

6. Establishment

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Introduction

6.1 In this chapter, the ALRC considers when it is appropriate to establish a Royal Commission or Official Inquiry, and whether there should be greater guidance on drafting the terms of reference for either type of inquiry. The ALRC also considers how both types of inquiry should be constituted, and whether there is scope for an expert advisor role within the proposed new statutory framework.

Factors for consideration before an inquiry is established

6.2 As noted in Chapter 3, there is very little guidance in the *Royal Commissions Act 1902* (Cth) as to when a Royal Commission should be established. The Act

provides that the Governor-General may establish a Royal Commission to consider ‘any matter specified in the Letters Patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth’.¹ Outside of the Act, there is little publicly available guidance on when it may be appropriate to establish a Royal Commission or other type of executive inquiry.

6.3 The Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984) (Costigan Royal Commission) suggested the introduction of a more principled approach to the decision to establish a Royal Commission.² It was noted in the report of that Royal Commission that not all ‘aberrant’ or unexplained conduct may warrant an executive inquiry. Instead, there should be a ‘complaint of substance’ or a ‘reasonable suspicion based on “articulable facts” of past, present or future criminal activities’.³ This view reflected the fact that inquiries can have a profound effect on those who are involved with them—indeed, even the act of calling a person to appear before an inquiry may have a permanent negative impact on the reputation of that person.⁴ The report also cautioned that, with the aim of trying to ascertain responsibility for illegal conduct, the attention of the executive may be ‘diverted’ from potential infringement of civil liberties.⁵

6.4 Another issue for the executive to consider before establishing an inquiry is whether it may adversely affect future legal proceedings. For example, an inquiry may cause delay in commencing legal proceedings, and evidence gathered by an inquiry may be afforded certain protections from subsequent use.⁶

6.5 In addition to considering whether an inquiry should be established at all, consideration may also be given to the type of inquiry most suited to a particular situation. This is particularly relevant because, in Chapter 5, the ALRC proposes the *Royal Commissions Act* should be amended to provide for the establishment of two tiers of inquiry (Royal Commissions and Official Inquiries). Inquiries also may be conducted outside of the proposed statutory structure, for example, by permanent bodies such as the Commonwealth Ombudsman. It also is anticipated that the executive may continue to appoint ad hoc public inquiries without statutory powers, for example, departmental inquiries. All these inquiries differ in nature and scope, and it may be beneficial for the executive to consider certain factors before deciding to establish a particular type of inquiry.

1 *Royal Commissions Act 1902* (Cth) s 1A. This provision operates ‘in respect of subjects of inquiry to which Commonwealth powers extend’: *Lockwood v Commonwealth* (1954) 90 CLR 177, 184.

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

3 *Ibid*, vol 2, 101.

4 *Ibid*, vol 2, 92–93, 98–100.

5 *Ibid*, vol 2, 102.

6 These issues are discussed in Chs 14 and 16.

6.6 Legislation in other jurisdictions provides some guidance about whether a Royal Commission or similar inquiry should be established. Legislation in Tasmania enables the Governor to establish a Royal Commission if he or she is satisfied that it is both in the public interest and expedient to do so.⁷ Legislation in the United Kingdom (UK) enables inquiries to be established into events that have caused, or may cause, ‘public concern’.⁸ Currently, legislation in New Zealand sets out a list of matters which may be the subject of a public inquiry, including ‘any matter of public importance’.⁹ If passed, the Inquiries Bill currently before the New Zealand Parliament would enable inquiries to be established to consider ‘any matter of public importance’.¹⁰

6.7 There has been little consideration of the types of factors that should be considered before establishing an inquiry. In the context of suggesting the establishment of a United States nonpartisan commission of inquiry into counter-terrorism policy after 11 September 2001, Frederick Schwartz at the Brennan Center for Justice at New York University considered three main principles:

- the likely consequences of not holding an inquiry;
- if an inquiry were held, the likelihood that its recommendations would assist the development of improved policies; and
- whether other mechanisms would be more appropriate (for example, criminal proceedings).¹¹

6.8 In Issues Paper 35, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether legislation establishing public inquiries should provide further guidance about the circumstances in which such inquiries should be established, and what those circumstances should be.¹²

Submissions and consultations

6.9 It was noted in consultations that often the decision to establish a Royal Commission is made quickly in the face of considerable public and media pressure. There may be forms of inquiry or investigation other than a Royal Commission that could—and perhaps should—be undertaken. Stakeholders suggested that more thought

7 *Commissions of Inquiry Act 1995* (Tas) s 4.

8 *Inquiries Act 2005* (UK) s 1.

9 *Commissions of Inquiry Act 1908* (NZ) s 2. New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec R7.

10 Inquiries Bill 2008 (NZ) cl 6(2), (3). This conforms to the view recently expressed by the New Zealand Law Commission that the other categories were redundant: New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec R7.

11 F Schwartz, *Getting to the Truth Through a Nonpartisan Commission of Inquiry—Written Testimony to United States Committee on the Judiciary*, 4 March 2009.

12 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [3.7]. See also Question 5–3.

needed to be given to whether a Royal Commission should be established and, if so, why.

6.10 The ALRC did not receive extensive feedback from submissions on this point. The Law Council of Australia (Law Council) noted the approach taken in the UK and submitted that legislation establishing public inquiries should include criteria to be considered before inquiries are established.¹³ Graham Millar submitted that, generally, if an inquiry does not require coercive powers, it ‘does not need to be a Royal Commission’.¹⁴

ALRC’s view

6.11 As noted in Chapter 2, Royal Commissions and other public inquiries have important functions, such as determining what happened in a particular situation and providing a forum for public catharsis. The ALRC is mindful, however, that persons may be negatively affected by any involvement with a Royal Commission or Official Inquiry. Further, inquiries—and particularly Royal Commissions—may be very costly exercises.

6.12 There should be some guidance, therefore, on when inquiries should be established. Such guidance is necessary particularly if the ALRC’s proposal for the introduction of a new form of statutory inquiry, the Official Inquiry, is accepted.

6.13 The ALRC is concerned that a statutory requirement to consider certain factors before establishing an inquiry might limit flexibility. The proposed *Inquiries Act*, however, should not be completely silent on when a Royal Commission or Official Inquiry may be established. Some guidance in legislation is necessary to ensure clarity and transparency. The ALRC sees value in including in the proposed *Inquiries Act* the following statutory requirements:

- a Royal Commission may be established to inquire into a matter of ‘substantial public importance’; and
- an Official Inquiry may be established to inquire into a matter of ‘public importance’.

6.14 The proposed requirements are phrased in sufficiently general terms to ensure flexibility. At the same time, they make clear that relevant members of the executive should give thought to the nature of the issue at hand when deciding which form of inquiry should be established, or whether an inquiry should be established at all. The different terms also distinguish between the two types of inquiry that may be

13 Law Council of Australia, *Submission RC 9*, 19 May 2009. See also I Turnbull, *Submission RC 6*, 16 May 2009.

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

established under the proposed *Inquiries Act*, and are a strong indication that Royal Commissions should be established only in exceptional circumstances.

6.15 In Chapter 5, the ALRC proposes that a mechanism for converting inquiries should be included in the proposed *Inquiries Act*. An inquiry that is to be converted from an Official Inquiry into a Royal Commission, or an inquiry established outside the statutory framework that is to be converted into an Official Inquiry or Royal Commission, also should meet the relevant test before it is converted.

6.16 There may be an argument that a stronger requirement should be included in the legislation with respect to the matters that the executive should consider before establishing an Official Inquiry. This is because Official Inquiries, as proposed by the ALRC, will have access to coercive powers, may affect the reputations of those involved, and may be more costly than, for example, a departmental inquiry.

6.17 The ALRC has reached the preliminary view, however, that the requirement that a matter be of ‘public importance’ is sufficient for the establishment of an Official Inquiry. It will require the executive to direct their attention to the nature of the issue and whether it is necessary to establish an inquiry. At the same time, the proposed term is sufficiently broad to encourage, where appropriate, the establishment of inquiries within the proposed new statutory framework. The proposed test for establishing an Official Inquiry is in line with a recent recommendation of the New Zealand Law Commission (NZLC) that inquiries legislation should provide that inquiries may be established into ‘any matter of public importance’.¹⁵

6.18 The ALRC is interested in hearing stakeholder views on whether the Australian Government should be required to consider certain matters before establishing a Royal Commission or Official Inquiry. For example, should the proposed *Inquiries Act* require the Australian Government to consider whether:

- a Royal Commission or Official Inquiry is the best way to achieve the Australian Government’s objectives, or whether it would be more appropriate to achieve these objectives another way, for example, through inquiry by an existing body or through civil or criminal proceedings;
- the recommendations of a Royal Commission or Official Inquiry would facilitate government policy making; and
- powers are required and, if so, which powers, having regard to the subject matter and scope of the inquiry?

¹⁵ New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 7. This test is included in the *Inquiries Bill 2008* (NZ) cl 6.

Proposal 6–1 The proposed *Inquiries Act* should provide that:

- (a) a Royal Commission may be established if it is intended to inquire into a matter of substantial public importance; and
- (b) an Official Inquiry may be established if it is intended to inquire into a matter of public importance.

Question 6–1 Should the proposed *Inquiries Act* include criteria that the Australian Government should consider before establishing a Royal Commission or Official Inquiry, for example, whether:

- (a) a Royal Commission or Official Inquiry is the best way to achieve the Australian Government’s objectives, or whether it would be more appropriate to achieve these objectives another way, for example, through inquiry by an existing body or through civil or criminal proceedings;
- (b) the recommendations of a Royal Commission or Official Inquiry would facilitate government policy making; and
- (c) powers are required and, if so, which powers, having regard to the subject matter and scope of the inquiry?

Establishing authority

6.19 As noted in Chapter 3, Royal Commissions with statutory powers are established by the Governor-General acting with the advice of the Federal Executive Council.¹⁶ In light of the ALRC’s proposal that the *Royal Commissions Act* be amended to enable the establishment of Royal Commissions and Official Inquiries, and renamed the *Inquiries Act*, two specific issues arise. First, should the current arrangements in the *Royal Commissions Act* continue with respect to Royal Commissions established under the proposed *Inquiries Act*? Secondly, who should establish Official Inquiries?

6.20 The issue of how different inquiries should be established was recently considered by the NZLC. It recommended the enactment of a general Act that enabled the establishment of two tiers of inquiry—‘public inquiries’ and ‘government inquiries’. In the NZLC’s recommended model, a principal distinguishing feature between these inquiries would be the way in which they are established. The NZLC

¹⁶ *Royal Commissions Act 1902* (Cth) s 1A. Section 16A of the *Acts Interpretation Act 1901* (Cth) provides that a reference in an Act to the Governor-General shall be read as referring to the Governor-General acting with the advice of the Executive Council.

intended public inquiries to have a similar stature and be established in the same way as inquiries established under the existing *Commissions of Inquiry Act 1908* (NZ)—that is, by the New Zealand Governor-General by Order in Council. On the other hand,

[g]overnment inquiries are designed to remove the need for non-statutory ministerial inquiries. They should be appointed by a Minister and should report directly to the Minister.¹⁷

6.21 In IP 35, the ALRC asked whether legislation establishing Royal Commissions and other public inquiries should address who should be able to establish such inquiries. It suggested that establishing authorities may include the Governor-General, the Cabinet, a Minister, or one or both Houses of Parliament.¹⁸

Submissions and consultations

6.22 With respect to Royal Commissions, Graham Millar submitted:

Royal Commissions are appointed by the Governor-General on the advice of the executive government. They are therefore ‘creatures’ of the executive government and, in practice, they result from Cabinet Decisions made by the Prime Minister and senior ministers. This long-standing practice seems to work well and, in the context of our system of government, I am not aware of any good reasons to depart from it.¹⁹

6.23 The Australian Government Solicitor (AGS) did not agree that a new statutory framework for inquiries was necessary. In this context, it suggested that the issue of who should establish a Royal Commission was a decision for government and should not be set out in legislation.²⁰

6.24 In consultations, it was suggested that each Royal Commission should be established under the general *Royal Commissions Act* and a short enabling Act. There was limited support, however, for the Parliament to be involved in the establishment of individual inquiries. Stakeholders also noted that, as a practical issue, there may be resourcing issues for an inquiry not established by the executive arm of government.

6.25 The ALRC received limited feedback on how a second tier of inquiry, or Official Inquiry, should be established. The Law Council indirectly indicated that such an inquiry may be established by a minister. It suggested that reporting requirements in new inquiries legislation would vary depending on who established an inquiry, and that if an inquiry was established by a minister, it would be appropriate for the inquiry to report to that minister. It also indicated, however, that inquiry members appointed under general inquiries legislation should be appointed by the Governor-General,

17 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [2.27]–[2.28]. This recommendation was not accepted fully by the New Zealand Government. The Inquiries Bill 2008 (NZ) enables the establishment of Royal Commissions in addition to public and government inquiries.

18 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 5–3(a).

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

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

which may indicate a view that the Governor-General should be involved in the establishment of non-Royal Commission forms of inquiry.²¹

ALRC's view

6.26 To ensure openness, transparency and accountability, the body establishing an inquiry should be set out in legislation. The ALRC notes stakeholder views that the current arrangements for the establishment of Royal Commissions appear to be working well. The ALRC agrees that the Parliament should not have a role in establishing individual Royal Commissions or Official Inquiries. If the executive wants to commence an inquiry, it should have the flexibility to do so. If the Parliament deems it necessary to inquire into a matter, there are other mechanisms available.

6.27 Stakeholders indicated how important it is for the public to have confidence in the independence of a Royal Commission. The ALRC notes the symbolic importance in having the Governor-General establish the highest form of Australian inquiry by Letters Patent. If changes to Australia's system of government result in another head of state, it would make sense, at that stage, for the arrangements concerning the establishment of Royal Commissions to be amended to reflect that position.

6.28 An underlying principle in designing a new statutory framework is to provide for more flexible arrangements for inquiries that may exercise coercive powers. At the same time, appropriate protections to those involved with or affected by such inquiries should be provided.

6.29 To promote flexibility, it should be easier for the executive to establish an Official Inquiry than a Royal Commission. The ALRC has reached the preliminary view, therefore, that an individual minister should be able to establish an Official Inquiry. While the ability to establish non-statutory inquiries would remain, such inquiries should be limited to matters that do not require coercive powers and are not of great public importance, such as matters internal to government departments.

6.30 The ALRC notes that the establishment of Official Inquiries by a minister is similar to the current practice whereby ministers establish (non-statutory) inquiries. For example, the Attorney-General, the Hon Robert McClelland MP, announced the establishment of the Inquiry into the Case of Dr Mohamed Haneef on 13 March 2008, and the then Minister for Immigration and Multicultural Affairs, Senator the Hon Amanda Vanstone, announced the establishment of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau on 9 February 2005.

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

6.31 The ALRC suggests that public servants should not be able to establish a statutory inquiry with coercive powers. As discussed in Chapter 2, the decision to establish a public inquiry is inherently political, and therefore, beyond the scope of the apolitical role of even senior public servants.

6.32 The proposed statutory framework is a considerable shift from the current arrangements. As discussed in Chapter 5, it is not anticipated that every inquiry established under the proposed *Inquiries Act* will need to exercise coercive powers; however, the decision to establish any inquiry with access to such powers should not be taken lightly. The ALRC suggests that empowering a minister to establish such an Official Inquiry provides a measure of flexibility while at the same time ensuring accountability.

6.33 The main features of responsible government are collective ministerial responsibility and individual ministerial responsibility.²² An effect of collective ministerial responsibility is that, if the government loses the confidence of the House of Representatives, the entire ministry must resign or the Prime Minister should recommend to the Governor-General that the House be dissolved and an election called.²³ If dismissal of an individual minister is warranted, this action tends to be taken by the prime minister rather than by Parliament.²⁴ In 1976, the Royal Commission on Australian Government Administration noted that

there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found. The evidence tends to suggest rather that while ministers continue to be held accountable to Parliament in the sense of being obliged to answer to it when Parliament so demands, and to indicate corrective action if that is called for, they themselves are not held culpable—and in consequence bound to resign or suffer dismissal—unless the action which stands condemned was theirs, or taken on their direction, or was action with which they ought obviously to have been concerned.²⁵

6.34 The ALRC notes that s 4 of the *Ministers of State Act 1952* (Cth) has the effect of providing that parliamentary secretaries are appointed as ministers for constitutional purposes.²⁶ Further, the effect of s 19 of the *Acts Interpretation Act 1901* (Cth) is that a minister may authorise a non-portfolio minister or a parliamentary secretary to act on his or her behalf.²⁷ These provisions enhance flexibility in how statutory inquiries may be established.

22 Parliament of Australia—House of Representatives, *House of Representatives Practice* (2005), 47–50.

23 Ibid, 47.

24 Ibid, 49. Also note that the Senate may pass a censure motion against an individual minister in the House of Representatives or Senate, but ministers who are the subject of such motions have not resigned in the past.

25 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), 59–60.

26 Amended by *Ministers of State and Other Legislation 2000* (Cth).

27 Amended by the *Acts Interpretation Amendment Act 1998* (Cth).

6.35 As a matter of practice, the Cabinet may endorse a minister's intention to establish an Official Inquiry. The Cabinet also may be of the view that an inquiry is of significant public importance, and may involve two or more ministries, but does not warrant the full powers of a Royal Commission. In such an instance, an Official Inquiry could be established by a minister or jointly by two or more ministers. The ALRC is not convinced, however, that the proposed *Inquiries Act* should require Cabinet to be involved formally in the decision to establish an Official Inquiry. The ALRC has reached the preliminary view that there are appropriate safeguards around empowering a minister to establish an inquiry, and sees no need to include further prescription in the proposed *Inquiries Act*.

An inquiry's terms of reference

6.36 An issue closely related to the establishment of an inquiry is whether there needs to be guidance about the drafting of its terms of reference. As noted in Chapter 3, the *Royal Commissions Act* does not provide any guidance on the framing of the terms of reference for a Royal Commission. The drafting of the terms of reference for an inquiry, however, is fundamental to its success. Terms of reference that are too wide can lead to unnecessary cost, complexity and delay, and can leave an inquiry 'floundering in a wilderness of possible avenues of investigation'.²⁸ In addition, carefully defined terms of reference may 'limit the opportunities for wide-ranging investigations without the safeguards associated with investigations by traditional law enforcement agencies'.²⁹

6.37 Terms of reference that are too narrow can undermine the efficacy of an inquiry. Some Royal Commissions have been criticised for the narrowness of their terms of reference. For example, the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry) was criticised for having terms of reference that were so narrow that they did not enable relevant issues to be examined adequately.³⁰

6.38 In IP 35, the ALRC asked whether legislation establishing public inquiries should address the framing of terms of reference for a Royal Commission in greater detail.³¹ For example, should it require that there be consultation on the draft terms of reference for a Royal Commission and, if so, with whom? Should there be a legislative requirement to publish the terms of reference in a particular manner, and should legislation establishing inquiries contain provisions dealing with the amendment of terms of reference during the course of an inquiry?

28 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 52.

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

30 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [4.33].

31 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 5-3(b).

6.39 The ALRC also sought views on whether the Act should attempt to address the content of terms of reference.³² The *Commissions of Investigation Act 2004* (Ireland), for example, contains a provision that stipulates the matters to be included in the terms of reference of an inquiry set up under the Act, including the dates on which events occurred, the location of the events, and the persons to be investigated.³³ It also contains a provision outlining the circumstances in which the terms of reference for an inquiry can be amended.³⁴

Submissions and consultations

6.40 In consultation, stakeholders noted how important it was for governments to understand fully the nature of an issue before it referred that issue to a Royal Commission. It also was suggested that governments need to give more thought to the drafting of an inquiry's terms of reference.

6.41 Those making submissions on this issue were not in favour of a statutory requirement for the Australian Government to do or consider certain things before formulating terms of reference. Commenting on Royal Commissions, Graham Millar submitted:

The usual practice is that the person being appointed as Commissioner is consulted on the terms of reference before they are finalised and, if there is a need for subsequent amendments, it is also usual practice for the Commissioner to be consulted before the amendments are made. ... this practice seems to work well and I do not see any need for it to be covered by legislation.³⁵

6.42 The AGS also agreed that the current practice worked well.

AGS doubts the need for statutory prescription regarding consultation on draft terms of reference, or as to requirements regarding publication of terms of reference, or dealing with the amendment of terms of reference during the course of an inquiry. We are not aware of any difficulties which have arisen as a result of the Act not prescribing these matters. For example, it is relatively commonplace for the terms of reference of Royal Commissions and inquiries to be amended during the life of an inquiry, often more than once.³⁶

ALRC's view

6.43 Under the current arrangements, and the proposed *Inquiries Act*, the executive arm of government establishes Royal Commissions and other inquiries. The executive, therefore, should have responsibility for preparing terms of reference for these inquiries.

32 Ibid, [3.13].

33 *Commissions of Investigation Act 2004* (Ireland) s 5.

34 Ibid s 6.

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

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

6.44 The ALRC agrees that the chair of an inquiry should consider the terms of reference before the commencement of an inquiry. It also agrees that there should be the capacity to amend terms of reference once an inquiry has commenced. The ALRC's view, however, is that the proposed *Inquiries Act* should not require the executive to consult with the chair of an inquiry on terms of reference, nor should it set out a process for amending terms of reference. The ALRC has not received feedback that suggests that a person currently does not have the opportunity to comment on terms of reference before agreeing to chair an inquiry. A person is not obliged to agree to chair an inquiry if he or she believes its terms of reference are unsatisfactory. Further, the ALRC notes that terms of reference frequently have been amended in the course of past Royal Commissions and similar inquiries. In the absence of any indication that the current process is not working, no change to the current arrangement is proposed.

Appointment of inquiry members

6.45 Another issue for this Inquiry is whether the proposed *Inquiries Act* should provide guidance on who should be appointed as a member of an inquiry established under the Act, or the procedure to be followed when appointing them. This is particularly relevant in the context of the proposed Act, which would enable the establishment of different tiers of inquiry that may require members with different skills, experience or attributes.

6.46 Currently, the Governor-General may issue a Royal Commission to one or more persons 'as he or she thinks fit'.³⁷ The *Royal Commissions Act* does not provide any further guidance on the appointment of Royal Commissioners. As Dr Scott Prasser has explained,

appointing members to a public inquiry, unlike other government or public service positions, is not undertaken via advertisement or formal selection processes; rather, it is achieved by private 'soundings' of potential candidates, usually between the relevant minister's office and the department. This process may take considerable time, as locating those who are competent, have the appropriate status, and are available and willing, is not always easy.³⁸

6.47 While there is no requirement in the *Royal Commissions Act* to appoint a person with a legal background, most Royal Commissions are chaired by current or former judges or legal practitioners. This has been the case for 32 of the 38 federal Royal Commissions that have been established since 1970.³⁹

6.48 Legislation in the UK provides guidance both in terms of procedure and eligibility. The *Inquiries Act 2005* (UK) requires the minister responsible for establishing an inquiry to consider whether a proposed member of an inquiry panel has

37 *Royal Commissions Act 1902* (Cth) s 1A.

38 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [6.21].

39 *Ibid.*, [8.6].

a suitable amount of expertise,⁴⁰ and prohibits the appointment of a person if it appears to the minister that he or she has a direct interest in the inquiry or a close association with an interested party to the inquiry.⁴¹ Further, it requires the minister to consult with the chair of the inquiry before appointing any other members to an inquiry panel,⁴² and to consult with certain senior members of the judiciary before appointing a judge as a panel member.⁴³

6.49 In addition, the NZLC recently recommended that new inquiries legislation in New Zealand should provide that inquiries established under the legislation are independent from the executive:

the integrity of an inquiry's work and its outcome are reliant on the extent to which it is viewed as independent. The principle that justice should be done and be seen to be done applies to inquiries as well as courts. An inquiry's independence should be made clear, rather than simply inferred.⁴⁴

6.50 Section 10 of the Inquiries Bill 2008 (NZ) requires inquiry members to act independently, impartially, and fairly in exercising powers and performing duties under the Bill.

Eligibility of serving judges

6.51 One issue that has attracted comment in Australia is the use of serving judges to conduct Royal Commissions.⁴⁵ The *Royal Commissions Act* expressly contemplates the appointment of judges to conduct Royal Commissions, as s 60 of the Act confers additional powers on a Commissioner who is also a judge (including a judge of a federal court) to punish contempt.⁴⁶

6.52 It has been observed that judges are appointed as Royal Commissioners for a number of reasons. First, they possess skills and abilities that may be useful in an investigative inquiry, such as the ability to collect, collate and analyse evidence, assess the credibility of witnesses, and make findings of fact.⁴⁷ Secondly, they may enhance the perception of the independence and impartiality of a Royal Commission.⁴⁸

40 *Inquiries Act 2005* (UK) s 8. See also *Commissions of Investigation Act 2004* (Ireland) s 7.

41 *Inquiries Act 2005* (UK) s 9.

42 *Ibid* s 4(3).

43 *Ibid* s 10.

44 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [3.18].

45 A Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 54; R Sackville, 'Royal Commissions in Australia: What Price Truth?' (1984) 60(12) *Current Affairs Bulletin* 3, 8.

46 In Ch 19 the ALRC expresses the view that a contempt power should not be included in the proposed *Inquiries Act*.

47 A Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 54.

48 *Ibid*.

6.53 One concern, however, is that using judges to inquire into politically controversial matters could undermine public confidence in the individual judge⁴⁹ or the judiciary as a whole.⁵⁰ It also has been argued that judges do not always possess the relevant skills to conduct a Royal Commission. For example, in evidence before the House of Commons Public Administration Select Committee, Lord Laming stated:

I would like to suggest that there are few judges who have managed a big workforce, managed a public agency, managed big budgets in competing priorities, dealt with the party political machine, both locally and nationally, dealt with trade unions going about their perfectly legitimate business and dealt with the media day by day.⁵¹

6.54 It has long been established that judicial officers may act in administrative roles if they are acting in their personal capacity (ie, as *persona designata*).⁵² Professor George Winterton has noted that it is unlikely that the consensual appointment of a judge of a state court to a federal Royal Commission would present a constitutional problem.⁵³ Following the decision of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*⁵⁴ (*Wilson*), however, there may be a question whether a judge currently serving on a federal court may be a member of a Royal Commission or an Official Inquiry.⁵⁵ In *Wilson*, a Federal Court judge was nominated to provide a report in her personal capacity to a minister pursuant to s 10 of the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth). A majority of the High Court found that this conferred a non-judicial function on a federal judge in a way that was incompatible with the holding of judicial office under Chapter III of the *Australian Constitution*.⁵⁶

6.55 The majority in *Wilson* indicated that, in some circumstances, serving federal judges may be appointed to Royal Commissions. This was on the basis that Royal Commissioners perform different functions to those of a reporter appointed under s 10 of the *Aboriginal and Torres Strait Islander Heritage Act*—in particular, members of Royal Commissions generally determine facts and apply the law, rather than advise a minister on whether he or she should make a particular decision. Relevant considerations for deciding whether the appointment of a serving federal judge to a Royal Commission is compatible with the holding of judicial office under Chapter III would include the terms of reference of the Royal Commission, and the legislation

49 House of Commons Public Administration Select Committee—Parliament of the United Kingdom, *Public Administration—First Report* (2005), [48]–[51].

50 R Sackville, ‘Royal Commissions in Australia: What Price Truth?’ (1984) 60(12) *Current Affairs Bulletin* 3, 8.

51 House of Commons Public Administration Select Committee—Parliament of the United Kingdom, *Public Administration—First Report* (2005), [44].

52 A Brown, ‘The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge’ (1992) 21 *Federal Law Review* 48, 54.

53 G Winterton, ‘Judges as Royal Commissioners’ (1987) 10 *University of New South Wales Law Journal* 108, 121.

54 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

55 In Ch 7, the ALRC proposes that Royal Commissions should continue to report to the Governor-General, and Official Inquiries should report to the minister who established the Official Inquiry: Proposal 7–1.

56 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17.

enabling its establishment.⁵⁷ In *Wilson*, Justice Gaudron also noted that, historically, ‘it is necessary to bear in mind that, to a large extent, functions [of Royal Commissions] were not carried out by Ch III judges’.⁵⁸

6.56 The policy of the Federal Court generally is not to allow the appointment of a Federal Court judge as a Royal Commissioner, although there may be circumstances in which such appointment may be possible. An appointment only may be made with the agreement of the Chief Justice. Before approaching an individual judge, the executive should first consult with the Chief Justice, who in turn should conduct further consultation.⁵⁹

Other issues

6.57 In IP 35, the ALRC suggested that, if legislation establishing public inquiries were to include criteria about the appointment of inquiry members, such criteria may include specific qualifications and gender and regional balance. The ALRC also sought views on whether the procedure by which appointment is made should be set out in legislation.⁶⁰

Submissions and consultations

Serving and retired judges

6.58 Commenting on Royal Commissions, the Law Council submitted:

There are numerous reasons why judicial officers are viewed as the appropriate members of society to undertake this role. Firstly, judicial officers possess the skills and experience that make them uniquely qualified to conduct public inquiries, which generally require the examination of evidence, fact finding, assessment of the credibility of witnesses and setting out reasons for decisions. Secondly, judicial officers bring to a public inquiry a necessary perception of independence and impartiality from government and afford a sense of authority to the proceedings. These skills are particularly necessary when the inquiry is examining issues of conduct, as opposed to inquiries into social or economic policy.⁶¹

6.59 The Law Council noted that drawbacks of appointing serving judges as inquiry members inquiry included: potentially politicising judges; undermining judicial independence; and ‘depleting already scarce judicial resources’. Further, judges may not have the necessary skills to conduct a specific inquiry. On balance, the Law Council was not opposed to the appointment of serving judges as inquiry members.

57 Ibid.

58 Ibid, 69.

59 See, eg, Council of Chief Justices of Australia and New Zealand, *Statement on Appointment of Judges to Other Offices by the Executive* (May 1998). See also more recent policies, eg, the Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2007), 21.

60 Question 5–3.

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

Where possible, however, the Law Council preferred the appointment of a ‘suitably qualified senior member of the profession or retired judicial officer’.⁶²

6.60 If a serving judge were to be appointed as an inquiry member, the Law Council suggested that this should be done in accordance with procedures set out by the Council of Chief Justices of Australia and New Zealand, which are similar to those of the Federal Court, discussed above.

The Law Council understands that they have been generally followed when appointing judicial inquirers in the past. The Law Council agrees that these practices should continue to be followed, as they go some way to overcoming many of the problems discussed above. It is not necessary, however, to formalise the guidelines by way of legislation as it appears that the procedures are generally followed as a matter of course.⁶³

6.61 In consultations, it was noted that the appointment of serving federal judges to inquiries was a live issue. Some stakeholders opposed the appointment of any serving judge on the basis that this would potentially require judges to review a decision made by a judge as inquiry member who may be more senior to them.⁶⁴

6.62 Another stakeholder indicated, in consultation, that it was important for inquiry members to have a strong understanding of natural justice issues. In that context, it would be more appropriate for those with judicial experience to conduct inquiries as even experienced barristers have not had the same level of experience with ensuring natural justice. Another stakeholder indicated that training was essential for inquiry members, regardless of whether they had judicial experience, because conducting an inquiry required a particular skill set. Further, it was noted that Australian lawyers and judges were trained in adversarial processes, which differ significantly from inquisitorial processes of inquiry.

Other criteria

6.63 In consultations, some stakeholders encouraged a more transparent process for the appointment of inquiry members. The Law Council submitted that members of a non-Royal Commission statutory public inquiry should be appointed in accordance with ‘publicly available criteria’. Such criteria need not include judicial experience, but should include ‘experience, suitability and impartiality’.⁶⁵

6.64 Liberty Victoria submitted that there should be a ‘flexible approach’ to the appointment of all inquiry members, so long as they

have sufficient qualifications and experience to conduct inquiries effectively. Typically this would require Commissioners to have judicial or at least post admission

62 Ibid.

63 Ibid.

64 In Ch 14, the ALRC discusses judicial review of decisions made by members of Royal Commissions and Official Inquiries.

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

legal experience. However, in some instances, it may be more appropriate to have someone with equivalent qualifications in other fields. The key requirement being that the Commissioner is competent for the type of inquiry and ostensibly independent of Government.⁶⁶

6.65 On the other hand, Graham Millar cautioned against prescribing any criteria for the appointment of inquiry members on the basis that this ‘may have the effect of eliminating the most suitable appointee(s) to conduct a particular inquiry’.⁶⁷ The AGS also doubted whether it was necessary to prescribe criteria for the process or appointment of inquiry members.⁶⁸

6.66 With respect to other characteristics of inquiry members, Liberty Victoria noted that:

Selection of personnel should be entirely merit based, but should also recognise the nature and sensitivities of the inquiry. For instance, a public inquiry into indigenous issues should be headed by an indigenous person or someone with appropriate experience and knowledge. However, the overriding consideration must be his or her independence and objectivity (both in fact and as a public perception).⁶⁹

6.67 Several stakeholders with whom the ALRC consulted in the Northern Territory suggested that, if an inquiry considered issues affecting Indigenous peoples, then Indigenous peoples should be represented as inquiry members. One stakeholder noted that there may be circumstances in which it would be appropriate to require the appointment of a woman as an inquiry member.

ALRC’s view

6.68 It is appropriate for the person or authority that establishes an inquiry to appoint members of that inquiry. The Governor-General or minister that establishes an inquiry should consider, on a case-by-case basis, the skills, knowledge or experience necessary to conduct that particular inquiry. There is no evidence that suggests that, currently, the executive fails to consider these matters.

6.69 The ALRC agrees with the NZLC that the independence of inquiry members should be made clear in legislation. The ALRC’s view, therefore, is that the proposed *Inquiries Act* should provide that inquiry members shall be independent in the performance of their functions. This will help to ensure public confidence in the independence of the inquiry. It also may allay some of the concerns in *Wilson* with respect to the independence of serving federal judges acting as inquiry members.⁷⁰

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

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

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

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

70 While the ALRC’s view is that Royal Commissions and Official Inquiries should be independent in the performance of their functions, these inquiries also should be accountable for their use of public funds. This is discussed further in Ch 9.

6.70 Care still should be taken, however, before the executive approaches a serving federal judge with the intention of appointing that judge as a member of a Royal Commission or Official Inquiry. The ALRC notes existing policies of the Federal Court require consultation with the Chief Justice and other judges, and the consent of the Chief Justice, before such an appointment is made. Therefore, issues around the appointment of serving federal judges should be addressed through policies and guidance, discussed below.

6.71 The ALRC also notes that decisions to establish an inquiry and appoint inquiry members may be made relatively quickly. Statutory prescription may limit flexibility within the proposed statutory framework without obvious benefit. The ALRC's view, therefore, is that there is no need to prescribe in the proposed *Inquiries Act* criteria for the appointment of an inquiry member.

6.72 Issues around the appointment of inquiry members, however, should be addressed in an *Inquiries Handbook* developed and published by the Australian Government. In particular, there should be some guidance concerning the necessary skills, knowledge or experience that an inquiry member should have. The ALRC suggests that many inquiries will require the involvement of those with legal or judicial experience. For example, given that Royal Commissions may exercise serious coercive powers, it may be more appropriate for a person who has an extensive understanding of the implications of such powers to be involved with this type of inquiry. Many other inquiries, however, may benefit from having inquiry members with skills, knowledge or experience within the subject-matter of a specific inquiry. If an inquiry is unlikely to abrogate privileges or have serious adverse legal implications for those involved with the inquiry, a person without prior experience in the use of coercive powers may be a suitable inquiry member.

6.73 The skills, knowledge and experience of those involved with Royal Commissions or Official Inquiries, therefore, should be assessed on a case-by-case basis. Further, the ALRC does not consider that it will always be necessary for the chair of an inquiry to have specific skills, knowledge or experience. Instead, the ALRC sees benefit in formalising the arrangements for assisting the chair of an inquiry. In later sections of this chapter, the ALRC makes proposals with respect to multi-member inquiries and expert advisors to assist inquiries.

6.74 If, in a particular inquiry, it is deemed necessary to appoint an inquiry member with legal or judicial experience, the establishing authority should consider precisely what experience is necessary. The ALRC notes that the experience of a legal practitioner is not entirely analogous with the experience of a judge. An advocate's role is to argue or defend a particular case, whereas a judge is tasked with determining questions of fact and law based on the evidence, and to ensure that procedural fairness is afforded to the parties. Also, as discussed in Chapter 15, inquiries conducted under the proposed *Inquiries Act* are more inquisitorial in nature than the procedure adopted in Australian courts.

6.75 In addition, information on the role of an inquiry member should be provided to persons regardless of their experience. This guidance could take the form of training, and could include information about inquiry procedures and implications of the exercise of inquiry powers. The precise matters that could be included in guidance or training are discussed further in Parts D and E.

6.76 Finally, the ALRC notes a lack of broad representation among members of Royal Commissions and other inquiries. For example, the only federal Royal Commission chaired by a woman reported in 1978.⁷¹ The ALRC suggests that establishing authorities should consider ensuring a broader representation on inquiries established under the proposed *Inquiries Act*. The ALRC's preliminary view, therefore, is that the Australian Government should develop and publish an *Inquiries Handbook* that addresses, amongst other matters, the appointment of members of Royal Commissions and Official Inquiries, including whether inquiry members should have certain attributes, such as gender or cultural attributes.⁷² In other chapters of this Discussion Paper, the ALRC proposes other matters that should be included in the *Inquiries Handbook*.

Proposal 6–2 The proposed *Inquiries Act* should provide that:

- (a) the Governor-General establishes Royal Commissions; and
- (b) a minister establishes Official Inquiries.

Proposal 6–3 The proposed *Inquiries Act* should provide that Royal Commissions and Official Inquiries shall be independent in the performance of their functions.

Proposal 6–4 The Australian Government should develop and publish an *Inquiries Handbook* that addresses the appointment of members of Royal Commissions and Official Inquiries. The matters addressed by the *Inquiries Handbook* should include:

- (a) whether the potential inquiry member has the skills, knowledge and experience to conduct the inquiry, having regard to the subject matter and scope of the inquiry; and

71 The Royal Commission on Human Relationships was chaired by the Hon Elizabeth Evatt AC between 1974 and 1978.

72 The term 'attribute' is used in some anti-discrimination, human rights and equal opportunity legislation, for example, the *Equal Opportunity Act 1995* (Vic).

- (b) whether inquiry members should have certain attributes (for example, gender or cultural attributes).

Multi-member inquiries

6.77 Another issue for this Inquiry is whether the proposed *Inquiries Act* should allow the appointment of more than one member of a Royal Commission or Official Inquiry.

6.78 Currently,⁷³ Royal Commissions can be conducted by one or more commissioners.⁷³ It has been noted that investigatory Royal Commissions—that is, Royal Commissions established to investigate a particular matter, such as the cause of a particular disaster or an allegation of corruption—tend to have fewer members than Royal Commissions established to provide policy advice. Only 18.5% of investigatory Royal Commissions appointed since 1950 has had more than one member, while 53% of the policy Royal Commissions appointed since this time have been multi-member Commissions.

6.79 In IP 35, the ALRC sought feedback from stakeholders on multi-member inquiries.⁷⁴ It noted that there are advantages and disadvantages associated with multi-member Royal Commissions. For example, appointing a number of inquiry members may help to ensure that it is conducted by people who, collectively, possess adequate skills and knowledge. Appointing a number of inquiry members, however, may cause delays in the finalisation of reports and recommendations, and also may lead to reports that contain divergent views.⁷⁵

Submissions and consultations

6.80 Graham Millar submitted that, in some inquiries, it may be appropriate to have several inquiry members with a mix of qualifications.⁷⁶ The question of how to deal with conflicting views among multiple inquiry members also attracted comment in consultations. One suggestion was that the legislation enabling the establishment of an inquiry, or its terms of reference, could make clear procedures with respect to how hearings should be conducted or findings made. Another suggestion was a more informal division of work, for example, determined by inquiry members in a given inquiry.

6.81 In consultations, the majority of stakeholders who commented on this issue supported the appointment of more than one inquiry member. This was on the basis

⁷³ *Royal Commissions Act 1902* (Cth) s 1A.

⁷⁴ Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [3.19].

⁷⁵ *Ibid.*, [3.19], Question 5–3(a).

⁷⁶ G Millar, *Submission RC 5*, 17 May 2009.

that multi-member inquiries increase the diversity of skills, knowledge and experience within an inquiry. Depending on the subject-matter of the inquiry, it also may be appropriate for persons with certain attributes or characteristics to be appointed as inquiry members. Further, it was suggested that multi-member inquiries may be an efficient use of government resources, with multiple inquiry members able to share the inquiry workload. One stakeholder suggested that the appointment of multi-member inquiries should be prescribed in legislation establishing public inquiries. Some stakeholders expressed the alternative view that only one inquiry member should be appointed as there may be difficulties in managing multi-member inquiries.

6.82 Some stakeholders favouring multi-member inquiries suggested that a person with judicial experience should chair such an inquiry. It also was suggested that inquiry members should produce a joint report, or at least agree on findings.

ALRC's view

6.83 The ALRC notes that most recent Royal Commissions have had one member. Notwithstanding this, the ALRC notes the several advantages suggested by stakeholders with respect to appointing more than one member of an inquiry. The proposed *Inquiries Act*, therefore, should provide that Royal Commissions and Official Inquiries may have more than one inquiry member. The chair of a multi-member inquiry, however, should have responsibility for making certain decisions. In other chapters of this Discussion Paper, the ALRC notes where it is appropriate for the chair of an inquiry to make a decision.⁷⁷

6.84 The ALRC is not convinced that the proposed *Inquiries Act* should set out other matters with respect to the appointment of multiple members of Royal Commissions or Official Inquiries. As discussed above, the nature of each inquiry will determine what skills, knowledge and experience should be possessed by an inquiry member or chair of an inquiry.

Proposal 6-5 The proposed *Inquiries Act* should provide that both Royal Commissions and Official Inquiries may have more than one inquiry member.

Persons assisting an inquiry

6.85 In this section, the ALRC considers whether the current arrangements for the appointment and role of counsel and solicitors assisting an inquiry are appropriate and should be included in the proposed *Inquiries Act*. It also considers whether the proposed Act should provide for the appointment of expert advisors. Remuneration issues are considered in Chapter 9.

⁷⁷ See, eg, Proposals 5-3 and 9-2.

Legal practitioners

6.86 Section 6FA of the *Royal Commissions Act* provides for the examination or cross-examination of a witness by certain persons, including a legal practitioner appointed by the Attorney-General. The only other provision in the Act that refers to a ‘legal practitioner’ is s 7, which provides that:

A legal practitioner assisting a Commission or appearing on behalf of a person at a hearing before a Commission has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

6.87 Recent practice has been to appoint both counsel and solicitors to assist Royal Commissions, referred to as ‘counsel assisting’ and ‘solicitors assisting’.

Counsel assisting

6.88 At the outset of the AWB Inquiry, the Attorney-General appointed four counsel to assist the inquiry. These appointments were based on the recommendations of the Commissioner in charge of the Inquiry, the Hon Terence Cole QC (Commissioner Cole). In turn, as noted in the inquiry report, Commissioner Cole based his recommendations on a shortlist of candidates drawn up by the AWB Inquiry in consultation with the Attorney-General’s Department (AGD).⁷⁸ Commissioner Cole noted that efforts were made to select ‘experienced barristers who possessed a range of skills and expertise relevant to the areas of investigation and law the Inquiry was likely to encounter’.⁷⁹

6.89 In contrast, the report of the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission) notes that, at the outset of the inquiry, expressions of interest were invited by persons interested in becoming counsel assisting the inquiry. On the basis of applications received, and on the recommendations of Commissioner Cole, the Attorney-General appointed 13 counsel to assist the inquiry.⁸⁰

6.90 While the Act does not define the nature of the role of counsel assisting, in practice he or she has a number of onerous duties, such as to identify and obtain all relevant evidence for the Commission.⁸¹ It has been noted that counsel assisting an inquiry

can play an important role in interacting with witnesses and will play a central role in hearings, where they are held, by making opening and closing statements, calling witnesses, and where appropriate, examining or cross-examining witnesses.⁸²

78 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10, [198].

79 *Ibid.*, Appendix 10, 127.

80 This number included three Queens Counsel and one Senior Counsel: T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, [21]–[22].

81 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [13.2].

82 *Ibid.*, [13.3].

Solicitors assisting

6.91 In some Royal Commissions, the provision of solicitors' legal work has been reserved for, or 'tied' to, the AGS. For example, at the outset of the AWB Inquiry, the Attorney-General issued a legal services direction that provided that legal work for solicitors assisting the inquiry was to be provided by the AGS.⁸³

6.92 The type of work carried out by solicitors assisting the AWB inquiry is detailed in its final report:

- interviewing potential witnesses and assisting with the preparation of witness statements;
- assisting in obtaining, analysing and preparing material to be presented by counsel assisting;
- aiding counsel assisting to finalise submissions arising from hearings;
- providing specialist legal advice; and
- carrying out related legal services.⁸⁴

6.93 The Building Royal Commission again provides a contrast. In this inquiry, expressions of interest were sought from persons or firms interested in providing legal support to the inquiry. Solicitors were appointed by the inquiry in accordance with criteria contained in its guidelines.⁸⁵ The inquiry noted that it may be an advantage if solicitors were able to draw on existing support structures and additional legal and other resources. The other criteria required the prospective solicitors to:

- Be able to commence work with the Commission in the immediate future;
- Be able to operate effectively and efficiently over the whole period of the Commission's inquiry;
- Be able to be based in Melbourne, but have the capacity to support hearings in all capital cities; and
- Be able to demonstrate that [the legal team] has no current or potential conflicts of interest, actual or perceived.⁸⁶

83 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10, 125. Legal services directions are issued by the Australian Government Attorney-General under the *Judiciary Act 1903* (Cth) s 55ZF(1)(b).

84 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), [32]–[36].

85 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, [29].

86 *Ibid*, vol 22, [29]–[30].

6.94 A number of applications were received by the inquiry.⁸⁷ Only the AGS was able to fulfil all the criteria, however, so it provided all the solicitors that assisted the Building Royal Commission.⁸⁸

6.95 In IP 35, the ALRC asked whether legislation establishing Royal Commissions or other public inquiries should set out criteria for the appointment of counsel and solicitors assisting, and if so, what these criteria should be.⁸⁹

Expert advisor

6.96 In IP 35, the ALRC also sought feedback on whether it was always appropriate for those assisting an inquiry to be legal practitioners.⁹⁰ For example, the *Inquiries Act 2005* (UK) provides for the appointment of expert ‘assessors’ to assist inquiry members. Assessors have an advisory role and do not exercise powers under the Act.⁹¹ The explanatory notes to the Act state:

The role of assessors will vary from inquiry to inquiry, but in essence they are experts in their own particular field whose knowledge, where necessary, can provide the panel with the expertise it needs in order to fulfil an inquiry’s terms of reference. For example in the Victoria Climbi inquiry, four expert assessors, including a consultant paediatrician and a detective superintendent, joined the chairman, Lord Laming. Assessors do not have any of the inquiry panel’s powers and are not responsible for the inquiry report or findings. An assessor could be appointed for the duration of the inquiry, but it would also be possible to appoint an assessor only for part of the inquiry, to assist when evidence on a particular subject was being considered.⁹²

6.97 In the context of Federal Court proceedings, Order 34B of the *Federal Court Rules* provides for the appointment of a person with specialised knowledge to assist a judge (‘expert assistant’). An expert assistant may be appointed only with the consent of the parties, and may not provide evidence in the proceedings. Further, an expert assistant may provide assistance only on issues identified by the Court or Judge, and in the form of a written report.⁹³

6.98 In its 2000 Report, *Managing Justice: A Review of the Federal Civil Justice System*, the ALRC considered the appointment of expert assistants and assessors under federal legislation and Federal Court Rules. The ALRC noted several benefits in an expert advisory role, but also noted some stakeholder concerns about the scope of such a role.⁹⁴ The ALRC recommended that the Federal Court should continue to develop

87 Ibid, vol 22, [31].

88 Ibid.

89 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Proposal 6–2.

90 Ibid, [6.14].

91 *Inquiries Act 2005* (UK) s 11.

92 Explanatory Notes, *Inquiries Act 2005* (UK), [23].

93 *Federal Court Rules* (Cth) O 34B r 3.

94 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [7.148]–[7.157].

appropriate procedures and arrangements, in consultation with legal professional and user groups, to allow judges to benefit from expert assistance in understanding the effect or meaning of expert evidence.⁹⁵

Submissions and consultations

6.99 The ALRC heard few issues about the way in which counsel and solicitors assisting an inquiry were appointed. Graham Millar noted that counsel and solicitors assisting were selected by the Commissioner with the assistance of the AGD. He cautioned against limiting flexibility in the appointment process, suggesting a range of matters that need to be considered in any appointment process, including:

- the Commissioner's personal experience and soundings in relation to prospective appointees
- the mix of skills required for the particular inquiry
- the availability of the appointees for the duration of the inquiry ie they may need to be away from their practice for some time
- any issues of conflict, and
- the location of the inquiry.⁹⁶

6.100 The ALRC did not hear of any issues concerning the appointment of solicitors assisting. AGS submitted:

We do not see that there is any marked difference in the underlying nature of the roles to be performed by counsel and solicitors assisting and for that reason we consider that it probably is desirable that solicitors as well as counsel are engaged on the same basis by being 'appointed' within the meaning of s 6FA [of the *Royal Commissions Act*].⁹⁷

6.101 In the context of supporting general inquiries legislation in addition to the retention of the *Royal Commissions Act*, the Law Council suggested that the chair of a second tier of inquiry should be able to appoint counsel assisting. Counsel assisting should not be able to exercise coercive powers under general inquiries legislation.⁹⁸

6.102 The role of legal practitioners appointed to assist inquiries attracted some comment. AGS favoured a flexible approach to determining the role of a legal practitioner, suggesting that the most appropriate system 'will depend upon the Commissioner's own preferences and the nature and breadth of the matter the subject of inquiry'. It noted that legal practitioners need to carry out independent tasks such as marshalling and tendering evidence as well as play an advisory role to inquiry members.⁹⁹

95 Ibid, Recs 85, 76.

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

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

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

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

6.103 AGS suggested that, in some cases,

it may be appropriate to have a structure that builds in a degree of separation between the commissioner and the investigative process. This might be necessary in cases where the parties before the commission are conducting themselves in an adversarial manner and are likely to make collateral challenges to a commissioner's authority, for example, where there has been an allegation of bias.¹⁰⁰

6.104 In contrast, AGS noted circumstances in which an inquiry member was criticised for not being inquisitorial and relying too heavily on counsel and solicitors assisting.¹⁰¹ In consultations, it was suggested that the role of counsel assisting and inquiry members should be clarified. In particular, legislation should make clear that the position is independent and counsel assisting do not need to do the 'bidding', or share the opinions, of a commissioner. On the other hand, it was suggested that the appointment and role of counsel assisting did not need to be addressed in legislation at all. It was noted that statutory provisions addressing counsel assisting indicated that an inquiry would be conducted in an adversarial way.

6.105 Several stakeholders supported the introduction of a more general advisor role in legislation establishing public inquiries. The Law Council suggested that counsel assisting appointed under general inquiries legislation could be legally qualified *or* appointed for their expertise in the subject matter of a particular inquiry.¹⁰² Some stakeholders suggested that Royal Commissions do not need to be dominated by lawyers. It was suggested that appointing non-legal advisors would not undermine the role of legal counsel, but rather would enhance the information and advice available to inquiries.

ALRC's view

6.106 The ALRC notes stakeholder views that inquiries tend to be dominated, sometimes unnecessarily, by lawyers. If inquiry members adopt an adversarial procedure, the need for the advocacy experience of counsel or solicitors may be necessary. Not all inquiries established within the ALRC's proposed statutory framework will need to appoint legal practitioners, for example, to cross-examine witnesses.

6.107 The best way to address this, however, is not to exclude from the proposed *Inquiries Act* provisions that deal with the appointment and role of legal practitioners in both Royal Commissions and Official Inquiries. In many inquiries, it will be appropriate to appoint legal practitioners. A statutory provision could set out a general process for appointment of legal practitioners and make it clear that a legal practitioner is independent of inquiry members. A statutory provision also could make clear what

100 Ibid.

101 Ibid.

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

immunities and protections are enjoyed by a legal practitioner assisting an inquiry.¹⁰³ A legal practitioner assisting an inquiry, however, should not be able to exercise coercive information-gathering powers.¹⁰⁴

6.108 The ALRC's view is that the proposed *Inquiries Act* should preserve the current arrangements for appointing legal practitioners to assist an inquiry. The ALRC agrees with stakeholders who suggested that the role of a legal practitioner should be made clear—in other words, they should be independent of an inquiry member. Legal practitioners have professional ethical obligations, and should not be required to do the 'bidding' of inquiry members. It follows, therefore, that a person other than an inquiry member should have a role in their appointment. The ALRC's view is that it is appropriate that the Attorney-General continue to appoint legal practitioners. Also, in practice, inquiry members will need to work closely with legal practitioners. The proposed *Inquiries Act*, therefore, should make clear that inquiry members should be consulted before legal practitioners are appointed to assist an inquiry.

6.109 The ALRC notes that the AGS has provided solicitors to assist most recent Royal Commissions. This continuity improves institutional memory between ad hoc inquiries. In several cases, the AGS may be the only firm without a conflict of interest. The ALRC's view, however, is that the proposed *Inquiries Act* does not need to require that legal assistance to inquiries established under the Act is reserved for, or 'tied' to, the AGS.

6.110 In addition, the ALRC has reached the view that the proposed *Inquiries Act* should provide for the appointment of 'expert advisors' to members of Royal Commissions and Official Inquiries. This will allow for the appointment to an inquiry of a non-legal advisor where an inquiry member has legal experience rather than detailed knowledge of the subject-matter of the inquiry. It also will allow for the appointment of a legal advisor where an inquiry member is appointed because he or she has experience with the subject-matter of the inquiry but does not have extensive legal knowledge. A statutory advisor role suggests that persons assisting an inquiry do not necessarily need to be legal practitioners.

6.111 As the role of the expert advisor is to provide advice or opinions to an inquiry member where necessary, it is appropriate for the advisor to be appointed by the member of an inquiry. Unlike the role of a legal practitioner, there is no need for the proposed *Inquiries Act* to stipulate that an advisor is independent of the inquiry member. The advisor role should be as flexible as possible—for example, an advisor may be appointed for part or all of an inquiry. The proposed *Inquiries Act* should make clear, however, that an advisor may not exercise coercive information-gathering powers under the Act.¹⁰⁵

103 In Ch 12, the ALRC discusses the scope of immunities and protections available to legal practitioners assisting a Royal Commission or Official Inquiry.

104 This is discussed further in Part D.

105 This is discussed further in Part D.

Proposal 6–6 The proposed *Inquiries Act* should provide that:

- (a) in consultation with members of Royal Commissions and Official Inquiries, the Attorney-General may appoint legal practitioners to assist inquiry members; and
- (b) legal practitioners assisting an inquiry are independent of inquiry members.

Proposal 6–7 The proposed *Inquiries Act* should provide that Royal Commissions and Official Inquiries may appoint an expert or experts in any field as an advisor to provide technical or specialist advice.