

13. National Security

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Introduction

13.1 The Terms of Reference for this Inquiry ask the ALRC to consider whether there is any need to develop special arrangements and powers for inquiries involving matters of national security. At present, the *Royal Commissions Act 1902* (Cth) does not contain any provisions dealing specifically with the protection of information that may prejudice national security during the conduct of an inquiry or after its completion.

13.2 The discovery of the truth has been described as a prime function of a Royal Commission.¹ Royal Commissions are established only where a particular area of public concern has been identified. Their purpose is to determine factual circumstances, report on the matters specified in the Letters Patent and make recommendations. Royal Commission proceedings, therefore, are generally conducted in public and full reporting by the media is allowed. A comprehensive final report detailing all the evidence heard is generally prepared by the Commission. However, there may be some national security-related information which, in the public interest, should not be disclosed publicly. Further, there are occasions on which the public interests in open justice and open government must be weighed against a proper need for secrecy.

13.3 Against this background, this chapter provides an overview of previous Royal Commissions and inquiries that have considered matters involving national security or have required access to national security information in the course of their inquiries. From this discussion, it is possible to identify a number of existing mechanisms that inquiries have used to protect national security information. The chapter then examines some issues that arise for consideration in the context of Royal Commissions and Official Inquiries such as: existing government policies and protocols for the protection of national security information; the role of existing permanent bodies; the protection of national security information in court proceedings; and the use of security clearances as a method of protecting and limiting access to such information. The approach taken in comparable overseas jurisdictions to the protection of national security information is also considered.

13.4 The ALRC puts forward a number of proposals for special arrangements and powers for Royal Commissions and Official Inquiries where matters of national security are under consideration. The proposals take into account the need for a flexible system for inquiries that incorporates both legal and practical solutions, including by way of guidance in the proposed *Inquiries Handbook*. They also emphasise the role of the inquiry members in tailoring procedures that will apply in any particular case in line with the specific circumstances of the inquiry and the dictates of procedural fairness.

Royal Commissions and inquiries in cases of national security

13.5 This section examines a number of past Royal Commissions and inquiries that have dealt with issues of national security or have required access to national security information in conducting their inquiries.

¹ T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), vol 1, [7.66].

Royal Commission on Espionage

13.6 The Royal Commission on Espionage (1955) was established in May 1954 following the defection of two Soviet diplomats, Vladimir and Evdokia Petrov. The Letters Patent authorising the investigation and report were issued pursuant to s 3 of the *Royal Commissions Act 1954* (Cth).² Subsequently, in order to increase the powers conferred upon the Royal Commission and to remove certain doubts that had arisen, the *Royal Commission on Espionage Act 1954* (Cth) was enacted.³

13.7 The Royal Commission was ‘concerned with matters which vitally affect the security and defence of the country’, its investigations involved ‘an examination of evidence and of material of a most confidential character; for example material in the possession of [ASIO], and some supplied by similar organizations in friendly countries’ and to ‘investigate material of this nature in public was, in the national interest, undesirable’. Despite the subject matter, the Royal Commission, which sat over 126 days in Canberra, Sydney and Melbourne, held most of its hearings in public except in ‘certain cases in which it seemed ... that the national interest demanded’ that evidence be heard in private sessions. Those cases fell into four broad classes:

- where the evidence was known to be of such a nature that, for reasons of security, it should not be made public;
- where a witness was engaged in counter-intelligence work and it was not desirable to disclose their identity;
- where it was uncertain until a matter had been investigated whether the answers to the questions would involve security considerations; and
- where the relations of Australia with other countries made it desirable that evidence concerning their nationals either should not be published or should be made known to the governments of those countries before publication.⁴

13.8 Transcripts of most of these private proceedings were withheld from publication until after the Royal Commission had presented its report. Some of the transcripts, however, were never published including in camera evidence of former and serving ‘senior servants of the Crown’.⁵

2 The Royal Commission was not established pursuant to the *Royal Commissions Act 1902* (Cth).

3 W Owen, R Philip and G Ligertwood, *Report of the Royal Commission on Espionage* (1955), 4. Section 6(1) of the *Royal Commission on Espionage Act 1954* (Cth) excluded the application of the *Royal Commissions Act 1902* (Cth) to the Royal Commission on Espionage although the provisions of both Acts were substantially the same.

4 W Owen, R Philip and G Ligertwood, *Report of the Royal Commission on Espionage* (1955), 8.

5 For example, in camera evidence of the Director-General of Security, Deputy Secretary of the Department of Defence, particular security officers and the former Secretary of the Department of External Affairs, Dr John Wear Burton: *ibid.*, 8–9. See also National Archives of Australia, *Series notes for series A6223—Printed copies of Royal Commission on Espionage Official Transcripts of In Camera Proceedings*, <www.naa.gov.au> at 18 June 2009.

13.9 The *Report of the Royal Commission on Espionage* was presented to the Governor-General on 22 August 1955 and tabled in Parliament on 14 September 1955.⁶ A separate 20 page *Annexure to the Report of the Royal Commission on Espionage* was also presented consisting of excerpts from the ‘Moscow Papers’ and in-camera evidence that the Royal Commissioners withheld from the report. This included the names of certain foreign diplomats in Australia, officers of the Department of External Affairs and slanderous material which the Royal Commissioners and government agencies felt should not be made public. The Annexure was intended for ‘official eyes only’ and had a very limited distribution.⁷

Royal Commission on Intelligence and Security

13.10 The Royal Commission on Intelligence and Security (1977) involved a comprehensive review of Australia’s security services, including their history, administrative structure and functions. The Royal Commission, chaired by the Hon Justice Robert Hope, was established by Letters Patent on 21 August 1974 and concluded its work in 1977.

13.11 The nature of the inquiry required ‘a somewhat different procedure to be adopted to that commonly adopted in the case of Royal Commissions ... particularly because of the degree of secrecy attached to many of the matters subject of the inquiry’.⁸ Consequently, while some of the sittings were held in public, most of them were held in camera. This practice was adopted not only because of the nature of the subject matter of the evidence and submissions, but also to protect those participating in the inquiry or those to whom they referred.⁹ Commissioner Hope made orders pursuant to s 6D(3) of the *Royal Commissions Act*, directing that evidence given before the Commission, or the contents of documents, books or writings produced at the inquiry, not be published.¹⁰

13.12 The Royal Commission also adopted other mechanisms to protect sensitive material. For example, in inviting submissions, the Commission advised those wishing to refer to secret information in their submission that the secretary of the relevant department must be informed in advance.¹¹ Further, Hope adopted a practice of making a recommendation as to whether each of the eight separate reports of the Royal Commission should be made public or regarded as classified.¹² While Hope recognised that information about many of the matters under investigation could not be released

6 National Archives of Australia, *Fact Sheet 130—The Royal Commission on Espionage, 1954–55* (2006) <www.naa.gov.au> at 18 June 2009. The final report was in one volume with four appendices including a printed copy of the *Interim Report of the Royal Commission on Espionage* dated 21 October 1954 (Appendix 2).

7 National Archives of Australia, *Series notes for series A6219—Annexure to the Report of the Royal Commission on Espionage*, <www.naa.gov.au> at 18 June 2009.

8 R Hope, *Royal Commission on Intelligence and Security—First Report* (1976), 1–2.

9 *Ibid.*, 2.

10 *Ibid.*

11 See ‘Opening Statement’—Appendix 1–B: *Ibid.*, 18–21.

12 *Ibid.*, 1–2.

publicly, he was concerned that where possible his findings should be set out in a way that would enable them to be released immediately.¹³ Accordingly, some of the reports were divided into publishable and non-publishable portions and some were accompanied by abridged versions of the findings and recommendations suitable for publication.

13.13 The Royal Commission's operating procedures were also influenced by the subject matter of the inquiry, which drew upon some 2,000 supporting files from security and intelligence agencies. As described by the former Secretary of the Royal Commission, George Brownbill, the minimum classification of most of the files provided to the Royal Commission was 'secret' and many were 'top secret' or higher.¹⁴ The office was located in secure premises in Canberra with a cipher locked entrance, 24 hour police guard and two secure electronic perimeters. All staff had top secret security clearances as provided for in the *Protective Security Handbook*. Brownbill required all staff to observe strictly procedures for paper handling, communications security and personal discretion.¹⁵

13.14 Hope was concerned about the records of the Royal Commission and in the Eighth Report set out recommendations about the disposal and subsequent use of the records—which he envisaged would be preserved and eventually released for public access.¹⁶ The sensitive records of the Commission were transferred to the National Archives of Australia for appropriate classification.¹⁷

Royal Commission on Australia's Security and Intelligence Agencies

13.15 The Royal Commission on Australia's Security and Intelligence Agencies (1984) was announced on 12 May 1983 following the expulsion from Australia of the Soviet diplomat, Mr Valeriy Ivanov, and exposure of his relationship with the Australian lobbyist, David Combe. Justice Hope was again appointed Royal Commissioner.

13.16 At the outset of hearings, Hope indicated that the nature of the investigation would require that some evidence be heard in closed session. Difficulties arose, however, from the exclusion of Combe from part of the hearings notwithstanding that he was mentioned by name in the terms of reference and had a clear interest in any

13 J Stokes, *A Brief History of the Royal Commission on Intelligence and Security* <www.naa.gov.au/collection/issues/stokes-rcis-history.aspx> at 4 August 2009.

14 G Brownbill, *The RCIS—An Insider's Perspective* (2008) National Archives of Australia <<http://www.naa.gov.au/collection/issues/brownbill-rcis.aspx>> at 4 August 2009.

15 *Ibid.*

16 R Hope, *Royal Commission on Intelligence and Security—Eighth Report* (1977).

17 J Stokes, *A Brief History of the Royal Commission on Intelligence and Security* <www.naa.gov.au/collection/issues/stokes-rcis-history.aspx> at 4 August 2009.

findings that were made.¹⁸ Hope decided to characterise information as falling within four separate classes:

- matter so sensitive it should not be shown either to Mr Combe or his counsel;
- matter that could be shown to Mr Combe's counsel, but not to Mr Combe or his instructing solicitor;
- matter that could be shown to Mr Combe and his instructing solicitor; and
- matter that could be made public.¹⁹

13.17 Hope made 'class orders' from time to time covering specific portions of the evidence and every exhibit was listed with a notation indicating to which of the four classes it was assigned.²⁰ There were only two pieces of evidence which fell within the most sensitive class. These were of only peripheral relevance and had no bearing upon Hope's conclusions.²¹ Evidence falling within the next most sensitive class was made available solely on the basis of the 'need-to-know' principle. Hence, only counsel and the witness giving evidence remained in the hearing room.²²

13.18 Of a total of 68 hearing days there were in camera hearings on 54 days. The full transcript of public hearings and edited transcript of in camera hearings were published. Material was deleted only for reasons concerning national security or privacy. The national security considerations taken into account in editing material included information on intelligence sources, methods of operation, resources, technical capacity, and knowledge about foreign intelligence services and methods of countering their activities.²³ Hope adopted a procedure whereby Royal Commission staff undertook preliminary editing of the transcripts of in camera proceedings. The draft transcript was then circulated to counsel for the Australian Government and counsel for Mr Combe (and, where appropriate, counsel for particular witnesses) to enable them to express a view. Hope noted that 'by this process a large measure of agreement was reached as to what should be published but when a difference remained it was resolved by me'.²⁴

13.19 Hope observed that throughout the hearings he 'was faced with the difficult problem of balancing competing interests'—which included 'valid security considerations, valid considerations of the public interest and Mr Combe's interests'—

18 R Hope, *Royal Commission on Australia's Security and Intelligence Agencies—Report on Term of Reference (c)* (1983), 5.

19 *Ibid.*

20 *Ibid.*, 6.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*, 6–8.

24 *Ibid.*, 7.

and the need to make rulings with regard to the publication of evidence arose frequently.²⁵ He dealt with these issues on a case-by-case basis.

13.20 The report contained all the material which the Commissioner considered could be made public. Other material, which the Commissioner recommended not be published, was contained in a separate volume of appendices.²⁶

Commission of Inquiry into the Australian Secret Intelligence Service

13.21 The genesis of the non-statutory Commission of Inquiry into the Australian Secret Intelligence Service (1995) was media stories disclosing what purported to be details of certain Australian Secret Intelligence Service (ASIS) operations based on information supplied by two former ASIS officers (the complainants).²⁷ On 23 February 1994, the Australian Government announced the terms of reference of a 'judicial inquiry into the operations and management of ASIS'.²⁸ Subsequently, the Hon Gordon Samuels QC and a former senior public servant, Mr Michael Codd, were appointed to head the inquiry.²⁹ The inquiry held an initial public hearing on 2 May 1993 and thereafter sat for 64 days in camera. The inquiry did not release any transcript of the evidence which it had taken or any of the exhibits it had admitted.³⁰

13.22 On 31 March 1995, the inquiry delivered to the Prime Minister a three volume secret report together with a summary report. The summary report was released publicly on 24 April 1995. Subsequently, the Australian Government tabled the first volume of the report with deletions recommended by the inquiry to protect national security and privacy. The second volume of the report was not made public for reasons of privacy and national security, although the complainants and their legal representatives were allowed to see certain parts on conditions of strict confidentiality. A copy of the full classified report was provided to the Leader of the Opposition and the Shadow Foreign Minister, subject to assurances of confidentiality.³¹

Inquiry into Australian Intelligence Agencies

13.23 The Inquiry into Australian Intelligence Agencies (2004) was a non-statutory inquiry conducted by Mr Philip Flood at the request of the Prime Minister. The primary focus of the inquiry was on the intelligence agencies in relation to foreign intelligence collection and assessment. In preparing the report, Flood was given full

25 Ibid.

26 Ibid, 11.

27 G Samuels and M Codd, *Commission of Inquiry into the Australian Secret Intelligence Service—Public Report* (1995), [5].

28 Ibid, [7].

29 Commonwealth, *Parliamentary Debates*, Senate, 1 June 1995, 716 (G Evans—Minister for Foreign Affairs).

30 G Samuels and M Codd, *Commission of Inquiry into the Australian Secret Intelligence Service—Public Report* (1995), [9].

31 Commonwealth, *Parliamentary Debates*, Senate, 1 June 1995, 716 (G Evans—Minister for Foreign Affairs).

access to all intelligence material that he required. He also conducted formal and informal interviews with members of the Australian Government, members and former members of Parliament and members and former members of the Australian Public Service and the Australian Defence Force. Only one person declined to be interviewed by the inquiry.³² As required by his letter of appointment, Flood delivered a classified and unclassified version of his report.

AWB Inquiry

13.24 During the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry), the Australian Government, through the Australian Intelligence Community (AIC), produced certain classified documents to the inquiry in response to a notice. The AIC sought orders that some of the documents not be produced, together with statutory declarations in support of the application for non-publication. The grounds of the application were that the public interest required that the documents remain secret because they were highly classified for national security reasons and the accompanying statutory declarations, if disclosed, might reveal information that might defeat the protection of the documents.

13.25 The Commissioner, the Hon Terence Cole QC, upheld these claims and ordered, pursuant to s 6D of the *Royal Commissions Act*, that the secret documents and statutory declarations not be published and only be viewed by nominated members of the inquiry legal team. It was also ordered that witnesses who might be expected to have seen the secret documents at the time they were officers of the Department of Foreign Affairs and Trade could be shown a copy and asked questions in a manner that did not disclose, in any way, the contents, the sources of the contents or the originating agency of the contents of the documents unless specifically authorised by Cole.

13.26 Subsequently, various parties submitted that the Commission did not have powers to hear or decide questions of public interest immunity under the *Royal Commissions Act*. Cole rejected those submissions.³³ No party sought judicial review of this decision.

13.27 Counsel assisting the Commission produced in draft form a ‘summation of the material’ contained in the secret documents. The document was provided initially to the Australian Government on a confidential basis to ensure that it did not disclose any material which ought not to be disclosed in the public interest. A substitute document, containing minor amendments to satisfy the government’s concerns, became an exhibit

32 This was because neither the Inquiry nor the Australian Army was in a position to agree to the witness’s condition that expenses of his senior and junior counsel be met: P Flood, *Report of the Inquiry into Australian Intelligence Agencies* (2004), 47.

33 Commissioner Cole issued written reasons, dated 30 March 2006, for his decision: T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 9, Figure 9.4.

and a public document.³⁴ Cole was satisfied that the document was a sufficient and adequate summation of the secret documents.

Clarke Inquiry into the Case of Dr Mohamed Haneef

13.28 Issues concerning the protection of classified and security sensitive material also arose in the Inquiry into the Case of Dr Mohamed Haneef (2008) (Clarke Inquiry). The head of the inquiry, the Hon John Clarke QC, had considerable difficulty negotiating access to sensitive material from the National Security Committee of Cabinet, as well as departments and agencies. In his report, Clarke noted that the physical arrangements made for the protection of relevant information were inconvenient and cumbersome, and that many documents were over-classified and should have had their security classification reviewed.³⁵ He also noted that gaining access to classified material from the United Kingdom was a ‘huge obstacle for all involved in the Inquiry’.³⁶ Finally, there was some difficulty in establishing which aspects of the report could be freely published.³⁷ All of these difficulties delayed the progress of the inquiry and eventually led to an extension of the reporting date.

13.29 Clarke’s report consisted of two volumes. The first volume sought to deal fully with the matters covered by the terms of reference and Clarke envisaged that it would be publicly released. In describing the events of the case, Clarke ‘made every effort to avoid including any material that might be judged a threat to national security information or continuing operations or might jeopardise any current trials’.³⁸ The second volume contained supplementary material that provided greater detail and analysis of the events examined and included references to sensitive or classified material that could not be published immediately.

13.30 Clarke expressed the view that inquiries or independent reviews that involve national security and thus deal with sensitive documentation and evidence should be covered by statutory provisions.³⁹ He recommended that the Australian Government consider incorporating in legislation the special arrangements and powers that would apply to inquiries and other independent reviews and investigations involving matters of national security.⁴⁰

34 Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme, *Exhibit 584—Distillation of Secret Exhibit 4*, (2006) <www.ag.gov.au/www/inquiry/offi.nsf/images/GOV.0002.0066.pdf> at 18 June 2009.

35 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 5.

36 *Ibid.*, 6.

37 *Ibid.*, 8.

38 *Ibid.*, Letter of Transmittal.

39 *Ibid.*, 16–17.

40 *Ibid.*, Rec 1.

Overview of the use of national security information by inquiries

13.31 Royal Commissions are not formally bound by the same requirements of openness as courts or tribunals and may call any witness, conduct hearings in private, and direct that any evidence or documents provided shall not be published.⁴¹ As can be seen from the above examples, previous Royal Commissions and inquiries have used a number of mechanisms to ensure the protection of national security information in the conduct of their inquiries, including:

- holding hearings and examinations in private;
- withholding material, such as transcripts and exhibits, from publication, or deferring publication of such material;
- making orders prohibiting the disclosure of particular documents or classes of documents;⁴²
- making orders prohibiting the disclosure of the identity of participants in an inquiry;⁴³
- making orders relating to how a person should be examined and what documents can be shown to the person;
- adapting inquiry procedures, for example, implementing arrangements with inquiry participants and the Australian Government to enable agreement to be reached on what portions of the transcript should, and should not, be published;
- requiring inquiry participants to provide notice prior to referring to national security information in the course of the inquiry, including in submissions;
- preparing confidential volumes or annexures of the report and placing limits on their distribution;
- making recommendations to the Australian Government regarding which parts of a report should, or should not, be made public;
- preparing abridged versions of findings and recommendations suitable for publication;

41 *Royal Commissions Act 1902* (Cth) s 6D.

42 The power to make such orders is currently found in *Royal Commissions Act 1902* (Cth) s 6D(3).

43 *Ibid.*

- examining national security information and preparing summaries of such information for use in the conduct of the inquiry;
- entering into arrangements with Australian Government agencies for the protection of national security information provided to the inquiry, including handling and storage; and
- making arrangements for persons accessing national security information in the course of an inquiry to obtain security clearances.

13.32 The doctrine of public interest immunity—which protects certain government documents from being called for under a coercive power—has been used to prevent the disclosure of information that is likely to prejudice national security in the context of Royal Commissions.⁴⁴ Other Commonwealth inquiries, such as the Clarke Inquiry, have developed ad hoc procedures to deal with issues concerning the protection of classified and security sensitive material.

13.33 Royal Commissions and other inquiries must also comply with the requirements of s 15XT of the *Crimes Act 1914* (Cth), the purpose of which is to ensure, to the greatest extent possible, that the real identity of a person who has an assumed identity—such as members of intelligence and law enforcement agencies—is protected from disclosure in the course of proceedings before a court, tribunal, Royal Commission or other commission of inquiry.⁴⁵

Other issues

Government policies and protocols

13.34 The Australian Government has an existing security classification system and a protective security policy—the *Australian Government Protective Security Manual* (PSM). The PSM is produced and periodically revised by the Protective Security Coordination Centre (PSCC) in the Australian Government Attorney-General's Department (AGD).

The PSM is the principal means for communicating protective security policies, procedures and minimum security requirements related to the protection of the Government's official resources. It is designed to assist agencies with their protective

44 The use of public interest immunity claims to protect the disclosure of national security information is considered later in this chapter. The application of public interest immunity to Royal Commissions and inquiries more generally is considered in Ch 16.

45 Section 15XT is located in Part 1AC of the *Crimes Act 1914* (Cth). Part 1AC deals with assumed identities and was introduced in 2001: *Measures to Combat Serious and Organised Crime Act 2001* (Cth). This provision, and others that may require consequential amendment, are set out in Appendix 6 of this Discussion Paper.

security arrangements, and includes principles, standards and procedures for the protection of government personnel, infrastructure and information.⁴⁶

13.35 In the Clarke Inquiry, the AGD assisted the inquiry to develop and promulgate arrangements for the protection of national security and other classified information provided to the inquiry. According to the report, the arrangements ‘were in accordance with the prescriptions of the [PSM] and the relevant legislation’.⁴⁷ As part of this process, the inquiry had systems and equipment installed to upgrade its premises and storage facilities to meet the standards required for classification as a ‘secure area’. While all inquiry staff had security clearances at top secret or secret level, they were still required to view some documents at the premises of particular agencies with some documents being delivered to, and removed from, the inquiry offices daily. In his report, Clarke noted that the situation was extremely inconvenient both administratively and operationally. He also formed the view that many documents were ‘over-classified’.⁴⁸

Existing permanent bodies

13.36 There are a number of existing permanent bodies that may be tasked with conducting inquiries into matters involving consideration of national security issues and information. In this section, the ALRC examines issues relating to the functions, powers and jurisdiction of these bodies. In some circumstances, it may be more appropriate, in terms of expertise and resources, for the Australian Government to appoint existing bodies to conduct inquiries rather than establishing a Royal Commission or Official Inquiry.

Inspector-General of Intelligence and Security

13.37 At least in respect of the six AIC agencies,⁴⁹ there is already an independent statutory office within the Prime Minister’s portfolio established to conduct inquiries into the legality and propriety of their activities—the Inspector-General of Intelligence and Security (IGIS).

13.38 The IGIS has an own motion capacity and strong coercive powers and protections as set out in the *Inspector-General of Intelligence and Security Act 1986* (Cth). Given the nature of the material involved, inquiries under the *Inspector-General*

46 Australian Government Attorney-General’s Department, *Protective Security Manual (PSM)*, <www.ag.gov.au> at 19 June 2009.

47 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 5.

48 Ibid. The ALRC examined the practice and procedure in the classification of sensitive material by government agencies and made a number of recommendations in Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), Chs 2, 4.

49 The agencies that comprise the Australian Intelligence Community (AIC) are: the Australian Security Intelligence Organisation (ASIO); Australian Secret Intelligence Service (ASIS); Defence Signals Directorate (DSD); Defence Imagery and Geospatial Organisation (DIGO); Defence Intelligence Organisation (DIO); and Office of National Assessments (ONA).

of *Intelligence and Security Act* must be conducted in private.⁵⁰ The IGIS is well practised in accessing, handling and dealing with the storage and further use of classified material. It also occupies highly secure premises and the AIC has grown comfortable over time with the level of security practised by the office over more than 20 years of maintaining and protecting confidentiality.⁵¹ Given that the jurisdiction of the IGIS is presently limited, it would not be able to extend its inquiries to other agencies or non-public sector bodies even if a national security-related matter could be adequately examined only by looking beyond the AIC.⁵²

13.39 Section 34 of the *Inspector-General of Intelligence and Security Act* imposes secrecy obligations on the IGIS and IGIS staff. Such persons cannot communicate any information acquired by reason of their position, except in the performance of their statutory functions or the exercise of their statutory powers.⁵³ Section 34(5) exempts such persons from any obligation to produce documents or provide information to a court, tribunal, authority or person which has power to require production of documents or answering of questions except where it is necessary to do so for the purposes of the *Inspector-General of Intelligence and Security Act*.

13.40 Following the establishment of the Royal Commission into the Australian Secret Intelligence Service in 1994, the Australian Government considered that the secrecy provisions in s 34 might prevent the IGIS and IGIS staff from giving information or documents to assist the Commission.⁵⁴ Accordingly, s 34A was inserted into the *Inspector-General of Intelligence and Security Act* to ensure that the IGIS and IGIS staff were able to cooperate fully with the Royal Commission.⁵⁵

13.41 The current IGIS submitted that, while s 34(5) of the *Inspector-General of Intelligence and Security Act* is a protection from compulsion, it leaves a discretion for the IGIS to decide to release information, should there not be another constraint on doing so. The IGIS submitted that s 34A should be repealed so that the IGIS is not potentially constrained from providing assistance to a Royal Commission, should the IGIS consider it appropriate to do so.⁵⁶

50 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 17(1).

51 Inspector-General of Intelligence and Security, *Submission RC 2*, 12 May 2009; Australian Intelligence Community, *Submission RC 12*, 2 June 2009.

52 The Government has announced that it will consider broadening the mandate of the IGIS to enable its inquiries to be extended, at the direction of the Prime Minister, to Commonwealth agencies that are not members of the AIC: See Australian Government, *Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), <www.ag.gov.au> at 19 June 2009.

53 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 34(1). Another exception, in s 34(1A) of the Act, is where the IGIS believes on reasonable grounds that the disclosure is necessary for the purpose of preserving the well-being or safety of a person.

54 C Horan, *Bills Digest—Inspector-General of Intelligence and Security Amendment Bill 1994*, Department of the Parliamentary Library, Parliamentary Research Services; Commonwealth, *Parliamentary Debates*, House of Representatives, 24 March 1994, 2073 (F Walker—Special Minister of State).

55 New s 34A was inserted by the *Inspector-General of Intelligence and Security Amendment Act 1994* (Cth) s 3.

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

Commonwealth Ombudsman

13.42 The office of the Commonwealth Ombudsman, another independent statutory office tasked with investigating the administrative actions of Commonwealth departments and prescribed authorities, is equipped with coercive information-gathering powers, employs staff with varying levels of security clearance and has existing information technology infrastructure to corral sensitive information. As in the case of the IGIS, however, there are limitations on the extent to which the Ombudsman can investigate matters—including those involving matters of national security—beyond the public sector.⁵⁷

13.43 The powers of the Ombudsman to investigate national security-related matters may be limited by s 9(3) of the *Ombudsman Act 1976* (Cth). This section provides that the Attorney-General may issue a certificate certifying that the disclosure to the Ombudsman of certain information or documents would be contrary to the public interest for a number of reasons—including that it would prejudice the security, defence or international relations of the Commonwealth.

Parliamentary Joint Committee

13.44 The Parliamentary Joint Committee on Intelligence and Security⁵⁸ has limited inquiry powers relating to the review of the administration, expenditure and financial statements of intelligence agencies within the AIC and other matters. The Committee can also review matters relating to the AIC referred to it by the responsible minister or the Parliament. The Committee is not authorised to initiate its own references, but may request the responsible minister to refer a particular matter to it for review. The Committee is specifically excluded from reviewing, among other things, the intelligence-gathering priorities of the agencies, their sources of information or other operational matters, and from conducting inquiries into individual complaints made against those agencies.⁵⁹

Expert role for the Inspector-General of Intelligence and Security

13.45 There may be scope to give existing permanent bodies, such as the IGIS, a role in advising and assisting Royal Commissions and Official Inquiries in the use of national security information. An expert advisory role for the IGIS is currently under consideration in the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth). The Bill proposes a new role for the IGIS in proceedings in the Administrative Appeals Tribunal (AAT) involving merits review of claims under a national security, defence, or international relations exemption, or a

57 The Ombudsman is limited to investigating administrative action by a department or prescribed authority. See, *Ombudsman Act 1976* (Cth) ss 3(1) and 5(1).

58 The Committee is established under s 28 of the *Intelligence Services Act 2001* (Cth). Predecessors of the Committee include the Parliamentary Joint Committee on ASIO, ASIS and DSD; Parliamentary Joint Committee on the Australian Security and Intelligence Organisation; and the Joint Select Committee on the Intelligence Services.

59 *Intelligence Services Act 2001* (Cth) s 29(3).

confidential foreign government communication exemption.⁶⁰ The Bill provides that before making a determination that a document is not exempt, the AAT will be required to request the IGIS to give evidence on:

- the damage that would, or could reasonably be expected to, result from disclosure to:
 - the security of the Commonwealth; or
 - the defence of the Commonwealth; or
 - the international relations of the Commonwealth; or
- whether giving access to the document would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Australian Government.⁶¹

13.46 If the AAT is already satisfied that the exemption claim should be upheld on other evidence, it is intended that evidence would not be sought from the IGIS. According to the Explanatory Memorandum, the purpose of the new procedural requirement is to assist the AAT through the provision of expert advice, which would be independent to an agency's submissions in support of its decision to claim an exemption. The AAT, however, is not bound by any opinion expressed by the IGIS. Nor is the measure intended to affect the ability of agencies to give evidence before the AAT on the harm that could result from the disclosure of the documents. Additionally, the IGIS could only be called to give evidence after the relevant agency or minister has given evidence or made submissions.⁶²

13.47 The Bill requires the IGIS to give evidence if requested, unless the IGIS is of the view that he or she is not qualified to give expert evidence. Provision is made for the IGIS to have access to documents in order to be properly informed before giving evidence.

Protection of national security information in court proceedings

13.48 The ALRC reviewed the handling and protection of national security information in legal proceedings in its 2004 report *Keeping Secrets: Protection of Classified and Security Sensitive Information* (ALRC 98). In that report, the ALRC

60 The effect of the Bill—which will repeal the power to issue conclusive certificates in the *Freedom of Information Act 1982* (Cth) and the *Archives Act 1983* (Cth)—is that the AAT may undertake full merits review of all exemption claims.

61 Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth), sch 1 item 25, sch 2 item 10.

62 Explanatory Memorandum, Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth), 6.

recommended the introduction of legislation to govern the use of such information in all stages of proceedings in all courts and tribunals in Australia. The ALRC's recommended scheme was intended to provide courts and tribunals with a range of options to tailor orders to suit the circumstances of the particular case, including:

- admitting the sensitive material after it has been edited or 'redacted' (that is, with the sensitive parts obscured);
- replacing the sensitive material with alternative, less sensitive, forms of evidence;
- using closed-circuit TV, computer monitors, headphones and other technical means to hide the identity of witnesses or the content of sensitive evidence (in otherwise open proceedings);
- limiting the range of people given access to sensitive material (for example, limiting access only to those with an appropriate security clearance);
- closing all or part of the proceedings to the public; and
- hearing part of the proceedings in the absence of one of the parties and its legal representatives—although not in criminal prosecutions or civil proceedings (except some judicial review matters), and only in other exceptional cases, (subject to certain safeguards).⁶³

13.49 It was the ALRC's view that the same principles that apply to court proceedings should generally apply to tribunal proceedings and Royal Commissions.⁶⁴

National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

13.50 In 2004 and 2005, the Australian Government introduced legislation establishing a scheme for the handling of national security information in criminal, and some civil, proceedings. The *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (NSI Act) largely incorporates the framework and terminology developed by the ALRC, as well as a number of principles and processes that are consistent with those expressed in ALRC 98. There are some points of departure in detail, however, between the NSI Act and the ALRC's recommended statutory scheme. Further, and critically important in the context of this Inquiry, the Act only relates to federal criminal and civil proceedings, and not to Royal Commissions or other types of inquiries.

63 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), Recs 11–1 to 11–43.

64 *Ibid.*, [11.193].

13.51 The NSI Act sets out a comprehensive procedure to determine the way in which information that may prejudice national security may be used in court proceedings.⁶⁵ The NSI Act is thereby said to facilitate the prosecution of an offence without prejudicing national security or the right of a defendant to a fair trial.⁶⁶ The NSI Act is supplemented by the *National Security Information (Criminal Proceedings) Regulations 2005* (Cth) (NSI Regulations) and the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings* issued by the AGD (NSI Requirements). Together, these documents provide a comprehensive regulatory framework for the disclosure, storage and handling of national security information in federal criminal proceedings and civil proceedings, whether in documentary or oral form.⁶⁷ The AGD has also published a *Practitioner's Guide* to the NSI Act.⁶⁸

13.52 The current practice in proceedings to which the NSI Act applies involves alternative 'tracks' for the management of national security information issues.⁶⁹ The first track, under Division 1 of Part 3, provides for pre-trial conferences to consider issues regarding the disclosure in the trial of information that relates to, or may affect, national security,⁷⁰ and for the parties to agree to consent arrangements about such disclosures.⁷¹ The Court may make orders to give effect to consent arrangements.⁷² The second track, under Division 2 of Part 3, involves the parties providing notifications to the Attorney-General about any expected disclosure of national security information⁷³ and mandatory adjournments of proceedings until the Attorney-General has either provided a non-disclosure certificate or witness-exclusion certificate to the court,⁷⁴ or advised that no such certificates will be issued. If the Attorney-General is satisfied that the disclosure of information would be likely to prejudice national security and has issued a certificate, he or she may provide a copy of the document with the information deleted, with or without a summary of the information or a statement of the facts that such information would be likely to prove.⁷⁵

65 S Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 88.

66 Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) <www.nationalsecurity.gov.au> at 3 June 2009.

67 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 6.

68 Ibid.

69 S Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 91 citing *R v Lodhi* (2006) 163 A Crim R 448, 464–465; *R v Benbrika* [2007] VSC 141.

70 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 21(1).

71 Ibid s 22.

72 Ibid s 22(1).

73 Ibid ss 24–25.

74 Ibid ss 26–28.

75 Ibid s 26.

13.53 The procedures for the disclosure of national security information in federal criminal proceedings and civil proceedings in the NSI Act have been in operation for over four years and, as at June 2008, have been invoked in federal criminal cases involving 28 defendants and in civil proceedings relating to the making of a control order under the *Criminal Code Act 1995* (Cth).⁷⁶ It has been observed that the first track, involving consent arrangements, has become common practice in most cases⁷⁷ and ‘provides a way of dealing with the complications that can arise’ from the second track.⁷⁸ As noted in the *Practitioner’s Guide*, consent arrangements ‘are useful because they can alleviate the need for the parties to fully adhere to detailed procedures set out in the NSI Regulations and NSI Requirements document’.⁷⁹ Consent arrangements are ordinarily negotiated as part of the pre-trial process between counsel for the Attorney-General and the defendant. The orders made are invariably detailed and may run to many pages.⁸⁰

Public interest immunity

13.54 Before the NSI Act, the common law doctrine of public interest immunity was the main mechanism by which the Commonwealth could seek to protect national security information from disclosure during court proceedings.⁸¹ As noted in Chapter 16, public interest immunity allows a court to exclude evidence which, if admitted, would be injurious to the public interest.

13.55 According to Donaghue, ‘traditional public interest immunity claims are, in the vast majority of cases, just as effective as the NSI Act in preventing any disclosure of information that is likely to prejudice national security’.⁸² Donaghue also argues that traditional public interest immunity claims have practical advantages over the NSI Act procedure, namely:

- they do not require the personal involvement of the Attorney-General, but can be made by a senior public servant or head of the relevant agency;

76 Australian Government Attorney-General’s Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners’ Guide* (2008), 5; *Criminal Code Act 1995* (Cth).

77 Ibid, 13.

78 S Donaghue, ‘Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice’ in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 91.

79 Australian Government Attorney-General’s Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners’ Guide* (2008), 13.

80 The protective orders made by Bongiorno J in *R v Benbrika & Ors (Ruling 1)* [2007] VSC 141, for example, comprised 45 paragraphs.

81 Australian Government Attorney-General’s Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners’ Guide* (2008), 5.

82 S Donaghue, ‘Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice’ in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 90.

- they can often be heard in public whereas claims made under the NSI Act must be held in private;⁸³ and
- they do not require the adjournment of the entire proceeding while the claim is prepared, but it is arguable that the NSI Act does require such an adjournment.⁸⁴

13.56 According to Donaghue, the main type of case that calls for the NSI Act to be used arises where either the prosecution or the defence needs to rely, as a central part of their case, on information that, if disclosed, would damage national security.⁸⁵ If a public interest immunity claim was made and upheld in that type of case, crucial evidence may not be available resulting in the prosecution either failing or being stayed because information had been denied to the defence.⁸⁶ In contrast, the NSI Act creates a procedure for such information to be admitted into evidence, but in a form that ensures that it does not prejudice national security—for example, edited documents, summaries, or statements of facts of the kind contemplated by s 26 of the NSI Act.⁸⁷

13.57 A number of additional difficulties associated with reliance upon public interest immunity to protect national security information have been identified.⁸⁸ National security issues may arise unexpectedly, even after an inappropriate disclosure has occurred, and claims for public interest immunity will therefore often have to be determined at very short notice. Additionally, it does not protect information from disclosure before the making of a court order. Nor does it allow for summaries or stipulations of fact to be substituted (in contrast to the procedure under s 26 of the NSI Act).

Security clearances

13.58 The requirement of a security clearance is another method used to protect national security information.⁸⁹ In ALRC 98, the ALRC considered existing procedures in relation to security assessments and clearances. It also considered issues concerning security clearances for various people (including lawyers) involved in court and tribunal proceedings.⁹⁰ Similar issues may arise in the context of Royal Commissions and Official Inquiries that require access to national security information for the purposes of conducting the inquiry. There are a number of examples—including the Royal Commission on Intelligence and Security and, more recently, the Clarke

83 *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* s 29.

84 In particular, *ibid* ss 24, 25; S Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 90.

85 *Ibid*, 90–91.

86 *Ibid*, 91.

87 *Ibid*.

88 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 5–6.

89 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [6.1].

90 *Ibid*, Ch 6, Recs 6–1, 6–2, 6–3.

Inquiry—in which inquiry staff have obtained security clearances in order to access national security information.

13.59 In ALRC 98, it was recommended that courts retain the discretion to grant lawyers without a security clearance participating in proceedings access to national security information, subject to such restrictions and undertakings that the court considers necessary.⁹¹ The ALRC was of the view that, in particular cases, it may be desirable to restrict access to those holding an appropriate security clearance.⁹² Rather than imposing obligations on lawyers to obtain a security clearance, however, it was recommended that the power to grant orders should be directed at controlling access to sensitive documents or information.⁹³ The ALRC concluded that allowing courts to order that specified material not be disclosed to any person who does not hold a security clearance at a relevant level was an appropriate part of an overall procedural framework for the disclosure and admission of classified and sensitive national security information in court and tribunal proceedings.⁹⁴ The ALRC also recommended that courts and tribunals be empowered to order that certain specified material be disclosed only to people who hold a security clearance at a specified level, including court and tribunal staff, reporters and others.⁹⁵

13.60 In contrast, the NSI Act empowers the Secretary of the AGD to give notice to a defendant's lawyer (or anyone assisting that lawyer) that the proceedings involve information that is likely to prejudice national security.⁹⁶ That person then may apply for a security clearance (if he or she does not already have one) at a level considered appropriate by the Secretary of the AGD.⁹⁷ Any adjournment necessary to seek that clearance must be given by the court.⁹⁸ If the person does not apply for clearance within 14 days, the court must be informed and may then advise the defendant of the consequences and may recommend that he or she retain another lawyer who is cleared or is prepared to seek a clearance.⁹⁹

13.61 Those persons who do not obtain a security clearance will be unable to have access to some of the evidence in the case. The court cannot override this prohibition and grant access to information the disclosure of which would prejudice national security to any person without a clearance to the requisite level, whether pursuant to a confidentiality undertaking or otherwise.¹⁰⁰

91 Ibid, Recs 11–10(c)(vii), 11–25.

92 Ibid, [6.103].

93 Ibid.

94 Ibid, [6.104].

95 Ibid, [6.147], Rec 11–25.

96 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 39, 39A.

97 Ibid ss 39(2), 39A(2). Security clearances are given in accordance with the *Australian Government Protective Security Manual*.

98 Ibid ss 39(3)–(4), 39A(3)–(4).

99 Ibid ss 39(5), 39A(5)–(7).

100 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [1.34].

13.62 The ALRC has previously expressed the strong view that judges and magistrates should never be subject to any security clearance in relation to their duties.¹⁰¹ This view was informed by concerns about the separation of powers and judicial independence. Under the NSI Act, judges are not required to undergo security clearances. The court retains a discretion to exclude other court personnel who are not security cleared such as associates, tip staff, court reporters, corrections officers and anyone else involved in the handling and storage of national security information.¹⁰²

Overseas jurisdictions

13.63 The following section examines the practices of some comparable overseas jurisdictions with regard to the protection of security sensitive information in the context of public inquiries.

United Kingdom

13.64 The *Inquiries Act 2005* (UK) does not specify explicitly that evidence relating to national security is inadmissible in inquiry proceedings. Pursuant to s 22(2) of the Act, however, a claim of public interest immunity may be made in respect of such evidence.

13.65 Assuming that a claim of public interest immunity fails, several provisions of the *Inquiries Act* attempt to ensure that sensitive evidence, if tendered in the proceedings, does not become publically available. Section 19 of the Act, for example, allows a minister or inquiry chairperson to restrict access to inquiry proceedings or evidence on public interest grounds if, among other things, there is a sufficient risk of ‘damage to national security or international relations’. Similarly, s 25 empowers the minister or inquiry chairperson to issue a non-publication order, which authorises the withholding of material in the inquiry’s final report to the extent necessary to avert ‘damage to national security or international relations’.

13.66 This approach has the benefit of granting inquiry chairpersons full access to the evidence they require to make their findings (assuming any claim of public interest immunity is overcome), while ensuring the confidentiality of sensitive information relating to national security. Nevertheless, the approach in the *Inquiries Act* may give rise to situations where the minister, but not the inquiry chairperson, determines that non-publication or restriction orders are in the public interest. In these situations, the public may perceive that a supposedly independent inquiry is being hampered by undue political interference.

Canada

13.67 At the federal level, s 4(b) of the *Inquiries Act 1985* (Canada) grants commissioners the power to require witnesses to ‘produce such documents and things

101 Ibid, [6.119]–[6.120].

102 Australian Government Attorney-General’s Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners’ Guide* (2008), 28.

as [the commissioners] deem requisite to the full investigation of the matters into which they are appointed to examine'. Accordingly, if evidence relating to national security falls within the purview of the inquiry's terms of reference, it is prima facie admissible. Section 5, however, goes on to specify that 'commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases'.

13.68 Accordingly, when the disclosure of evidence relating to national security becomes an issue for a public inquiry, s 38 of the *Canada Evidence Act 1985* (Canada) is invoked. The section requires that persons who are about to disclose what they believe to be 'sensitive information', or participants in proceedings to which those persons are a party (and who also believe that information to be sensitive), must notify the Attorney-General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding. Public officials have the same duty of notification. Once notified, the Attorney-General may authorise or refuse disclosure within 10 days. Alternatively, the Attorney-General may refer the question of disclosure to the Federal Court. Pending the final decision as to disclosure, the evidence under review may not be given in connection with the proceedings.

13.69 The Canadian approach has the benefit of ensuring consistency between the treatment of sensitive evidence in public inquiries and in civil proceedings. Nonetheless, the decision with respect to disclosure remains with the executive in the first instance. While the Attorney-General may choose to allow the Federal Court to make the determination, he or she may circumvent the judicial process by summarily deciding against disclosure.

New Zealand

13.70 Section 4B(1) of the *Commissions of Inquiry Act 1908* (NZ) empowers commissions to 'receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law'. Clause 20(a) of the *Inquiries Bill 2008* (NZ) is materially identical to this provision. Clause 28 of the Bill, however, incorporates the New Zealand Law Commission's suggestion that inquiries legislation embody the privileges and immunities contained in the *Evidence Act 2006* (NZ).¹⁰³ Thus, public interest immunity, as enshrined in s 70 of the *Evidence Act*, will be a valid basis for a refusal to disclose to inquiries evidence relating to national security.

13.71 Clause 21(c) of the *Inquiries Bill* provides that the inquiry may:

- examine any document or thing for which privilege or confidentiality is claimed, or refer the document or thing to an independent person or body, to determine whether—
- (i) the person claiming privilege or confidentiality has a justifiable reason in maintaining the privilege or confidentiality; or
- (ii) the document or thing should be disclosed.

103 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Ch 9.

13.72 Pursuant to cl 28 of the Inquiries Bill, if the inquiry decides to disclose or admit the evidence, it may do so subject to ‘appropriate terms and conditions’.

13.73 Like the United Kingdom approach, the proposed New Zealand approach grants inquiries full access to the evidence they require to make their findings, provided that there is no successful claim of public interest immunity. Not only are inquiries granted access to the evidence for the purposes of determining its admissibility, but their power to attach conditions to its disclosure and use helps to ensure that the evidence in question is protected.

Submissions and consultations

13.74 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC sought stakeholder views on whether there is a need for public inquiries to have special powers in cases of national security. In particular, the ALRC asked whether:

- special administrative arrangements should be developed for Royal Commissions and other forms of public inquiries dealing with matters relating to national security, for example, standard arrangements for access to classified and security sensitive material,¹⁰⁴ and
- legislation establishing Royal Commissions or other public inquiries should incorporate the procedures applied in federal criminal and civil proceedings—that is, the NSI Act, NSI Regulations and NSI Requirements—in dealing with matters relating to national security.¹⁰⁵

13.75 Liberty Victoria raised a number of issues regarding matters of national security in the context of Royal Commissions and inquiries. First, it argued that those with carriage of a public inquiry must have minimum qualifications and experience including, where applicable, security clearances to enable access to secret or highly confidential materials. This would ensure inquiries had adequate access to classified information where relevant to the inquiry (and prevent governments from withholding information on the basis of ‘national security’ or other interests).

13.76 Secondly, Liberty Victoria supported inquiries having access to classified information where relevant to the inquiry and where appropriate protections were in place to ensure security is maintained.

13.77 Finally, it submitted that where issues of national security or other sensitive matters were dealt with in an inquiry’s report, those parts could be redacted or an expedited version tabled in Parliament—but only to the degree absolutely necessary to protect Australia’s interests or individual civil liberties.¹⁰⁶

104 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–6.

105 Ibid, Question 7–7.

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

13.78 The Law Council of Australia (Law Council) expressed general support for the findings and recommendations made in the *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef*.¹⁰⁷ The report stated that:

inquiries or independent reviews that involve national security and thus deal with sensitive documentation and evidence should be covered by statutory provisions. At a minimum, these provisions would confer coercive powers in respect of the following:

- Production of documents – which might override claims of public interest immunity or legal professional privilege
- Appearances before an inquiry
- Maintenance of confidentiality
- Protection of witnesses

The expectation is that inquiries established under these conditions would normally be conducted in private, and proceedings would remain confidential, although this would not necessarily preclude conducting hearings in public where circumstances allowed.¹⁰⁸

13.79 The Law Council submitted that government departments and agencies should not have the discretion to refuse to disclose relevant information to public inquiries. Moreover, once information was disclosed, whether it was made public should be determined by the independent inquiry head, following submissions by relevant agencies concerning non-publication. Such applications should be determined according to established legal criteria and in an environment where an agency's application may be subject to challenge.¹⁰⁹

13.80 The Law Council also submitted that such a process would allow for national security considerations and the integrity of ongoing investigations and prosecutions both here and abroad to be given due weight. This decision would be made by the inquiry itself applying criteria defined in law, rather than being determined solely by the assertion, either by domestic or foreign agencies, that security or police operations may be prejudiced by disclosure.¹¹⁰

13.81 The Law Council expressed the view that any general inquiries legislation should include criteria to determine whether certain information should be protected from public disclosure or publication. Such criteria could require inquiry heads to consider issues such as national security and the public interest in publication before determining whether to conduct hearings in private or restrict publication of certain material. The Law Council also suggested that consideration be given to establishing administrative guidelines or arrangements for inquiries dealing with national security—for example, guidelines for accessing classified and security sensitive documents.

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

108 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 17.

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

110 Ibid.

13.82 The Department of Immigration and Citizenship (DIAC) supported the recommendations made by the Clarke Inquiry referred to above. It considered that any general inquiries legislation ‘should also be able to support further coercive powers to accommodate inquiries into matters of national security or serious investigatory inquiries if required’.

13.83 In relation to the use of coercive powers by an inquiry relating to matters of national security, DIAC submitted that the treatment of witnesses, witness statements and transcripts and documents required stronger protections. For example, documents and transcripts that have national security implications should not be disclosed, or if disclosed, should be protected from subsequent publication, and accordingly should not be reflected in detail in an inquiry’s report.

13.84 DIAC queried whether inquiries should have the power to request and examine confidential material from government agencies in their own right. DIAC also submitted that the protections available for handling sensitive information should also extend to related information such as transcripts of interviews of witnesses who discuss the content of sensitive information.¹¹¹

13.85 There were differing views amongst stakeholders as to whether the NSI Act should be applied to Royal Commissions and public inquiries. The Law Council did not support the adoption of the procedures contained in the NSI Act in the context of Royal Commissions and public inquiries.¹¹²

13.86 The AIC submitted that while the NSI Act had proven to be a useful framework for the facilitation of national security information in legal proceedings, it was a procedurally intricate system that may not lend itself to Royal Commissions seeking to access information in an expeditious and flexible manner.¹¹³ The AIC considered that:

current legislative arrangements do not inhibit appropriate information sharing to Royal Commissions and there is no clear need to incorporate procedures applied in federal and criminal and civil proceedings in dealing with matters relating to national security. The AIC considers that Royal Commissions have, to date, struck an appropriate balance between access to national security information and protections against inappropriate disclosure of sensitive material.

13.87 In contrast, Liberty Victoria was of the view that the framework under the NSI Act should be available to inquiries.¹¹⁴

13.88 The Australian Government Solicitor (AGS) observed that while the *Royal Commissions Act* did not expressly deal with national security information, Royal Commissions did have some flexibility in dealing with such information. The AGS

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

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

113 Australian Intelligence Community, *Submission RC 12*, 2 June 2009.

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

observed that extending the regime which is available under the NSI Act to Royal Commissions would ensure that equivalent protections were available to protect national security information in the context of Royal Commission proceedings.¹¹⁵

13.89 If that course was adopted, the AGS submitted that consideration should be given to whether a Commissioner would be given the source information in respect of which a ‘summary’ had been provided by the Attorney-General.¹¹⁶ The AGS noted that in the AWB Inquiry, a summary of sensitive evidence was produced for affected persons, but the Commissioner and certain identified Commission lawyers were allowed to access the source material for the purposes of the inquiry.¹¹⁷

ALRC’s view

13.90 Matters of national security may fall for consideration by a Royal Commission or inquiry for a number of reasons, including that the inquiry:

- is reviewing and/or investigating the structure and operations of intelligence and security agencies;
- is investigating Australia’s relations with foreign countries;
- requires access to national security information and documents to investigate and establish the facts; or
- calls evidence from a witness whose identity, if disclosed, could raise national security-related issues.

Are special arrangements and powers required?

13.91 At present, the *Royal Commissions Act* does not contain any specific powers or procedures for the protection of national security information. As noted above, however, Royal Commissions have previously exercised general powers to make orders to prevent the disclosure of such information—for example, by taking evidence in private and making orders for non-disclosure of information and evidence.

13.92 Royal Commissions and inquiries have also used other procedural mechanisms and developed ad hoc arrangements with Australian Government agencies that are providing national security information to the inquiry. Using existing mechanisms, inquiries have been able to prevent inadvertent disclosure of national security information in the conduct of their inquiries.

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

116 This procedure is set out in *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 26.

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

13.93 In view of this, the ALRC has considered whether it is necessary to incorporate special procedures and powers for the protection and use of national security information in the proposed *Inquiries Act*. An alternative would be to leave it to inquiry members to determine their own procedures in relation to the protection of national security information in line with certain statements of principle, for example, in the proposed *Inquiries Handbook*.

13.94 In the ALRC's view, special procedures and powers should be provided in a formal statutory regime. Although previous inquiries have been able to prevent inadvertent disclosure of national security information, some have encountered practical difficulties in relation to their access and use of such material.¹¹⁸ Others have experienced complications in the determination of public interest immunity claims.¹¹⁹

13.95 The proposed *Inquiries Act* should contain provisions dealing specifically with the protection of national security information in the conduct of Royal Commissions and Official Inquiries. It is the prevailing view of stakeholders that issues relating to the use and protection of national security information in the conduct of inquiries warrant a regime with statutory force. The ALRC agrees with this view. It is important that inquiry members have access to all relevant information, including national security information, and that there be appropriately balanced measures to protect such information.

Should the NSI Act apply to inquiries?

13.96 Royal Commissions and Official Inquiries, unlike courts and tribunals, do not determine rights and are not formally bound by the same requirements of openness or the rules of evidence. There are significant differences between court proceedings—which involve the determination of a person's guilt or innocence or their legal rights and liabilities—and the conduct and findings of a Royal Commission or Official Inquiry—which do not involve such determinations, but may impact the individual interests of persons affected by or involved in an inquiry. In the ALRC's view, any tension between the mechanisms used to protect national security information on the one hand, and principles of open justice and the right of a person to a fair trial, are likely to be more prominent in court proceedings than in the context of Royal Commissions or Official Inquiries.

13.97 The regime under the NSI Act is designed for federal criminal proceedings and selected civil proceedings and entails a number of prescriptive, procedural steps that might not be suitable in the context of inquiries. For example, the regime requires the personal involvement of the Attorney-General for the purposes of issuing non-

118 For example, the *Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008) <www.haneefcaseinquiry.gov.au/> at 4 August 2009.

119 For example, the *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry.gov.au/> at 4 August 2009.

disclosure certificates.¹²⁰ It also directs the court to hold closed hearings for the purposes of determining whether to allow a witness to be called and whether, and in what form, information potentially prejudicial to national security may be disclosed.¹²¹ Further, the regime provides for mandatory adjournments of proceedings if information will be disclosed that relates to or may affect national security.¹²² Finally, the ALRC notes that parties in court proceedings to which the NSI Act applies often rely on consent orders in preference to adherence to the detailed procedures set out in the Act, NSI Regulations and the NSI Requirements.¹²³

13.98 In the ALRC's view, the procedural framework under the NSI Act, which is specifically drafted to apply in the context of court proceedings, could not be readily applied to Royal Commissions and Official Inquiries in its present form. Amendments would be required to tailor specialist procedures for inquiries. In view of this, the ALRC proposes that any special arrangements and powers relating to the protection of national security information should be located in the proposed *Inquiries Act*.

Proposal 13–1 The proposed *Inquiries Act* should contain provisions dealing specifically with the protection of national security information in the conduct of Royal Commissions and Official Inquiries.

A framework for the protection of national security information

13.99 As noted in Chapter 15, the ALRC proposes measures to encourage greater flexibility in inquiry procedures. Royal Commissions and Official Inquiries should retain the discretion to determine the procedures that will apply in a particular inquiry in relation to the protection of national security information. The proposed *Inquiries Act* should, however, incorporate sufficient powers to enable inquiry members to make directions, including on their own motion, or at the request of an inquiry participant, in relation to the disclosure and use of national security information.

13.100 In certain inquiries—namely, those in which national security-related matters fall for consideration, or access to national security information is necessary to enable the fullest examination of the matters within the terms of reference—there is value in empowering inquiry members to make directions aimed at controlling access to particular documents or information on the basis of whether a person holds a security clearance. While inquiry members should not be able to impose obligations on a particular person to obtain a security clearance, the ALRC is currently of the view that such a power is an appropriate part of its proposed statutory framework for the

120 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) pt 3 div 2, pt 3A div 2.

121 *Ibid* pt 3 div 3, pt 3A div 3.

122 *Ibid* ss 29, 38I.

123 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 13.

protection of national security information in the context of Royal Commissions and Official Inquiries.

13.101 The ALRC's proposal for the protection of national security information is intended to establish the general principles that would, if adopted, govern the drafting of special arrangements and powers in the proposed *Inquiries Act*. These principles are analogous to those recommended in ALRC 98, but tailored to the specific circumstances of Royal Commissions and Official Inquiries.

13.102 In making determinations about the relevance of any national security information, including any claims for public interest immunity made in respect of such information, inquiry members require access to the underlying documents or material. The procedures that should generally apply to determining claims of privilege, including public interest immunity, are discussed in Chapter 16. The framework is also intended to operate in conjunction with the ALRC's proposals for offences for non-compliance with a notice issued by an inquiry to produce documents or provide information.

13.103 Another aspect of the proposed framework is to enable inquiry members, in appropriate circumstances, to restrict who can access national security information, including by limiting access to those people who hold security clearances at an appropriate level. As noted in ALRC 98, requiring security clearances is an essential feature of sensible risk management in that it helps to prevent people who are discerned to be security risks from gaining access to the information, as well as providing training and reinforcement about proper handling of such sensitive information.¹²⁴

13.104 The ALRC notes that no security clearance is currently required for members of a Royal Commission under the *Royal Commissions Act*, although some Commissioners have obtained such clearances in the past. It is also noted that the security clearance process can be discriminatory and intrusive.¹²⁵ As such, a requirement that an inquiry member undergo a security clearance in order to access information is, on the face of it, inconsistent with the ALRC's proposal that Royal Commissions and Official Inquiries be independent in the performance of their functions.¹²⁶

13.105 In the ALRC's view, the proposed *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries do not require a security clearance to access national security information. This would facilitate access by inquiry members to national security information for the purpose of determining any

124 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [6.95].

125 *Ibid.*, [6.8].

126 Proposal 6–3.

claims for public interest immunity and the making of appropriate directions about the disclosure and use of such information in the conduct of the inquiry. It would, however, be open to an inquiry member to request and obtain such a clearance if he or she considered it desirable.

Proposal 13–2 Royal Commissions and Official Inquiries should retain the ultimate discretion to determine the procedures that will apply in a particular inquiry. The proposed *Inquiries Act* should empower inquiry members to make directions on their own motion, or at the request of a person or body affected by or involved in the conduct of the inquiry, in relation to the use of national security information, including, but not limited to, the following:

- (a) determinations of the relevance of any national security information, including any claims for public interest immunity, and the use to which that information may be put in the conduct of the inquiry;
- (b) the provision by persons involved with the inquiry of lists of all national security information that those persons reasonably anticipate will be used in the course of the inquiry. The chair of an inquiry may make such directions as he or she thinks fit in relation to the specificity with which national security information is to be described in these lists, the people to whom these lists are to be given, the use that may be made of the information and the degree of protection that must be given;
- (c) the form in which any national security information may be produced or otherwise used in the conduct of the inquiry. Such directions may involve:
 - (i) the redaction, editing or obscuring of any part of a document containing or advertent to national security information;
 - (ii) replacing the national security information with summaries, extracts or transcriptions of the evidence sought to be used, or by a statement of facts, whether agreed by the parties or persons involved in the inquiry or not;
 - (iii) replacing the national security information with evidence to similar effect obtained through unclassified means or sources;
 - (iv) concealing the identity of any witness or person identified in, or whose identity might reasonably be inferred from, national security information or from its use in the conduct of the inquiry (including oral evidence), and concealing the identity of any person who comes into contact with national security information;

- (v) the use of written questions and answers during evidence which would otherwise be given orally;
- (vi) the use of technical means by which the identity of witnesses and contents of national security information may be protected, for example, through the use of closed-circuit television, computer monitors and headsets;
- (vii) restrictions on the people to whom any national security information may be given or to whom access to that information may be given. Such restrictions may include limiting access to certain material to people holding security clearances to a specified level;
- (viii) restrictions on the use that can be made by a person with access to any national security information; and
- (ix) restrictions on the extent to which any person who has access to any national security information may reproduce or disclose that information.

Proposal 13–3 The proposed *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries do not require a security clearance to access national security information.

Role of the Inspector-General of Intelligence and Security

13.106 In determining the use or disclosure of information in the conduct of an inquiry, including any claims for public interest immunity in respect of national security information, inquiry members may benefit from expert advice, which would be independent to the inquiry and to the provider of the information (who will, in most cases, be a government agency). The ALRC therefore proposes that the *Inquiries Act* should empower an inquiry member to request advice or assistance from the IGIS concerning:

- the damage or prejudice to national security that would, or could reasonably be expected to, result from the use or disclosure; and
- whether giving access to the information would divulge any matter communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation to the Australian Government.

13.107 In this respect, the ALRC envisages a role for the IGIS similar to that proposed in the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth). As proposed in the Bill, the IGIS would be required to give advice and assistance if requested and would be entitled to have access to documents in order to be properly informed of the issues under consideration. The IGIS could decline to assist in limited circumstances, for example, if the IGIS was of the view that he or she was not qualified to give expert evidence.

13.108 The ALRC also envisages some departure in detail between the role of the IGIS in the Bill and that proposed in relation to Royal Commissions and Official Inquiries. First, inquiry members would have the option of requesting such advice from the IGIS before making a determination, but would not be required to do so. Secondly, the IGIS could be called upon to assist at any stage of the inquiry and not only after the provider of the information had given evidence or submissions. Finally, any advice provided by the IGIS could be given in any form agreed upon by the IGIS and inquiry members and need not be given by way of sworn evidence in oral or written form.

13.109 The ALRC notes that these proposals, if adopted, may necessitate consequential changes to the provisions of the *Inspector-General of Intelligence and Security Act* relating to the IGIS's statutory functions and secrecy obligations to cover information and documents that the IGIS or IGIS staff have acquired in the performance of the IGIS's role under the proposed *Inquiries Act*.¹²⁷

13.110 Consistent with the submission of the IGIS, the ALRC proposes that s 34A of the *Inspector-General of Intelligence and Security Act*, which relates to information and documents that may be given to the Commission of Inquiry into the Australian Secret Intelligence Service (1995), be repealed. If national security-related matters are considered by Royal Commissions or Official Inquiries, the IGIS or his or her staff should not be precluded from assisting inquiries in appropriate circumstances, including by disclosing or communicating information or documents to the inquiry.

13.111 It is arguable that the repeal of s 34A would be sufficient to remove potential constraints on the IGIS providing assistance to an inquiry should he or she consider it appropriate to do so. For the avoidance of doubt, however, the discretion of the IGIS to decide to provide such assistance, including by the release of relevant information to an inquiry, should be made explicit by way of consequential amendments to the statutory functions and secrecy obligations of the IGIS. While the IGIS should have a discretion in relation to such assistance, it is appropriate that the protection from compulsion in s 34(5) of the *Inspector-General of Intelligence and Security Act* be preserved.

¹²⁷ Similar consequential amendments are contained in the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth) sch 4.

Proposal 13–4 The proposed *Inquiries Act* should empower inquiry members, in determining the use or disclosure of information in the conduct of an inquiry, to request advice or assistance from the Inspector-General of Intelligence and Security concerning:

- (a) the damage or prejudice to national security that would, or could reasonably be expected to, result from the use or disclosure; and
- (b) whether giving access to the information would divulge any matter communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation to the Australian Government.

Proposal 13–5 Section 34A of the *Inspector-General of Intelligence and Security Act 1986* (Cth), which relates to information and documents that may be given to the Commission of Inquiry into matters relating to the Australian Secret Intelligence Service (1995), should be repealed.

Technical assistance

13.112 The ALRC considered whether other arrangements of an administrative nature should be implemented in addition to the proposed statutory framework, to facilitate physical access by a Royal Commission or Official Inquiry to national security information while also ensuring adequate protection of such information. Some stakeholders supported the introduction of such arrangements, including by way of written guidance for inquiry members and staff.

13.113 One option is to leave individual Royal Commissions and Official Inquiries to develop their own arrangements, or enter into memorandums of understanding with relevant government departments and agencies, who are usually the custodians of national security information. In the ALRC's view, however, it is preferable for issues relating to the handling and storage of national security information by inquiries to be addressed in the proposed *Inquiries Handbook*. This would provide more consistency and certainty and avoid duplication of effort from inquiry to inquiry. In the Clarke Inquiry, the inquiry had to negotiate with relevant agencies and promulgate its own arrangements. This contributed to the consequent delay in the conduct of the inquiry.¹²⁸

13.114 The ALRC notes that the PSM already provides a comprehensive protective security framework from which appropriate standards and procedures could be developed for inquiries. Such information could be developed in consultation with relevant government department or agencies—who in most cases will provide national

128 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 5.

security information to inquiries—and the Protective Security Policy Committee, who has responsibility for the management and dissemination of the PSM.

13.115 There are many technical and practical aspects relating to the physical protection of national security information, including its handling and storage. The ALRC proposes that the Australian Government department responsible for the administration of inquiries—presently the AGD—should assign, upon request by an inquiry member, appropriately trained personnel to advise the inquiry on the handling and storage of national security information. Such officers could be assigned on a part-time or full-time basis to advise on technical aspects only and while performing any such function would be answerable to the inquiry members.

Proposal 13–6 The proposed *Inquiries Handbook* should include information on the handling and storage of national security information by inquiries. The information should be developed in consultation with relevant government departments or agencies such as the Protective Security Policy Committee and the Australian Intelligence Community and may incorporate, as appropriate, the standards and procedures in the *Australian Government Protective Security Manual*.

Proposal 13–7 If requested by members of Royal Commissions and Official Inquiries, the Australian Government should assign appropriately trained personnel to advise the inquiry on the handling and storage of national security information.