

## 19. Contempt

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### Introduction

19.1 In this chapter, the ALRC examines the offence created by s 6O of the *Royal Commissions Act 1902* (Cth). Other offences created by the Act are dealt with in Chapter 18. The offence created by s 6O requires separate consideration because of its relationship with a distinct branch of the law, the law of contempt of court.

19.2 In this chapter, the ALRC commences with an explanation of the law of contempt of court, and its relevance to s 6O of the *Royal Commissions Act*. It then considers whether the law of contempt should be applied to inquiries established under the *Inquiries Act* proposed in this Discussion Paper, namely, Royal Commissions and

Official Inquiries.<sup>1</sup> Finally, the ALRC considers whether any of the conduct prohibited by s 60 should be prohibited by the proposed *Inquiries Act*.

19.3 In its 1987 report, *Contempt*, the ALRC considered in detail the law of contempt of court, including the relationship between Royal Commissions and contempt of court.<sup>2</sup> The report's recommendations were not implemented.<sup>3</sup> In the following section, the ALRC sets out the aspects of contempt of court that are relevant for the purposes of this Inquiry.

## Contempt of court

19.4 Contempt of court is a body of rules and procedures which are designed to protect the authority and processes of courts. This body of legal rules and procedures is of ancient origin.<sup>4</sup> The concept of contempt is unique to the common law, and has several unusual features.<sup>5</sup>

### Types of contempt

19.5 There are three broad categories of conduct that may constitute contempt of court.<sup>6</sup> First, contempt of court may involve conduct that amounts to interference with proceedings, including: interference with the progress of proceedings (known as 'contempt in the face of the court'); interference with participants in proceedings; and interference with evidence in proceedings. For example, it may be contempt to disrupt a court room, bribe a judge, or destroy a vital document.

19.6 Secondly, certain publication of material may amount to 'contempt by publication'. Most commonly, publication is prohibited because it may influence the deliberations of a jury in a criminal trial. For example, the publisher of a newspaper article that expresses views on whether a person is guilty during a trial may be in contempt of court. Another form of contempt by publication may occur when a publication casts imputations on the integrity or propriety of judicial conduct (known as 'scandalising the court'), such as by alleging that the judge is acting for ulterior purposes.

19.7 Thirdly, it may be contempt of court to fail to comply with an order made by a court, or an undertaking given to a court. A failure to comply with court orders or undertakings differs from the other types of contempt because traditionally this has

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1 In Ch 5, the ALRC proposes that the *Royal Commissions Act 1902* (Cth) should be renamed the *Inquiries Act* and amended to enable the establishment of Royal Commissions and Official Inquiries: Proposal 5–1.

2 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987).

3 While the Australian Government prepared a position paper on the final recommendations and four jurisdictions initially agreed to work together for the purpose of agreeing on uniform contempt legislation, there appears to have been no further progress on the issue.

4 See A Arlidge and D Eady, *The Law of Contempt* (1982), Ch 1.

5 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [22].

6 *Ibid.*, [23]–[26].

been considered a ‘civil’ rather than a ‘criminal’ contempt. This distinction is increasingly becoming less important. Unless indicated otherwise, the following discussion refers to both civil and criminal contempt.

19.8 Much of the conduct that constitutes contempt may also constitute a separate criminal offence. For example, bribery of witnesses and destruction of evidence constitute offences under Part III of the *Crimes Act 1914* (Cth).<sup>7</sup> As discussed in Chapter 18, the *Royal Commissions Act* includes a number of criminal offences that cover similar conduct in relation to Royal Commissions, such as failing to comply with notices to attend or produce evidence. The Act also contains a number of provisions prohibiting interference with evidence or witnesses.<sup>8</sup>

### Procedure

19.9 The procedure by which contempt is punished is its most unusual feature. An ordinary criminal offence is dealt with in one of two ways: either by trial on indictment before a judge and, usually, a jury; or a summary trial by a magistrate or magistrates. The latter is described as summary because it is faster and more informal than the procedure on indictment.<sup>9</sup>

19.10 Contempt also is punished by a procedure referred to as ‘summary’, because the procedure is speedy and informal. The contempt procedure differs from other summary proceedings, however, principally because cases of alleged contempt are dealt with by a judge or judges sitting without a jury. The contempt procedure does not involve any preliminary proceedings—such as committal proceedings before a magistrate—which usually precede a trial on indictment.<sup>10</sup>

19.11 The evidence used in the contempt procedure is different from that used in an ordinary criminal trial. In cases of ‘contempt in the face of the court’, what the judge saw or heard is the primary source of ‘evidence’. In other contempt proceedings, the evidence is presented in the form of affidavits (written statements of evidence which are sworn or affirmed), and the persons so swearing or affirming may be cross-examined.

### Sentencing powers

19.12 A criminal contempt may be punished by a fixed term of imprisonment, a fine or an order to give security for good behaviour. Although the sentence must be for a fixed term of imprisonment, there is no upper limit on the term that may be stipulated. This is in contrast to ordinary criminal offences in which a maximum penalty generally is set out in the statute.<sup>11</sup>

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7 *Crimes Act 1914* (Cth) ss 37, 39.

8 *Royal Commissions Act 1902* (Cth) ss 3, 6H–6N.

9 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [28].

10 *Ibid.*

11 *Ibid.*, [37].

19.13 Civil contempt may be punished by: a sentence of imprisonment with no fixed limit, but which is specified to last until the person obeys the order or undertaking or indicates a willingness to do so; or a fine that increases during the period of disobedience. A fixed term prison sentence or a fine may be imposed in respect of past disobedience.<sup>12</sup>

### **Application of contempt to public inquiries**

19.14 In the following section, the ALRC considers whether the proposed *Inquiries Act* should contain a provision that prohibits conduct amounting to contempt of Royal Commissions and Official Inquiries and, if so, what form such a provision should take. The types of conduct that may be covered by such a provision are considered later in this chapter.

#### **Section 6O of the *Royal Commissions Act 1902* (Cth)**

19.15 Section 6O of the *Royal Commissions Act* is unusual in that, while it is expressed in the form of an ordinary criminal offence, it draws on both the content and the procedure of the law of contempt of court. Section 6O(1) provides that:

Any person who intentionally insults or disturbs a Royal Commission, or interrupts the proceedings of a Royal Commission, or uses any insulting language towards a Royal Commission, or by writing or speech uses words false and defamatory of a Royal Commission, or is in any matter guilty of any intentional contempt of a Royal Commission, shall be guilty of an offence.<sup>13</sup>

19.16 This prohibits a range of conduct that, if done in court, would constitute contempt in the face of court, and scandalising the court. Further, as it prohibits ‘any intentional contempt’ of a Royal Commission, the scope of the offence partly depends on the scope of the law of contempt of court.

19.17 Section 6O(2) provides that, if the President or Chair of a Royal Commission, or a sole Royal Commissioner, is a judge:

he or she shall, in relation to any offence against subsection (1) of this section committed in the face of the Commission, have all the powers of a Justice of the High Court sitting in open Court in relation to contempt committed in face of the Court, except that any punishment inflicted shall not exceed the punishment provided by subsection (1) of this section.

19.18 This paragraph seeks to confer on certain Royal Commissioners the power to punish a person for contempt in the same manner as a judge of the High Court, but only in relation to contempts in the face of the Royal Commission—namely,

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12 Ibid, [38].

13 Section 6O(1) also provides for a penalty of \$200, or imprisonment for three months. The ALRC discusses penalties in Ch 20.

intentional insults and disturbances of a Royal Commission, or interruptions of a Royal Commission.<sup>14</sup>

### Other ways to sanction conduct

19.19 There are several ways of sanctioning the kind of conduct currently sanctioned by s 60 of the *Royal Commissions Act*. First, the conduct could continue to be sanctioned as contempt. Secondly, it could be sanctioned solely through the enactment of statutory offences. A third option is for the proposed *Inquiries Act* to include both statutory offences and a power to apply to a court to punish conduct as contempt of court.

19.20 In many Australian states and territories, the legislation governing Royal Commissions allows for punishment for contempt of Royal Commissions.<sup>15</sup> For example, in New South Wales (NSW), disobedience of any order or summons issued by a Royal Commissioner, as well as acts that would constitute contempt of court if done in a court, constitute a contempt of a Royal Commission.<sup>16</sup> This is punished by the Royal Commission certifying the matter to the Supreme Court, which hears the matter and punishes the person in the same way as if that contempt had been committed in the court.<sup>17</sup> Conduct that may constitute a contempt of a commission also may constitute one of the specific offences set out in the *Royal Commissions Act 1923* (NSW).<sup>18</sup>

### Contempt sanctions

19.21 The appropriateness of contempt powers for inquiries was considered by the ALRC in *Contempt*,<sup>19</sup> and more recently by the New Zealand Law Commission (NZLC) and the Law Reform Commission of Ireland (LRCI) in their reports on inquiries.<sup>20</sup> In *Contempt*, the ALRC recommended that s 60 of the *Royal Commissions Act* should be repealed and replaced by a statutory offence.<sup>21</sup> As noted in the reports of the NZLC and LRCI, there are a number of disadvantages in sanctioning contempt in the context of Royal Commissions and other public inquiries.

14 The High Court has the power to try and punish all forms of contempt in relation to the High Court, and any inferior court (such as a District Court or County Court) over which it has a 'supervisory jurisdiction': see *Judiciary Act 1903* (Cth) s 24.

15 *Royal Commissions Act 1923* (NSW) ss 18A, 18B (this is limited to Royal Commissions chaired or constituted by judicial officers or legal practitioners of at least seven years standing); *Commissions of Inquiry Act 1950* (Qld) ss 9, 10; *Royal Commissions Act 1968* (WA) ss 13, 14; *Royal Commissions Act 1991* (ACT) ss 27, 31.

16 *Royal Commissions Act 1923* (NSW) s 18A.

17 *Ibid* s 18B.

18 *Ibid* ss 19–23A.

19 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Ch 15.

20 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [8.24]; Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), 107–115, 118.

21 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [757].

### ***The contempt procedure***

19.22 There are disadvantages to using the unusual procedure for punishing contempt of court. As the ALRC noted in *Contempt*, the contempt powers enable a judge to act as complainant, prosecutor, witness and judge.<sup>22</sup> This is in tension with three fundamental principles of criminal law: that a judge should be free from bias; there should be a presumption of innocence; and there should be a power to confront a witness. Further, as it is difficult to define the limits of the conduct that may constitute contempt of court, contempt also conflicts with the principle that criminal offences should be defined with sufficient precision to enable all citizens to understand what types of conduct will incur criminal liability.<sup>23</sup>

### ***Contempt in the context of public inquiries***

19.23 It may be inappropriate to apply the concept of contempt to non-judicial bodies such as Royal Commissions and other public inquiries. Contempt is based on the concept of an interference with the administration of justice. This is not readily applicable to Royal Commissions and other public inquiries, which are inquisitorial in nature and established by the executive arm of government in a political context.<sup>24</sup>

19.24 As Dean J observed in the Supreme Court of Victoria:

The problem is, how to apply to a Royal Commission which is not concerned in the administration of justice at all, doctrines designed solely to prevent interference with the administration of justice. ... The very touchstone whereby the question of contempt or no contempt is to be judged has been withdrawn ... Difficulties will arise in forcing the old doctrines to new uses ...<sup>25</sup>

### ***Punishing for contempt***

19.25 A further difficulty arises in the context of the *Royal Commissions Act*. Section 6O(2) of that Act purports to put certain Royal Commissioners in the same position as that of a judge in determining some forms of contempt, subject to the imposition of a maximum statutory penalty. There is a strong argument that this subsection is unconstitutional because it is inconsistent with the separation of powers in the *Australian Constitution*.<sup>26</sup> The issue has been succinctly stated by Professor Enid Campbell:

A jurisdiction to try and punish offences created by federal law clearly involves an exercise of the judicial power of the Commonwealth, and under the Constitution this power is exercisable only by the courts listed in s 71.<sup>27</sup>

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22 Ibid, [92]–[93].

23 Ibid, [92]–[93].

24 *R v Arrowsmith* [1950] VLR 78, 85–86. See also Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [755].

25 *R v Arrowsmith* [1950] VLR 78, 85–86.

26 This was noted by Commissioner Cole as one of the reasons for the ineffectiveness of s 6O: T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 45.

27 E Campbell, *Contempt of Royal Commissions* (1984), 47.

19.26 Section 71 of the *Australian Constitution* provides that the judicial power of the Commonwealth shall be vested in various courts. As noted by the High Court in *Attorney-General for Australia v The Queen*,<sup>28</sup> the power to punish contempt can only be conferred on a ‘court’ within the meaning of s 71.

19.27 The power of a Royal Commissioner to punish for contempt also may violate art 14 of the *International Covenant on Civil and Political Rights* (ICCPR), which provides, in part, that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

19.28 If, as s 60(2) provides, a Royal Commissioner determines the guilt of a person charged with contempt, it can be argued that the offender has not received a fair hearing by an ‘independent and impartial tribunal’ as required by art 14 of the ICCPR.<sup>29</sup>

19.29 In any event, it seems highly undesirable to confer a power to imprison a person on someone who, while a judge in one capacity, is not acting in that capacity. It is notable that, although the constitutional issue does not arise in relation to Australian states or territories,<sup>30</sup> only the South Australian and Queensland inquiries legislation confers upon Royal Commissioners a power to punish similar conduct.<sup>31</sup> In Queensland, a chair of a Royal Commission who is not a judge of the Supreme Court may only impose a maximum penalty of \$200, and is not empowered to imprison the person.<sup>32</sup> Other Australian states and territories require a Royal Commission to refer the matter to the relevant Supreme Court, which examines the evidence and exercises its inherent powers to punish for contempt of court.<sup>33</sup>

19.30 In *Contempt*, the ALRC also noted practical difficulties with the power of a Royal Commissioner to punish contempt in the face of the Commission. In particular, the sentence of imprisonment imposed could expire after the Royal Commission had concluded. It is clearly preferable for the body which convicted the offender to be in existence and approachable during the term of a sentence.<sup>34</sup>

28 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 534.

29 See S Odgers, *Contempt in Relation to Commissions and Tribunals—Research Paper No 1* (1986) Australian Law Reform Commission, 48; E Campbell, *Contempt of Royal Commissions* (1984), 63.

30 Only the *Australian Constitution* exclusively vests judicial power in the courts, so there is no equivalent constitutional doctrine of separation of powers in Australian states. As to the position of territory courts, see L Zines, *Cowen and Zines’s Federal Jurisdiction in Australia* (3rd ed, 2002), 172–174.

31 *Royal Commissions Act 1917* (SA) s 11(1).

32 *Commissions of Inquiry Act 1950* (Qld) s 10(2).

33 See, eg, *Royal Commissions Act 1923* (NSW) s 18B.

34 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [789].

### Statutory offences

19.31 Notwithstanding the above, there may be some value in retaining a statutory procedure, such as that set out in s 6O, in the proposed *Inquiries Act*. The summary procedure used by courts to punish contempt of court has two major advantages over ordinary criminal procedure.

19.32 First, the conduct can be sanctioned much more rapidly, which arguably makes it a more effective deterrent. In practice, an ordinary federal criminal offence—such as an offence in the *Royal Commissions Act*—is prosecuted if the Commonwealth Director of Public Prosecutions decides it is in the public interest to prosecute the offence.<sup>35</sup> This process can lead to significant delays. For example, in the Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (1984), the prosecution of union members who refused to comply with orders of the Royal Commission took, on average, eight months.<sup>36</sup> In contrast, a person aggrieved by the failure of another person to comply with orders may instigate contempt proceedings in a court. Such proceedings usually proceed more rapidly than criminal proceedings.

19.33 The effectiveness of the contempt procedure to punish for non-compliance has been considered recently in the context of the Australian Crime Commission (ACC). Like the *Royal Commissions Act*, the *Australian Crime Commission Act 2002* (Cth) includes offences for refusing to attend, produce evidence, or answer questions. These offences are prosecuted in accordance with standard criminal procedure.

19.34 In 2001, the Australian Government proposed to empower the forerunner to the ACC, the National Crime Authority, to apply to the Supreme Court of a state or territory for the court to deal with specified conduct as if it were contempt of court.<sup>37</sup> The proposal, however, was defeated in the Senate.

19.35 In 2007, Mark Trowell QC conducted an independent review into the effectiveness of the *Australian Crime Commission Act* (Trowell Inquiry). The report of that inquiry (Trowell Report), recommended that the ACC should be empowered to apply to a court to deal with conduct as if it were contempt of court.<sup>38</sup> The Trowell Report concluded that such a power was desirable because:

The existing process is just too slow. It fails to give sufficient weight to the need, when circumstances require, of an immediate or at least proximate response to a refusal to submit to the legislative requirements of an ACC examination. Given the ACC uses the examination process as an investigative tool, it makes no tactical sense to deprive an examiner of the power to respond quickly and effectively in

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35 See Commonwealth Director of Prosecutions, *Prosecution Policy of the Commonwealth* (2008).

36 F Costigan, *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984), [1.004].

37 National Crime Authority Legislation Amendment Bill 2000 (Cth) pt 15.

38 M Trowell, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*, (2007).

circumstances where it is obviously necessary to do so. The inability to respond immediately devalues the inquisitorial capacity of the ACC to effectively deal with organised or serious crime.<sup>39</sup>

19.36 The Trowell Report noted that stakeholders generally supported the ACC having the power to apply for a court to deal with acts of contempt.<sup>40</sup> At the end of 2008, the Parliamentary Joint Committee on the ACC agreed with this aspect of the Trowell Report. The Committee recommended that the *Australian Crime Commission Act* be amended to include a statutory definition of contempt and a power of referral to a court.<sup>41</sup>

19.37 Secondly, as the procedure for punishing contempt allows a judge to sentence a person to imprisonment until they agree to comply with the order of the court, it may be more effective than a criminal prosecution in coercing compliance. For example, in *Wood v Galea*,<sup>42</sup> the court considered a court order for contempt was ‘necessary in order to prevent a witness avoiding his obligation to answer merely by paying the fine’.<sup>43</sup>

### Court enforcement orders

19.38 An alternative approach is to empower a Royal Commission or Official Inquiry to apply to a court for enforcement of its notices or directions. The Australian Securities and Investments Commission (ASIC), for example, has a power to apply to the Federal Court for the enforcement of its orders. Section 70 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) provides:

- (1) This section applies where ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Part (other than Division 8).
- (2) ASIC may by writing certify the failure to the Court.
- (3) If ASIC does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

19.39 ASIC submitted to the Trowell Inquiry that it frequently considered the use of this power since it generally aims to secure compliance rather than impose punishment.<sup>44</sup> The effect of the provision is that, if the court orders the person to comply with the requirement, a failure to obey may be punished as contempt of court.

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39 Ibid, [158].

40 Ibid, [132].

41 Parliament of Australia—Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007* (2008), Rec 6.

42 *Wood v Galea* (1995) 79 A Crim R 567.

43 Ibid, 573.

44 M Trowell, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*, (2007), [132].

19.40 The provision in the ASIC Act is similar to inquiries legislation in other jurisdictions. The LRCI, in its 2005 *Report on Public Inquiries Including Tribunals of Inquiry*, recommended that the dual approach in Irish legislation should be retained. While specified conduct was prohibited in the form of criminal offences, this approach enables a tribunal of inquiry to apply to the High Court for an order enforcing an order of the tribunal which has not been complied with.<sup>45</sup> The NZLC, noting the Irish provision, recommended that new New Zealand inquiries legislation should include a similar provision enabling the Solicitor-General to initiate proceedings in the High Court.<sup>46</sup>

19.41 Similarly, the *Inquiries Act 2005* (UK) provides for specific criminal contempt offences, and enforcement by a court:

- (1) Where a person —
  - (a) fails to comply with, or acts in breach of, a notice under section 19 [restricting public access] or 21 [requiring production of evidence] or an order made by an inquiry, or
  - (b) threatens to do so,
 the chairman of the inquiry, or after the end of the inquiry the Minister, may certify the matter to the appropriate court.
- (2) The court, after hearing any evidence or representations on a matter certified to it under subsection (1), may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the court.<sup>47</sup>

19.42 The Australian Government Attorney-General's Department *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (Guide to Framing Commonwealth Offences)* advises that it may be appropriate to include a mechanism for enforcement of contempt by a court if there 'is a strong incentive to withhold information because releasing information may expose a person to a large penalty for their substantive misconduct'.<sup>48</sup> Such a mechanism may be more easily justified if:

- the enforcing agency serves a critical regulatory or enforcement function which will be frustrated if a strong incentive to withhold information persists;
- access to information via a notice is likely to be critical to successful prosecution of substantive misconduct;

45 See Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005); Tribunals of Inquiry Bill 2005 (Ireland) cl 31, 52.

46 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 39. This recommendation has been incorporated into Inquiries Bill 2008 (NZ), cl 32. This provision does, however, use the language of 'contempt of an inquiry', unlike the Irish and UK versions.

47 *Inquiries Act 2005* (UK) s 36.

48 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 99.

- defendants typically have significant financial resources at their disposal, and
- the public interest requires that persons be prevented from frustrating criminal investigations by withholding information to defeat the interests of justice.<sup>49</sup>

19.43 The procedure of applying to a court to enforce an order for compliance differs, in a subtle but important way, from the procedure used in some state and territory legislation of applying to a court to punish conduct as a contempt of court. The approach of applying for enforcement avoids using the concept of contempt in the context of Royal Commissions and other public inquiries. Rather, the scope of the conduct that may be referred to the court is limited to a failure to comply with notices or directions of the tribunal or inquiry.

19.44 In contrast, some state and territory legislation typically includes conduct other than non-compliance with orders, and may rely on the scope of contempt of court itself to define the conduct that may be referred to a court. Further, while some state or territory legislation deems the conduct contempt of the Royal Commission itself, in the application for enforcement of an order, the contempt lies in the failure to obey the order of the court.

## Other issues

### *Evidentiary certificates*

19.45 In *Contempt*, the ALRC considered whether Royal Commissions should have the power to certify facts to a court and, if so, what evidentiary status such a certificate should have.<sup>50</sup> While a clear majority of stakeholders thought a person presiding at a tribunal should be required to furnish to a court a certificate or affidavit setting out the tribunal's understanding of the relevant facts, they were divided as to whether such a certificate should be treated as prima facie correct unless positively rebutted. The ALRC decided not to recommend the use of such a certificate, since it had not recommended such a provision in relation to courts.<sup>51</sup>

19.46 The provision in the ASIC Act that empowers ASIC to apply for enforcement of orders does not provide that a certificate by ASIC is proof of the facts within it. Dr Stephen Donaghue has suggested that ASIC's power was not 'designed to ensure rapid compliance with these orders ... since the court must inquire into the case itself

49 Ibid, 99.

50 Provisions providing that certificates of inquiries are evidence of the facts, unless rebutted, exist in *Royal Commissions Act 1923* (NSW) s 18B(4); *Royal Commissions Act 1968* (WA) s 15B(4); although not in *Commissions of Inquiry Act 1950* (Qld) s 10; *Commissions of Inquiry Act 1995* (Tas) s 31. See the discussion in analogous circumstances in M Trowell, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*, (2007), [165]–[168].

51 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [792].

before ordering compliance'.<sup>52</sup> He observed that, in the interests of efficiency, it would be desirable for a certification procedure to be introduced, but noted that the section prevented ASIC 'from being judge of its own cause and restricts the power to impose potentially draconian coercive sanctions to judges'.<sup>53</sup> Donaghue concluded that 'the costs in terms of efficiency may therefore be outweighed by the benefits of a fair contempt procedure'.<sup>54</sup>

19.47 In relation to evidentiary certificates, the *Guide to Framing Commonwealth Offences* states that:

Evidentiary certificate provisions are only suitable where they relate to formal or technical matters that are not likely to be in dispute but that would be difficult to prove under the normal evidential rules, and should be subject to appropriate safeguards.<sup>55</sup>

### **Venue**

19.48 Another issue is which court or courts should exercise the power to punish contempt, on an application from an inquiry. The Trowell Report recommended that the Federal Court should have jurisdiction to hear such an application, in addition to the Supreme Courts of the Australian states and territories.<sup>56</sup> It noted that several provisions in the *Australian Crime Commission Act* already provided for applications to a judge of the Federal Court, and that federal criminal law had developed significantly in recent years.<sup>57</sup>

### **Double jeopardy**

19.49 The Trowell Report also recommended that the *Australian Crime Commission Act* should provide that a person should not be liable to be prosecuted both for contempt and an offence under the Act.<sup>58</sup> Equivalent provisions are also provided in state and territory inquiries legislation, which enable the same act or omission to constitute either contempt or an offence.<sup>59</sup>

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

53 Ibid.

54 Ibid.

55 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 32.

56 M Trowell, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*, (2007), [169]–[171]. When a similar power was introduced in a bill in 2000, it conferred power only on the Supreme Courts of the states and territories: National Crime Authority Legislation Amendment Bill 2000 (Cth) cl 67.

57 M Trowell, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*, (2007), [170]–[171].

58 Ibid., [190]–[191]. While a person cannot be punished twice for the same conduct or omission where it is an offence under two or more laws, the term 'offence' indicates that it may not apply to contempt: *Crimes Act 1914* (Cth) s 4C.

59 *Royal Commissions Act 1923* (NSW) s 18D; *Royal Commissions Act 1968* (WA) s 15E. The inquiries legislation of other jurisdictions which enable punishment for contempt do not enable the same act or omission to constitute both contempt and an offence: see *Royal Commissions Act 1991* (ACT) s 46; *Commissions of Inquiry Act 1950* (Qld) ss 9, 10; *Commissions of Inquiry Act 1995* (Tas) ss 27–31.

19.50 The *Guide to Framing Commonwealth Offences* advises that

it is important to ensure that if a person is dealt with by way of a contempt order, then that person is not also liable to be prosecuted for a non-compliance offence for the same conduct, and vice versa.<sup>60</sup>

19.51 The *Guide to Framing Commonwealth Offences* also notes that s 4C of the *Crimes Act*, which protects against double punishment in relation to two or more offences, does not apply to contempt proceedings, because they are not included in that section.<sup>61</sup>

### Submissions and consultations

19.52 In its Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether a person should be subject to proceedings for contempt of a Royal Commission or other public inquiry, and if so, what the appropriate procedures should be.<sup>62</sup> The ALRC indicated that, while it was interested in stakeholder views, it remained inclined to the view that, at a minimum, s 6O(2) should be amended to provide that sanctions for contempt should be imposed by a competent court, rather than by a Royal Commission.<sup>63</sup>

19.53 Several of the stakeholders who addressed this issue in consultations and submissions expressed concerns about applying the concept of contempt to executive bodies.<sup>64</sup> For example, one stakeholder submitted:

I much favour the ALRC view on contempt. The term ‘contempt’ whilst highly appropriate to a court proceeding does not sit well with the term ‘inquiry’.<sup>65</sup>

19.54 Other stakeholders who considered a contempt power to be undesirable noted the need for precision in criminal offences, and expressed concern about the unusual features of the contempt procedure. The Law Council of Australia (Law Council) stated that

the powers invested in Royal Commissioners under subsection 6O(2) create the perception of a ‘star chamber’, as they empower a commissioner to act at once as informant, prosecutor and judge.<sup>66</sup>

60 Australian Government Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 100.

61 Ibid.

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

63 Ibid, [9.107].

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

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

66 Law Council of Australia, *Submission RC 9*, 19 May 2009, citing A Brown, ‘The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge’ (1992) 21 *Federal Law Review* 48, 55.

19.55 It also was noted in consultations that, where there was non-compliance with the summonses or notices of Royal Commissions, the existing criminal sanctions were largely ineffective. This was partly due to the inadequacy of the penalties, but also because of issues of timeliness in commencing proceedings.<sup>67</sup>

19.56 In relation to s 6O(2)—which confers on suitably qualified Royal Commissioners the power to punish contempt—most stakeholders were of the view that this provision was unconstitutional and highly undesirable.<sup>68</sup>

### **ALRC's view**

#### ***Contempt sanctions***

19.57 In the ALRC's view, the concept of contempt should not be applied to bodies established by the executive arm of government. The law of contempt was developed to protect the administration of justice, and is not directly applicable to public inquiries. Applying the concept of contempt to Royal Commissions and other public inquiries confuses the role and functions of the judiciary with the role and functions of public inquiries.<sup>69</sup>

19.58 There are several undesirable features of contempt procedures, in particular, the judge's power to act as complainant, prosecutor and arbitrator. Section 6O(2) of the *Royal Commissions Act* introduces these features into the Royal Commission context. The ALRC remains of the view that s 6O(2) may be unconstitutional and, in any event, is undesirable from a policy perspective. It does not propose, therefore, that a similar provision be included in the proposed *Inquiries Act*.

19.59 This does not mean, of course, that inquiries do not need powers to protect the integrity of their proceedings and ensure compliance with their notices and directions. The prosecution of the offence of non-compliance may not assist an inquiry because the process of criminal prosecution takes too long. Prosecution also may be an ineffective deterrent in some cases because, if an inquiry has concluded, it may no longer be in the public interest to prosecute.

#### ***Dual approach***

19.60 An attractive model for enforcement of orders is the dual model contained in the United Kingdom and Irish inquiries legislation, and in the ASIC Act. This model allows behaviour to be prosecuted as a criminal offence, or upon application by an inquiry, by a court exercising its power to enforce its own orders. The ALRC sees advantages in empowering a Royal Commission to apply to a court for enforcement of its notices and directions. This would apply in addition to criminal offences of refusing

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67 Penalties are discussed in Ch 20.

68 See, eg, Law Council of Australia, *Submission RC 9*, 19 May 2009.

69 The roles and functions of public inquiries are discussed in detail in Ch 2.

to comply with such notices or requirements.<sup>70</sup> In the ALRC's view, the policy justification for this approach—namely, the need for a more timely sanction for non-compliance—applies equally to Official Inquiries.

19.61 The ALRC's proposal to allow a court to enforce orders made by Royal Commissions and Official Inquiries is consistent with the *Guide to Framing Commonwealth Offences*. In many public inquiries, there may be a strong incentive to withhold information—for example, where it may expose serious misconduct or criminal behaviour, or expose the person to subsequent legal proceedings. It is inconsistent with the public interest in holding an inquiry if a person can frustrate the purposes of that inquiry by withholding information.

19.62 The procedure proposed by the ALRC, however, should be limited to ensuring compliance with notices or directions. In the ALRC's view, it would not be useful for a court to enforce orders in relation to disruptions and interruptions to a hearing, or the use of insulting language. If done in a court, this conduct could be dealt with promptly by the court itself. On the other hand, a Royal Commission or Official Inquiry would have to refer the matter to a court. As such, there would be no real advantage in terms of speed.

19.63 The ALRC proposes that a provision similar to s 36 of the *Inquiries Act 2005* (UK) be included in the *Inquiries Act* proposed in this Discussion Paper. Such a provision would enable a Royal Commission or Official Inquiry to apply to a court for enforcement of its notices to attend or produce evidence, or to enforce a requirement to answer a question. The ALRC does not propose that s 36 of the *Inquiries Act* (UK) be replicated in full, however—in particular, it does not seem necessary to enable the certification of a matter after a Royal Commission or Official Inquiry has concluded.

#### ***Other issues***

19.64 In line with the procedure in the ASIC Act, the ALRC proposes that Royal Commissions and Official Inquiries should be able to apply to the Federal Court for enforcement of their notices or directions.

19.65 In the ALRC's view, members of Royal Commissions and Official Inquiries should be able to initiate such an application by certifying the relevant facts. This is a convenient method of providing evidence in such an application, and it avoids the need for inquiry members to give evidence orally in court. This certificate, however, should not be prima facie evidence of the facts. Rather, the power to determine the facts should be exercised independently of the Royal Commission or Official Inquiry. In determining the facts, the Federal Court will give such certificates due weight in their consideration.

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70 In Ch 18, the ALRC proposes that the *Inquiries Act* should provide, with respect to Royal Commissions and Official Inquiries, that a person commits an offence if the person, without reasonable excuse, refuses or fails to comply with a certain notice or requirement: Proposal 18-1.

19.66 As noted above, the ALRC proposes in Chapter 18 that it should be a criminal offence to refuse or fail to comply with a notice to attend or produce evidence before a Royal Commission or Official Inquiry, or a requirement to answer a question asked in a Royal Commission or Official Inquiry. The proposed *Inquiries Act*, therefore, should provide that a person is not liable to be punished twice for the same act or omission, if the act or omission would constitute both an offence under the proposed Act and, if enforced by the Federal Court, contempt of court. This is an important procedural safeguard to ensure that a person is not liable to be prosecuted twice for the same conduct.

**Proposal 19–1** The proposed *Inquiries Act* should provide that, where a person fails to comply with a notice or a direction of a Royal Commission or Official Inquiry, or threatens to do so, the chair of the inquiry may refer the matter to the Federal Court of Australia. The Court, after hearing any evidence or representations on the matter certified to it, may enforce such a notice or direction as if the matter had arisen in proceedings before the Court.

**Proposal 19–2** The proposed *Inquiries Act* should provide that a person is not liable to be punished twice for the same act or omission, if the act or omission would constitute both an offence under the proposed Act and, if enforced by the Federal Court of Australia, contempt of court.

## **The prohibited conduct**

19.67 In the previous section, the ALRC proposed that, if there was a failure to comply, or threat to fail to comply, with a notice or direction of a Royal Commission or Official Inquiry, the inquiry should have the power to apply to the Federal Court to enforce that notice or direction. A second question arises as to whether any of the conduct currently punishable under s 60 of the *Royal Commissions Act* should continue to be punished by way of a criminal offence.

### **Contempt in the face of a Royal Commission**

19.68 Section 60 prohibits a person from intentionally disturbing, or interrupting, a Royal Commission. These forms of conduct would, if done in court, constitute ‘contempt in the face of the court’.

19.69 The provision can be justified on the basis that Royal Commissions, like courts, need to protect against the disruption of their proceedings. Although the proceedings of a Royal Commission tend to be less formal, the political controversy that can

accompany Royal Commissions often makes it more likely that their proceedings will be disrupted.<sup>71</sup>

19.70 The ALRC recommended in *Contempt* that it should be an offence to cause substantial disruption of a hearing of a tribunal or commission, if the disruption was intended or recklessly caused.<sup>72</sup> It further recommended that this should extend to behaviour outside the premises which disrupted the hearing.<sup>73</sup>

19.71 The ALRC also recommended that Royal Commissioners should have the power to expel people from a hearing if the Commissioners believed, on reasonable grounds, that the person would otherwise disrupt the proceedings.<sup>74</sup> The power should be exercised only after an inquiry member had warned the person and adjourned the proceeding, and the expulsion should last only as long as necessary to ensure the inquiry could proceed without disruption.<sup>75</sup>

19.72 The ALRC's recommendations are consistent with the subsequent recommendation in the *Final Report of the Royal Commission into the Building and Construction Industry*. In that inquiry, Commissioner Cole recommended that Royal Commissioners should be empowered to expel persons, and that officers be protected from the legal consequences of using any reasonable force necessary to give effect to such a direction.<sup>76</sup>

19.73 Section 15A of the *Royal Commissions Act 1968* (WA) provides an example of such a power:

- (2) A Commission may order that a person who under subsection (1) is in contempt of the Commission at an inquiry be excluded from the place where the inquiry is being conducted.
- (3) An officer of the Commission, acting under the Commission's order, may exclude the person from the place and may use necessary and reasonable help and force to do so.

### Insults and false and defamatory words

19.74 Section 60 prohibits a person from 'insulting' a Royal Commission, and using insulting language to, or false and defamatory words of, a Royal Commission.<sup>77</sup> There

71 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [759].

72 Ibid, Rec 114.

73 Ibid, [762]–[763].

74 Ibid, Rec 116.

75 Ibid, [768]. The ALRC also noted that, if the person was subject to findings by the Royal Commission, the person should be removed only if the hearing could fairly continue in their absence, and steps should be taken to keep that person aware of what was occurring in the hearing. The ALRC also suggested that an expulsion order should be able to be swiftly challenged in proceedings before the Federal Court or the Administrative Appeals Tribunal.

76 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), [91].

77 A Royal Commissioner could also sue for defamation in relation to the use of false and defamatory words.

are similar provisions in some of the older legislation governing public inquiries in Australian states and territories.<sup>78</sup>

19.75 The language of s 60 indicates a distinction between ‘insulting’ a Royal Commission, and using insulting language towards a Royal Commission. The former appears to refer to insults directed at members of a Royal Commission during a hearing, based on a form of contempt in the face of the court.<sup>79</sup> Using ‘insulting language towards a Royal Commission’, on the other hand, appears to refer to insults outside of a hearing, based on the form of contempt of court traditionally known as ‘scandalising the court’.<sup>80</sup> As they raise similar issues, however, they are discussed together in this section.

19.76 The rationale for the prohibition on ‘scandalising the court’ is that public faith in the administration of justice would be undermined if the respect and dignity of courts and their officers were not maintained.<sup>81</sup> This form of contempt, however, is controversial. It has been argued that public criticism of judges is part of a healthy democratic discussion and acts as a form of accountability,<sup>82</sup> and that prohibiting such criticism unduly restricts freedom of expression.<sup>83</sup> Further, critics have suggested that such a prohibition is largely ineffective, because one cannot coerce respect through the use of the criminal law. As Henry Burmester has suggested, the prohibition ‘resembles some antique weapon which will probably do more harm to those who use it than to those against whom it is used’.<sup>84</sup> These objections led the ALRC to recommend in *Contempt* that the common law liability in respect of this conduct in relation to courts should be abolished, and replaced with a limited statutory offence.<sup>85</sup>

19.77 Can this form of contempt be justified in relation to Royal Commissions and Official Inquiries? In *Contempt*, stakeholders were divided on this issue. Some submissions strongly urged that Royal Commissions should not be protected from public debate, given the political context in which they operate. On the other hand,

78 *Commissions of Inquiry Act 1950* (Qld) s 9(2)(d); *Royal Commissions Act 1968* (WA) s 15A(1); *Royal Commissions Act 1917* (SA) s 11.

79 See N Lowe and G Borrie (eds), *Borrie and Lowe’s Law of Contempt* (2nd ed, 1983), 14–16.

80 See *Ibid*, 226–242.

81 *Ibid*, 226.

82 See, eg, H Burmester, ‘Scandalizing the Judges’ (1985) 15 *Melbourne University Law Review* 313; C Walker, ‘Scandalising in the Eighties’ (1985) 101 *Law Quarterly Review* 359.

83 Freedom of expression is guaranteed under art 19 of the *International Covenant on Civil and Political Rights*, which Australia ratified on 13 August 1980. The High Court has also interpreted the *Australian Constitution* as including an implied freedom of political communication: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

84 H Burmester, ‘Scandalizing the Judges’ (1985) 15 *Melbourne University Law Review* 313, 338, citing *Attorney-General v Blomfield* (1913) 33 NZLR 545, 563.

85 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Recs 56, 57. The Western Australian Law Reform Commission recently made a similar recommendation in its review of contempt laws: Western Australian Law Reform Commission, *Report on Review of the Law of Contempt*, Project No 93 (2003), Rec 56.

other stakeholders submitted that some form of remedial action seemed justified when imputations were made against the integrity of a Royal Commissioner.<sup>86</sup>

19.78 As the ALRC noted in *Contempt*, the very different functions of a Royal Commissioner, and the inherently political nature of their appointment, make it unlikely that an attack on a particular Royal Commissioner would affect respect for Royal Commissions as a whole. The objects of Royal Commissions should not be divorced from their political contexts, and the establishment and membership of Royal Commissions are political decisions which should not be removed from public debate.<sup>87</sup> In *Contempt*, therefore, the ALRC recommended that this form of conduct should not be prohibited in relation to Royal Commissions.<sup>88</sup>

19.79 The prohibition on insults directed to a Royal Commission during a hearing rests on the rationale that a Royal Commission should have the power to control proceedings.<sup>89</sup> Nevertheless, insults directed to the Commission in a hearing raise similar issues concerning freedom of expression. For example, in one case based on this provision, a trade unionist was convicted of insulting a Royal Commission when he attacked the decision to establish a Royal Commission to inquire into the activities of a union as part of a political attack on unions and their members. The Federal Court, upholding his conviction, considered that such an attack amounted to an attack upon the Royal Commission itself.<sup>90</sup>

19.80 In *Contempt*, the ALRC concluded that there should be no offence in relation to insulting behaviour during proceedings of a Royal Commission.<sup>91</sup> The ALRC stated that:

The central concern in this context is the efficient and effective running of government. It is even more inappropriate to use the criminal law to try to induce respect for Commissions and tribunals than for the judicial system. If insults and disrespectful conduct during a hearing do not actually interfere with the operation of such bodies, the law should not step in to punish it.<sup>92</sup>

### Residual contempt

19.81 Section 6O also prohibits any other kind of ‘intentional contempt’. This part of the section makes it an offence to commit any other form of intentional contempt which is not otherwise set out in s 6O (that is, it is a residual contempt provision). For example, it may prohibit an intentional refusal to comply with notices to produce. The

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86 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [778].

87 *Ibid.* The ALRC also noted that judges feel that their position in the community inhibits them from answering their critics publicly or taking any legal action against them, but that this does not apply to Royal Commissioners as they have entered the public arena.

88 *Ibid.*, Rec 120.

89 N Lowe and G Borrie (eds), *Borrie and Lowe's Law of Contempt* (2nd ed, 1983), 6–7, 14–15.

90 *R v O'Dea* (1983) 10 A Crim R 240.

91 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [764].

92 *Ibid.*

reference to intention is somewhat unclear.<sup>93</sup> Inquiries legislation in four Australian states include similar provisions that equate the powers of contempt of a Royal Commission to that of a court.<sup>94</sup> The *Royal Commissions Act 1923* (NSW) however, restricts this power to Royal Commissions chaired or constituted by a superior court judge, where the letters patent specify these additional powers apply.<sup>95</sup>

19.82 The primary argument against a residual contempt provision is its breadth. Conduct may be punished even though it does not fall within a specifically prohibited activity.<sup>96</sup> Further, as discussed above, it ‘is difficult to “transplant” the technical notion of contempt from its judicial context to the executive context of Royal Commissions’.<sup>97</sup>

19.83 Another difficulty with a residual contempt provision is that it would seem that an act that would be prohibited by a specific offence under the *Royal Commissions Act* would appear to be punishable also as an intentional contempt under s 6O.<sup>98</sup> Finally, such a provision means those dealing with Royal Commissions, and Royal Commissioners without legal training, may not have a clear idea of what behaviour is unacceptable.<sup>99</sup>

19.84 For these reasons, the ALRC recommended in *Contempt* that there should be no such general provision. Rather, specific offences should be created.<sup>100</sup> This recommendation was in line with the ALRC’s approach to courts. Similarly, Campbell considered it preferable that the *Royal Commissions Act* ‘set out exhaustively the acts and omissions punishable under the Act’.<sup>101</sup> On the other hand, Dr Leonard Hallett thought such a residual clause was desirable because ‘it is not possible to envisage all the actions which might prejudice an inquiry’, and considered it would not be unduly unfair to defendants since it would be used rarely.<sup>102</sup>

93 In *Bell v Stewart* (1920) 28 CLR 419, 427, Isaacs and Rich JJ took the view that a similar phrase in the *Conciliation and Arbitration Act 1904* (Cth) required actual intention to prejudice the administration of justice. By analogy, such an intention may be necessary to breach s 6O of the *Royal Commissions Act 1902* (Cth).

94 *Royal Commissions Act 1923* (NSW) s 18A; *Commissions of Inquiry Act 1950* (Qld) s 9(2)(h); *Royal Commissions Act 1968* (WA) s 15A(1)(d); *Commissions of Inquiry Act 1995* (Tas) s 28(c).

95 *Royal Commissions Act 1923* (NSW) s 18A. Section 6O(2) of the *Royal Commissions Act* also restricts this power to Royal Commissions chaired or constituted by a superior court judge, but this power need not be specifically conferred in the letters patent establishing the Royal Commission.

96 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [755].

97 *Ibid.*

98 *Ibid.*; E Campbell, *Contempt of Royal Commissions* (1984), 30–31.

99 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [755].

100 *Ibid.*, Rec 113.

101 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [15.8].

102 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 257.

### Submissions and consultations

19.85 In general, the proposition that interruptions and disruptions to Royal Commissions and other inquiries should be sanctioned was strongly supported by stakeholders who addressed this issue.<sup>103</sup>

19.86 There was also support from stakeholders for the earlier recommendation by the ALRC that Royal Commissions and, by analogy, Official Inquiries, should have the power to expel persons from a hearing room. For example, the Law Council, after referring to the ALRC's earlier recommendation in *Contempt*, stated that it

share[d] the ALRC's view that a wide-ranging contempt power such as that contained in section 6O of the [*Royal Commissions Act*] may not be necessary provided there are alternative means of preventing interference with the conduct of the inquiry.<sup>104</sup>

19.87 Very few stakeholders addressed the issue of whether the other forms of conduct prohibited by s 6O should continue to be prohibited. The Law Council, in its submission, expressed concern that the prohibition on false and defamatory words was unduly restrictive of freedom of speech, and noted that the ALRC had recommended the removal of similar provisions in relation to sedition.<sup>105</sup> It also submitted that the residual provision was unnecessary, given that conduct amounting to intentional contempt—such as failing to attend a hearing when required by a summons—amounted to a specific offence under the *Royal Commissions Act*.<sup>106</sup>

### ALRC's view

19.88 Royal Commissions and Official Inquiries require powers to deal with substantial disruption of their proceedings. The ALRC supports its earlier recommendations in *Contempt* that it is desirable to create an offence of causing substantial disruption, with an intention to cause, or reckless as to the likelihood of, substantial disruption. The same considerations apply equally to Official Inquiries. Although it is anticipated that Official Inquiries may be conducted in a more procedurally flexible manner than Royal Commissions, Official Inquiries may hold public hearings that would justify similar prohibitions and powers.

19.89 The ALRC's view is that Royal Commissions and Official Inquiries should be empowered to expel a person from the place in which it is conducting its inquiry. This power should apply if a person is disrupting an inquiry, and not merely where members of Royal Commissions and Official Inquiries believe a person might disrupt an inquiry. The power should allow an officer, or a person duly authorised by a Royal Commission or Official Inquiry, to use reasonable force and help as necessary in order

103 See, eg, Law Council of Australia, *Submission RC 9*, 19 May 2009; I Turnbull, *Submission RC 6*, 16 May 2009.

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

105 Australian Law Reform Commission, *Fighting Words: A Review of Seditious Laws in Australia*, ALRC 104 (2006).

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

to expel the person. This power will protect those responsible for expelling people from an inquiry from the legal consequences of using reasonable force.<sup>107</sup> The ALRC proposes, therefore, that a provision similar to s 15A(3) of the *Royal Commissions Act 1968* (WA), set out above, should be included in the proposed *Inquiries Act*.

19.90 A specific prohibition on the use of insults, insulting language, or false and defamatory words should not be included in the proposed *Inquiries Act*. Such a prohibition is likely to restrict freedom of expression in relation to matters that are properly the subject of political comment.

19.91 In the ALRC's view, a residual provision making it an offence to commit any other form of intentional contempt is unnecessary. Such a provision is not sufficiently clear for the purposes of imposing punishment, and overlaps with existing criminal offences.

**Proposal 19-3** The proposed *Inquiries Act* should provide that it is an offence to cause substantial disruption to the proceedings of a Royal Commission or Official Inquiry, with the intention to disrupt the proceedings, or recklessness as to whether the conduct would have that result.

**Proposal 19-4** The proposed *Inquiries Act* should provide that if a person is disrupting the proceedings of an inquiry, a member of a Royal Commission or Official Inquiry may exclude that person from those proceedings, and authorise a person to use necessary and reasonable force in excluding that person.

**Proposal 19-5** Section 60 of the *Royal Commissions Act 1902* (Cth) dealing with contempt of Royal Commissions should not be included in the proposed *Inquiries Act*.

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107 In the absence of such a power, a person could be liable for assault or battery.