

## 14. Inquiries and Courts

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### Introduction

14.1 In this chapter, the ALRC discusses the relationship between inquiries established under the proposed *Inquiries Act* and court proceedings. Court proceedings may affect inquiries in four ways. First, court proceedings may be used to supervise the legality of the establishment and conduct of an inquiry. Secondly, court proceedings may be used to determine legal disputes arising in an inquiry. Thirdly, inquiries may be restrained from inquiring into matters that are in dispute in related court proceedings that are being conducted at the same time. Fourthly, an inquiry may affect the conduct of subsequent legal proceedings.

14.2 This chapter examines the interactions between inquiries and courts, beginning with the supervision of inquiries through judicial review, and the determination of legal disputes through the referral of a question of law to a court. It then briefly draws together relevant parts of the Discussion Paper that relate to the interaction of inquiries with concurrent and subsequent legal proceedings.

## Judicial review

### Introduction

14.3 Judicial review can be described broadly as ‘the function or capacity of courts to provide remedies to people adversely affected by unlawful government action’.<sup>1</sup> Importantly, the purpose of judicial review is to ensure the legality of government action, rather than its correctness.<sup>2</sup> As the High Court put it, judicial review

is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. ... Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction.<sup>3</sup>

14.4 Judicial review of administrative action can be sought in the High Court in the exercise of its original jurisdiction under the *Australian Constitution*,<sup>4</sup> or in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).<sup>5</sup> The principles governing judicial review, however, remain to a large extent the product of common law.

14.5 A court may determine that administrative action is unlawful on a number of grounds—for example, that it was not based on any evidence or other material; or that it was made in breach of the principles of procedural fairness (as discussed in Chapter 15).<sup>6</sup> If a court determines the administrative action is unlawful, it may make a number of orders, such as quashing a government decision, or compelling a person to do, or prohibiting a person from doing, an act.

### Judicial review of inquiries

14.6 While historically Royal Commissions were not subject to judicial review, it is clear now that they are subject to such review.<sup>7</sup> For example, a Royal Commission may be challenged on the basis that its conduct extends beyond its terms of reference,<sup>8</sup> because a Royal Commissioner is biased or appears to be biased,<sup>9</sup> or because there has been a breach of the principles of procedural fairness.<sup>10</sup> In Australia, courts generally

1 Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006), 1.

2 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36.

3 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–514.

4 In particular, s 75(iii) and (v).

5 The jurisdiction under the *ADJR Act* is limited to conduct, decisions, and failures to make decisions ‘under an enactment’, so it may not be available in respect of decisions that are not given force and effect by the *Royal Commissions Act 1902* (Cth): *AWB Ltd v Cole* (2006) 152 FCR 382, [168]–[174].

6 See generally P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), Ch 13.

7 *Ibid.*, 691.

8 *Ibid.*, 704–705.

9 *Ibid.*, 734–744.

10 A finding of a Royal Commission may be challenged on this basis: see *Mahon v Air New Zealand Ltd* [1984] AC 808; and, in the analogous context of a coronial finding, *Annetts v McCann* (1990) 170 CLR 596.

have been reluctant to intervene in the conduct of Royal Commissions. For example, as discussed below, the courts take a liberal approach in determining whether evidence is relevant to a Royal Commission.<sup>11</sup>

14.7 As the New Zealand Court of Appeal has observed, there are competing considerations as to whether, and to what extent, judicial review ought to be available in the context of Royal Commissions.<sup>12</sup> On the one hand, a report is merely an expression of opinion and has no immediate legal effect. This points towards a fairly limited role for judicial review. On the other hand, most Royal Commissions are of major significance in ‘practical, public and other senses’.<sup>13</sup> They are appointed relatively rarely, they generally receive major publicity and they impact on significant interests of individuals.<sup>14</sup> These considerations suggest that judicial review is an important safeguard in the context of Royal Commissions.

#### ***Delay caused by judicial review***

14.8 Judicial review proceedings may delay the proceedings of an inquiry, and therefore increase the cost of an inquiry. For example, several actions were instituted in the Federal Court in respect of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme (2006),<sup>15</sup> causing several months delay.

14.9 In the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission), Commissioner Cole discussed the difficulties that arise as a result of judicial review:

[A]s the law currently stands the effectiveness of Royal Commissions can be greatly hampered by the threat of court action. Court action will inevitably delay a Commission and involve very considerable time and expense. It can easily derail an investigation. This Commission naturally sought to avoid litigation. That meant, however, that it was sometimes possible for baseless objections to frustrate an investigation, particularly where the person or organisation concerned was prepared to fight a matter in the courts largely irrespective of its merits. The benefits of frustrating the Commission’s investigations were, apparently, thought to outweigh the costs of court action even though that action was unlikely to be successful.<sup>16</sup>

14.10 There are three principal methods of addressing the issue of delay caused by judicial review proceedings. First, a legislative provision, commonly known as an ouster or a privative clause, may state that courts cannot judicially review a Royal

11 See, eg, *Ross v Costigan* (1982) 59 FLR 184. See generally P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 706–708.

12 *Peters v Davison* (1999) 2 NZLR 164, 181–182.

13 *Ibid.*, 182.

14 *Ibid.*

15 *AWB Ltd v Cole (No 6)* (2006) 235 ALR 307; *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30; *AWB Ltd v Cole (No 4)* [2006] FCA 1050 *AWB Ltd v Cole (No 3)* [2006] FCA 1031; *AWB Ltd v Cole (No 2)* (2006) 233 ALR 453; *AWB Ltd v Cole* (2006) 152 FCR 382.

16 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 81.

Commissions.<sup>17</sup> In the federal context, however, a privative clause is not generally very effective because the *Australian Constitution* entrenches the judicial review jurisdiction of the High Court.<sup>18</sup> This means that such clauses in federal legislation are either held to be constitutionally invalid or are read very restrictively in order to be compatible with the *Australian Constitution*.<sup>19</sup>

14.11 A second method of addressing the issue is to impose time limits on the institution of judicial review proceedings.<sup>20</sup> Under the *ADJR Act*, a time limit of 28 days is imposed, although a court may allow an extension of this period.<sup>21</sup> Longer periods apply under the High Court and Federal Court's original jurisdiction.<sup>22</sup> A time limit, however, also may be constitutionally invalid if it has the effect of curtailing or limiting the right or ability of a person to seek judicial review under the *Australian Constitution*.<sup>23</sup>

14.12 A third method would be to provide, by legislation or otherwise, that the Federal Court or High Court must expedite matters involving Royal Commissions or the Official Inquiries proposed in this Discussion Paper.

### Submissions and consultations

14.13 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether there were any concerns about judicial review in the context of inquiries generally.<sup>24</sup>

14.14 Submissions that addressed the issue all supported the existence of judicial review, and argued against the introduction of specific expedited procedures. For example, the Law Council of Australia (Law Council) submitted that

it is important that there is some level of oversight of Royal Commissions and public inquiries. The availability of judicial review means that Courts are able to intervene when they consider it appropriate, and ensure that Royal Commissions or other public inquiries do not go beyond their terms of reference or otherwise go off the rails.<sup>25</sup>

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17 *Special Commissions of Inquiry Act 1983* (NSW) s 36(2); *Royal Commissions Act 1917* (SA) s 9; *Royal Commissions Act 1991* (ACT) s 48.

18 *Australian Constitution* s 75(iii), (v).

19 See generally M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), 840–860. See especially *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

20 For example, *Inquiries Act 2005* (UK) s 38 imposes a time limit of 14 days for bringing such a proceeding, although a court may extend this time.

21 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11(3).

22 Under the *High Court Rules 2004* (Cth), a period of two months applies to an order requiring a judicial tribunal to do an act (r 25.07); and a period of six months applies to an order removing a judgment, order, conviction or other proceeding for the purpose of being quashed (r 25.06). There is no time limit governing orders prohibiting a person from doing something. These time limits, however, may be extended by a judge of the Court: r 4.02. There are no equivalent provisions in the *Federal Court Rules* (Cth). Time limits may be prescribed in specific Acts: see, eg, *Migration Act 1958* (Cth) s 477A.

23 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

24 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 3–1.

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

14.15 The Law Council noted that the removal of other safeguards—including the inability to sue Royal Commissions, discussed in Chapter 12, and the fact that the rules of evidence applicable in civil litigation do not apply to Royal Commissions—made judicial review more important in this context. It observed that courts generally have been reluctant to interfere with Royal Commissions, and had mechanisms to prevent frivolous or vexatious claims.<sup>26</sup>

14.16 In relation to the possibility of a privative clause, the Law Council submitted:

Judicial review cannot be excluded under the Commonwealth Constitution, and the usefulness of conventional privative clauses in limiting the scope for review of decisions under Commonwealth legislation now appears to be debatable at best. Therefore it is unclear what use a privative clause, such as that included in the *Royal Commission Act 1917* (SA), would serve, other than to further confuse matters and to encourage arid jurisdictional debate.<sup>27</sup>

14.17 The Law Council also rejected the idea of a time limit, arguing that there was insufficient justification to shorten the time limit of 28 days under the *ADJR Act*, especially as the delays caused by judicial review were usually determined by the speed with which the court could hear and determine the case, not by the time for instituting the case. It also observed that reducing the time limit further could cause constitutional difficulties, as noted above.<sup>28</sup>

14.18 Liberty Victoria also rejected an expedited process, saying:

Liberty believes that the current mechanisms are adequate and should only be reformed if there is a clear and demonstrable need to do so.<sup>29</sup>

14.19 In consultations, the overwhelming majority of stakeholders who addressed this issue acknowledged that the process of judicial review caused delays, but felt that these did not justify or warrant an attempt to modify the usual application of judicial review, especially in light of the constitutional difficulties involved.<sup>30</sup>

14.20 Further, there was limited support for expediting the process. The majority of stakeholders addressing the issue observed that in the past, the Federal Court had shown a willingness to expedite such cases, and that the case management practices of the Federal Court were sufficiently flexible to enable cases to be heard rapidly.

14.21 Some stakeholders also observed that there were important practical difficulties in accessing judicial review, especially for less well-resourced participants. These included the prospect of court fees and costs, and the fear of challenging inquiry members.

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26 Ibid.

27 Ibid.

28 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

29 Liberty Victoria, *Submission RC 1A*, 12 May 2009.

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

**ALRC's view**

14.22 The possibility of judicial review is an important check on the legality of government action. Judicial review is an especially important check in the context of Royal Commissions and the proposed Official Inquiries for two additional reasons. First, a number of procedural safeguards that apply in court proceedings do not apply to, or are relaxed in, Royal Commission proceedings. This will apply equally to the proceedings of Official Inquiries. Further, as temporary, independent bodies, Royal Commissions and the proposed Official Inquiries are not subject to the supervision of a government department or a body with oversight powers, such as the Ombudsman. The absence of these other safeguards makes it more important that inquiries be subject to judicial review.

14.23 The ALRC acknowledges that availability of judicial review may delay an inquiry. The mere fact of delay, however, does not outweigh the important role judicial review plays in ensuring the legality of the proceedings of Royal Commissions and Official Inquiries.

14.24 The ALRC also does not propose that the Australian Government should introduce an expedited process for the hearing of such cases. As stakeholders have noted, the Federal Court has shown a willingness to expedite appropriate cases, and the case management practices of the Federal Court are sufficiently flexible to enable the Court to hear cases rapidly.

**Challenges to notices or summons**

14.25 In the Building Royal Commission, Commissioner Cole recommended that the *Royal Commissions Act 1902* (Cth) be amended

to provide that no challenge may be made to a notice or summons on the basis that the information sought does not fall within the Terms of Reference of a Royal Commission, except on the basis that the notice or summons is not a bona fide attempt to investigate matters into which the Commission is authorised to inquire.<sup>31</sup>

14.26 Cole considered that this recommendation, if implemented, would codify the common law.<sup>32</sup> He considered that it was necessary to define the rules as precisely as possible to avoid the delays caused by legal challenges.<sup>33</sup>

14.27 Coercive powers, such as the power to compel evidence, may be exercised only for the purposes of a particular investigation. If a Royal Commission or Official Inquiry is acting outside of its terms of reference, it may be restrained from doing so. As noted above, however, the courts have tended to take an expansive view of the relevance of any information sought to be compelled and the subject of the inquiry.

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

32 *Ibid*, vol 2, 81.

33 *Ibid*.

14.28 For example, in *Ross v Costigan (No 2)*, the Full Court of the Federal Court stated that ‘what the Commissioner can look to is what he bona fide believes will assist him in his Inquiry’.<sup>34</sup> In *Douglas v Pindling*, the Privy Council stated:

If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, then it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result. ...

[T]he decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at.<sup>35</sup>

14.29 As Cole indicated, therefore, the common law position is that a challenge to any decision made in good faith to issue a summons or notice to produce will not succeed.

14.30 There is, however, a subtle but important difference between an expansive interpretation of the power of Royal Commissioners to issue summonses or notices by the courts, and a legislative provision that prohibits courts from examining such cases. Although the ultimate effect may be the same, the exclusion of judicial review infringes an important constitutional principle—namely that it is the role of the courts to ensure the legality of administrative action. Further, such a provision also may be constitutionally invalid.<sup>36</sup> For the reasons discussed above in relation to judicial review generally, it is the ALRC’s preliminary view that the recommendation on this issue by the Building Royal Commission should not be included in the proposed *Inquiries Act*.

## Referral of questions of law

14.31 The power to refer a question of law is commonly conferred on federal tribunals and other federal bodies.<sup>37</sup> These provisions typically provide that a tribunal may refer a question of law to the Federal Court, either on its own motion or at the request of a party.<sup>38</sup>

14.32 The *Commissions of Inquiry Act 1995* (Tas) empowers a commission of inquiry, or parties to that inquiry, to refer a question of law to the Supreme Court of Tasmania.<sup>39</sup> This provision also states that, while the Commission awaits the decision

34 *Ross v Costigan (No 2)* (1982) 64 FLR 55, 69.

35 *Douglas v Pindling* [1996] AC 890, 904.

36 The case of *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, which changed the law relating to privative clauses, was handed down in the same year as the Building Royal Commission reported.

37 See, eg, *Corporations Act 2001* (Cth) s 659A; *Administrative Appeals Tribunal Act 1975* (Cth) s 45.

38 Procedural matters, such as whether a special case should be drawn up, may be prescribed in the *Federal Court Rules* (Cth), as is done in relation to native title proceedings: *Federal Court Rules* (Cth) O 78, Div 3. Proceedings in relation to a question referred to the Federal Court are exempt from court fees: *Federal Court of Australia Regulations 2004* (Cth) Sch 3, ss 2(e), 4(e).

39 *Commissions of Inquiry Act 1995* (Tas) s 16. This provision further states that a question of law may be referred to the court in the form of a special case drawn up by the parties to the inquiry or, if there are no parties to the inquiry or the parties cannot agree, by the Commission, and provides that a court decision on a referral is binding on the Commission and any parties to the inquiry.

of the court, it may either conclude its inquiry subject to the decision, or adjourn its inquiry until the decision is given.<sup>40</sup>

14.33 A similar provision is contained in s 10 of the *Commissions of Inquiry Act 1908* (NZ). In *A New Inquiries Act*, the New Zealand Law Commission (NZLC) reported that s 10 had been used at least five times since 1908.<sup>41</sup> It noted that while such a procedure can cause delay, so can subsequent judicial review of an inquiry member's decision. In the NZLC's view, where there is a genuine dispute about a proposed ruling in an inquiry, 'it may be preferable that the inquirer seeks directions from the court on that issue, rather than wait to see if judicial review will result'.<sup>42</sup> On the NZLC's recommendation, a similar section was included as cl 35 of the *Inquiries Bill 2008* (NZ).<sup>43</sup>

14.34 The referral of a question of law may be a convenient way of ensuring that legal disputes before a Royal Commission or an Official Inquiry are resolved, rather than relying on those participating in a Royal Commission or Official Inquiry to bring judicial review proceedings. As noted earlier, those participating in inquiries may be deterred from bringing judicial review proceedings because of the cost involved.

14.35 The referral of a question of law also may be a useful way of determining claims of privilege or public interest immunity. Privileges and public interest immunity are discussed in Chapter 16. For example, if a person wishes to claim that information is protected from disclosure by a privilege or public interest immunity, an inquiry could refer to the Federal Court the question of whether the information is subject to the privilege or public interest immunity.

14.36 The power to refer a question of law, however, is subject to a constitutional limitation, namely that federal courts cannot give advisory opinions.<sup>44</sup> In *Mellifont v Attorney-General (Qld)*, however, the majority of the High Court held that there were two critical concepts which identified an advisory opinion: an abstract question of law which did not involve the right or duty of any body or person; and the making of a declaration of law divorced from any attempt to administer that law.<sup>45</sup>

14.37 A court, therefore, may determine questions of law involving the rights or duties of a person participating in an inquiry, such as whether a Royal Commission is validly established, and whether information is exempt from disclosure because it is protected by privilege or public interest immunity. Further, a claim of a breach of procedural

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40 Ibid s 16(3).

41 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [11.39].

42 Ibid, [11.40].

43 Ibid, Rec 55. The NZLC noted a procedural issue. Stating a case to the High Court raises the potential for parties to seek reimbursement of their costs from the inquiry. The NZLC suggested that the power should be rarely exercised: New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [11.40].

44 *Re Judiciary and Navigation Acts (Advisory Opinions Case)* (1921) 29 CLR 257.

45 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 303.

fairness in relation to a report with practical consequences for the reputations of individuals or companies ‘involves no mere hypothetical question’.<sup>46</sup>

### Submissions and consultations

14.38 In IP 35, the ALRC asked whether it was desirable to enable Royal Commissions and other public inquiries to refer a question of law to the Federal Court during the course of an inquiry,<sup>2</sup> and if so, how this could be achieved within the limits of the *Australian Constitution*.<sup>47</sup>

14.39 Stakeholders generally supported a power to refer questions of law. Liberty Victoria expressed similar views in its submission.

It is foreseeable that at various times, inquiries may be faced with legal questions which are best determined by the courts rather than seeking tentative legal advice. A similar power to that of section 16 of the *Commissions of Inquiry Act 1995* (Tas) ... has particular appeal. To ensure constitutional validity and in keeping with [*Mellifont v Attorney-General (Qld)*], it is suggested that any provision require that the question be drawn up as a dispute between the parties. Where there is only one party, it may be possible for the Attorney-General or the Solicitor-General to take the place of a second party. Liberty supports a general power for inquiries to refer questions of law to the Federal Court where those questions are formulated as a determinative dispute between one or more parties. Where a second party is required, it may be possible to implement a similar program to the Australian Tax Office’s Test Case Litigation Program whereby the inquiry subsidises the second party’s costs of the litigation; particularly where the second party is not a government agency.<sup>48</sup>

### ALRC’s view

14.40 In the ALRC’s view, a power to refer a question of law to the Federal Court would have several benefits. It would provide a convenient alternative to judicial review proceedings in ensuring the legality of the conduct of an inquiry. In particular, this is likely to be beneficial to inquiry members who are not legally trained, and those participating in inquiries who wish to challenge a decision without incurring the costs of judicial review proceedings. It also would be a useful mechanism for determining claims of privilege and public interest immunity. As noted above, while such a power may cause delay, such delays would not be greater than that caused by applications for judicial review.

14.41 As these considerations are relevant to both Royal Commissions and Official Inquiries, the ALRC proposes that both should have the power to refer a question of law to the Federal Court, either on their own motion or pursuant to the request of a participant to an inquiry.

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46 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582.

47 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–10.

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

14.42 It is the ALRC's preliminary view that it is unnecessary to prescribe any procedural matters, or matters relating to the recovery of costs, in relation to the reference of the question of law. Such matters are best left to be determined by the Federal Court.

**Proposal 14–1** The proposed *Inquiries Act* should provide that Royal Commissions and Official Inquiries may refer a question of law to the Federal Court, either on their own motion or pursuant to the request of a participant.

### Concurrent legal proceedings

14.43 A concern may arise in relation to Royal Commissions and Official Inquiries that may be investigating matters related to court proceedings that are being conducted at the same time (that is, where there are concurrent legal proceedings). In such a situation, a chairperson of an inquiry could suspend the inquiry while these court proceedings are underway. This appears to be inherent to a chairperson's broad discretion to conduct an inquiry in the way he or she thinks fit.<sup>49</sup>

14.44 Another question is whether the body that establishes an inquiry should be able to suspend an inquiry while related court proceedings are underway. A provision of this kind is found in s 13 of the *Inquiries Act 2005* (UK), which enables a minister, after consulting with the chairperson of an inquiry, to suspend the inquiry by notice to the inquiry pending the completion of any other related investigation or related court proceedings. The ALRC is interested in stakeholder views on this matter.

14.45 Another issue arises when an inquiry into crime or misconduct is examining matters that are being prosecuted in criminal or penalty proceedings. This may raise the question of whether the inquiry is in contempt of court. Contempt of court is discussed in Chapter 19. An inquiry may be in contempt of court if there is a 'real risk' that its proceedings will interfere with the administration of justice in a particular case.<sup>50</sup>

14.46 There are two main ways in which this issue could arise. First, commissions could generate publicity through public hearings or public reports that prejudice pending trials. Secondly, inquiries could compel an accused to reveal material which could tend to incriminate a person in relation to an offence which is being prosecuted in the courts.<sup>51</sup> As discussed in Chapter 16, a person may be required to incriminate him or herself before a Royal Commission (but not an Official Inquiry), but is protected from disclosing such material in a court. In that case, there is a real risk that compelling a person to reveal such material may interfere with the criminal proceeding.

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49 The ALRC discusses these issues in detail in Ch 15.

50 See S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), Ch 10.

51 *Ibid.*, [10.12].

**ALRC's view**

14.47 In the ALRC's view, the issue of concurrent legal proceedings can be dealt with in a number of ways. These are discussed in other chapters of this Discussion Paper.

14.48 The issue of prejudicial publicity is normally dealt with by conducting inquiry hearings in private, and reporting in private as necessary.<sup>52</sup> The power to restrict public access to hearings and evidence is discussed in Chapter 15. In that chapter, it is proposed that the *Inquiries Act* should provide that members of Royal Commissions or Official Inquiries may prohibit or restrict public access to hearings or publication of certain information before an inquiry because of, among other things, the potential for prejudice to legal proceedings.<sup>53</sup>

14.49 The second issue, concerning the use of incriminating evidence, is discussed in Chapter 16 in relation to the privilege against self-incrimination. As noted in that chapter, the *Royal Commissions Act* presently provides that the privilege against self-incrimination is abrogated, except if related criminal charges or penalty proceedings have begun, and have not been finally disposed of.<sup>54</sup>

14.50 The ALRC proposes in Chapter 16 that the proposed *Inquiries Act* should include a provision with a similar effect, although in different terms. That is, the *Inquiries Act* should provide that a Royal Commission must not require a person to answer a question, or produce a document or other thing, about a matter if a person is subject to concurrent legal proceedings in respect of that matter.<sup>55</sup> The ALRC notes, however, that a court may restrain an inquiry from examining a witness even where a person has not been charged with an offence, if in the particular circumstances of a case such examination would amount to contempt.<sup>56</sup>

14.51 Finally, it should be noted that a number of proposals in this Discussion Paper relate to inquiries and legal proceedings that are commenced after an inquiry has concluded.<sup>57</sup> For example, in Chapter 16, the ALRC examines the scope of the immunity of evidence from subsequent use in a legal proceeding. The ALRC proposes that the present position, in which direct use in subsequent legal proceedings of certain evidence before a Royal Commission is prohibited, but indirect use of that evidence is

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52 Ibid, [10.13]–[10.14]. As noted there, the courts generally have placed great weight on the public interest in public reporting.

53 Proposal 15–4.

54 *Royal Commissions Act 1902* (Cth) s 6A(3), (4).

55 Proposal 16–1(b).

56 *Sorby v Commonwealth* (1983) 152 CLR 281, 307–308.

57 See Ch 5, which deals with the relevance of the prospect of subsequent legal proceedings in determining whether an inquiry should be established; Ch 8, which considers the transfer of custody and use of Royal Commission records; Ch 11, which deals with the power of a Royal Commission and Official Inquiry to communicate information relating to contraventions of a law to an agency responsible for administering that law; and Ch 12, which discusses the protection from subsequent legal liability of those involved in inquiries.

permitted, should continue.<sup>58</sup> The ALRC further proposes that the scope of this immunity should be clarified in a number of ways, including by making it clear that the immunity applies to documents in the nature of a disclosure, but not to pre-existing documents.<sup>59</sup>

**Question 14–1** Should the proposed *Inquiries Act* enable the body establishing a public inquiry (the Governor-General in the case of a Royal Commission, and a minister in the case of an Official Inquiry) to suspend an inquiry, pending a related investigation or related court proceedings?

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58 Proposals 16–1, 16–2.

59 Proposal 16–2.