

## 9. Funding and Costs

---

### Contents

Introduction	161
Types of costs and expenses	161
Costs of inquiry participants	162
Legal assistance	163
Costs of attendance or appearance	168
Costs of production	169
Other non-legal assistance	169
Submissions and consultations	169
ALRC's view	172
Other inquiry costs	176
Inquiry legal costs	176
Inquiry members	180
Submissions and consultations	181
ALRC's view	181
Method of funding inquiries	184
Submissions and consultations	186
ALRC's view	187

### Introduction

9.1 In this chapter, the ALRC examines issues relating to the funding and costs of Royal Commissions and Official Inquiries. It commences by identifying the types of costs and expenses that may be incurred in the conduct of inquiries, such as legal costs and the costs of providing legal and non-legal assistance to inquiry participants. The engagement and remuneration of inquiry members and legal practitioners assisting Royal Commissions and Official Inquiries is also discussed. Various methods of funding Royal Commissions and Official Inquiries are then examined.

### Types of costs and expenses

9.2 Various types of expenses and costs may be incurred in the conduct of Royal Commissions and Official Inquiries. Some of the costs associated with inquiries include the following:

- commissioners or inquiry members;
- counsel and solicitors assisting the inquiry;

- contractors and consultants;
- other staff members;
- travel;
- business and residential accommodation;
- information and communication technology; and
- document management and stationery.<sup>1</sup>

9.3 The Australian Government department responsible for the administration of inquiries—presently the Australian Government Attorney-General’s Department (AGD)—may need to procure services from a range of suppliers when establishing an inquiry. Royal Commissions and Official Inquiries also may need to obtain such services throughout the life of the inquiry and may deal directly with external suppliers, consultants and contractors. These activities involve the expenditure of public money. As such, AGD officials and inquiry staff responsible for negotiating and acquiring services on behalf of an inquiry must have regard to the *Commonwealth Procurement Guidelines* (CPGs). The CPGs set out the Australian Government’s procurement policy framework and are issued by the Minister for Finance and Deregulation under the *Financial Management and Accountability Regulations 1997* (Cth). Broadly speaking, the CPGs set out procurement principles and mandatory procurement procedures to be followed by government officials.

9.4 As the CPGs do not cover statutory appointments, they may not apply to the process of engaging and setting the remuneration of inquiry members and any legal practitioners or expert advisors appointed under the proposed *Inquiries Act*. The CPGs would apply to the process of procuring other types of services from contractors, consultants and information and communication technology providers.

### **Costs of inquiry participants**

9.5 In this section, the ALRC examines the types of costs that may be incurred by inquiry participants as a result of their involvement in a Royal Commission or Official Inquiry, and how these costs should be funded. Inquiry participants may incur costs relating to:

- legal representation for those required to give evidence or answer questions;
- legal representation for those authorised to participate as a party to an inquiry;

---

1 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, 45.

- attending or appearing for those required to give evidence or answer questions;
- producing documents or other things required by an inquiry; and
- other types of non-legal assistance required by inquiry participants, such as counselling or witness support.

9.6 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC raised issues relating to the types of assistance required by inquiry participants and how such assistance should be provided.<sup>2</sup> The ALRC also asked whether the Australian Government should fund the costs of legal representation and other non-legal expenses of witnesses.<sup>3</sup>

### Legal assistance

9.7 The *Royal Commissions Act 1902* (Cth) does not make specific provision for the payment of legal fees incurred by witnesses and other inquiry participants. According to the principles set out in the *Report of the Royal Commission on Tribunals of Inquiry* ('Salmon Principles'), the legal expenses of any person involved in an inquiry and called as a witness should normally be met out of public funds.<sup>4</sup> As noted by Stephen Donaghue, however, procedural fairness does not require the provision of public funding for legal representation before Royal Commissions.<sup>5</sup>

9.8 At the federal level, no central body provides legal assistance to individuals involved with Royal Commissions or other public inquiries. In past Royal Commissions, however, public funding has been provided for central participants. The AGD has administered ad hoc, non-statutory financial assistance schemes for a number of recent Royal Commissions and public inquiries.<sup>6</sup> The AGD produces guidelines for each inquiry setting out the criteria for assistance, the procedure for applications and the scope of financial assistance available. For example, a person who appeared before the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (AWB Inquiry) was eligible to apply to the AGD for the payment of reasonable legal costs and expenses.<sup>7</sup> Guidelines were produced setting out the criteria under which such assistance was awarded, including where:

---

2 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–5.

3 Ibid, Questions 6–3(b) and 6–3(c).

4 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), 16. The Salmon Principles are discussed in more detail in Ch 15.

5 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 192. The requirements of procedural fairness in the context of inquiries is discussed in Ch 15.

6 For example, the Australian Government, *Financial Assistance for Legal and Related Costs before the Clarke Inquiry—Guidelines* (2008).

7 Australian Government, *Guidelines for Financial Assistance for Legal and Related Costs before the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2005), 1.

- the applicant's personal interests could have been exposed to prejudice as a result of appearing before the inquiry;
- the applicant was, or was likely to be, a central figure in the proceedings and thus likely to be involved to a major degree in those proceedings; or
- cross-examination of the applicant was likely to assist the inquiry.<sup>8</sup>

9.9 The guidelines also prescribed the scale at which witnesses' legal fees could be paid:

- a solicitor's fees are payable at 80% of the Federal Court scale. The solicitor's professional fees are payable at \$195 per hour up to a maximum of \$1,560 per day
- junior counsel's fees are payable in the range of \$175–\$250 per hour up to a maximum of \$1,400–\$2,000 per day depending on the experience of counsel
- senior counsel's fees are payable in the range of \$250–\$400 per hour up to a maximum of \$2,000–\$3,200 per day depending on the experience of counsel.<sup>9</sup>

9.10 The Royal Commission into the Building and Construction Industry (Building Royal Commission) adopted a similar procedure, with financial assistance for legal costs associated with the Commission being made available in certain circumstances through the AGD. The Commission was not involved in the administration of applications for financial assistance. To assist persons who incurred costs associated with summonses to appear or appearances before the Commission, or the production of documents to the Commission, the Commission included on its website a link to the AGD's guidelines for financial assistance. The Final Report noted that as the Commission was drawing to a conclusion, it became aware that some persons served with summonses or directions which required responses within short timeframes had found it difficult to make applications for financial assistance before costs were incurred.<sup>10</sup>

9.11 Public funding for legal representation before permanent commissions is provided for in some Australian jurisdictions. For example, legislation establishing crime and corruption bodies such as the Australian Crime Commission, the New South Wales Crime Commission, the New South Wales Independent Commission Against Corruption (ICAC) and the Queensland Crime and Misconduct Commission all confer discretion on the relevant Attorney-General to provide legal or financial assistance to any person in relation to an appearance before the commission.<sup>11</sup> The provision of such

---

8 Ibid. The guidelines also set out the circumstances in which legal costs would not be paid, for example, where the applicant may recover these costs under an insurance policy or similar indemnity arrangement.

9 Ibid.

10 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), 41.

11 *Australian Crime Commission Act 2002* (Cth) s 27; *New South Wales Crime Commission Act 1985* (NSW) s 15; *Independent Commission Against Corruption Act 1988* (NSW) s 52; *Crime and Misconduct Act 2001* (Qld) s 205.

assistance may be subject to conditions, and the discretion to provide it will be exercised having regard to, among other things, the hardship that would be caused to the witness if assistance were declined, and the significance of the evidence to be given by the witness.<sup>12</sup>

9.12 It is also becoming more common for large or permanent commissions to establish legal representation offices from which witnesses can obtain legal representation at government expense either directly or through referral to an independent panel of counsel and solicitors.<sup>13</sup> An example is the New South Wales Legal Representation Office (LRO), which was originally established by the state government to provide independent legal advice and representation in relation to the Royal Commission into the New South Wales Police Service (1997). Following the completion of the Royal Commission, the LRO was retained to provide similar services in relation to the Police Integrity Commission and ICAC. From time to time, the LRO has also provided legal assistance to persons appearing before other Royal Commissions and Special Commissions of Inquiry in New South Wales.<sup>14</sup> Legal assistance is provided by in-house lawyers within the LRO, or is assigned to private legal practitioners selected from a panel appointed following a competitive tendering process. The cost of such legal representation is met by the LRO, which is a business centre within the New South Wales Attorney General's Department.

9.13 Some of the advantages of establishing a permanent legal representation office were identified in the Final Report of the Royal Commission into the New South Wales Police Service:

Although in a sense appearing in an adversarial role to the Royal Commission, and on occasions, taking a view in opposition to the Commission on matters of practice or policy in the interests of its clients, the Office provided a substantial overall contribution.

Once guidelines were established, and a clear understanding of the respective roles were worked out, initial difficulties were overcome, and the two bodies worked co-operatively. The Royal Commission in particular was able to be confident that security was maintained, and that conflicts of interest would be solved. The Legal Representation Office (LRO) was able to provide quick and effective legal advice, and was also able to move expeditiously in procuring independent advice for those persons who indicated an interest in assisting the Royal Commission.

... LRO and assigned Counsel, and solicitors conducted the necessary cross-examination of witnesses, and representation of its clients in a way that was cost-effective, timely, and not otherwise possible had representation been required to be provided either privately, or at the expense of the Police Associations.<sup>15</sup>

---

12 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 193.

13 *Ibid*, 194.

14 New South Wales Government, *Legal Representation Office* (2009) <<http://www.lawlink.nsw.gov.au/lro>> at 4 August 2009.

15 J Wood, *Royal Commission into the New South Wales Police Service—Final Report* (1997), vol 3, A–9.

9.14 Royal Commissions almost never have the power to order that legal expenses be provided.<sup>16</sup> The *Commissions of Inquiry Act 1995* (Tas), however, expressly provides that a Commission may order the payment by the Crown of the whole or any part of the legal costs of a person who appears before it.<sup>17</sup> The Act sets out a number of matters to which the Commission may have regard in determining whether such an order should be made, including:

- (a) whether the person has shown that he or she had a valid reason to seek legal representation;
- (b) whether in all the circumstances, including the events which led to the Governor directing the making of the Commission's inquiry, it would be a hardship or injustice for the person to bear the costs;
- (c) the nature and possible effect of any allegations made about the person;
- (d) whether the person has been found to have been seriously at fault, to the extent that criminal or other charges have been recommended or instituted;
- (e) whether a certificate has been issued to the person by the Commission under s 23 [a witness certificate];
- (f) any other relevant matter.<sup>18</sup>

9.15 Legal assistance also may be available to employees of an Australian Government department or agency and ministerial staff in accordance with Appendix E of the *Legal Services Directions 2005* (Cth) issued by the Attorney-General.<sup>19</sup> Paragraph 16 of Appendix E enables the Australian Government to cover the costs of an employee's legal representation at an inquiry 'if it is in the interests of the Commonwealth' and the matter 'relates to their employment'. In contrast, paragraph 5 of Appendix E—which applies to public servants who are named as defendants in court proceedings—provides that the costs of assistance 'should normally be approved' if they arose out of an incident that relates to their employment. The provision of assistance to an employee who has acted, or is alleged to have acted, negligently is not precluded.

### ***Overseas jurisdictions***

9.16 Under s 40 of the *Inquiries Act 2005* (UK), the chairman of an inquiry may award reasonable amounts to a person in respect of expenses incurred in relation to the inquiry, including the costs of legal representation. This power is expressed as being subject to any qualifications placed upon it by the minister. As noted in the Explanatory Notes to the *Inquiries Act* (UK), it was envisaged that the minister would generally set out any broad conditions under which payment may be granted, and the

---

16 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 192.

17 *Commissions of Inquiry Act 1995* (Tas) s 36(1).

18 *Ibid* s 36(2).

19 The *Legal Services Directions* are a set of binding rules that apply to Australian Government agencies in relation to the provision of legal services and the conduct of litigation.

chairman will then take the individual decisions.<sup>20</sup> In addition, the *Inquiries Rules 2006* (UK) set out detailed provisions for the determination, assessment and payment of awards for legal representation.<sup>21</sup>

9.17 Section 23 of the *Commissions of Investigation Act 2004* (Ireland) provides that the responsible minister must prepare guidelines for the payment to witnesses of legal costs necessarily incurred by them in connection with an investigation. These guidelines may restrict the types of legal services or fees for which payment may be made and otherwise limit (including by specifying maximum amounts) the extent to which legal costs may be paid.<sup>22</sup>

9.18 In its 2005 report, the Law Reform Commission of Ireland (LRCI) recommended that such a restriction of an individual's discretion to have present, at all relevant times, the legal representation of their choice, ought be removed.<sup>23</sup> Under proposed Part 9 of the *Tribunals of Inquiry Bill 2005* (Ireland), the chairperson of a tribunal of inquiry has wide-ranging powers to determine an application for costs following the publication of the report or at the conclusion of the tribunal proceedings. Any award of costs, however, must not exceed the relevant maximum amounts applicable to various categories of costs specified by regulation.<sup>24</sup>

9.19 In its recent report, *A New Inquiries Act*, the New Zealand Law Commission (NZLC) considered that a 'balance needs to be found between containing costs, adequately protecting rights and ensuring equality before inquiries, and maximising their potential to fully serve their purpose'.<sup>25</sup> To this end, it was recommended that inquiries should be given express power to recommend to their overseeing department that a person's representation be funded in part or in whole, and either on a representative group or individual basis depending on the circumstances.<sup>26</sup> Clause 19 of the *Inquiries Bill 2008* (NZ) provides that an inquiry may make a recommendation for legal assistance at any time having regard to certain statutory criteria, namely:

- the likelihood of hardship to a person if legal assistance is declined;
- the nature and significance of the contribution that the person will, or is likely to, make to the inquiry;

---

20 Explanatory Notes, *Inquiries Act 2005* (UK).

21 *Inquiries Rules 2006* (UK) rr 19-34.

22 *Commissions of Investigation Act 2004* (Ireland) s 23(3).

23 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), 12-13.

24 *Tribunals of Inquiry Bill 2005* (Ireland) cl 50(1) (as amended by the Select Committee on Justice, Equality, Defence and Women's Rights). The Committee completed its consideration of the Bill on 2 April 2009 and it is presently awaiting the Fourth (Report) Stage in the House of Deputies (Dáil Éireann).

25 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [7.31].

26 *Ibid.*

- the extent to which legal assistance is, or is likely to be, required to enable the inquiry to fulfil its purpose; and
- any other matters relating to the public interest.<sup>27</sup>

9.20 Following a recommendation, the relevant department may grant funding for legal assistance (with or without conditions) to a person appearing before the inquiry or with an interest in the inquiry.<sup>28</sup> Such assistance encompasses both legal representation and legal advice or help (for example, help with drafting submissions to an inquiry).<sup>29</sup>

### **Costs of attendance or appearance**

9.21 The *Royal Commissions Act* makes provision for the payment of some non-legal expenses. Under s 6G, any witness appearing before a Royal Commission is to be paid ‘a reasonable sum for the expenses of his or her attendance in accordance with the prescribed scale’. Section 8 of the Act states:

- (1) The Governor-General may make regulations prescribing a scale of allowances to be paid to any witness summoned under this Act for his or her travelling expenses and maintenance while absent from his or usual place of abode.
- (2) The claim to allowance of any such witness, certified by the President or Chair of the Commission or by the sole Commissioner as the case may be, shall be paid by the Minister for Finance out of moneys to be provided by the Parliament for the purposes of the Commission.

9.22 Regulation 7 of the *Royal Commissions Regulations 2001* (Cth) provides that a witness who appears before a Commission in answer to a summons under s 2 of the *Royal Commissions Act* may be paid expenses in accordance with the *High Court Scale*.<sup>30</sup> A witness who appears before a Commission, but not in answer to a summons under s 2 of the Act, may be paid equivalent expenses if so ordered by the Commission.<sup>31</sup> For the purposes of the regulation, a Commission includes a Commissioner authorised in writing by the Commission.<sup>32</sup>

9.23 In the Building Royal Commission, the statement of rights and obligations that was provided to witnesses who were summoned to appear made reference to witness allowances and expenses. Claims from witnesses were approved by the Secretary to the Royal Commission, with cheques for the approved amounts being forwarded by the

---

27 Inquiries Bill 2008 (NZ) cl 19(1)–(2).

28 Ibid cl 19(3).

29 Ibid cl 19(4).

30 *Royal Commissions Regulations 2001* (Cth) reg 7(1).

31 Ibid reg 7(2).

32 Ibid reg 7(4). The regulation also provides that, in the application of the *High Court Scale* to a witness, the Commission has, and may exercise, all the powers and functions of the taxing officer under that scale: ibid reg 7(3).

AGD. No distinction was made between claims from witnesses who had been summonsed and those who appeared voluntarily.<sup>33</sup>

### Costs of production

9.24 It is not clear whether the provisions in ss 6G and 8 of the *Royal Commissions Act* contemplate an allowance to a witness for the time occupied in searching out and collating documents, or the expense of copying documents required to be produced pursuant to a summons or notice to produce issued by a Royal Commission. In the Final Report of the Building Royal Commission, it was recommended that those provisions be amended to allow persons, companies and organisations to be paid a reasonable sum for their expenses in complying with notices to produce documents or summonses to produce documents.<sup>34</sup>

### Other non-legal assistance

9.25 There may be costs associated with providing other types of assistance to witnesses or participants in an inquiry, such as counselling, witness support and interpreting services.<sup>35</sup> For example, the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) made provision for the responsible minister, after consultation with the Commissioner, to ‘engage or appoint a suitably qualified person or persons to provide support or assistance to any person who may wish to place evidence before the Inquiry’.<sup>36</sup> A full-time witness support manager was appointed and over the period of the inquiry provided support, counselling and referral services for 448 people involved in the Inquiry.<sup>37</sup>

### Submissions and consultations

9.26 The ALRC heard a range of stakeholder views regarding whether legal and non-legal assistance should be provided to inquiry participants by the Australian Government and, if so, whether such assistance should be contracted on an ad hoc basis or provided by a government department or some other permanent body.

9.27 Dr Ian Turnbull suggested that the use of government departments or other quasi-government bodies or authorities for the provision of legal assistance to witnesses may have an impact on the independence or the appearance of independence of an inquiry.<sup>38</sup>

---

33 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 41.

34 *Ibid*, vol 2, 80.

35 The provision of information and assistance concerning inquiry procedures and issues relating to Indigenous peoples, are discussed in Ch 15.

36 *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 8(3).

37 E Mullighan, *Children in State Care Commission of Inquiry—Allegations of Sexual Abuse and Death from Criminal Conduct* (2008), 16.

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

9.28 The Australian Government Solicitor (AGS) submitted that it was not aware of policy reasons which would mean that the Australian Government should be involved in providing (as opposed to meeting the expenses of) legal or other assistance.<sup>39</sup>

9.29 While the Law Council of Australia (Law Council) noted that the provision of legal assistance afforded a necessary balance between the powers of inquiry members and the protections of the rights and liberties of persons interested in or affected by such inquiries, it did not suggest that such assistance should be provided by a permanent government body.<sup>40</sup>

9.30 In relation to funding the costs of inquiry participants, Turnbull was of the opinion that legal representation for witnesses should not be allowed except in exceptional circumstances and that such costs should not be publicly funded.<sup>41</sup> In contrast, Liberty Victoria submitted that funding of public inquiries, including funds for legal advice and the reasonable expenses of witnesses, should be provided for in legislation.<sup>42</sup>

9.31 Graham Millar noted that under current arrangements, the Australian Government funded the bulk of the costs of Royal Commissions; however, it was likely that many parties and witnesses covered some proportion of their own costs. In part, this was due to limits on the extent of legal assistance for parties under the financial assistance schemes administered by the AGD and the prescribed limits on daily rates payable to certain witnesses. Royal Commissions generally met the reasonable travel and related expenses claimed by witnesses for their attendance at hearings or meetings with the Commission.<sup>43</sup>

9.32 The AGS submitted that the practice in past inquiries was for the Australian Government to fund legal representation of witnesses. Sections 6G and 8 of the *Royal Commissions Act* made provision for reimbursement of expenses of witnesses required to appear. The AGS understood the policy rationale for this to be that the establishment of Royal Commissions and other public inquiries was motivated by broad public purposes and represented an extraordinary imposition on those caught up in the investigation. As such, the costs of such involvement should be met from the public purse. The AGS noted that there are presently legal assistance schemes for Royal Commissions administered by the AGD and there are guidelines in place which address applications for legal assistance.<sup>44</sup>

---

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

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

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

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

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

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

9.33 The Law Council noted that adverse findings by a Royal Commission or public inquiry could have significant negative impacts on an individual. An individual may need legal assistance but may not be able to afford to do so. The Law Council submitted that the *Royal Commissions Act* should be amended to allow Royal Commissions to recommend that legal assistance be provided to certain persons appearing before an inquiry. The need for the provision of legal assistance to witnesses and interested persons in other public inquiries was also noted.<sup>45</sup>

9.34 The Law Council observed that government-funded legal representation may not necessarily be required in all public inquiries, or for all individuals involved in public inquiries, but it was crucial if a person was the subject of adverse allegations or the inquiry concerned the conduct of any person. On this issue, the Law Council agreed with the findings of the NZLC that:

Denial of funds to pay for counsel for a person who is subject to adverse comment and cannot afford a lawyer is essentially the denial of a right to counsel. An issue of equity also arises since government officials will tend to have representation paid for by their department, and others may have the backing of employers or unions.<sup>46</sup>

9.35 The Law Council submitted that funding for legal representation of witnesses who are not necessarily under investigation also may be required in certain circumstances. The Law Council endorsed the criteria of the *Commissions of Inquiry Act 1995* (Tas) as an effective way to determine whether a witness should be entitled to government-funded legal representation. Such an approach would afford the Commission an element of discretion in deciding which persons interested in or affected by a public inquiry may qualify for legal assistance. The Law Council therefore considered that Royal Commissions should be given express power to recommend that legal assistance be provided (similar to the recommendation made by the NZLC) and that the factors to be considered by the Commission should be based upon similar principles to the approach adopted in Tasmania.

9.36 The Law Council submitted that grants of legal assistance could be funded from the budget of the Royal Commission, in the same way that witnesses' travel expenses are presently funded under the *Royal Commissions Act*. Alternatively, the Law Council submitted that persons participating in Royal Commissions could apply for legal assistance from schemes established by the Commonwealth specifically for the purposes of providing legal assistance in public inquiries.<sup>47</sup>

9.37 The Community and Public Sector Union (CPSU) submitted that it was appropriate for the Australian Government to meet the legal and non-legal expenses incurred by witnesses required to appear before inquiries. The CPSU noted that public

---

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

46 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 113.

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

servants frequently appeared before Royal Commissions and other public inquiries in their work capacity. Moreover, they were usually required to give evidence of activities or duties undertaken in the usual course of their employment. It followed, therefore, that the legal and other expenses incurred by such witnesses should be reimbursed.<sup>48</sup>

9.38 The CPSU submitted that, in certain circumstances, the individual interests of a particular public servant and the employing agency may differ and gave various examples from previous inquiries. In these circumstances, the CPSU maintained that the Australian Government should meet the legal and non-legal expenses of public servants, including the provision of independent legal representation if requested.<sup>49</sup>

9.39 The Department of Immigration and Citizenship (DIAC) noted that in previous inquiries involving matters within its portfolio, it had facilitated access to legal advice for participating officers and made them aware of other support services that were available, such as staff counselling. In the Clarke Inquiry into the Case of Dr Mohamed Haneef (Clarke Inquiry), DIAC engaged lawyers to assist in the preparation of statements for its officers and attend interviews with the Inquiry. DIAC acknowledged, however, that there ‘may be a tension where legal representation is provided by the Department for a witness acting in their official capacity and where legal representation is required for a witness in their private capacity’. DIAC recommended that representation could be provided by the same lawyers who represent the relevant department ‘unless and until a conflict of interest arises or is perceived to arise’.<sup>50</sup>

9.40 DIAC also noted that prior to the commencement of the Clarke Inquiry, relevant departmental officers were advised of the assistance available to them under Appendix E (Assistance to Commonwealth employees for legal proceedings) of the *Legal Services Directions*. DIAC recommended, as a general position, that legal and non-legal advice and representation should be readily available to junior and inexperienced officers, especially if witness protections were not to be made available. DIAC recommended that the assistance provisions in Appendix E of the *Legal Services Directions* continue to apply to Commonwealth officers appearing before any inquiry.<sup>51</sup>

### **ALRC’s view**

9.41 In the ALRC’s view, it is appropriate that provision be made for the Australian Government to fund certain costs incurred by witnesses and other inquiry participants in Royal Commissions and Official Inquiries. The ALRC has considered various options based on its examination of current practice at the federal level and in other jurisdictions, together with the views expressed by stakeholders in consultations and submissions. The ALRC notes that the majority of stakeholders were in favour of the

---

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

49 *Ibid.*

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

51 *Ibid.*

---

Australian Government funding legal and related costs of witnesses and other inquiry participants.

9.42 As the ALRC has not identified a need for a permanent government body to provide legal and other assistance to inquiry participants, it does not propose the establishment of such a body. Public inquiries have been appointed sporadically in the past, indicating that the workload of a permanent body may be variable and may not be a cost-effective method of delivering legal and other assistance to inquiry participants.<sup>52</sup>

9.43 In particular, the ALRC does not envisage that Royal Commissions and Official Inquiries at the federal level will be appointed frequently enough to provide a workload for a permanent body comparable to that of the LRO, which provides assistance in relation to two permanent commissions in NSW. If a permanent body were to be established, one option would be for it to deliver assistance, not only in the context of Royal Commissions and Official Inquiries, but also in relation to inquiries conducted by other federal investigatory and regulatory bodies, such as the Australian Crime Commission, the Australian Securities and Investments Commission and the Australian Commission for Law Enforcement Integrity.<sup>53</sup>

9.44 A variant of the legal representation office model, would be for the Australian Government to maintain and fund a panel of private legal practitioners to whom witnesses and inquiry participants could be referred for independent legal advice and representation. There was no widespread support amongst stakeholders for such an approach. While there was no widespread support amongst stakeholders for such an approach, there was overall support for the current arrangements, whereby the responsible department (presently the AGD) establishes and administers ad hoc financial assistance schemes for individual Royal Commissions and certain other inquiries. Some stakeholders were of the view, however, that such schemes should have statutory force.

9.45 In the ALRC's view, it is appropriate that issues relating to a person's participation in an inquiry should be determined by inquiry members, while issues relating to a person's entitlement to government-funded legal assistance should be determined by the Australian Government. It is desirable to maintain a separation between the determination of payments to inquiry participants—which should be overseen by the AGD as the responsible department—and substantive matters related to the conduct of the inquiry—which are the responsibility of the inquiry members. This approach may also reduce the possibility that a funding decision made by an inquiry member will be subject to legal challenge—for example, on the basis that it amounts to bias or apprehended bias.

---

52 The ALRC discusses issues relating to a permanent inquiry body in Ch 5.

53 Legal representation and other assistance for participants appearing before these bodies, however, are outside the Terms of Reference of this Inquiry.

9.46 The ALRC proposes that provisions modelled on the non-statutory financial assistance schemes that have been administered by the AGD in past inquiries be incorporated into the proposed *Inquiries Act*. Specifically, the proposed *Inquiries Act* should empower the Attorney-General to determine that the costs of legal and related assistance of witnesses and other inquiry participants should, or should not, be met by the Australian Government in whole or in part. Applications for such assistance and determinations could be made at any stage of a Royal Commission or Official Inquiry. The proposed *Inquiries Act* should set out factors to be considered by the Attorney-General in making such a recommendation, including:

- whether the person has a valid reason to seek legal representation;
- whether it would cause hardship or injustice for the person to bear the costs of legal representation or appear without legal representation;
- the nature and possible effect of any allegations made about the person;
- whether the person could be the subject of adverse findings; and
- the nature and significance of the contribution that the person will, or is likely to, make to the inquiry.

9.47 The ALRC notes that assistance is currently available to public officials and ministerial staff in accordance with Appendix E of the *Legal Services Directions*. In the ALRC's view, it is appropriate that legal assistance normally be approved for employees in relation to their involvement in Royal Commissions and Official Inquiries if it relates to their employment. If the employing agency determines, however, that it is not 'in the interests of the Commonwealth' to approve such expenditure, it would still be open to the employee to apply to the Attorney-General for financial assistance in accordance with the statutory scheme proposed above.

9.48 The ALRC notes that payments under financial assistance schemes are currently subject to prescribed limits and may only cover a proportion of the costs of an individual's legal representation. Under the proposed statutory scheme, it would be open to the Attorney-General to publish guidelines relating to the manner in which applications will be determined and the amounts and conditions of any such financial assistance.

9.49 In relation to the costs of production, the proposed *Inquiries Act* should provide that any person, company or other organisation required to produce documents or other things in compliance with a notice issued by a Royal Commission or Official Inquiry, be paid a sum sufficient to meet their reasonable expenses. As the scale of costs in the *High Court Rules 2004 (Cth)* does not presently prescribe any amount for expenses of this nature, appropriate amounts should be fixed at the commencement of an inquiry by the Attorney-General. This proposal differs slightly from the equivalent provision in

s 6G of the *Royal Commissions Act* in that it vests the Attorney-General, rather than the inquiry, with the power to decide the amounts to be paid. Again, in the ALRC's view, this maintains a desirable separation between the determination and payment of the costs of inquiry participants, and substantive matters related to the conduct of the inquiry.

9.50 In relation to the costs of attendance and appearance before an inquiry, such as travel and accommodation expenses and other allowances, the proposed *Inquiries Act* should incorporate provisions equivalent to those in the *Royal Commissions Act*, which provide for witnesses to be paid expenses in accordance with the scale of costs in the *High Court Rules*. The AGD could administer claims for such expenses as part of its administrative support role; however, if such claims are to be processed and paid by the inquiry itself, this should be reflected in its budget allocation.

9.51 The ALRC recognises that in some circumstances witnesses and inquiry participants in Royal Commissions and Official Inquiries may require other types of assistance, such as counselling or referrals to other government or social services.<sup>54</sup> The ALRC has not identified any need for the funding of such assistance by the Australian Government to be legislatively mandated. Under the proposed *Inquiries Act*, it would be open to inquiry members to determine that specialist assistance, such as counselling or witness support, is required and for the costs of that assistance to be met from the inquiry's own budget.

**Proposal 9-1** The proposed *Inquiries Act* should empower the Australian Government Attorney-General's Department to determine, at any stage of a Royal Commission or Official Inquiry, that the costs of legal and related assistance to witnesses and other inquiry participants should, or should not, be met by the Australian Government in whole or in part. The factors to be considered by the Attorney-General's Department in making such a recommendation should include:

- (a) whether the person has a valid reason to seek legal representation;
- (b) whether it would cause hardship or injustice for the person to bear the costs of legal representation or appear without legal representation;
- (c) the nature and possible effect of any allegations made about the person;
- (d) whether the person could be the subject of adverse findings; and
- (e) the nature and significance of the contribution that the person will, or is likely to, make to the inquiry.

54 The assistance that may be required by Indigenous witnesses is discussed in Ch 15.

**Proposal 9–2** The proposed *Inquiries Act* should provide that individuals and organisations are to be paid a sum sufficient to meet their reasonable expenses for complying with notices to produce documents or other things. The Australian Government Attorney-General’s Department may, at any stage of the inquiry, determine the amount to be paid.

**Proposal 9–3** The proposed *Inquiries Act* should provide that individuals required to attend or appear before Royal Commissions and Official Inquiries are to be paid expenses in accordance with the *High Court Rules 2004* (Cth).

### Other inquiry costs

9.52 The costs of inquiry members, legal practitioners assisting and inquiry staff, constitute a significant proportion of the overall costs of an inquiry. In this section, the ALRC examines inquiry legal costs, including those incurred by legal counsel (counsel assisting the inquiry) and solicitors (solicitors assisting the inquiry), and the costs of inquiry members.

9.53 The section also examines the various ways in which inquiry members, legal practitioners assisting and inquiry staff may be engaged and remunerated. Generally, the terms of engagement are negotiated by the AGD at the outset of the inquiry, while the actual payment of those costs is allocated from the inquiry’s own budget.<sup>55</sup> The inquiry may then be responsible for recruiting and engaging other inquiry staff.

### Inquiry legal costs

9.54 An inquiry’s legal costs can be a significant expense. For example, in the Building Royal Commission, the costs for ‘legal and auditing’ were about \$23.33 million of the approximate final amount of \$76.68 million.<sup>56</sup> The former figure does not include travel and accommodation costs for the inquiry’s legal team.<sup>57</sup>

---

55 The respective roles and criteria for appointment of inquiry members and staff, including legal practitioners assisting, are addressed in Ch 6.

56 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, 45. These figures have been adjusted to reflect 2008 values.

57 *Ibid*, vol 22, 45.

9.55 Currently, legal practitioners assisting an inquiry may be appointed formally by the Attorney-General under s 6FA of the *Royal Commissions Act*. The definition of ‘legal practitioner’ is not confined to counsel, as the definition in the Act includes a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of the High Court or of the Supreme Court of a state or territory.<sup>58</sup> As a matter of practice, however, it is usual for counsel assisting to be formally appointed under s 6FA of the *Royal Commissions Act* and for a firm of solicitors then to be engaged to instruct counsel and assist the inquiry.<sup>59</sup>

### ***Counsel assisting***

9.56 In most Royal Commissions and some Official Inquiries it may be necessary for inquiry members to secure the assistance of suitably skilled, competent and expert counsel—especially if the subject matter of the inquiry is likely to require examination of witnesses at formal hearings. The engagement of counsel needs to be balanced, however, against the considerable costs of retaining members of the private bar to assist inquiries, often for extended periods of time.

9.57 The Australian Government policy relating to the engagement of counsel is set out in Appendix D of the *Legal Services Directions*. In this context, ‘litigation’ is defined to include ‘proceedings before courts, tribunals, inquiries ... and the preparation for such proceedings’.<sup>60</sup> Appendix D is also expressed as applying to ‘briefs to appear before courts, tribunals and inquiries’. While it is not entirely clear whether ‘inquiries’ in this context extends to Royal Commissions and other public inquiries, it would be surprising if that were not the case, especially in the absence of an express statement to that effect in the *Legal Services Directions*.

9.58 In engaging counsel, the Australian Government relies on its position as a major purchaser of legal services in agreeing on the level of fees payable to counsel.<sup>61</sup> While there is no generally applicable fee scale, counsel must have an approved rate for performing Commonwealth legal work, which is determined by the Office of Legal Services Coordination in the AGD. There are caps on daily rates for senior counsel (at the time of writing \$2,400 inclusive of GST) and for junior counsel (at the time of writing \$1,600 inclusive of GST), which cannot be exceeded without the approval of the Attorney-General.

9.59 As noted above, in the case of Royal Commissions and other public inquiries, counsel assisting are engaged by the Commonwealth and daily rates are ordinarily negotiated between individual counsel and the AGD. There is no fee scale for Royal

---

58 *Royal Commissions Act 1902* (Cth) s 1B.

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

60 *Legal Services Directions 2005* (Cth) [15].

61 *Ibid*, Appendix D, [1].

Commissions or public inquiries such as those that apply to legal practitioners undertaking legal aid work in New South Wales.<sup>62</sup>

9.60 In the Building Royal Commission, rates were paid ‘in accordance with the policy on counsel fees approved by the Attorney-General for the engagement of counsel by the Commonwealth’.<sup>63</sup> Similarly, in the AWB Inquiry, terms of engagement for counsel assisting were negotiated between counsel and the AGD, in accordance with the Australian Government fee structure for the engagement of counsel.<sup>64</sup> These rates were subject to a daily cap.<sup>65</sup> These rates and the daily cap have not been made public.

9.61 The Australian Government has had a longstanding practice of not disclosing details of the daily fees paid to counsel.<sup>66</sup> A number of reasons for this approach have been suggested. First, it is said that Commonwealth rates are moderate compared to the commercial fees that barristers might otherwise be paid and there is some commercial sensitivity about that information being made public.<sup>67</sup> Secondly, it is thought that publishing daily fees may disadvantage the Commonwealth when negotiating rates with individual counsel.<sup>68</sup>

### ***Solicitors assisting***

9.62 As noted above, solicitors assisting can be appointed by the Attorney-General under s 6FA of the *Royal Commissions Act*. The practice, however, has been for a firm to be contracted by the Australian Government to provide legal services to Royal Commissions and inquiries, including instructing counsel assisting.<sup>69</sup>

9.63 The manner in which solicitors assisting are engaged and remunerated varies. 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.<sup>70</sup> The terms of engagement,

---

62 For example, Legal Aid New South Wales publishes fee scales for state and Commonwealth matters on its website <[www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)> at 12 June 2009.

63 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, [23].

64 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10, 127.

65 *Ibid*, Appendix 10, 129.

66 Commonwealth, *Official Committee Hansard*, Senate Standing Committee on Legal and Constitutional Affairs, 27 May 2008, 91–92. As noted in Ch 10, however, information about the total fees paid to individual barristers often comes to light through Senate Estimates hearings or in response to written questions on notice in Parliament.

67 *Ibid*.

68 *Ibid*.

69 The role of solicitors assisting and the procedure for their appointment is discussed in Ch 6.

70 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).

which included hourly rates (subject to a daily cap) and, where necessary, conditions for reunion travel and accommodation in Sydney, were negotiated between the Executive Officer of the Inquiry and the AGS. The occasional need to engage interstate lawyers added to the overall cost. Once agreed, rates and conditions remained constant for the duration of the Inquiry.<sup>71</sup>

9.64 In the Building Royal Commission, arrangements were negotiated with the AGS and recorded in a Memorandum of Terms, which was not disclosed publicly for commercial-in-confidence reasons.<sup>72</sup> As part of this agreement, the AGS dedicated legal staff to provide ‘collateral legal services’—which generally related to the provision of specialist legal advice—and ‘related legal services’—which generally involved the receipt of Commission property in those states and territories where the Commission did not have an office. The remuneration paid for these services was based on hourly rates. Disbursements for carrying out such services were charged at cost and there was no charge for access to the AGS library. The remuneration payable to legal staff was negotiated by the Secretary to the Commission after consulting the AGD, having regard to the skills and experience of the solicitors in question and the amounts payable to counsel assisting. Hourly rates of payment were determined for each category, with daily fee caps for each. For staff required to operate temporarily interstate, the Commission met the costs of reunion travel.<sup>73</sup>

9.65 In relation to inquiries other than Royal Commissions, the practice of engaging and remunerating solicitors has also varied. For example, in the Clarke Inquiry, there was no formal ‘tender process’, but a number of firms were approached by the AGD on behalf of the inquiry.<sup>74</sup> A private law firm was appointed to assist the inquiry, and the terms of the engagement were negotiated by the Secretary to the inquiry, at arms-length from the AGD.<sup>75</sup> Another example is the Equine Influenza Inquiry. The AGS was appointed as solicitors assisting while another private law firm was engaged to represent the Commonwealth as a party to the inquiry.<sup>76</sup> No information is publicly available regarding the terms and conditions of engagement or whether the appointments were subject to a competitive tendering process.

---

71 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10, 129.

72 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), Appendix 22, 8–9.

73 Ibid.

74 Commonwealth, *Official Committee Hansard*, Senate Standing Committee on Legal and Constitutional Affairs, 27 May 2008, 92, 131.

75 Ibid, 94; M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 289.

76 I Callinan, *Equine Influenza: The August 2007 Outbreak in Australia—Report of the Equine Influenza Inquiry* (2008), 2.

**Other jurisdictions**

9.66 In New Zealand, the engagement of counsel assisting has varied from inquiry to inquiry. Counsel assisting may be seconded from the Crown Law Office, but if in private practice, they are contracted on standard commercial terms.<sup>77</sup>

9.67 In its recent report, *A New Inquiries Act*, the NZLC noted the significant impact of the legal team on the costs of the inquiry. To control costs, the NZLC recommended that the Solicitor-General be responsible for setting terms and conditions of the appointment of counsel assisting and to approve invoices, within an overall budget and in consultation with the responsible department.<sup>78</sup> This recommendation, together with a requirement that the Solicitor-General consult with the inquiry beforehand, is reflected in cl 13(2)(c) of the Inquiries Bill 2008 (NZ).

9.68 Methods for remunerating the legal team of a public inquiry were discussed by the LRCI in its *Report on Public Inquiries, Including Tribunals of Inquiry* (2005).<sup>79</sup> The LRCI recommended flexible arrangements in order to attract the most experienced applicants at competitive prices.<sup>80</sup> Further, the LRCI recommended that a tribunal of inquiry should be able to engage a particular lawyer for remuneration agreed upon by the parties.<sup>81</sup>

9.69 Under the *Inquiries Act 2005* (UK), the responsible minister has a discretion to pay the expenses of counsel or solicitors assisting an inquiry and there are no legislative provisions prescribing the manner of their engagement and remuneration.

**Inquiry members**

9.70 As noted in Chapter 6, the selection of inquiry members is usually undertaken relatively quickly, and often before the inquiry is publicly announced. The Australian Government currently has a broad discretion to appoint inquiry members and the ALRC is not proposing that criteria be prescribed in the proposed *Inquiries Act*.<sup>82</sup> Equally, there is a measure of flexibility in the negotiation of terms of engagement and remuneration of inquiry members. These terms are usually the subject of negotiations between the AGD and potential inquiry members when an inquiry is being established.

9.71 There are no fixed rates for the remuneration and allowances that are to be paid to Royal Commissioners and other inquiry members, either in existing government policies or in legislation. In contrast, many other statutory office holders, including

---

77 New Zealand Government Department of Internal Affairs, *Setting Up and Running Commissions of Inquiry* (2001), 40.

78 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [13.7].

79 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), Ch 7.

80 *Ibid*, [7.50], [7.58]–[7.59].

81 *Ibid*, [7.58].

82 The appointment of inquiry members is discussed in Ch 6.

judicial officers, are paid remuneration and allowances as determined by the Remuneration Tribunal.<sup>83</sup>

### Submissions and consultations

9.72 In its consultations, the ALRC heard a range of views about how legal practitioners assisting an inquiry should be engaged and remunerated.<sup>84</sup> Some noted the need to retain flexibility in the arrangements so that those with the appropriate skill and levels of experience could be retained on relatively short notice. An alternative view was that the government could simply set the fees and leave it to individual lawyers to decide whether or not to accept the appointment. It was thought that there would always be counsel, even senior counsel, willing to accept such appointments if the subject matter of the inquiry raised interesting issues or there was opportunity to enhance one's reputation.

9.73 Millar submitted that the existing arrangements worked well and seemed to take account of prevailing market factors for the engagement of lawyers. He also noted that the fees paid to individual counsel were invariably published in accordance with parliamentary and other established protocols.<sup>85</sup>

9.74 In contrast, Turnbull was in favour of a scale of fees being included in legislation and queried whether negotiated fees could be justified from the public purse when effectively only 'routine lawyering and advocacy' were involved.<sup>86</sup>

9.75 In relation to disclosure, the AGS submitted that it was not aware of any clear case for greater disclosure than that which presently occurs with the government's spending on legal fees in the course of its ordinary business.

### ALRC's view

9.76 It is the ALRC's view that the proposed *Inquiries Act* should not provide that the remuneration and allowances paid to inquiry members be determined by the Remuneration Tribunal. The ALRC has emphasised in its proposals in Chapter 6, that the Australian Government requires a degree of flexibility in appointing inquiry members. If it cannot negotiate the engagement and remuneration of inquiry members on a case-by-case basis, this may limit choice and flexibility in the appointment of inquiry members that have the requisite skills, knowledge or experience necessary to conduct the particular inquiry.

---

83 The Tribunal is established under the *Remuneration Tribunal Act 1973* (Cth) and its role is to determine, report on and provide advice about remuneration, including allowances and entitlements, for certain public office holders within its jurisdiction.

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

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

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

9.77 In order to obtain a determination from the Remuneration Tribunal, the relevant government department must prepare a submission. This would add another step to the process of appointing inquiry members. It may not be practical for the Tribunal to make a determination on the remuneration and allowances that should be paid to individual inquiry members within a short timeframe as the Tribunal generally meets once every two months (although there is capacity to arrange out of session hearings). The ALRC considers that involving the Remuneration Tribunal in the appointment process may result in unavoidable delays and other practical difficulties that may impact on the expeditious establishment of the inquiry.

9.78 The ALRC has considered whether a scale of costs should be prescribed, for example, in the *Royal Commissions Regulations 2001* (Cth) or other inquiries legislation to fix the amount of legal costs payable to counsel and solicitors assisting an inquiry. In the ALRC's view, such a scale would not be workable, because the nature, length and subject matter of inquiries vary greatly. It would be very difficult to formulate a scale of fees that could be applied easily to the circumstances of different inquiries.

9.79 It would not be feasible simply to model a scale of fees for Royal Commissions and Official Inquiries on those used by courts, because there may be substantial differences between conducting litigation and the tasks undertaken by legal practitioners assisting an inquiry. In some inquiries, counsel assisting may undertake tasks not usually performed by advocates in court litigation—for example, they may investigate matters relevant to the inquiry and undertake research and analysis of documents well before hearings commence.

9.80 It would also take considerable effort and resources to formulate and update a fees scale for Royal Commissions and Official Inquiries. The frequency with which inquiries are likely to occur would not appear to warrant such an undertaking.

9.81 In the ALRC's view, the current arrangements for negotiating legal fees in Royal Commissions and inquiries are appropriate and efficient. The AGD (or other responsible department) should continue to take the lead role in negotiating the terms of engagement and remuneration for the legal team on a commercially competitive basis. It is appropriate that the terms of engagement reflect Australian Government policy on the procurement of legal services and the engagement of counsel, for example, Appendix D of the *Legal Services Directions*.

9.82 In order to promote consistency and transparency, encourage competition and ensure the efficient, effective and ethical use of public resources,<sup>87</sup> the proposed *Inquiries Handbook* should provide guidance on issues relating to the engagement and

---

87 The use of resources in an 'efficient, effective and ethical' manner is consistent with s 44 of the *Financial Management and Accountability Act 1997* (Cth), which applies to Australian Government departments and their officials.

remuneration of legal practitioners appointed to assist inquiries established under the proposed *Inquiries Act*. For example, the fee structure should take into account the nature of the work to be performed by counsel and solicitors assisting and the skills and level of experience of individual lawyers. In some inquiries, especially where the subject matter is limited in scope, it may be appropriate for the fee structure to incorporate daily rates, although these should ordinarily be subject to caps. Alternatively, if an inquiry is likely to be broad-ranging and involve extensive investigatory work, it may be more appropriate for caps to apply to particular stages or events in the individual inquiry rather than a uniform cap on legal fees.<sup>88</sup>

9.83 It is appropriate for existing approved Commonwealth rates for individual counsel to be used as a reference point in determining the fees to be paid to counsel assisting.<sup>89</sup> Other relevant factors may include the normal market rates of counsel, the volume of guaranteed work provided during the inquiry, and any long-term impact that the engagement may have on an individual counsel's private practice.

9.84 In Chapter 10, the ALRC proposes that summary information about the costs of inquiries be made publicly available. This information should include details of legal costs, including fees and allowances, as separate items, paid to legal practitioners assisting the inquiry. These figures should include the total amount paid to counsel assisting for the whole of the inquiry but need not include commercially sensitive information such as the daily rates or fee structures of individual counsel or solicitors.

**Proposal 9–4** The proposed *Inquiries Handbook* should include guidance on the engagement and remuneration of legal practitioners assisting an inquiry. These terms of engagement and remuneration should, as far as practicable, be negotiated on a commercially competitive basis. The guidelines should set out the factors that may be relevant in negotiating these terms, for example:

- (a) the nature of the work to be performed, having regard to the subject matter and scope of the inquiry;
- (b) the skills and level of experience of individual legal practitioners;
- (c) having regard to the subject matter and scope of the inquiry, the appropriateness of applying:

88 In Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), the ALRC recommended that, with respect to assistance provided by legal aid commissions in legally aided, family law cases, the federal Attorney-General's Department, in consultation with legal aid commissions, should develop new procedures for assessing and imposing funding limits. These should include 'capping procedures directed at particular stages or events in the individual case' rather than a uniform cap on legal fees: Rec 45.

89 This principle is consistent with the *Legal Services Directions 2005* (Cth), Appendix D, [12].

- (i) daily rates subject to fee caps; or
- (ii) fee caps by reference to particular stages or events in the conduct of an inquiry;
- (d) the commercial rates of legal practitioners;
- (e) the volume of guaranteed work provided during the inquiry;
- (f) the impact that the engagement may have on a legal practitioner's usual practice; and
- (g) any existing Australian Government policy on the procurement of legal services and the engagement of counsel, for example, Appendix D of the *Legal Services Directions 2005* (Cth).

### Method of funding inquiries

9.85 There is no permanent or standing appropriation to cover the costs of Royal Commissions and public inquiries. Rather, funding is allocated from the Attorney-General's portfolio budget. The AGD has responsibility for administrative support for Royal Commissions and certain other inquiries under the current *Administrative Arrangements Order*.<sup>90</sup>

9.86 As noted by Millar, Royal Commissions are usually appointed shortly after the need arises with an expectation of early commencement.<sup>91</sup> Unless the timing is such that specific provision can be made in the annual *Appropriation Acts*, either as part of the Budget or after Additional Estimates—which occur in November of each year—the funding arrangements are handled through the standard budgetary process for urgent and unforeseen expenditure, namely, an additional appropriation issued under an Advance to the Finance Minister (AFM).<sup>92</sup>

This involves the Royal Commission and ... the Attorney-General's Department, preparing an initial budget. This budget is submitted to the Department of Finance and Deregulation for assessment and to arrange approval by the Finance Minister for funds to be available from the AFM appropriation, either as a final charge on the

90 Issues relating to the administration of inquiries are discussed in Ch 8.

91 G Millar, *Submission RC 5*, 17 May 2009

92 The Advance to the Finance Minister (AFM) is a provision in the annual *Appropriation Acts* which enables the Minister for Finance and Deregulation (Finance Minister) to provide additional appropriation funding to agencies in the current year in which the AFM is issued. The Finance Minister will only consider issuing an AFM if satisfied that there is an urgent need for expenditure that is either not provided for or has been insufficiently provided for in the existing appropriations of the agency: Department of Finance and Deregulation, *Advance to the Finance Minister (AFM)* <www.finance.gov.au> at 2 June 2009.

AFM or pending recovery from a subsequent appropriation made in the Annual Appropriation Acts. There is often a need to seek approval to modify the budget once the Royal Commission has commenced operations and the size of its task becomes clearer. The Commission's budget then appears in the Budget or Additional Estimates documentation.<sup>93</sup>

9.87 Generally, the majority of the budget allocation is administered by the inquiry itself although some funds are administered by the AGD. For example, the Clarke Inquiry was funded under the budget appropriation of the AGD: \$4.19 million was allocated to it and of that amount, the inquiry itself administered \$3.84 million.<sup>94</sup> The balance of the budget, which was administered by the AGD directly, was allocated to provide financial assistance to members of the public who were asked to provide submissions or statements to the inquiry.<sup>95</sup> All other costs directly related to the inquiry were met from the inquiry's own budget.<sup>96</sup>

9.88 In the United Kingdom, the minister responsible for an inquiry is obliged to fund certain costs (witness costs and expenses incurred in holding the inquiry such as publication costs) and has a discretion to fund other types of costs (legal costs of the inquiry).<sup>97</sup> The minister is also able to withdraw funding if he or she considers the inquiry is acting, or is likely to act, outside its terms of reference.<sup>98</sup>

9.89 Another method of funding inquiries is through a 'standing appropriation' or 'special appropriation' in the proposed *Inquiries Act*. These terms refer to funds appropriated for a specified purpose, for example to finance a particular project or programme. According to the Department of Finance and Deregulation, around 75% of government expenditure is currently covered by special appropriation.<sup>99</sup> Special appropriation bills often do not specify an amount or duration. Those providing funds for an indefinite period are said to give standing appropriation.<sup>100</sup>

9.90 The *Commissions of Inquiry Act 1995* (Tas) contains a 'standing appropriation', which means that some costs and expenses of Commissions are payable out of the Tasmanian Consolidated Fund without the need for further appropriation. These are:

- costs and expenses incurred in, or in connection with, the conduct of an inquiry under the Act;

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

94 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 292.

95 Australian Government, *Financial Assistance for Legal and Related Costs before the Clarke Inquiry—Guidelines* (2008).

96 These costs included salary and associated expenses, premises, office services (including information technology), transcription services, advertising, report production and printing, hearings, interviews and the public forum: M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008).

97 *Inquiries Act 2005* (UK) s 39.

98 *Ibid* s 39(4), (5).

99 Department of Finance and Deregulation, *Appropriation Bills* <www.finance.gov.au> at 2 June 2009.

100 *Ibid*.

- certain legal costs of witnesses;
- certain allowances for witnesses; and
- certain compensation to witnesses for loss of income.<sup>101</sup>

9.91 One option would be to introduce a standing appropriation to cover certain types of inquiry costs. Professor Enid Campbell has suggested the introduction of a permanent appropriation to cover the expenses of witnesses in Royal Commissions.<sup>102</sup>

9.92 The use of standing appropriations and their significance from the perspective of parliamentary accountability was examined by the Senate Standing Committee for the Scrutiny of Bills (Senate Committee) in its *Fourteenth Report of 2005*.<sup>103</sup> The Committee noted an earlier Audit Report prepared by the Australian National Audit Office, which found that widespread shortcomings existed in the financial management and disclosure of special appropriations.<sup>104</sup> The Senate Committee concluded that the use of standing appropriations limited accountability and scrutiny by denying Parliament the opportunity to approve expenditure through the annual appropriations processes.<sup>105</sup> To that end, the Senate Committee determined that it would look at explanatory memorandums for an explanation of the reasons for the inclusion of standing appropriations in bills and, where appropriate, seek an explanation from the responsible minister to justify ‘the exclusion of the appropriation from subsequent parliamentary scrutiny and renewal through the ordinary appropriations process’.<sup>106</sup>

### **Submissions and consultations**

9.93 In IP 35, the ALRC sought stakeholder views on how Royal Commissions and other inquiries should be funded—for example, whether a standing appropriation was a feasible option.<sup>107</sup>

9.94 Liberty Victoria observed that the funding and administration of public inquiries was absolutely critical to their success and suggested that it should be legislatively supported. In relation to the funding, it submitted that:

One method of limiting the effectiveness of a public inquiry is to restrict its access to funds. An inquiry which doesn’t have the funds to attend or interview witnesses may

---

101 *Commissions of Inquiry Act 1995* (Tas) s 39.

102 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 345.

103 Parliament of Australia—Senate Standing Committee for the Scrutiny of Bills, *Fourteenth Report of 2005—Accountability and Standing Appropriations* (2005), 271.

104 Australian National Audit Office, *Financial Management of Special Appropriations*, Audit Report No 15 2004–05 (2004), 12.

105 Parliament of Australia—Senate Standing Committee for the Scrutiny of Bills, *Fourteenth Report of 2005—Accountability and Standing Appropriations* (2005), 271.

106 *Ibid.*, 272.

107 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–4.

be unable to obtain the information it needs. In extreme cases, an inquiry may be unable to afford even basic office equipment and services. Unfortunately this can be exploited by governments to 'close down' politically unpopular inquiries. The use of a standing appropriation is on the face of it tempting, but not without its own pitfalls. Not only does it run the risk of wasting taxpayer dollars by sitting idle, but its administration (in particular, the allocation of funds) would be subject to the same political pressures.<sup>108</sup>

9.95 Liberty Victoria suggested a number of alternatives for the funding of public inquiries such as:

- a standing appropriation, which was administered independently or which had its funds allocated to a particular inquiry by Parliament;
- Parliament allocating the funds directly at the time of the inquiry;
- allocating funding based upon an independent auditor's estimate of the funds required for an inquiry.

9.96 In his submission, Millar doubted that the budget of a Royal Commission or other public inquiry would meet the normal criteria for a standing appropriation and it would not seem to improve the transparency of the current budget arrangements.<sup>109</sup>

#### **ALRC's view**

9.97 The ALRC is not persuaded that any changes are required to the current methods of appropriating funds for inquiries. Clearly, inquiries require adequate funding to carry out their terms of reference, however the ALRC has not identified any particular problems in the current arrangements. Inquiries can be adequately funded through the standard annual appropriations process. Alternatively, if an inquiry is not foreseen at the time of the annual *Appropriation Acts*, there is an established process in place for the Minister for Finance and Deregulation to approve an AFM appropriation.

9.98 In the ALRC's view, it is not appropriate for Royal Commissions and Official Inquiries to be funded under a special appropriation in the proposed *Inquiries Act*. While a special appropriation may be suitable where the Government requires a detailed legislative scheme relating to funds, it is important from the perspective of independence that an inquiry maintains control over the administration of its budget and not be subject to detailed conditions attached to the expenditure of funds.

9.99 On the other hand, it is the ALRC's view that the funding of inquiries cannot remain open-ended and must be financially accountable. Accordingly, the ALRC does

---

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

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

not propose that the *Inquiries Act* incorporate a standing appropriation as this would diminish the scope for parliamentary control over public expenditure on inquiries.

9.100 For the above reasons, the ALRC does not propose that Royal Commissions and Official Inquiries be funded through a standing or special appropriation. It is appropriate that funding continue to be allocated from the budget of the Attorney-General's portfolio, consistent with the AGD's existing administrative responsibility for Royal Commissions and certain other public inquiries.<sup>110</sup>

---

110 As discussed in Ch 8, the ALRC is proposing that administrative responsibility for Royal Commissions and Official Inquiries be allocated to a single Australian Government department, presently the AGD. Issues relating to the jurisdiction of inquiry members to award costs are discussed in Ch 10.