal Commissions Act*.¹⁷⁸

11.147 Thirdly, the referral power should clarify the persons and agencies to which information or evidence may be communicated. In the ALRC’s view, it is preferable that the proposed *Inquiries Act* provide that Royal Commissions and Official Inquiries be empowered to communicate information to bodies or persons responsible for the administration or enforcement of the law as prescribed by regulations under the Act. This would enable the list of agencies or bodies to be updated from time to time without requiring legislative amendment of the principal Act as has occurred in the past. This approach would still ensure parliamentary oversight through the usual procedures for scrutiny of delegated legislation. The proposal would, if adopted, leave it open to the Australian Government to make regulations enabling the communication of information to disciplinary bodies. It may also remove the need to make specific provision for referrals of information in the terms of reference of an inquiry, although it would not preclude the Australian Government from doing so.

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

178 Section 9(12) of the *Royal Commissions Act 1902* (Cth) preserves, for the avoidance of doubt, the operation of s 6DD of the Act, which provides that certain statements by a witness before a Royal Commission are not admissible in evidence against the witness: Explanatory Memorandum, Royal Commissions Amendment (Records) Bill 2006 (Cth). Section 6DD of the Act is discussed in Ch 16.

Proposal 11–8 The proposed *Inquiries Act* should empower Royal Commissions and Official Inquiries to communicate information that relates to a contravention, or evidence of contravention, of a law of the Commonwealth or of a state or territory, to bodies or persons responsible for the administration or enforcement of the law as prescribed by regulations under the Act.

Concurrent functions and powers under state laws

11.148 There is nothing to stop the establishment of joint federal-state Royal Commissions through the issuance of complementary Letters Patent.¹⁷⁹ There have been a number of such Commissions in Australia including: the Stewart Royal Commission; the Royal Commission into the Activities of the Australian Building Construction Employees' and Builders Labourers' Federation (1982); and the Royal Commission into Aboriginal Deaths in Custody (1991).

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

11.150 Section 7AA of the *Royal Commissions Act* allows a federal Royal Commission to accept powers and functions given to it by a state government in the Letters Patent of joint Royal Commissions. It was inserted in the Act in 1982 following the decision in *R v Winneke: Ex parte Gallagher*.¹⁸⁰ In that case, the court found that a commissioner could rely on both the federal *Royal Commissions Act* and the relevant state legislation in issuing a summons to a witness where the matter under inquiry fell within both terms of reference.¹⁸¹ The inclusion of s 7AA was intended to remove any doubt about this matter.¹⁸²

11.151 While the coercive powers granted under the *Royal Commissions Act* may be exercised throughout Australia, the powers possessed by a state commission may be exercised only in that state. Campbell notes that during a joint commission, the federal Royal Commission must be careful not to use a state power outside of that state, even where the power is being used in a way that is relevant to the state inquiry.¹⁸³ This does not appear to be affected by s 7AA.

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

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

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

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

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

11.152 There also may be issues where subsequent legal proceedings arise from a Commission. In *Giannarelli v The Queen*, two witnesses who had given evidence to the Costigan Royal Commission were charged with perjury. The proceedings were brought in the Supreme Court of Victoria under the *Crimes Act 1958* (Vic). Transcripts of their evidence in the Royal Commission were used as evidence in the case. The High Court overturned the conviction on the basis that the transcripts from the federal Royal Commission should not have been admitted as evidence because of s 6DD of the *Royal Commissions Act*—which does not allow a statement of a witness to be used in evidence against a witness in criminal or civil proceedings.¹⁸⁴

Submissions and consultations

11.153 In IP 35, the ALRC asked whether any issues arise from the exercise of coercive powers by a Royal Commission or other public inquiry established jointly by the Australian Government and the government of a state or territory.¹⁸⁵ There was no indication by stakeholders that there were any problems in this area.

11.154 The AGS noted that there is always going to be some prospect of challenges of the type that was involved in *R v Winneke; Ex parte Gallagher*.¹⁸⁶ The AGS observed that close consultation and co-operation between the Australian Government and state or territory governments involved should ensure that the arrangements work in a way that limits the scope for challenge.¹⁸⁷

ALRC's view

11.155 The subject matter of a Royal Commission may have a multi-jurisdictional character or involve events occurring throughout Australia. As such, the ALRC proposes that the power to confer concurrent functions and powers on federal Royal Commissions under state law should be retained in the proposed *Inquiries Act* subject to the following comments. The ALRC has not identified any reason in principle why these provisions should not also enable the conferral of powers under the law of a territory.

11.156 As noted by stakeholders, it is possible that the concurrent sources of power of joint Royal Commissions may give rise to legal complexities from time to time. For example, it may not always be clear whether federal or state powers are being exercised at any given time. While these complexities cannot be easily remedied in Commonwealth legislation, the inter-governmental agreement establishing the joint Royal Commission should clarify these issues and ensure that both the terms of

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

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

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

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

reference of the Commonwealth and of the state or territory are—subject to any legal limitations—coextensive.

11.157 In the ALRC’s view, only Royal Commissions should be able to exercise concurrent functions and powers under state and territory laws. Under the ALRC’s proposed statutory framework, it is envisaged that Official Inquiries will have a limited range of coercive information-gathering and investigatory powers. In contrast, some state and territory legislation confers entry, search and seizure powers and arrest powers on Royal Commissions and other public inquiries.¹⁸⁸ It would not be appropriate to enable the limitations on the powers of Official Inquiries to be sidestepped by the conferral of wider powers under state and territory inquiries legislation. Official Inquiries are also less likely to inquire into broad ranging matters across a number of jurisdictions that would otherwise necessitate the establishment of a concurrent state or territory inquiry.

Proposal 11–9 The proposed *Inquiries Act* should provide that only Royal Commissions may have concurrent functions and powers conferred under the proposed Act and state and territory laws.

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

