



Australian Government

Australian Law Reform Commission

Review of the Royal Commissions Act

INQUIRY SNAPSHOT

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Review of the *Royal Commissions Act*

Inquiry Snapshot

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The ALRC's Review of the *Royal Commissions Act 1902 (Cth)* and related issues

The Attorney-General of Australia, the Hon Robert McClelland MP, has asked the Australian Law Reform Commission (ALRC) to review the operation and provisions of the *Royal Commissions Act 1902 (Cth)* and consider the question of whether an alternative form or forms of Commonwealth executive inquiry should be established by statute.

The ALRC has been asked to examine, among other things, whether Royal Commissions have sufficient powers to operate effectively and whether there are appropriate protections for the rights of people who are participants in a Royal Commission. The ALRC will also look at whether there is a need to establish other forms of inquiries that are less formal and more cost-effective.

The ALRC is due to present its final Report and recommendations to the Attorney-General by 30 October 2009. The full Terms of Reference are available at www.alrc.gov.au/inquiries/current/royal-commissions/terms.html.

Setting the scene

Royal Commissions occupy a unique place in the Australian system of government, being the highest form of inquiry on matters of public importance. When there are controversial issues that cannot be handled satisfactorily by the political process or the courts, there are invariably calls for the establishment of a Royal Commission.

However, in recent years, some inquiries—such as the AWB Inquiry and the Royal Commission into the Building and Construction Industry—have experienced difficulties because provisions of the *Royal Commissions Act* are antiquated or inappropriate. Royal Commissions can be expensive—often running into the tens of millions of dollars.

The ALRC has been directed to consider whether there is any need to develop an alternative form or forms of Commonwealth public inquiry to provide more flexibility, less formality and greater cost-effectiveness than a Royal Commission.

Other matters that the ALRC will be considering include:

- whether there is any need to develop special arrangements and powers for inquiries involving matters of national security;
- the appropriate balance between powers for persons undertaking inquiries, such as members of a Royal Commission, and protections of the rights and liberties of persons interested in, or potentially affected by, inquiries;
- the appropriateness of restrictions on the disclosure of information to, and use of information by, Royal Commissions and other inquiries, including restrictions contained in other legislation (but not including those arising from the operation of client legal privilege); and
- suggestions for changes to the *Royal Commissions Act* made by past Royal Commissions.

What is the role of Royal Commissions?

Royal Commissions have an extensive history, dating back to the time of William the Conqueror in the 11th Century. They also have a long history in Australia. The *Royal Commissions Act 1902* (Cth) was one of 59 statutes enacted by the first Parliament of the Commonwealth of Australia. There have been 127 Royal Commissions in Australia since 1902 and this is the first time the Act has been comprehensively reviewed.

In Australia, all arms of government conduct some form of inquiry. The courts adjudicate on civil and criminal matters of law; parliamentary committees review and report on proposed and existing laws and practices; and government departments inquire into matters relevant to policy development and government processes. As part of its review of Royal Commissions, the ALRC is considering a particular type of ‘public inquiry’—one that is conducted on an ad hoc basis by an entity commissioned by, but external to, the government. This type of public inquiry includes Royal Commissions and other ad hoc inquiries appointed to investigate issues and make recommendations to government.

The primary function of a Royal Commission is to inquire into, and report on, the subject matter it has been asked to consider by the government. The key features of Royal Commissions are that they are:

- *public in nature*—meaning that the inquiry and its processes have a degree of public visibility, and members of the public contribute to the inquiry by providing information or other relevant material;
- *independent*—its membership is usually drawn from outside government (most often from the judiciary); and
- *advisory*—meaning that inquiries cannot implement their own recommendations or make legal determinations.

Royal Commissions may consider issues of policy or law reform (policy inquiries); or investigate the facts of a particular incident or problem (investigatory inquiries). Royal Commissions in Australia have considered issues as diverse as science and technology, Indigenous affairs, and the building industry, and have investigated specific allegations of corruption and other criminal behaviour.

The Royal Commissions Act

The *Royal Commissions Act* provides that the Governor-General may appoint a Royal Commission into any matter relating to the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth. Royal Commissioners are appointed by the Governor-General, on the advice of the government.

The *Royal Commissions Act* has been amended 20 times since its enactment. Some amendments have been of a minor, technical nature. Other amendments, however, have been substantive, addressing problems with the legislation identified by particular Royal Commissions. Currently, the *Royal Commissions Act* uses a variety of drafting styles. Some of its provisions were inserted in the early 1900s, and have remained largely unaltered, while others were inserted as recently as 2006. The ALRC will be considering whether the *Royal Commissions Act* should be renamed, redrafted or repealed and replaced with a general Act for public inquiries.

Costs of Royal Commissions

Royal Commissions have often been criticised for being too expensive. Estimates of the costs (in today's dollars) of recent Royal Commissions include approximately \$13 million for the AWB Inquiry, over \$47 million for the inquiry into the collapse of insurance giant HIH, and over \$70 million for the three-year inquiry into the Building and Construction Industry.

The costs of Royal Commissions, however, must be balanced against the benefits of conducting such inquiries. Royal Commissions have several functions, and their effectiveness may be measured in many ways.

Other forms of public inquiry are generally less costly than most Royal Commissions. This may be because most forms of inquiry other than Royal Commissions do not have the same coercive information-gathering powers as Royal Commissions. This may reduce the duration of the inquiry and the legal costs incurred by an inquiry. On the

other hand, the lack of powers to demand information may make inquiry findings less comprehensive.

The ALRC will be considering the funding and costs of Royal Commissions and the most appropriate ways to reduce these costs.

Comparative forms of public inquiry

As well as Royal Commissions, the Australian Government establishes ad hoc taskforces, committees, departmental and other inquiries to investigate and provide advice on a diverse range of matters. This type of inquiry often is used by the government because it is a more flexible, and sometimes more cost-effective, option than a Royal Commission. An example of a recent inquiry that was not a Royal Commission is the Inquiry into the Case of Dr Mohamed Haneef. The Equine Influenza Inquiry was not a Royal Commission, but had most of the powers of a Royal Commission.

There are significant differences between Royal Commissions and this type of non-statutory inquiries. Members of such inquiries, or the witnesses that appear before them, may not enjoy the same legal protections that are accorded to members of, and those appearing before, Royal Commissions. Also, non-statutory inquiries generally do not have the same level of public input as Royal Commissions, nor generally can they compel witnesses to give evidence. Consequently, non-statutory inquiries may not have all the information necessary to make the best recommendations. Further, non-statutory inquiries may not enjoy the same perception of independence as Royal Commissions.

The ALRC will be considering whether legislation should be introduced to formalise and standardise the arrangements and powers of this type of public inquiry.

There are several matters that need to be considered when developing the most effective and efficient model for conducting public inquiries. The following list provides an overview of the types of issues that may need to be addressed by any legislation establishing a Royal Commission or other public inquiry.

- **establishment of public inquiries**—who should set or amend the terms of reference for an inquiry and appoint inquiry members (for example, the Governor-General; Cabinet; the Prime Minister; any individual minister; or one or both Houses of Parliament);
- **constitution of public inquiries**—should there be any restrictions on the appointment of a chair or member of the inquiry (for example, should membership be restricted to a judge or legal practitioner or an expert in a particular field);
- **nature of the inquiry**—do all inquiries require similar powers (for example, do policy inquiries require coercive powers to summon witnesses and gather information);

- **flexibility**—is there scope to provide an inquiry with different powers and protections in certain circumstances;
- **nature and exercise of powers**—what powers are needed by an inquiry and should all inquiry members be allowed to exercise these powers (for example, should an inquiry be allowed to issue search warrants);
- **protections and privileges**—what protections and privileges should be provided to inquiry members and witnesses (for example, do witnesses require protection from self-incrimination);
- **offences and penalties**—what are the consequences for individuals who breach provisions of the Act (for example, what offences and penalties are necessary, should civil penalties and criminal penalties or both be used);
- **funding and other assistance**—how should an inquiry be funded and what assistance should be provided to the inquiry or to parties involved;
- **responsibilities of government**—what responsibilities should the government have after the inquiry presents its report (for example, should it be required to table inquiry reports in Parliament or provide updates on recommendations).

Commission powers

Royal Commissions established under the *Royal Commissions Act* have a number of powers to demand information. For example, they have the power to summon witnesses to give evidence or to produce documents. Certain Royal Commissions may also apply for a search warrant to gather evidence, and all Royal Commissions can issue a warrant for the arrest of a witness for failing to attend in answer to a summons.

By their very nature, Royal Commissions are ‘fishing expeditions’. On the one hand, some may consider that Royal Commissions require broad powers to ensure that the issues and facts are fully canvassed. Royal Commissions are not courts, however, and it can be argued that they should not exercise powers comparable to those exercised by courts. One of the key issues that will be addressed in this Inquiry is whether all inquiries require similar powers to undertake their investigations. For example, should commissions only be armed with coercive powers when they are undertaking investigatory inquiries?

The ALRC is also considering whether there is any need to develop special arrangements and powers for inquiries involving matters of national security. At present, the *Royal Commissions Act* does not contain any provisions that deal specifically with such matters.

As noted above, Royal Commission proceedings are generally conducted in public and full reporting by the media is allowed. There may be some national security-related information, however, which, in the national interest, should not be disclosed publicly. Royal Commissions and other public inquiries may also need access to security sensitive information in order to conduct their investigations. For example, the head of the Inquiry into the Case of Dr Mohamed Haneef, the Hon John Clarke QC, had

considerable difficulty negotiating access to sensitive material from government departments and agencies.

The ALRC will be considering whether existing mechanisms adequately protect national security information provided to Royal Commissions and other public inquiries; and whether better processes need to be established to allow inquiries to access the information they need to investigate and to address properly the issues arising from their terms of reference.

Witnesses

The rights of witnesses who appear before Royal Commissions, particularly when those witnesses have been compelled to appear, is an important issue. Under the *Royal Commissions Act* witnesses have some limited rights to refuse to answer certain questions or to request that evidence be given in private. Royal Commissions can be wide ranging investigations, however, and witnesses can be the subject of public scrutiny without the same protections they would have in court. For example, in a Royal Commission, a witness cannot refuse to give evidence on the grounds that it may incriminate him or her (although that evidence cannot be used later in criminal or civil proceedings).

Witnesses also do not have the right to cross-examine a person who is giving evidence adverse to their interests or to give evidence rebutting any allegations made against them although the Commissioner, in his or her discretion, may allow cross-examination or rebuttal evidence.

A key issue for the ALRC is whether the rights of witnesses in Royal Commissions and other public inquiries are adequately protected, either by statute or common law, and whether additional protections should be put in place.

Offences

There are three categories of offences in the *Royal Commissions Act*:

- offences that punish persons who do not comply with the requirements of the Royal Commission;
- offences that prohibit interference with evidence or witnesses; and
- an offence prohibiting interference with the work or authority of the Royal Commission.

The primary purpose of such offences is to ensure the effective operation of the proceedings. The offences are similar to those protecting the administration of justice in courts. There are differences, however, between Royal Commissions and courts that may make some sanctions less appropriate in the former context—especially those sanctions relating to interference with evidence or witnesses, and those relating to interference with the authority of the Royal Commission. The ALRC is considering whether criminal offences are appropriate, or necessary, in the context of Royal

Commissions and other public inquiries. Alternatively, civil penalties may be a more appropriate form of sanction.

Getting involved

The ALRC Issues Paper 35, *Review of the Royal Commissions Act* (IP 35) contains 49 questions seeking input on the issues discussed above. *Issues Paper 35* and further information about this Inquiry are available from the ALRC website <www.alrc.gov.au>. The closing date for written submissions in response to the Issues Paper is **19 May 2009**. When the Discussion Paper is released in mid-2009, there will be another chance to make submissions.

The ALRC has also set up an interactive website for the public where you will find information about the Inquiry and a place where you can have your say by participating in the *Talk to Us...about Royal Commissions* online forum. This online forum is at <http://talk.alrc.gov.au>.

The ALRC welcomes any submissions or comments on its review of the *Royal Commissions Act*.