

15. Procedures

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Introduction

15.1 The types of procedures an inquiry member chooses to employ will be extremely important to the effectiveness and efficiency of an inquiry. When choosing which procedures to employ, an inquiry member will need to consider a range of

matters, including: the purposes of an inquiry; the types of information needed to fulfil the terms of reference; the accessibility, quality and means of obtaining the information; and the impact of the methods of information-gathering on affected parties. In particular, when an inquiry is required to investigate allegations of misconduct or serious mismanagement, an inquiry member will have to balance the wider interest in exposing wrongdoing and ensuring transparency against the individual rights and interests that may be affected.

15.2 In this chapter, the ALRC examines a number of issues relating to the procedures adopted by inquiries. First, it examines the types of procedures available to conduct an inquiry. Secondly, it examines the requirement that the procedures adopted comply with the principles of procedural fairness, and whether the obligations of procedural fairness should be extended, including in relation to the right of reply and the ability to cross-examine. Thirdly, it examines particular aspects of procedures which affect the interests of individuals participating in an inquiry, including: the use of public and private hearings; the entitlement to appear before an inquiry; the taking of evidence from Indigenous witnesses; and the provision of information and assistance concerning the procedures adopted by an inquiry.

Methods of inquiry

15.3 There are many possible methods of inquiring into a matter. The *Royal Commissions Act 1902* (Cth) itself does not prescribe any particular method of conducting an inquiry. The *Royal Commissions Act*, however, frequently uses terms such as witnesses, evidence, formal hearings, cross-examination, and appointment of counsel assisting, which may reinforce the use of a court-like procedure.¹

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

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

¹ See, eg, *Royal Commissions Act 1902* (Cth) ss 2, 3, 6, 6FA.

obtained ‘overview evidence’ intended to inform the Commission about issues in the building industry, and conducted private hearings.²

15.6 Methods of inquiry often are categorised as adversarial or inquisitorial. An adversarial procedure is the procedure used in courts of common law countries—that is, parties identify the issues and present the case as they think fit, and the judge acts as an umpire deciding between the cases put by the parties. In an inquisitorial procedure, the person responsible for making the decision (or, in the case of an inquiry, the recommendations) is in charge of identifying and investigating the issues and the evidence. Although this distinction has its uses, in practice procedures tend to include elements of both adversarial and inquisitorial methods.

Processes of Royal Commissions

15.7 The processes of Royal Commissions and other forms of inquiry were the subject of significant comment in consultations.³ As many stakeholders observed, the public expectation and the usual practice is that Royal Commissions are conducted in a manner similar to courts, with public hearings consisting of opening statements, examination and cross-examination of witnesses, and closing statements.

15.8 Some stakeholders observed, however, that such procedures may not be the most appropriate or efficient method of investigation. It may inhibit cooperation from witnesses, and tends to encourage an adversarial rather than an inquisitorial process, which is inappropriate for an investigation such as a Royal Commission. Court-like procedures are also time consuming and costly. Further, such procedures may cause significant and irreparable harm to the reputations of witnesses who may endure a form of ‘trial by media’. The specific issue of public and private hearings is considered later in this chapter.

15.9 In the opinion of many stakeholders, the undue focus on public hearings and court-like procedures is the product of a number of factors. These include: public expectations as to the conduct of a Royal Commission; media pressure for public hearings; the time pressures experienced by Royal Commissions; and the legal training of most Royal Commissioners. The cumbersome and costly nature of the typical Royal Commission is, in the view of many stakeholders, a principal motivation behind the increased use of non-statutory inquiries. This was so even though nothing in the *Royal Commissions Act* itself requires adversarial processes.

15.10 Stakeholders observed that the conduct of non-statutory forms of public inquiries tended to be more inquisitorial. Such inquiries tend to rely on more flexible procedures such as meetings with stakeholders, analysis of documentation, and written submissions. This, it was suggested, resulted in more efficient inquiries which were

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

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

able to report quickly, and cost less than a Royal Commission. A number of stakeholders expressed concern that a statutory structure may limit this procedural flexibility.

Measures to encourage flexibility

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

15.12 The use of Official Inquiries is a key mechanism for increasing flexibility. It is expected that Official Inquiries will be able to use more informal procedures than Royal Commissions, since the public expectations that apply to Royal Commissions are less likely to apply to Official Inquiries. Further, the Australian Government may be more likely to appoint non-judicial members to an Official Inquiry, as is presently the case with non-statutory inquiries. In Chapter 6, the ALRC proposes that the *Inquiries Act* should provide for the appointment of an expert or experts in any field to assist inquiry members.⁴ As expert advisors may be appointed to advise on legal matters, this may also encourage the appointment of members with other types of expertise to both Royal Commissions and Official Inquiries.

Statutory list of available procedures

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

15.14 In the report *A New Inquiries Act*, the New Zealand Law Commission (NZLC) recommended the inclusion of such a provision to address similar concerns about the appropriateness of court-like procedures.⁵ Clause 14(3) of the resulting Inquiries Bill 2008 (NZ) provides that inquiries ‘may determine matters such as’:

- (a) whether to conduct interviews, and if so, who to interview;
- (b) whether to call witnesses, and if so, who to call;
- (c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held;
- (d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry;

4 Proposal 6–7.

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

- (e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions; and
- (f) whether to allow or restrict cross-examination of witnesses.

15.15 This clause is expressed as not limiting the general power of an inquiry to ‘conduct its inquiry as it considers appropriate’, subject to the Act, once passed, or the inquiry’s terms of reference.⁶ The NZLC considered that such a provision would clarify the scope of the inquiry’s powers to inquiry participants, inquiry members, and the public.⁷

15.16 In its submission to this Inquiry, the Law Council of Australia (Law Council) supported a provision along the lines of the New Zealand model.⁸

Guidance on the selection of procedures

15.17 Another way to encourage flexibility is the use of a handbook on how to conduct an inquiry. For example, the New Zealand Department of Internal Affairs produces a handbook on the running of an inquiry, which includes a section discussing the selection of appropriate procedures.⁹ This section includes guidance on: the issues inquiry members may need to consider in selecting procedures; deciding who has an interest in an inquiry; the treatment of witnesses and evidence; the holding of hearings; a standard format for hearings; and the requirements of procedural fairness.

15.18 The ALRC proposes that a handbook for Royal Commissions and Official Inquiries (the *Inquiries Handbook*) should be developed and published, and that this should address a range of matters.¹⁰ A number of stakeholders supported the use of guidance in relation to matters of procedure.

ALRC’s view

15.19 In the ALRC’s view, a provision similar to cl 14(3) of the Inquiries Bill 2008 (NZ) should be included in the proposed *Inquiries Act*. Such a provision, indicating the variety of procedures that can be adopted by an inquiry, may promote a move away from court-like procedures where these might not be appropriate. This would reinforce the fact that Royal Commissions may adopt a wide variety of procedures when conducting an inquiry. Since procedural flexibility is desirable with respect to both Royal Commissions and Official Inquiries, such a provision should apply to both types of inquiry.

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

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

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

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

10 Proposals 6–2, 6–5, 8–1, 9–1, 12–3, 13–6.

15.20 In addition, it would be useful for the *Inquiries Handbook* to address the selection and use of different procedures. As noted above, the decision as to which procedures are adopted in an inquiry is critical to its success. Since some inquiry members may not have conducted an inquiry before, or may be unfamiliar with particular kinds of procedures, it would be useful to give some information as to which kinds of procedures may be appropriate in different contexts and how such procedures operate. This also may encourage greater use of more inquisitorial methods of inquiry. The New Zealand handbook would be a useful model in this regard.

Proposal 15–1 The proposed *Inquiries Act* should provide that Royal Commissions and Official Inquiries may conduct inquiries and gather information as members consider appropriate, subject to any other provisions in the Act and the requirements of procedural fairness. For example, an inquiry may:

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

Proposal 15–2 The *Inquiries Handbook* should address the suitability and use of different kinds of procedures that may be used by inquiries. For example, the *Inquiries Handbook* may address the manner in which hearings are conducted, the ways in which people may participate in an inquiry, and how to accord procedural fairness in the context of different types of inquiry.

Procedural fairness

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

15.22 If an inquiry may operate to ‘destroy, defeat or prejudice a person’s rights, interests or legitimate expectations’,¹¹ it is required to observe the principles of procedural fairness. That is, it is under a duty to observe fair procedures when making decisions affecting those rights, interests or legitimate expectations. Reputation, both

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

personal and commercial, is an interest that attracts the protection of the principles of procedural fairness.¹² Therefore, any inquiry that may affect the reputation of individuals and corporations, which would include all inquiries investigating misconduct, is obliged to observe the principles of procedural fairness.

Aspects of procedural fairness

15.23 There are two main aspects of procedural fairness: the requirement that a person who is liable to be affected by a decision must be given notice of the relevant matters, and given an opportunity to put his or her case (the ‘hearing rule’); and the requirement that a decision maker is not biased, or seen to be biased (the ‘bias rule’). What these principles require in a particular case will depend on the circumstances involved.

15.24 The principles of procedural fairness do not impose many limitations on the procedures that may be adopted by inquiries.¹³ The main requirement of procedural fairness is that an inquiry ‘cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding’.¹⁴

15.25 This requirement does not require an inquiry to give notice of any possible adverse matter at the time it is disclosed.¹⁵ Typically, in a Royal Commission, a person may be given sufficient notice of matters adverse to his or her interests in a number of ways. For example, counsel assisting may give notice of adverse matters through the identification of issues and possible adverse findings in an opening and closing statement. Further, notice of adverse matters may be provided through the publication of the evidence, the use of public hearings and the provision of transcripts of evidence to the person affected. An important way of ensuring notice is given of adverse findings is by providing copies of draft adverse findings.¹⁶

15.26 A person may be given a reasonable opportunity to respond to these matters if an adverse matter is put to them in examination, or a person is re-examined or given the opportunity to cross-examine. Further, the opportunity to provide written statements and submissions in response to evidence, closing statements and draft findings may constitute a reasonable opportunity to respond.¹⁷

15.27 The bias rule has a more limited operation in the context of inquiries, both because those conducting inquiries necessarily begin with suspicions before they commence their investigations,¹⁸ and because inquiry members inevitably play an

12 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578.

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

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

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

16 *Ibid.*

17 *Ibid.*

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

active role in investigating the issues.¹⁹ The bias rule test is whether the conduct in the circumstances would give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the inquiry member will not discharge his or her task impartially.²⁰

Guidance on procedural fairness

15.28 The *Royal Commissions Act* does not refer to the principles of procedural fairness. Inquiry members usually are given no guidance on the matter, although members with legal training are likely to be aware of the requirements of procedural fairness. One issue for this Inquiry is whether it would be useful to provide some guidance on the application of those principles.

15.29 Such guidance could be provided for by statute.²¹ For example, cl 17 of the *Inquiries Bill 2008 (NZ)* provides that an inquiry must not make any finding adverse to a person in a report unless the inquiry has taken all reasonable steps to:

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

15.30 Clause 17(b) also requires that the inquiry give proper consideration to any response given. The provision in the Bill was included on the recommendation of the NZLC, which considered that the rules regarding adverse comment should be set out in statute to ‘give clear direction to those conducting and participating in inquiries’.²²

15.31 Section 35A of the *Royal Commissions Act 1991 (ACT)* goes further than the *Inquiries Bill 2008 (NZ)* by requiring that an inquiry provide a copy of the proposed comment, together with a written notice allowing for the party to respond within a specified period of at least 14 days.²³

15.32 Guidance could also be provided in a handbook, as discussed above. For example, the New Zealand handbook includes a section on procedural fairness.²⁴

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

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

21 See, eg, *Commissions of Inquiry Act 1995 (Tas)* s 18.

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

23 Further, as discussed later in this chapter, the submission or statement in response, or a summary of it, must be included in the report. A similar provision is contained in the *Coroners Act 1997 (ACT)* s 55.

24 New Zealand Government Department of Internal Affairs, *Setting Up and Running Commissions of Inquiry* (2001), [20.12.1]–[20.12.3].

Extending procedural rights

15.33 One issue in this Inquiry is whether the rights and interests of affected parties are protected adequately by the common law requirement of procedural fairness, or whether additional safeguards should be introduced.

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

- Before persons become involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect those persons and which the Tribunal proposes to investigate.
- Before persons who are involved in an inquiry are called as witnesses, they should be informed of any allegations which are made against them and the substance of the evidence in support of the allegations.
- Persons should be given an adequate opportunity of preparing their case and of being assisted by their legal advisers. Their legal expenses should normally be met out of public funds.²⁵
- Persons should have the opportunity of being examined by their own solicitor or counsel and of stating their case in public at the inquiry.
- If persons involved in an inquiry wish a material witness to be called, that person should, if reasonably practicable, be heard.
- Persons should have the opportunity of testing by cross-examination conducted by their own solicitor or counsel any evidence which may affect them.²⁶

15.35 The common law requirement of procedural fairness does not generally require all of these principles to be applied, although they may be required in particular circumstances. For example, in Australia, it does not appear that a person has the right to call additional evidence to answer contemplated adverse findings.²⁷

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

26 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), Rec 3.

27 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 56; cf *Mahon v Air New Zealand Ltd* [1984] AC 808, 820–821.

15.36 The Salmon Principles were not intended to operate as statutory rules, but rather as guidelines for the proceedings of inquiries.²⁸ Nevertheless, they have been given statutory form in the *Commissions of Inquiry Act 1995* (Tas).²⁹

15.37 The Salmon Principles have been criticised for not satisfying a number of other objectives of public inquiries. These include the desirability of more informal proceedings, the need for proceedings to be conducted as efficiently as possible, and the need for the costs of inquiries to be kept within reasonable bounds.³⁰

Submissions and consultations

15.38 In IP 35, the ALRC asked what rights of witnesses, in addition to those currently set out under the *Royal Commissions Act*, should be protected in proceedings of Royal Commissions and other public inquiries.³¹ In its submission, the Law Council supported a statutory provision setting out the common law requirement to give a person a reasonable opportunity to respond to draft adverse findings, in similar terms to the New Zealand Bill. It submitted that:

it is the compulsory nature of attendance before an executive body which gives considerable force to this call for statutory protection of witnesses. The common law rules of procedural fairness, and particularly their content in any given situation, are too discretionary and uncertain to afford sufficient protection to witnesses compelled to attend, give evidence, and be cross examined by the executive and its representatives, and then be subject of possibly adverse comment or findings.³²

15.39 The Law Council recognised the dangers of putting the obligations of procedural fairness into statutory form and noted that

enacting general law principles into statutory form can risk shifting the debate from the application of a principle to the construction of an opaque phrase (such as ‘reasonable opportunity’ to respond to an adverse finding or assertion). There is also potential for statutory provisions to interrupt proceedings for non-compliance with a mandatory requirement even if no unfairness results, and conversely, the potential for unfair procedures to slip through on the basis that formal compliance with a mandatory requirement occurred.³³

15.40 On balance, however, the Law Council endorsed the approach of the NZLC.

15.41 The Community and Public Sector Union (CPSU) specifically supported the inclusion of a provision similar to s 35A of the *Royal Commissions Act 1991* (ACT).³⁴

28 G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 63.

29 *Commissions of Inquiry Act 1995* (Tas) ss 17, 18, 36.

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

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

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

33 *Ibid.*

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

The Construction, Forestry, Mining and Energy Union (CFMEU) also supported a statutory provision,³⁵ citing in support the views of Dr Janet Ransley, who has stated:

[C]ontrols over commissions and their use of powers could be improved by clearly imposing upon them, through legislation, general duties of procedural fairness, together with an obligation to base their findings on probative evidence. This could be supplemented by statutory guidelines as to appropriate procedures to achieve such fairness. ... These measures would spell out the legal position of commissions, make them clearly amenable to review by the courts, and still subject them to the dynamic development of the common law doctrines of procedural fairness ...³⁶

15.42 The Law Council also discussed how the Salmon Principles could be used in federal inquiries. It observed that the Salmon Principles took ‘the concepts of procedural fairness beyond the point that the common law has reached’, referring specifically to the requirements to put ‘any allegations’ to a potential witness before they are called, the payment of legal expenses out of public funds, and the opportunity to call witnesses.³⁷

15.43 It noted that it was most likely that these procedures would be required by procedural fairness only in ‘exceptional cases’, and submitted that there was ‘therefore some force in the criticisms of the Salmon Principles as being inconsistent with other objectives of public inquiries’.³⁸ Such principles, however,

might appropriately guide a Royal Commissioner when seeking to adequately protect the interests of a particular witness, subject to considerations including the nature of the particular commission and its terms of reference, the nature of the evidence given, and the access of the witness to proper legal representation.³⁹

15.44 The Law Council suggested that there was scope to include in legislation a ‘guided discretion’, such as providing that at any stage of a Royal Commission, if a witness is able to make a case that his or her reputation might be adversely affected, certain balanced protective steps might be taken, such as protecting information from publication until a certain date. It noted that while such a power already exists, ‘it is the linking of it to the protection of reputation of witnesses that needs further consideration’.⁴⁰

15.45 Most stakeholders expressed support for the position that, while the ultimate discretion must be left to the inquiry member, some guidance on the application of the rules of procedural fairness in either legislation or in guidelines was appropriate.

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

36 J Ransley, ‘The Powers of Royal Commissions and Controls Over Them’ in P Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 22, 31.

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

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

ALRC's view

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

15.47 It is difficult to generalise about what procedural fairness requires in the conduct of inquiries, because of the diversity of circumstances in which issues of procedural fairness might arise. Further, the concept continues to evolve. One clear obligation, however, is the right to be given an opportunity to respond before the making of adverse findings.

15.48 In the ALRC's view, this obligation can usefully be set out in legislation in similar terms to the provision in the Inquiries Bill 2008 (NZ). The provision in the Inquiries Bill is preferable to the provision in the *Royal Commissions Act 1991* (ACT), because the New Zealand provision sets out the procedure for discharging the obligation in a more flexible way.

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

15.50 The ALRC does not propose, however, that there should be any statutory extension of procedural rights along the lines of the Salmon Principles. It is concerned that any codification of the Salmon Principles would be too prescriptive and fail to recognise competing interests, such as the desirability of flexibility and efficiency in the conduct of inquiries. The ALRC is concerned that any codification would promote an overly judicial approach to inquiries. Nevertheless, the Salmon Principles may be useful in informing the discussion in the handbook concerning the application of procedural fairness.

Proposal 15–3 The proposed *Inquiries Act* should provide that reports of Royal Commissions and Official Inquiries should not make any finding that is adverse to a person, unless the inquiry has taken all reasonable steps to give that person reasonable notice of the intention to make that finding and disclose to that person the contents of the proposed finding, the relevant material relied on for that finding, and the reasons on which it is based. Further, the inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and the inquiry should properly consider any response given.

Right of reply

15.51 The proposed *Inquiries Act* could provide that responses to adverse findings, or summaries of those responses, must be included in the inquiry's final report. For example, s 35A(4) of the *Royal Commissions Act 1991* (ACT) provides that

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

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

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

15.53 These submissions or statements could be included in an inquiry's report by, for example, appending them to the report. This would have the advantage of putting on record the responses of individuals to the adverse findings contained in a report.

15.54 In the ALRC's view, the provision in s 35A of the *Royal Commissions Act 1991* (ACT), requiring the inclusion of responses, or summaries of responses, to adverse findings in reports appears to be desirable. It would provide a public record of a person's objection, and would impose little extra burden on inquiries as such responses could be attached as an appendix to the report. The ALRC is interested in stakeholders' views on this question.

Question 15–1 Should the proposed *Inquiries Act* include a provision requiring that, when an inquiry gives an opportunity to a person to respond to potential adverse findings made against him or her in a report, that response or a summary of it should be included in the report?

Correction of the public record

15.55 The fact that the outcomes of related proceedings subsequent to an inquiry are not always reported was another issue that arose in consultations. If in a subsequent proceeding an adverse finding is found to be without merit, the damage done by the adverse finding is not countered by a correction of the public record. The issue is likely to arise most frequently in the context of administrative and disciplinary proceedings, since court proceedings are held in public and tend to be reported by the media if they are related to a public inquiry of significant importance,

15.56 The CPSU provided an example of this situation. Public statements had been made on behalf of the Department of Agriculture, Fisheries and Forestry that individual officers named in the Equine Influenza Inquiry (2008) would be investigated for breaches of the Australian Public Service Code of Conduct (APS Code of Conduct).⁴¹ Breaches of the APS Code of Conduct are handled by the employing agency under agency guidelines.⁴² The subsequent investigation found, however, that none of the officers had breached the Code of Conduct. In consultations, the CPSU stated that it was unaware of any media release or other public statement that made it clear the individuals had been cleared in subsequent disciplinary proceedings. The CPSU observed that ‘the reputations of those individual officers were, however, unfairly harmed by the earlier public comments’.⁴³

15.57 The Australian Public Service Commissioner (APSC) provides detailed guidance to agencies about the handling of investigations into breaches of the APS Code of Conduct. This includes advice on when the identity of a person subject to such an investigation should be disclosed.⁴⁴ In general, the identity of such an employee is not released unless it is ‘necessary, appropriate and reasonable’ to do so.⁴⁵ The APSC advises that, before disclosure is made, certain steps should be taken, including notifying the affected person of the usual disclosures that are made,⁴⁶ and seeking consent for disclosure of information to third parties, if such information is not normally disclosed to such parties.⁴⁷

41 Although the statement did not include the names of the officers, the identity of the officers could be ascertained readily by examining the report of the Equine Influenza Inquiry.

42 *Public Service Act 1999* (Cth) s 15.

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

44 Australian Public Service Commissioner, *Circular No 2008/3: Providing Information on Code of Conduct Investigation Outcomes to Complainants* (2008). This states that ‘withholding a person’s name may not be sufficient to protect that person’s identity. Personal information can include any information or opinion from which a person’s identity is apparent or may be “reasonably ascertained”’: [11].

45 *Ibid.*, [35].

46 *Ibid.*, [16].

47 *Ibid.*, [19]–[21].

15.58 The APSC also publishes advice on the best practice to be adopted by agencies in handling investigations into breaches of the APS Code of Conduct.⁴⁸

It may be appropriate for the agency to take some action, where the employee has suffered any loss of reputation because it became known they were suspected of misconduct if it is clear that no such misconduct occurred (e.g. with the consent of the employee a notice be sent to all relevant employees informing them of the outcome).⁴⁹

15.59 The CPSU submitted:

In our view, the Government should not be allowed to make public statements about the initiation of Code of Conduct proceedings. It would only be appropriate for such public comment to be made after the Code of Conduct investigation has been completed, and the individual employee has had an opportunity to answer the allegations made against him/her.⁵⁰

15.60 The CPSU also suggested that there should be a mechanism to allow correction of the public record in such cases.

Options for reform

15.61 There are several ways this issue could be addressed. For example, agency guidelines or best practice advice could state that the identity of an employee who is subject to an investigation for breach of the APS Code of Conduct should not be disclosed. The employee, however, may consent to disclosure of his or her identity. This appears in line with the best practice advice given by the APSC.

15.62 Another option would be to ensure publication of the results of subsequent investigations which are relevant to an adverse finding in an inquiry report. This could be done in a number of ways. For example, in Chapter 7 the ALRC proposes that the Australian Government should be required to table in Parliament its implementation of an inquiry's recommendations, if any are accepted, and periodically publish information about further implementation of recommendations.⁵¹ This proposal could be extended to require the tabling or publication of the results of subsequent proceedings, especially where a person has been cleared in such proceedings. Alternatively, a legislative requirement could be enacted to require the Australian Government to publish the findings of subsequent proceedings related to an inquiry.

ALRC's view

15.63 A real issue of fairness arises when prejudicial comments are made to the media after an inquiry, and those named or identified are subsequently found not to have engaged in the imputed conduct.

48 Australian Public Service Commissioner, *Handling Misconduct: A Human Resources Practitioner's Guide to the Reporting and Handling of Suspected and Determined Breaches of the APS Code Of Conduct* (2007).

49 Ibid.

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

51 Proposal 7-3.

15.64 The results of subsequent proceedings should be included, therefore, as part of the requirement to report on implementation activities, as proposed in Chapter 7. This would provide an avenue for correcting the public record in a way that makes those results readily accessible to those reading the report of the inquiry itself. The ALRC is interested in further comment from stakeholders on this issue.

Question 15–2 What mechanism, if any, should be included in the proposed *Inquiries Act* to address the harm caused to a person who, having been named or otherwise being identifiable in a public statement as the subject of an investigation flowing from an inquiry, is cleared in that subsequent investigation, without any further public statement to that effect?

Examination and cross-examination

15.65 One method of achieving procedural fairness is to enable a person to cross-examine a witness who is giving evidence adverse to the interests of that person. Witnesses in a Royal Commission may be examined by a Commissioner or by counsel assisting the Commission. They also may be examined or cross-examined by a legal practitioner who is authorised by the Commission to appear before it representing a party involved in the inquiry.⁵² Authorisation of leave to appear is discussed below. The proposed Official Inquiries also may use the procedures of examination and cross-examination.

15.66 The procedures adopted for the examination or cross-examination of witnesses can vary significantly according to the nature of the Royal Commission or Official Inquiry and the type of evidence being presented.⁵³ In each Commission, procedures for cross-examination may be determined by directions or guidelines developed by the Commission, or rulings of the Commissioner on applications to cross-examine.⁵⁴

15.67 For example, the Building Royal Commission early in its inquiry released a practice note outlining principles for examination and cross-examination. The note advised that any witness who was legally represented would be first examined by counsel assisting the Commission, and then allowed to be examined by his or her own legal representative. That witness could then be cross-examined by or on behalf of any person considered by the Commission to have sufficient interest in so doing. Re-examination by the person's representative or the counsel assisting the Commission would then be allowed.⁵⁵

52 *Royal Commissions Act 1902* (Cth) s 6FA.

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

54 *Ibid.*

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

15.68 A slightly different process was employed in the HIH Royal Commission (2003). In that inquiry, if a witness was represented or was connected with a party who was represented, counsel for the witness or party was given leave to lead the evidence from the witness. The usual practice was for the witness's written statement to be adopted where one had been provided. Counsel assisting was then able to ask questions of the witness, with other parties then able to cross-examine if given leave. Re-examination was then allowed to occur, if desired.⁵⁶

Leave to cross-examine a witness

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

15.70 In a second practice note for the inquiry, Commissioner Cole indicated that leave to cross-examine would be given only in limited circumstances. In particular, persons other than counsel assisting would not be permitted to cross-examine a witness unless they provided counsel assisting with a signed statement of evidence advancing material contrary to the evidence of that witness.⁵⁷ In practice, this meant cross-examination could not occur except where there was direct evidence challenging the witness.

15.71 The other guiding principles used by Commissioner Cole to decide when leave to cross-examine would be given were as follows. Cross-examination was allowed if there was a disputed issue of fact relevant to a matter regarded as material to any issue that had to be determined and, overriding all other considerations, if there were grave allegations against a person which may have been diminished or eliminated by an attack on the credit of the witness giving evidence. Cross-examination was not allowed in relation to adverse evidence where that evidence was not denied; if the disputing evidence was a matter of comment; or if the person wishing to contest the fact stated he or she had no recollection of a fact about which a person had given evidence, and there were no surrounding circumstances casting doubt upon the truth of that evidence.⁵⁸

15.72 In the final report of the Building Royal Commission, Commissioner Cole expressed the view that 'procedural fairness does not usually, and certainly does not invariably require Commissions to permit cross-examination'.⁵⁹ In Cole's view, this limitation on cross-examination allowed the inquiry to proceed more efficiently, by identifying only issues genuinely in dispute.⁶⁰

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

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

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

15.73 Counsel representing the unions under investigation by the Building Royal Commission argued that these procedures impeded their ability to fairly represent their clients.

The Royal Commission ... imposed extraordinary, restrictive limitations on cross-examination of witnesses. When cross-examination was allowed, it was often days or even weeks after the damage in the media was done, and even then the Royal Commission severely restricted what could be the subject of cross-examination. It is believed that the only other royal commission to impose similar restrictions on cross-examination was the Victorian Royal Commission into Communism which took place at the height of anti-communist hysteria more than 50 years ago.⁶¹

15.74 The conditions on cross-examination were challenged by the CFMEU on the basis that the rules of procedural fairness include the right to cross-examine a witness who is giving evidence adverse to an affected person's interests.⁶² In *Kingham v Cole*, Heerey J rejected this argument, holding that the direction on cross-examination 'on its face seems rationally and reasonably related to the efficient performance of the obligations of the Commissioner'.⁶³ He held that the *Royal Commissions Act* contemplated the imposition of limitations on cross-examination, and this was not inconsistent with the rules of procedural fairness. While it did not allow a Commissioner an unfettered discretion to impose any conditions he or she wished, conditions which had a reasonable connection with the function of a Commissioner under the Act or the Letters Patent were valid. In particular, Heerey J noted that there was no authority for the proposition that there is a right to cross-examination under the principles of procedural fairness.⁶⁴

15.75 In the HIH Royal Commission, Commissioner Owen also sought to limit excessive cross-examination, but these limitations were less restrictive than those in the Building Royal Commission. He issued a practice note indicating that cross-examination would be allowed only where 'it would help ... ascertain the facts on which' the final report would be based.⁶⁵ In his view, 'although cross-examination might play a part in affording people procedural fairness, it did not follow that it constituted the only opportunity to be heard'.⁶⁶ The Final Report of the Commission notes that leave was not withheld on any occasion.⁶⁷

Submissions and consultations

15.76 In IP 35, the ALRC asked whether any changes were required to the powers available to a Royal Commissioner to examine and cross-examine witnesses, and

61 Slater and Gordon Lawyers, Submission to Senate Employment, Workplace Relations and Education Committee, *Beyond Cole: The Future of the Construction Industry* (2004), 41.

62 Other aspects of the rules of procedural fairness are discussed below.

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

64 *Ibid.*, 295.

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

66 *Ibid.*, [2.12.3].

67 *Ibid.*, [2.11].

whether public inquiries should have similar powers.⁶⁸ It also asked whether a party to a Royal Commission or public inquiry should have the right to cross-examine a witness who is giving evidence adverse to the party's interests.⁶⁹

15.77 The CFMEU stated:

First, legislative provision should be made that before any evidence can be used to found an adverse finding, it may be the subject of cross-examination by a legal representative in the same way as in the courts. Cross examination in the courts can be curtailed if it is repetitive, unnecessary or oppressive. Such limitations are sufficient in the interests of fairness in a royal commission or inquiry.⁷⁰

15.78 The CPSU also supported a right to cross-examine if adverse evidence was given. It observed that cross-examination 'should allow parties represented in the proceedings to refute allegations made against them in a timely way, but similarly not impede the timely and efficient conduct of proceedings'.⁷¹ It noted the concern of some of its members that they had been subject to unnecessarily lengthy and repetitive cross-examination in Royal Commission proceedings. In the CPSU's view:

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

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

In the interests of fairness, this should occur as promptly as possible so the injured party has an opportunity to correct the public record. If the party is not afforded this right and afforded it in a timely manner, their interests will be harmed by the public reporting of allegations made against them without any fair opportunity to respond.⁷²

15.79 Dr Ian Turnbull submitted that leave to cross-examine should not be allowed, because such inquiries were inquisitorial and not adversarial. Rather, there should be an opportunity to provide written questions to counsel assisting to put to the witness, at his or her discretion, even where there was a signed statement of contradictory evidence.⁷³

68 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 8-1.

69 Ibid, Question 8-2.

70 CFMEU, *Taking Liberties—The Cole Royal Commission into the Building and Construction Industry* (2004).

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

72 Ibid.

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

15.80 In its submission, the Australian Government Solicitor (AGS) doubted whether ‘a Commissioner’s powers to determine how a witness may be examined and cross-examined should be further prescribed’.⁷⁴ In its experience, the existing discretion had proven to be effective in practice.

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

ALRC’s view

15.82 While the opportunity to cross-examine may be an important method of achieving procedural fairness, a statutory right to cross-examine where evidence adverse to a party is given would have a number of disadvantages. These include: reducing the flexibility of inquiries; reinforcing the tendency to use court-like procedures in inquiries; encouraging the use of legal representation; and encouraging judicial review of procedural issues, resulting in delay to inquiries.

15.83 While the ALRC makes no proposal in relation to examination or cross-examination, it may be useful to address the issue in the *Inquiries Handbook*.⁷⁵ For example, guidance in the *Inquiries Handbook* might address the importance of cross-examination as a method of achieving procedural fairness and advise that, if the inquiry is to be conducted by way of hearings, there should generally be an opportunity to cross-examine in a timely fashion if a person is giving evidence adverse to the interests of another.

Procedural protections

15.84 This section of the chapter discusses other procedural measures that afford protection to the interests of individuals participating in an inquiry, as well as the protection afforded to confidential or sensitive information.⁷⁶ These measures include: restricting public access to the hearings of, and information obtained by, an inquiry; ensuring that procedures are culturally appropriate, in the context of inquiries affecting Indigenous people; and enabling affected parties to understand the nature of the inquiry, the procedures and their rights.

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

75 For other matters relating to the proposed *Inquiries Handbook* see: Proposals 6–2, 6–5, 8–1, 9–1, 12–3, 13–6.

76 See Chs 13, 16, 17 for a discussion of different types of confidential or sensitive information.

Restricting public access

15.85 An issue of major importance in the protection of individual interests is the degree of public (and media) access to the inquiry, including access to hearings and evidence. This issue is also raised where the information sought by a Royal Commission or Official Inquiry may be confidential or sensitive in nature, such as where it may prejudice national security.⁷⁷

Public interest in public access

15.86 Royal Commissions are usually conducted primarily in public, in that: the hearings usually are held in public; most if not all of the evidence is published; and most if not all of the report is made publicly available.⁷⁸

15.87 There are strong reasons for conducting Royal Commissions (and, if established, Official Inquiries) in public. Royal Commissions are often established to investigate a matter of substantial public interest or concern. Ascertaining the ‘truth’ of a matter and making these findings public is the fundamental reason for establishing a Royal Commission. Public exposure of wrongdoing, or publicly dispelling allegations, may be the most important outcome of a Royal Commission.⁷⁹ Where the allegations concern the propriety of government conduct, the case for full public access may be particularly compelling.

15.88 Further, conducting inquiries in public helps to instil confidence in the integrity and independence of inquiry processes. It also enables citizens to access information that may be of significant public importance.

15.89 Mason J (as he then was) described the difficulties of holding an inquiry in private in *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation*.

It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive ...

The denial of public proceedings immediately brings in its train other detriments. Potential witnesses and others having relevant documents and information in their possession, lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.⁸⁰

77 National security information is discussed in Ch 13. Chs 16 and 17 discuss other types of confidential or sensitive information which may enable a person to resist disclosure.

78 Not all Royal Commissions are conducted primarily in public. For example, the Royal Commission on Intelligence and Security (1977) conducted most of its hearings in private.

79 F Costigan, *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984), vol 2, [14.044].

80 *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25, 97.

Interests of witnesses

15.90 On the other hand, there may be good reasons for restricting public access to inquiries. Inquiries, particularly Royal Commissions, can have an intrusive impact on the lives of witnesses. For example, the reputation of a witness can be damaged even if he or she is subsequently cleared in the inquiry's final report. The mere fact of being called as a witness to a Royal Commission may damage that person's reputation, even where that person is not the subject of an inquiry.

15.91 These concerns about reputation are greater in the context of inquiries than in judicial proceedings, since inquiries are investigatory by nature. As Lord Justice Scott wrote in an article concerning an inquiry he had conducted:

Unless a witness is known to have relevant evidence to give, there can be no reason for exposing the witness to a public hearing ... it is worth asking on what basis an investigative hearing ought to be a public hearing. The police are not expected to conduct their investigations in public.⁸¹

15.92 These concerns may be magnified in the contemporary media landscape, where 'sound bites' of untested allegations or opening statements may mislead viewers and can be transmitted instantly and globally.

15.93 Other kinds of harm to the individual interests of witnesses may result. For example, a person may be required to disclose personal or sensitive information that may infringe a person's privacy.

15.94 As was pointed out in *Independent Commission Against Corruption v Chaffey*, however, an inquiry is not obliged to avoid or minimise publicity in order to protect a person's reputation.⁸² Rather, an inquiry must balance the public interests served by an inquiry against the interests of affected individuals.

Sensitive information

15.95 Chapters 13, 16, and 17 discuss a range of types of information that may be exempted from disclosure because of their sensitive or confidential nature, such as information obtained for the purposes of legal advice or information that may prejudice national security.

15.96 There are many types of sensitive or confidential information other than those that may be exempted from disclosure. For example, s 6D(2) of the *Royal Commissions Act*, allows a person to request that financial information may be taken in private, recognises the sensitivity of financial and commercial information.

81 R Scott, 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596, 614.

82 *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, 28.

15.97 Chapters 13, 16 and 17 discuss different types of confidential or sensitive information. For the reasons noted in those chapters, the ALRC's view is that some of these do not justify an exemption from disclosure but may justify a restriction on public access.⁸³

Prejudice to legal proceedings

15.98 The disclosure of information may also prejudice legal proceedings that are being conducted at the same time as an inquiry, or thereafter. As discussed in Chapter 16, at common law an inquiry is unable to require a person to answer questions that are directly relevant to matters that are the subject of a criminal proceeding or a proceeding for the imposition of a penalty that is being conducted at the same time. The ALRC proposes that a provision setting out this limitation should be included in the proposed *Inquiries Act*.⁸⁴

15.99 An inquiry, however, may be able to inquire into matters that are otherwise relevant to legal proceedings. For example, an inquiry examining alleged malpractice in a particular industry may continue to conduct its inquiry even though the matter 'touched and concerned a pending criminal charge'.⁸⁵ In such a case, it may need to restrict public access to the hearings, evidence or report to ensure it does not prejudice the related legal proceeding.⁸⁶

15.100 An inquiry also may need to restrict public access to ensure it does not prejudice any subsequent legal proceedings that may be contemplated.⁸⁷ For example, if it is contemplated that a person may be prosecuted for matters that are the subject of the inquiry, it may be necessary to hear that evidence in private to avoid influencing potential jurors.

Efficient and effective conduct

15.101 Another important reason for restricting public access is to facilitate a more informal and inquisitorial process. This may have several benefits. More informal and confidential meetings may be more productive in terms of ascertaining the truth, because witnesses are more likely to be frank. Public hearings in Royal Commissions often involve lawyers, which adds to the formality and cost of proceedings and tends to encourage an adversarial approach.

83 These include: national security information; information otherwise subject to confidential professional relationships privilege, religious confessions privilege, or a privilege for evidence relating to settlement negotiations; information relating to secret processes of manufacture; and information otherwise subject to a secrecy provision.

84 Proposal 16-1(b).

85 *Hammond v Commonwealth* (1982) 152 CLR 188, 199.

86 *Ibid.*

87 See Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [326].

15.102 Further, there is additional administration involved in organising public hearings and the publication of evidence. Matters such as finding appropriate venues, producing transcripts of evidence, and accommodating the public and the media inevitably require additional time and expense.

Methods of restricting public access

15.103 There are three important methods of restricting public and media access. First, information may be provided to an inquiry privately. Alternatively, if information is provided in a public hearing, some members of the public or media may be excluded.

15.104 It is clear that Royal Commissions have the power to take evidence in private. Under s 6D(2) of the *Royal Commissions Act*, witnesses may request that their evidence be given in private if they are giving evidence about the profits or financial position of any person, and the taking of that evidence in public would be unfairly prejudicial to that person. Section 6D(5) states that this provision operates in ‘aid of and not as in derogation of the Commission’s general powers to order that any evidence may be taken in private’. The Act otherwise gives no guidance as to whether hearings should be held in public or private.

15.105 Secondly, the publication of certain evidence can be prohibited or restricted. Under s 6D(3) of the *Royal Commissions Act*, the Commission may prohibit or restrict the publication of any evidence before it, the contents of any document, a description of anything produced to a Commission, or any information that might enable a person who has given evidence before the Commission to be identified.⁸⁸

15.106 Thirdly, an inquiry can exercise its discretion as to what evidence or findings are made public, in a report or otherwise. For example, in the Building Royal Commission, Commissioner Cole submitted a confidential volume of his report to the government.⁸⁹

15.107 This discretion extends to the decision of the inquiry to publish material on the internet. In recent times, the practice has been to establish inquiry websites on which evidence, submissions and reports may be published. The Victorian Bushfires Royal Commission, which held hearings while this Discussion Paper was being written, streamed these hearings over the internet. This has the advantage of increasing the accessibility, transparency and accountability of inquiries. As discussed in Chapter 12, care needs to be taken with electronic publications, because of the degree of the accessibility and the difficulty of enforcing rules governing information (such as rules relating to privacy) in the electronic environment. The ALRC proposes, in Chapter 12,

88 Failure to comply with such a direction is a criminal offence: see Ch 18.

89 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 23.

that the *Inquiries Handbook* should include guidance on the appropriateness of electronic publication.⁹⁰

Presumption of public access to hearings

15.108 The inquiries legislation of some jurisdictions requires that the hearings of an inquiry should be public, subject to exceptions.⁹¹ One is s 18(1) of the *Inquiries Act 2005* (UK), which states that, subject to any restrictions imposed by the chair of an inquiry, or the responsible minister, reasonable steps must be taken to allow members of the public to attend inquiry hearings and view evidence.⁹²

15.109 The NZLC, after considering this issue, concluded that such a provision could encourage the inappropriate use of formal hearings. It stated:

While inquiries should be as open as possible, there will be cases where their purposes are better served without formal hearings and where witnesses can speak freely without fear of public exposure.⁹³

15.110 The NZLC recommended instead that legislation should confer a specific power to hold an inquiry or any part of it in private, or otherwise restrict public access to an inquiry or any part of it.⁹⁴ It also recommended that, before making any such order, the inquiry should consider the following criteria:

- (a) the risk to public confidence in the proceedings of the inquiry;
- (b) the need for the inquiry to properly ascertain the facts;
- (c) the extent to which public proceedings may prejudice the security or defence or economic interests of New Zealand;
- (d) the privacy interests of any individual; and
- (e) whether such an order would interfere with the administration of justice, including the right to a fair trial.⁹⁵

15.111 It is useful to consider also the experience of the Independent Commission Against Corruption (ICAC) in this respect. The *Independent Commission Against Corruption Act 1988* (NSW) originally provided that ICAC hearings generally should be held in public.⁹⁶ In 1991, the section was amended to allow ICAC to decide whether

90 Proposal 12–3.

91 Other examples include the *Special Commissions of Inquiry Act 1983* (NSW) s 7; *Commissions of Inquiry Act 1950* (Qld) s 16A; *Commissions of Inquiry Act 1995* (Tas) s 13; *Royal Commissions Act 1991* (ACT) s 28; *Inquiries Act 1991* (ACT) s 21.

92 Restrictions on public access may be imposed where it is in the public interest, with particular regard to the risk of harm or damage that could be avoided or reduced; any conditions as to confidentiality by which a person acquired information; and the effect on the efficiency or effectiveness of, or additional cost to, the inquiry: *Inquiries Act 2005* (UK) s 19(3), (4).

93 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [6.3].

94 *Ibid*, Rec 27. This is now *Inquiries Bill 2008* (NZ), cl 15(1).

95 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 28. This is now *Inquiries Bill 2008* (NZ) cl 15(2).

96 *Independent Commission Against Corruption Act 1988* (NSW) s 31, as originally enacted.

it would hold hearings in public or private.⁹⁷ Subsequent practice has been for ICAC to make greater use of private hearings and other information-gathering powers.⁹⁸

15.112 In 2002, the Parliamentary Joint Committee that supervises ICAC recommended that all initial investigations, including hearings, should be conducted in private, followed by a public hearing if there is sufficient evidence to justify making an adverse finding.⁹⁹ This ‘reform model ... limits the risk of unnecessary damage to reputation, preserves the Commission’s role in publicly exposing corrupt conduct and emphasises the need for the strategic use of other investigative strategies and methodologies in the confidential investigation stage’.¹⁰⁰

15.113 This is similar to the model used in the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984), where matters were usually explored in private sittings to ensure that ‘before matters were put in a public sitting there was a high degree of confidence that they would be material to [the Royal Commissioner’s] enquiries and the expected answers would be likely to be correct’.¹⁰¹

Power to restrict publication

15.114 Section 6D(3) of the *Royal Commissions Act* enables a Royal Commission to make a direction prohibiting or restricting publication of evidence, the contents of any document or description of a thing produced or delivered to it, or any information that might enable a person who has given evidence before the Commission to be identified. The section does not set out any limitations on this power, or indicate the grounds on which such a power may be exercised.¹⁰² Similar provisions can be found in the inquiries legislation of other jurisdictions.¹⁰³

15.115 In the HIH Royal Commission, Commissioner Owen indicated that the exercise of the discretion to make an order should be guided by the principles used in courts.¹⁰⁴ The powers of courts to restrict publication in a similar manner, through what are commonly known as suppression orders, have been reviewed recently by the New

97 *Independent Commission Against Corruption (Amendment) Act 1991* (NSW) sch 1, cl 2. In 2005, public hearings of ICAC were renamed ‘public inquiries’ and private hearings renamed ‘compulsory examinations’: *Independent Commission Against Corruption Amendment Act 2005* (NSW), sch 1, cl 17.

98 See P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), Ch 4, Pt 4.

99 Parliament of New South Wales—Joint Committee on the Independent Commission Against Corruption, *Review of the ICAC Stage III: The Conduct of ICAC Hearings* (2002), 44.

100 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), [4.220].

101 F Costigan, *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984), vol 2, [14.040].

102 A contravention of such a direction is a criminal offence: *Royal Commissions Act 1902* (Cth) s 6D(4). This is discussed in Ch 18.

103 *Special Commissions of Inquiry Act 1983* (NSW) s 8; *Evidence Act 1958* (Vic) s 19B; *Commissions of Inquiry Act 1950* (Qld) ss 16; *Royal Commissions Act 1917* (SA) s 16A; *Royal Commissions Act 1968* (WA) s 19B; *Commissions of Inquiry Act 1995* (Tas) ss 13, 14; *Royal Commissions Act 1991* (ACT) s 28; *Inquiries Act 1991* (ACT) s 21.

104 N Owen, *HIH Royal Commission: Reasons for Ruling No 04/02* (2002).

South Wales Law Reform Commission (NSWLRC).¹⁰⁵ The NZLC also is currently examining suppression orders.¹⁰⁶ The ALRC considered suppression orders in its 1987 report, *Contempt* (ALRC 35).¹⁰⁷

15.116 Suppression orders in courts involve a number of important considerations, including the principle that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’¹⁰⁸ (the principle of open justice), and freedom of expression.¹⁰⁹ The principle of open justice, however, may be in tension with the greater purpose of ensuring that justice is done.¹¹⁰ For example, it may be necessary to make a suppression order to ensure that juries are not unduly influenced.

15.117 The powers of courts to make suppression orders derive from the common law and a variety of statutory provisions.¹¹¹ At common law, the principle of open justice cannot be departed from unless it is necessary in the administration of justice.¹¹² There are established categories in which suppression orders may be made at common law, including in order to protect trade secrets and other confidential information.

15.118 Some of the statutory provisions governing the making of suppression orders by courts set out the grounds for making those orders.¹¹³ The grounds typically relate to the interests of justice, including prejudice to a fair trial; the interests of victims or witnesses, including the safety of persons and the adverse impact on victims of sexual offences in particular; national security or defence; and public morality or decency.¹¹⁴

Submissions and consultations

15.119 In IP 35, the ALRC asked whether inquiries should be required to hold hearings in public, and set out in their reports the evidence on which their decisions are based. The ALRC asked, if those requirements were to apply, whether they should be subject to specified exemptions and, if so, which ones.¹¹⁵

105 New South Wales Law Reform Commission, *Contempt by Publication*, Report 100 (2003).

106 New Zealand Law Commission, *Suppressing Names and Evidence*, IP 13 (2008).

107 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Ch 6.

108 *R v Sussex JJ ex p McCarthy* [1924] 1 KB 256, 259.

109 New Zealand Law Commission, *Suppressing Names and Evidence*, IP 13 (2008), [1.1].

110 *Ibid.*, [1.5].

111 See generally A Kenyon, ‘Not Seeing Justice Done: Suppression Orders in Australian Law and Practice’ (2006) 27 *Adelaide Law Review* 279.

112 *Scott v Scott* [1913] AC 417.

113 See, eg, *Supreme Court Act 1986* (Vic) ss 18, 19.

114 See A Kenyon, ‘Not Seeing Justice Done: Suppression Orders in Australian Law and Practice’ (2006) 27 *Adelaide Law Review* 279; New Zealand Law Commission, *Suppressing Names and Evidence*, IP 13 (2008), Ch 2. In November 2008, the Standing Committee of Attorneys-General agreed to develop draft model provisions to enable harmonised legislation governing suppression orders, and also agreed to further development of a national electronic register of such orders: Standing Committee of Attorneys-General, *Communique*, November 2008, [16].

115 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 8–11.

15.120 The ALRC also asked whether Royal Commissions or other inquiries should be required to consider a list of factors before making directions prohibiting the publication of evidence or matters identifying witnesses,¹¹⁶ such as the list of factors recommended in the New Zealand provision concerning public hearings, set out above.

15.121 Stakeholders agreed that the public interest in open hearings and publication of evidence had to be weighed against other considerations, and that the balance to be struck would vary from inquiry to inquiry. Stakeholders differed on when that balance would favour a restriction on access to a hearing or a restriction on publication, with the exception of certain clear cases such as information that would prejudice national security.

15.122 Most stakeholders who made submissions supported the principle that, in general, public inquiries should be open, and that the power to take evidence in private, while necessary, was an exception to that general rule. For example, Liberty Victoria submitted:

In general, Liberty believes all public inquiries should be open, but recognises that this must be weighed against the protection of individual liberties.¹¹⁷

15.123 The CPSU submitted that ‘public accountability and transparency must be paramount in all forms of public inquiries’, and expressed concern that the credibility of inquiries conducted mostly in private ‘is often compromised, fairly or unfairly, by the way in which it was conducted’.¹¹⁸ It noted that, in some circumstances, it would be appropriate for evidence to be taken in private, such as where evidence might otherwise fall within the scope of secrecy provisions. The opportunity for evidence to be taken in private may influence the level of information willingly provided by the witness.¹¹⁹ It concluded:

It should therefore be open to a Commissioner to accept evidence in private, however in deciding whether to accept evidence in private the Commissioner should be required by the statute to balance the interests of claim to privacy with the interests of the public in having an open, public inquiry.

The CPSU believes that it is important that Royal Commissions and public inquiries should have public hearings and their reports clearly identify the evidence on which findings are made. Any evidence taken in private should only be by necessity and should be the exception to the rule. The only exemptions should be where a party has a legitimate interest in maintaining privacy and, on balance, that legitimate individual interest overrides the public interest in such matters being dealt with openly. Wherever possible, the Commissioner should merely de-identify such evidence in its report.¹²⁰

116 Ibid, Question 9–4(a).

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

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

119 Ibid.

120 Ibid.

15.124 The Department of Immigration and Citizenship (DIAC) similarly considered that it would be useful to provide in legislation that an inquiry should hold a hearing in public. Such a provision, however, should allow an inquiry to exclude the public from a hearing (or from part of it) where an inquiry decides that the public interest in holding the hearing in public is outweighed by other considerations. These other considerations could include the consequences of possible disclosure of national security information, the right to privacy, and the right of any person to a subsequent fair trial. DIAC also noted that sensitive documents, such as documents that could prejudice national security, should not be set out in detail in an inquiry's report.¹²¹

15.125 DIAC considered that it may be useful to allow certain witnesses to give evidence in private to avoid media scrutiny or public attention—in particular witnesses of 'a junior level [who] have only had limited involvement in, or responsibility for, the issue being investigated by the inquiry'.¹²²

15.126 The Law Council submitted that any new legislation should include, among other things, criteria to determine whether certain information should be prevented from public disclosure or publication. Such criteria could require inquiry members to consider issues such as personal privacy, national security and the public interest in publication before determining whether to conduct hearings in private or restrict publication of certain material.¹²³

15.127 The IGIS submitted:

I would observe that the degree of openness with which an inquiry can be conducted will be determined by the subject matter and consideration of sensitivities such as privacy and security. In the case of the IGIS Act, inquiries must be conducted in private ... This is hardly surprising given the nature of the material which will be involved. The experience of other inquiries and Royal Commissions which have dealt with intelligence and security issues has been that most of the proceedings must be conducted in private.¹²⁴

15.128 The Commonwealth Ombudsman noted that his investigations were conducted in private, and that reports of the investigations usually did not include identifying details. This approach, the Ombudsman suggested, could be adopted where there was an inquiry into events relating to identifiable individuals, especially if they related to sensitive personal information, or where an inquiry deals with an inherently sensitive matter. The Ombudsman suggested that, 'while the default position might lean towards openness, inquiries need to be given some legislative guidance about the circumstances that may warrant such a departure'.¹²⁵

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

122 *Ibid.*

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

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

125 Commonwealth Ombudsman, *Submission RC 13*, 4 June 2009.

15.129 The AGS noted that it was rare for a Royal Commission to take evidence in private, but that ‘the power to take evidence in private remains an important option and we see no reason why that power should not be maintained’.¹²⁶ The AGS submitted that it was ‘not aware of compelling arguments in favour of a legislative *requirement* that Royal Commissions and other public inquiries should hold hearings in public’.¹²⁷ Private hearings might be necessary to protect, for example, national security information, the identity of certain witnesses or to prevent the disclosure of matters which could interfere with the administration of justice. The AGS considered that inquiries should maintain a broad discretion to conduct their proceedings as they consider appropriate, and noted that administrative mechanisms such as publishing edited or redacted forms of evidence, or summaries of evidence, might be adopted if evidence was given in private.

15.130 Turnbull submitted:

A public inquiry does not require public hearings. Transcripts can be made available on the internet, for example. The key to its public nature is that the final report be complete and thorough and contain or refer to all relevant evidence (with identified exemptions).¹²⁸

15.131 Most stakeholders who addressed this issue in consultations expressed significant concern about the prejudice caused to reputations by public hearings, particularly where witnesses were subsequently cleared or were not the subject of an inquiry. These stakeholders also emphasised the fact that there was already strong pressure to hold inquiries in public, and expressed concern that not enough attention was paid to the legitimate interests of individuals that might outweigh the public interest in an open inquiry.

15.132 Some stakeholders also indicated that inquiries held in private were a much more efficient way to get to the truth. Such inquiries were said to enable a degree of informality that was more productive, minimise the need for legal representation and greatly enhance the flexibility of an inquiry. Stakeholders echoed the concern of the NZLC that including a statutory requirement that hearings normally be held in public would lead to an undesirable degree of formality in inquiry processes.

15.133 While stakeholders generally agreed that the control of proceedings should be left to the head of the inquiry, there was support for additional guidance on these matters. Stakeholders differed, however, on the form such guidance should take. Some were of the view that codifying exemptions in legislation would be too restrictive, although there was support by some stakeholders for a non-exhaustive list of circumstances in which it was appropriate to restrict public access.

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

127 *Ibid.*

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

ALRC's view

15.134 The power to conduct an inquiry in private or restrict publication of material protects a range of interests, such as the reputations of those participating in inquiries and the sensitivity of information. This power is especially significant given that certain material that is protected from disclosure to a court may have to be disclosed to a Royal Commission or Official Inquiry.¹²⁹

15.135 The ALRC proposes that Royal Commissions and Official Inquiries be empowered to make directions: prohibiting or restricting public access to a hearing; prohibiting or restricting publication of any information that might enable a person to identify a person giving information to an inquiry; or publication of any information provided to an inquiry. This power should be formulated to ensure that it extends beyond witnesses giving evidence at a hearing to include less formal types of information-gathering processes.

15.136 In the ALRC's view, the discretion to exercise the power should not be constrained by a legislative requirement that, in general, inquiries should hold hearings in public and set out the evidence for findings in a report. The pressure to hold inquiries in public is already great.

15.137 There are three reasons why there may be a greater need to restrict public access in an inquiry than in a court proceeding. First, while the holding of public hearings may instil confidence in the integrity of the inquiry's processes, inquiries are not concerned with ensuring the integrity of the judicial process. In this respect, the public interest in public hearings of an inquiry is less compelling than the public interest in public court hearings.

15.138 Secondly, the wider range of information that is typically accessed by an inquiry, the wider scope of its inquiry, and the fewer evidential and procedural safeguards that apply to disclosure may mean that greater restrictions on disclosure may be appropriate. For example, where Royal Commissions and Official Inquiries obtain information that could not be obtained in a court—such as by compelling the production of incriminating evidence—it may be appropriate to restrict publication of such evidence.¹³⁰

15.139 Thirdly, inquiries differ from courts in that inquiries are investigatory. Publication of material during the progress of an investigation may prejudice the success of the investigation. For example, publishing the evidence of a witness may alert other potential witnesses to the direction the inquiry is taking. Publication of material during an investigation also may lead to unfair damage, because suspicions

129 See Chs 16, 17. For example, a Royal Commission may compel the production of information that would, in a court, be protected from disclosure by the privilege against self-incrimination, or which would be inadmissible in a court because it was hearsay or opinion evidence.

130 See Ch 16.

raised during the course of an inquiry may, in the light of all of the evidence, turn out to be unfounded. Some inquiries may be more efficiently and effectively conducted in private, or partly in private. Many non-statutory inquiries are now currently conducted largely or entirely in private, as are statutory investigations such as those by the Ombudsman. A requirement that hearings should be held in public is likely to encourage greater formality in these types of inquiries, which involves additional time and cost.

15.140 Given the importance of the discretion to restrict public access, however, there is significant value in giving greater guidance as to its use. The ALRC proposes that a non-exhaustive list of the grounds which might justify a prohibition or restriction on public access, or publication, should be set out in the statute. It is not necessary to further provide that an inquiry should balance these interests against the public interest in an open inquiry. In the ALRC's view, such a requirement might have the same effect as a legislative requirement that an inquiry should generally be held in public: namely, it might further tilt the balance in favour of an open inquiry, at the expense of legitimate interests that may need protection.

15.141 There are a number of factors which are readily identifiable as reasons why a restriction on access, either in the form of restricting public access to a hearing or restricting publication, might be desirable. These include the prejudice or hardship caused to an individual; the nature and subject-matter of the information that may be involved; the potential for prejudice to legal proceedings; and the efficient and effective conduct of an inquiry. The ALRC proposes that these should be the grounds for exercising the power to prohibit or restrict public access set out in the proposed provision.¹³¹

15.142 Consequently, there is no need for an equivalent of s 6D(2) of the *Royal Commissions Act*, enabling a person to request a private hearing in the case of prejudice to the financial position or profits of a person.

15.143 It may be useful for the proposed *Inquiries Handbook* to provide more detailed guidance as to the circumstances in which it might be appropriate to prohibit or restrict access or publication. In particular, the *Inquiries Handbook* might emphasise the value of using private hearings as a strategic investigative tool, and the value of assessing the likely quality and relevance of evidence, prior to holding public hearings.

131 These factors are framed more broadly than statutory provisions empowering courts to make suppression orders, and the equivalent provision in the Inquiries Bill 2008 (NZ). They capture a broader range of interests that might need to be protected, and take into account the fact that there may be a greater need to restrict public access in the context of inquiries.

Proposal 15-4 (a) The proposed *Inquiries Act* should provide that Royal Commissions and Official Inquiries may make directions prohibiting or restricting:

- (i) public access to a hearing;
- (ii) publication of any information that might enable a person to identify a person giving information to the inquiry; or
- (iii) publication of any information provided to the inquiry.

(b) The proposed *Inquiries Act* should provide that members of Royal Commissions or Official Inquiries may exercise the power to prohibit or restrict public access or publication on the following grounds:

- (i) prejudice or hardship to an individual;
- (ii) the nature and subject matter of the information that may be involved;
- (iii) the potential for prejudice to legal proceedings;
- (iv) the efficient and effective conduct of an inquiry; or
- (v) any other matter that an inquiry considers appropriate.

Authorisation of leave to appear

15.144 Another significant procedural issue that affects the participation of interested parties is the power of a Royal Commission to authorise a person to appear before it, under s 6FA of the *Royal Commissions Act*. That section provides that any person authorised to appear before a Commission, or any legal practitioner authorised to appear before a Commission for the purpose of representing a person, may, 'so far as the Commission thinks proper', examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry.

15.145 Section 6FA does not identify, however, the factors that are relevant to the decision of a Royal Commission to allow a person to appear before it.¹³² In contrast, in some jurisdictions legislation addresses the issue of determining which individuals or groups should have the right to appear. In the United Kingdom, the chair of an inquiry

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

may designate a person as a ‘core participant’ in the inquiry, having particular regard to whether:

- (a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;
- (b) the person has a significant interest in an important aspect of the matters to which the inquiry relates; or
- (c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.¹³³

15.146 Core participants are entitled to have their legal representatives designated as a ‘recognised legal representative’. These representatives are entitled to apply to the chair for leave to ask questions of a witness giving oral evidence, and make opening and closing statements.¹³⁴

15.147 The NZLC recommended the adoption of a similar provision which would entitle a core participant to give evidence and make submissions, subject to any directions of the inquiry in relation such matters.¹³⁵

15.148 The provisions in the *Inquiries Act 2005* (UK) and the *Inquiries Bill 2008* (NZ) list factors which guide the exercise of the inquiry’s discretion in determining who should have the right to appear. In the Building Royal Commission, Commissioner Cole suggested a similar list of relevant factors for granting an application for authority to appear before the applicant.¹³⁶ Additionally, Cole noted that an application may be granted if a person would be in a better position to assist the Royal Commission in carrying out its inquiry if he or she were authorised to appear. All general grants of authority to appear were made subject to a number of conditions.¹³⁷

Submissions and consultations

15.149 In IP 35, the ALRC asked whether it was appropriate for a Royal Commission to retain the discretion to authorise appearances before it and, if so, whether the *Royal Commissions Act* should outline the factors a Royal Commission should consider before exercising this discretion.¹³⁸ It also asked whether public inquiries other than Royal Commissions should have similar powers.¹³⁹

133 Inquiries Rules 2006 (UK) r 5.

134 Ibid rr 6, 10(4), 11.

135 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 16. This is now *Inquiries Bill 2008* (NZ) cl 18.

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

137 Ibid, vol 2, 32.

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

139 Ibid, Question 7–3.

15.150 Liberty Victoria stated that all levels of inquiries ‘should have a broad discretion ... in how and what they obtain as evidence’, including the ability to authorise persons or organisations to appear before it.¹⁴⁰ The AGS noted that the power to authorise leave to appear was generally effective.¹⁴¹

ALRC’s view

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

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

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

Proposal 15–5 The proposed *Inquiries Act* should provide that Royal Commissions and Official Inquiries may allow any person or a person’s legal representative to participate in an inquiry, to the extent that inquiry members consider appropriate. In making that decision, inquiry members may have regard to:

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

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

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

Inquiries affecting Indigenous peoples

15.154 There have been a number of public inquiries that have affected Indigenous peoples, although the last federal Royal Commission focusing primarily on Indigenous issues was the Royal Commission into Aboriginal Deaths in Custody (1991).¹⁴² The treatment of Indigenous witnesses in public inquiries was raised as an issue in consultations. Some of these concerns may be applicable to other minority groups.

15.155 The issues that Indigenous witnesses may encounter in giving evidence in court have been addressed in a number of reports by the ALRC and other law reform bodies.¹⁴³ These issues include language and physical communication barriers; cultural factors that influence communication; the formality of court proceedings; and the effect of customary laws on the giving of evidence.¹⁴⁴ There is a very large number of Indigenous groups in Australia and the ALRC notes that the observations below are general in nature and may not apply equally to all Indigenous peoples.

Language and physical communication barriers

15.156 Many Indigenous peoples speak a number of languages other than Standard Australian English, including traditional languages, pidgins or creoles, and Aboriginal English.¹⁴⁵ In the 2006 census, 12% of Indigenous people spoke an Indigenous language at home, and 19% indicated they did not speak English well or at all.¹⁴⁶ Aboriginal English is a dialect of Standard Australian English and is the first language for most Indigenous people in Queensland. It differs from Standard Australian English in pronunciation, grammar, vocabulary and style.¹⁴⁷

15.157 As a result, some Indigenous witnesses, while speaking some English, may not be fluent in Standard Australian English and may encounter difficulties in legal

142 Other public inquiries include the federal Northern Territory Emergency Response Review Board (2008); Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007), established under the *Inquiries Act 1945* (NT); Commission of Inquiry: Children on APY Lands (2007), established under the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA); and the Hindmarsh Island Bridge Royal Commission (1995), established under the *Royal Commissions Act 1917* (SA).

143 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), vol 1, pt V; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Ch 5. See also Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996); New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, NSWLRC 96 (2000), Ch 7.

144 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), Ch 15.

145 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), 15–17.

146 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006*, 4713.0 (2008).

147 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), 16–17.

proceedings. They may not fully understand the questions which are put to them, and their responses may be misinterpreted because of the different meanings of common English words in Aboriginal English or in one of the creoles.¹⁴⁸ A range of Indigenous interpreting services have been established to address these difficulties, most notably the Northern Territory Aboriginal Interpreters Service.

15.158 The Queensland Criminal Justice Commission, after considering the issue of interpretation in the context of Indigenous peoples, recommended that the *Evidence Act 1977* (Cth) should include a provision that a ‘witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact’.¹⁴⁹ It further recommended that, if a court had any reason to doubt the capacity of a witness both to understand and speak Standard Australian English, proceedings should not continue until an interpreter is provided.¹⁵⁰

15.159 The uniform evidence laws in place in several Australian jurisdictions permit a witness to give evidence ‘about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact’.¹⁵¹ This applies to court proceedings and other proceedings that apply the rules of evidence.¹⁵² This provision was based on a recommendation made by the ALRC in its 1985 Interim Report on *Evidence* (ALRC 26).¹⁵³

15.160 In some non-judicial proceedings, such as those before the Migration Review Tribunal, a person is entitled to an interpreter if the person is not sufficiently proficient in English. Section 366C of the *Migration Act 1958* (Cth) provides:

- (1) A person appearing before the Tribunal to give evidence may request the Tribunal to appoint an interpreter for the purposes of communication between the Tribunal and the person.
- (2) The Tribunal must comply with a request made by a person under subsection (1) unless it considers that the person is sufficiently proficient in English.
- (3) If the Tribunal considers that a person appearing before it to give evidence is not sufficiently proficient in English, the Tribunal must appoint an interpreter for the purposes of communication between the Tribunal and the person, even though the person has not made a request under subsection (1).

148 Ibid, 17–18. In addition, the high incidence of hearing impairment in Indigenous groups may be a physical barrier to communication: Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996), 28–29.

149 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996), Rec 5.1.

150 Ibid, Rec 5.2.

151 *Evidence Act 1995* (Cth) s 30.

152 Other legislation makes similar provision: see, eg, *Evidence Act 1971* (ACT) s 63A; *Crimes Act 1958* (Vic) s 464D.

153 Australian Law Reform Commission, *Evidence (Interim)* ALRC 26 (1985), [611]. See generally Australian Law Reform Commission, *Multiculturalism and the Law* ALRC 57 (1992), Ch 2.

Communication styles

15.161 A number of cultural factors may affect the way Indigenous peoples communicate in formal proceedings. For example, interviews conducted through questions and answers are said to be ‘culturally alien to many Aboriginal people, who are accustomed to a less direct form of information gathering’.¹⁵⁴ Indigenous groups may build up complex information over a period of time, and through a series of interactions. The appropriate response, if one does not understand, may be to wait for clarification through continued interaction as to ‘state that one does not understand what has been said can be humiliating’.¹⁵⁵ If an Indigenous person volunteers information about a matter, it can be intensely embarrassing for him or her to have that knowledge questioned.¹⁵⁶

15.162 Indigenous peoples may seek to avoid open disagreement or criticism. Avoiding loss of personal dignity is central in dealing with conflict, and a key strategy to achieve this is to feign disinterest.¹⁵⁷ Indigenous witnesses are also susceptible to agreeing to a question rather than disagreeing, particularly if the questioning takes place in an oppressive environment and over a long period of time.¹⁵⁸

15.163 Another feature of Indigenous communication styles is that silence may indicate a number of different things. For many Indigenous groups, silence is a common and positively valued part of conversation that allows time for thinking. In a courtroom, however, it may imply that the person is not in control of, or not comfortable with, the dialogue. It may also indicate a lack of authority to speak about a matter, or criticism or disapproval if there is conflict within an Indigenous group. Further, silence may indicate a failure of the person questioning to understand matters important to the Indigenous person.¹⁵⁹

Formality of proceedings

15.164 The Queensland Criminal Justice Commission reported that many of the people it had consulted for its report on *Aboriginal Witnesses in Queensland’s Criminal Courts* indicated that

feelings of intimidation, isolation, fear and disorientation are common among Aboriginal people who gave evidence in our courts. Those feelings are not restricted to Aboriginal people, nor are they experienced by all Aboriginal people. However, the [Criminal Justice Commission] is satisfied that feelings of alienation are sufficiently widespread among Aboriginal people to justify measures to make courts more familiar and less intimidating.¹⁶⁰

154 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996), 19.

155 Ibid.

156 Ibid, 19–20.

157 Ibid, 20.

158 Ibid, 21–22.

159 Ibid, 23–24.

160 Ibid, 77.

Effect of customary laws

15.165 The customary laws of Indigenous groups also may affect the ways in which Indigenous participants in an inquiry provide information.¹⁶¹ For example, an Indigenous person may not have the authority to speak on certain matters—for example, issues related to specific areas of land—or may have the authority to speak only in conjunction with others who collectively have such authority. Some information may be secret, and an Indigenous person may be subject to severe penalties for breaching that secret. In addition, it needs to be considered whether an Indigenous person should be required to disclose a violation of Aboriginal customary law that might expose them to some retaliation.¹⁶²

Measures adopted in courts

15.166 A number of measures have been developed to address these issues in relation to courts, which may be relevant to inquiries. For example, the *Evidence Act 1995* (Cth) allows a court to direct that evidence can be given in narrative form.¹⁶³ The Queensland Criminal Justice Commission recommended that a similar provision be included in the *Evidence Act 1977* (Qld).¹⁶⁴

15.167 The Supreme Court of the Northern Territory has developed guidelines to apply to the interrogation of Indigenous peoples by police, known as the Anunga Rules.¹⁶⁵ These address matters such as the need for interpreters and legal assistance, the desirability of a ‘prisoner’s friend’ or support person being present, the need to ensure that the person understands the meaning of the right to silence, and the need to frame questions carefully and avoid cross-examination. If they have been seriously breached, any confession is likely to be rejected at a trial. These guidelines have been incorporated into standing police orders and are applied in other jurisdictions, although care clearly needs to be taken to ensure their appropriateness in the particular circumstances.¹⁶⁶

161 These issues are discussed in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), vol 1, Ch 25.

162 This may raise similar concerns to those which justify the privilege against self-incrimination. See Ch 16.

163 *Evidence Act 1995* (Cth) s 29(2).

164 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996), Rec 4.1. It recommended, however, that there should be no requirement that the court must make a direction to this effect.

165 *R v Anunga* (1976) 11 ALR 412.

166 *Ibid.* These rules, or similar rules, have been incorporated into police orders or otherwise apply as relevant guidelines in the Northern Territory, Queensland, South Australia, and Western Australia: see, eg, *R v LLH* (2002) 132 A Crim R 498; *R v W* [1988] 2 Qd R 308; *Walker v Marklew* (1976) 14 SASR 463 (FC); *Webb v The Queen* (1994) 13 WAR 257, 259. See also D Mildren, ‘Redressing the Imbalance: Aboriginal People in the Criminal Justice System’ (1999) 6 *Forensic Linguistics* 1350; M Powell, ‘Practical Guidelines for Conducting Investigative Interviews with Aboriginal People’ (2000) 12 *Current Issues in Criminal Justice* 181.

Consultations

15.168 In consultations, the ALRC asked whether any legislation, guidelines or protocols were necessary or desirable to address issues specific to Indigenous witnesses in public inquiries. Stakeholders suggested that issues affecting Indigenous peoples should be dealt with in guidelines. Stakeholders also noted, however, that guidance had to be tailored to the particular Indigenous groups involved in an inquiry.

15.169 Stakeholders commenting on this issue supported a broad legislative requirement to consider Indigenous issues or to consult with communities on the relevant issues. For some stakeholders, this was felt to be necessary because guidelines and protocols were in practice not always applied.¹⁶⁷ Other stakeholders felt it would be difficult to frame a specific provision given the diversity of Indigenous groups and the diversity of circumstances in which inquiries might arise.

15.170 Stakeholders also emphasised the importance of interpreters. There was support for a statutory right to an interpreter, particularly since such a right could have implications in terms of funding. There was also strong support for an Indigenous witness to have the right to bring a person to an inquiry for support.

15.171 A number of stakeholders referred to the desirability of allowing narrative evidence and group evidence, restricting unnecessary cross-examination, and the need to ensure hearings were located near the communities and in relatively informal settings. Finally, some stakeholders thought guidance was desirable in relation to types of culturally sensitive evidence that might require protection, including whether such evidence ought to be heard in private.

ALRC's view

15.172 In order to ensure that the special needs of Indigenous peoples participating in an inquiry are addressed adequately by an inquiry, the ALRC proposes that, if a Royal Commission or Official Inquiry is inquiring into matters that may have a significant effect on Indigenous peoples, there should be a legislative requirement to consult with Indigenous groups, individuals and organisations to inform the development of procedures for an inquiry. In the ALRC's view, such consultation is necessary to ensure the effectiveness and the legitimacy of a public inquiry significantly affecting Indigenous peoples.

15.173 This duty to consult would arise only where the inquiry was likely to have a significant effect on Indigenous peoples. This duty would arise, for example, if an inquiry focused upon Indigenous interests such as native title. It would not arise, however, merely because an Indigenous witness was called to give evidence in an inquiry which otherwise had no special bearing on Indigenous interests.

¹⁶⁷ This concern was acknowledged in the context of privacy protocols in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), Ch 7.

15.174 This broad duty to consult takes into account the concern expressed by stakeholders that the appropriate procedures in a particular inquiry will depend on the groups affected by the inquiry as well as the nature of the inquiry. It would be inappropriate to develop a generalised set of guidelines about the treatment of Indigenous participants because of the diversity of Indigenous groups and interests within those groups, and because of the diversity of the types of issues and procedures that may arise in a particular inquiry. Another reason for imposing a legislative requirement is the view of some stakeholders that guidelines and protocols have not generally proven effective.

15.175 The proposed legislative duty to consult, however, is not a duty to ensure a particular outcome. It is a duty to consult a particular group that is significantly affected to inform the development of procedures. It does not specify the level or type of consultation that is required—as noted above this will depend on the particular inquiry and the Indigenous peoples that are likely to be affected.

15.176 The ALRC also proposes that there should be a statutory right to an interpreter in inquiries for those not sufficiently proficient in English. This should be drafted in similar terms to the right to an interpreter before the Migration Review Tribunal—that is, a person may request an interpreter, and must be given one if the inquirer considers he or she is not sufficiently proficient in English, even if the person has not requested one. The language of this provision is preferable to that in the *Evidence Act*, as that relates to questioning about specific facts and does not empower a person to request an interpreter.

15.177 The factors prompting this proposal are also applicable to other minority groups that may require interpretation services. The proposal, therefore, is not restricted to Indigenous witnesses and is framed in general terms. It is also framed so that the right to an interpreter exists in more informal types of procedures such as interviews or meetings, as long as the person has been asked to provide information to an inquiry.

Proposal 15–6 The proposed *Inquiries Act* should provide that, if a Royal Commission or Official Inquiry is inquiring into matters that may have a significant effect on Indigenous peoples, the inquiry should consult with Indigenous groups, individuals or organisations to inform the development of appropriate procedures for the conduct of the inquiry.

Proposal 15–7 The proposed *Inquiries Act* should provide that an interpreter should be appointed if a person is asked to provide information to a Royal Commission or Official Inquiry and the person is not sufficiently proficient in English.

Rights to information

15.178 Providing guidance for participants in judicial and non-judicial proceedings has become increasingly common in Australia. For example, ICAC provides a brochure which covers: the nature of the Commission; the nature and legal effect of a summons; their entitlements to legal representation and expenses; the conduct and procedure of examinations and hearings; the recording of examinations and hearings; processes after an examination or hearing; and the protection of witnesses.¹⁶⁸

15.179 It has also been customary for Royal Commissions, at least, to provide directions and rulings for the conduct of its proceedings at the beginning of, and sometimes during, an inquiry. These typically cover the grant of leave to appear (discussed earlier) as well as procedures for the conduct of its proceedings.

Submissions and consultations

15.180 In IP 35, the ALRC asked whether any other rights of witnesses should be protected in proceedings of Royal Commissions or other public inquiries.¹⁶⁹

15.181 The CPSU addressed the issue of information about an inquiry in its submission. It stated:

There is often uncertainty about what the proceedings involve and how an individual's interests may be affected by those proceedings. This has impeded individual's abilities to make informed decisions about their best representation.

For example, members who have been involved in previous inquiries have advised us whilst they were offered their own representation they did not elect to take up that option because they did not understand what would be involved in the proceedings and if they were offered the choice again they would probably make a different decision. Royal Commissions, and other forms of public inquiries, involve formal, legal proceedings, with which most APS employees would have had no previous involvement.

Employees involved in these proceedings should be provided with very clear information about what is likely to be involved in these proceedings, including the scope of the proceedings, and any potential consequences for them as individual employees, if the report makes adverse findings against them as individuals. Such information could be provided centrally and should assist employees in making appropriate decisions.¹⁷⁰

168 Independent Commission Against Corruption, *Information for Witnesses*.

169 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 8–12. The issue of counselling for inquiry participants is discussed in Ch 9.

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

15.182 The CPSU noted that in the Inquiry into Quarantine and Biosecurity Review (2008),¹⁷¹ the transcript of the hearings was not made available to the CPSU or CPSU members. Also, there was no publicly available information about who had appeared, and was scheduled to appear, before the Inquiry and what evidence they had put forward. In its view, ‘this resulted in uncertainty about the focus of the Inquiry, and concern about the weight being given to the evidence of the six CPSU members who appeared’.¹⁷²

15.183 In contrast, the CPSU reported that, prior to the Inquiry into the Circumstances of the Vivian Alvarez Matter (2005)¹⁷³ which was undertaken by Neil Comrie under the authority of the Commonwealth Ombudsman (the Comrie Inquiry), the CPSU had met with the Commonwealth Ombudsman to discuss the procedures of that inquiry and the protections available to its members. This allowed the CPSU to advise its members on what they should expect and what their rights were.

15.184 The matters addressed in this meeting related in part to the nature of the inquiry, such as the Ombudsman’s use of its coercive powers, the formality of proceedings, and the Ombudsman’s focus on systemic issues. The meeting also addressed the rights of those participating in the inquiry to administrative support and advice, interview transcripts, and assistance in the form of a support person. Those participating could also contact the Ombudsman’s office after an interview to clarify matters, and were given the opportunity to respond to comments directly or indirectly critical to a person.¹⁷⁴

ALRC’s view

15.185 Providing sufficient information on the nature and conduct of an inquiry has a number of benefits. For participants, it enables them to understand the purpose of the inquiry and to prepare for it appropriately. It also may serve to reduce their anxieties. This is likely to facilitate the efficient and effective conduct of inquiries. Further, the provision of information by an inquiry encourages inquiries to consider the impact of their work on interested parties, and encourages the early development of procedural strategies.

15.186 This information may be provided in a number of ways. For example, inquiry members may meet directly with representative organisations to discuss issues. Further, information may be provided through: directions and rulings; the production

171 This was an independent review established by a minister into Australia’s quarantine and biosecurity arrangements, including the functions of the Australian Quarantine and Inspection Service and Biosecurity Australia. It was undertaken by an independent panel of experts chaired by Mr Roger Beale AO, a Senior Associate with the Allen Consulting Group.

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

173 Commonwealth Ombudsman and N Comrie, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report 3/2005 (2005).

174 Community and Public Sector Union, *DIMA Bulletin* (April 2006).

of brochures or the creation of a telephone hotline; and oral communication with interested parties.

15.187 In the ALRC's view, it is generally desirable that timely and sufficient information about the nature and conduct of an inquiry is available to participants. The diversity of inquiries and the variety of approaches by which such information may be supplied, however, make it difficult to prescribe either when or how such information should be provided. For example, there is likely to be a gap between the establishment of an inquiry and the adoption of procedural matters, and an inquiry may need to change its procedures during the course of its investigation.

15.188 A number of proposals in this Discussion Paper address the right to information about the nature and conduct of an inquiry. For example, the ALRC proposes that the *Inquiries Act* should set out the powers available to Royal Commissions and Official Inquiries, and the exemptions from disclosure that will apply to those powers.¹⁷⁵ The ALRC also proposes that the protections available to inquiry participants should be set out in the statute.¹⁷⁶ This should assist inquiry participants in ascertaining their rights.

15.189 Other proposals may help inquiry participants to understand when certain powers may be exercised by an inquiry. For example, the ALRC proposes that the *Inquiries Act* should list factors relevant to the decision to authorise a person to appear, and grounds for the exercise of the power to prohibit or restrict public access to hearings, or the publication of information relating to the inquiry.¹⁷⁷

15.190 Finally, the ALRC proposes that an *Inquiries Handbook* should be published to provide guidance on a number of issues including what kinds of procedures are available to inquiries, and when and how different procedures should be used.¹⁷⁸ This should provide inquiry participants with information about the types of procedures an inquiry might employ.

175 Proposal 5-2, Chs 11, 16, 17.

176 Proposal 12-2.

177 Proposals 15-4, 15-5.

178 Proposal 15-3.