Australian Government
Australian Law Reform Commission

MAKING INQUIRIES

REPORT

A New Statutory Framework

REPORT 111
October 2009

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Australian Government

Australian Law Reform Commission

The Hon Robert McClelland MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

30 October 2009

Dear Attorney-General

Review of the Royal Commissions Act 1902 and related Issues

On 14 January 2009, you issued terms of reference for the ALRC to undertake a comprehensive review of the *Royal Commissions Act* 1902 and related issues.

On behalf of the Members of the Commission involved in this Inquiry—including Justice Berna Collier and Justice Susan Kenny—and in accordance with the *Australian Law Reform Commission Act 1996*, we are pleased to present you with the final report in this reference, *Making Inquiries: A New Statutory Framework*.

Yours sincerely

Emeritus Professor David Weisbrot AM
President

Professor Les McCrimmon
Commissioner in charge

Professor Rosalind Croucher
Commissioner

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Terms of Reference

REVIEW OF THE *ROYAL COMMISSIONS ACT 1902* AND RELATED ISSUES

I, ROBERT McCLELLAND, Attorney-General of the Commonwealth of Australia, having regard to the need to ensure that the executive government has available to it forms of inquiry on matters of public importance which are effective and efficient in the context of contemporary requirements, refer to the Australian Law Reform Commission for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, the operation and provisions of the *Royal Commissions Act 1902* (the Act) and the question whether an alternative form or forms of Commonwealth executive inquiry should be established by statute.

1. In carrying out its review, the Commission is to consider:

   (a) whether there is any need to develop an alternative form or forms of Commonwealth executive inquiry, with statutory foundations, to provide more flexibility, less formality and greater cost-effectiveness than a Royal Commission (particularly whether there would be any advantage in codifying special arrangements and powers that should apply to such alternative forms of inquiry);

   (b) whether there is any need to develop special arrangements and powers for inquiries involving matters of national security;

   (c) the appropriate balances between powers for persons undertaking inquiries and protections of the rights and liberties of persons interested in, or potentially affected by, inquiries;

   (d) 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

   (e) suggestions for changes to the Act proposed or raised by Royal Commissions.

2. In carrying out its review, the Commission will identify and consult with key stakeholders, including relevant Commonwealth, State and Territory agencies.

3. The Commission will provide its final report to me by 30 October 2009.

Dated: 14 January 2009

[signed]

Robert McClelland

Attorney-General

List of Participants

Australian Law Reform Commission

Division

The Division of the ALRC constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this Inquiry comprises the following:

Professor David Weisbrot AM (President)
Professor Les McCrimmon (Commissioner in charge)
Professor Rosalind Croucher (Commissioner)
Justice Berna Collier (part-time Commissioner)
Justice Susan Kenny (part-time Commissioner)

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Advisory Committee Members

Ms Sheila Butler, former Secretary to several recent Commonwealth public inquiries

Emeritus Professor Enid Campbell AC OBE, former Dean, Monash University, Faculty of Law and Sir Isaac Isaacs Professor of Law

The Hon Stephen Charles QC, former judge of the Victorian Court of Appeal

The Hon Terence Cole AO RFD QC, former judge of the New South Wales Court of Appeal

Mr Simon Daley, Australian Government Solicitor

Ms Megan Davis, Director, Indigenous Law Centre, University of New South Wales

The Hon Gerald (Tony) Fitzgerald AC QC, former judge of the New South Wales Court of Appeal

Professor Scott Prasser, Professor of Public Policy, Australian Catholic University

The Hon Acting Justice Ronald Sackville AO QC, New South Wales Court of Appeal

Mr Michael Sexton SC, New South Wales Solicitor General

The Hon Iris Stevens, former judge of the District Court of South Australia

Dr Kristin van Barneveld, Director, Policy and Research, Community and Public Sector Union

Mr Bret Walker SC, Barrister, St James Hall

The Hon Hal Wootten AC QC, former judge of the New South Wales Supreme Court and Foundation Dean of Law, University of New South Wales

Mr George Zdenkowski, Visiting Professor of Law at the University of Tasmania, and former New South Wales Magistrate

List of Recommendations

5. A New Statutory Framework for Public Inquiries

Recommendation 5–1 The *Royal Commissions Act 1902* (Cth) should be:

(a) amended to provide for the establishment of two tiers of public inquiry—Royal Commissions and Official Inquiries;

(b) renamed the *Inquiries Act*; and

(c) updated to reflect modern drafting practices.

Recommendation 5–2 The recommended *Inquiries Act* should set out the specific powers that are conferred on Royal Commissions and Official Inquiries.

Recommendation 5–3 The recommended *Inquiries Act* should include a mechanism that allows the Australian Government, in accordance with other provisions of the Act:

(a) with the consent of the Governor-General, to convert an Official Inquiry into a Royal Commission;

(b) to convert an inquiry established other than under the recommended Act into an Official Inquiry; and

(c) with the consent of the Governor-General, to convert an inquiry established other than under the recommended Act into a Royal Commission.

6. Establishment

Recommendation 6–1 The Australian Government should develop and publish an *Inquiries Handbook* containing information for those responsible for establishing inquiries, inquiry members, inquiry participants and members of the general public on a range of matters relating to Royal Commissions and Official Inquiries, including the:

(a) establishment of inquiries;

(b) appointment of inquiry members;

(c) administration of inquiries;

(d) powers, protections and procedural aspects of inquiries; and

(e) use and protection of national security information by inquiries.

Recommendation 6–2 The recommended *Inquiries Handbook* should address when it is appropriate to establish a Royal Commission or Official Inquiry. This guidance should include a consideration of:

(a) the level of public importance—matters of substantial public importance being more appropriate for Royal Commissions and matters of public importance being more appropriate for Official Inquiries;

(b) whether powers are required and, if so, which powers are appropriate, having regard to the subject matter and scope of the inquiry;

(c) whether the recommendations of a Royal Commission or Official Inquiry will facilitate government policy making; and

(d) whether a Royal Commission or Official Inquiry is the best way to achieve the Australian Government's objectives, or whether it is more appropriate to achieve these objectives in another way—for example, through an inquiry by an existing body or through civil or criminal proceedings.

Recommendation 6–3 The recommended *Inquiries Act* should provide that:

(a) the Governor-General establishes Royal Commissions; and

(b) ministers establish Official Inquiries.

Recommendation 6–4 The recommended *Inquiries Act* should provide that:

(a) the Letters Patent, or a copy of the Letters Patent certified by an inquiry member, is evidence of the establishment of a Royal Commission; and

(b) the terms of reference, or a copy of the terms of reference certified by an inquiry member, is evidence of the establishment of an Official Inquiry.

Recommendation 6–5 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries shall be independent in the exercise of their powers and in the performance of their duties and functions.

Recommendation 6–6 The recommended *Inquiries Handbook* should provide guidance on the appointment of members of Royal Commissions and Official Inquiries. This guidance should include, having regard to the subject matter and scope of the inquiry, whether potential inquiry members:

(a) have the skills, knowledge and experience to conduct the inquiry;

(b) should have certain attributes (for example, gender or cultural attributes); and

(c) should hold or obtain a security clearance.

Recommendation 6–7 The recommended *Inquiries Act* should provide that both Royal Commissions and Official Inquiries may have more than one inquiry member.

Recommendation 6–8 The recommended *Inquiries Act* should provide that, in consultation with members of Royal Commissions and Official Inquiries, the Attorney-General may appoint legal practitioners to assist inquiry members.

Recommendation 6–9 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may appoint an expert or experts in any field as an advisor to provide technical or specialist advice.

7. Reports and Recommendations

Recommendation 7–1 The recommended *Inquiries Act* should provide that:

(a) Royal Commissions report to the Governor-General; and

(b) Official Inquiries report to the minister that established the Official Inquiry.

Recommendation 7–2 The recommended *Inquiries Act* should provide that, within 15 sitting days of receiving the final report from a Royal Commission or Official Inquiry, the Australian Government should table in Parliament the report or, if a part of the report is not being tabled, a statement of reasons why the whole report is not being tabled.

Recommendation 7–3 The recommended *Inquiries Act* should provide that the Australian Government should publish an update on implementation of recommendations of an inquiry that it accepts: one year after the tabling of the final report of a Royal Commission or Official Inquiry; and periodically thereafter to reflect any ongoing implementation activity.

8. Administration and Records

Recommendation 8–1 The recommended *Inquiries Handbook* should provide guidance on matters pertaining to the administration of inquiries, for example:

(a) recruitment;

(b) accommodation;

(c) budget and finance;

(d) information and communication technology; and

(e) records management, including archiving.

Recommendation 8–2 The Australian Government should allocate responsibility for the administration of Royal Commissions and Official Inquiries to a single Australian Government department. The role of that department should include responsibility for the following tasks:

(a) assisting with matters preparatory to the formal establishment of the inquiry;

(b) providing assistance to inquiry members and staff to ensure an efficient and expedited establishment process and conduct of the inquiry;

(c) at the conclusion of the inquiry, facilitating the transfer of an archival copy of the records of the inquiry to the National Archives of Australia; and

(d) monitoring and updating the recommended *Inquiries Handbook.*

Recommendation 8–3 The recommended *Inquiries Act* should provide for the custody and use of records of Royal Commissions and Official Inquiries in terms equivalent to those in s 9 of the *Royal Commissions Act 1902* (Cth).

Recommendation 8–4 Section 22 of the *Archives Act 1983* (Cth) should be amended to require the transfer of an archival copy of the records of Royal Commissions and Official Inquiries to the National Archives of Australia:

(a) as soon as practicable after the conclusion of the inquiry, subject to any directions made by the minister to whose ministerial responsibilities the records most closely relate; and

(b) in any event, within five years of the conclusion of the inquiry.

Recommendation 8–5 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries comply with the standards determined, or record-keeping obligations imposed, by the National Archives of Australia.

9. Funding and Costs

Recommendation 9–1 The recommended *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.

Recommendation 9–2 The recommended *Inquiries Act* should provide that individuals and organisations may claim 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 and the claimant is to be reimbursed accordingly.

Recommendation 9–3 The recommended *Inquiries Act* should provide that individuals required to attend or appear before Royal Commissions and Official Inquiries may claim expenses in accordance with the *High Court Rules 2004* (Cth).

Recommendation 9–4 The recommended *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 *Inquiries Handbook* 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:

    (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).

10. Minimising Costs

Recommendation 10–1 The recommended *Inquiries Act* should require the Australian Government to publish an expenditure statement setting out the costs of Royal Commissions and Official Inquiries within a reasonable time after the inquiry has concluded. The statement should include summary information about the costs of an inquiry, including:

- fees and allowances paid to inquiry members;
- fees and allowances paid to counsel assisting;
- fees and allowances paid to solicitors assisting;
- financial assistance provided to witnesses and other participants for legal and non-legal costs;
- staff costs;
- information and communication technology costs;
- office accommodation; and
- other administrative and operational expenditure.

11. Powers

Recommendation 11–1 The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to issue notices requiring a person to:

(a) attend or appear before the inquiry; and

(b) produce documents or other things.

Recommendation 11–2 The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to require a person appearing before the inquiry to give evidence or answer questions to swear an oath or make an affirmation. An inquiry member, or a person authorised by an inquiry member, should be empowered to administer an oath or an affirmation to that person.

Recommendation 11–3 The power in s 6B of the *Royal Commissions Act 1902* (Cth), which enables a Royal Commission to issue a warrant for the apprehension of a person who fails to appear before it, should be redrafted in the recommended *Inquiries Act.* Royal Commissions should be required to apply to a judge to issue a warrant for the apprehension and immediate delivery of a person to a police officer or judicial officer. This power should not be conferred on Official Inquiries.

Recommendation 11–4 The recommended *Inquiries Act* should empower a member of a Royal Commission or Official Inquiry to issue a notice requiring a person to provide information in a form approved by the inquiry, failing which the member can require the person to attend the inquiry as if he or she had been issued with a notice to attend or appear before the inquiry.

Recommendation 11–5 The recommended *Inquiries Act* should contain provisions, applicable to both Royal Commissions and Official Inquiries, equivalent to those in ss 7A, 7B, 7C, 16(2) and 16(3) of the *Royal Commissions Act 1902* (Cth), which concern the making of inquiries and taking of evidence outside Australia.

Recommendation 11–6 The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to inspect, retain and copy any documents or other things produced to an inquiry in terms equivalent to those in s 6F of the *Royal Commissions Act 1902* (Cth).

Recommendation 11–7 The recommended *Inquiries Act* should contain provisions for a Royal Commission, but not an Official Inquiry, to apply to a judge for a warrant to exercise entry, search and seizure powers equivalent to those in ss 4 and 5 of the *Royal Commissions Act 1902* (Cth). The *Inquiries Act* should provide that, if an application for a warrant is made to a judge of a federal court, the judge issues the warrant in his or her personal capacity.

Recommendation 11–8 The provisions in the *Telecommunications (Interception and Access) Act 1979* (Cth) that allow for the communication of intercepted information in certain circumstances should apply to Royal Commissions, but not Official Inquiries, established under the recommended *Inquiries Act.*

Recommendation 11–9 The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to communicate information that relates to a contravention, or evidence of contravention, of a law of the Commonwealth or of a

state or territory, to bodies or persons responsible for the administration or enforcement of the law as prescribed by regulations under the Act.

Recommendation 11–10 The recommended *Inquiries Act* should provide that Royal Commissions, but not Official Inquiries, may have concurrent functions and powers conferred under the Act and state and territory laws.

12. Protection from Legal Liability

Recommendation 12–1 The recommended *Inquiries Act* should provide that no civil or criminal proceedings shall lie in respect of acts done, or omissions made, in good faith, in the exercise, or intended exercise, of powers or functions under the Act. This protection should apply to members of Royal Commissions and Official Inquiries, legal practitioners assisting inquiries, legal representatives of inquiry participants, and those employed or engaged by an inquiry.

Recommendation 12–2 The recommended *Inquiries Act* should provide that civil proceedings shall not lie against a person for loss, damage or injury of any kind suffered by another person by reason of the provision of any information or the making of any statement to Royal Commissions or Official Inquiries, or acts done in preparation for such provision of information or making of statements.

Recommendation 12–3 The recommended *Inquiries Handbook* should address liability for defamation and other court action in the case of electronic publications.

Recommendation 12–4 The recommended *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries are not compellable to give evidence about those inquiries, unless the court gives leave.

13. National Security

Recommendation 13–1 The recommended *Inquiries Act* should contain provisions dealing specifically with the use and protection of national security information in the conduct of Royal Commissions and Official Inquiries.

Recommendation 13–2 Royal Commissions and Official Inquiries should retain the ultimate discretion to determine the procedures that will apply in a particular inquiry. The recommended *Inquiries Act* should empower inquiry members to make directions on their own motion, or at the request of a person or body affected by or involved in the conduct of the inquiry, in relation to the use and protection of national security information, including, but not limited to, the following:

(a) determinations of the relevance of any national security information, including any claims for public interest immunity, and the use to which that information may be put in the conduct of the inquiry;

(b) the provision by persons involved with the inquiry of lists of all national security information that those persons reasonably anticipate will be used in the course of the inquiry. The chair of an inquiry may make such directions as he or she thinks fit in relation to the specificity with which national security information is to be described in these lists, the people to whom these lists are to be given, the use that may be made of the information and the degree of protection that must be given;

(c) the form in which any national security information may be produced or otherwise used in the conduct of the inquiry. Such directions may involve:

(i) the redaction, editing or obscuring of any part of a document containing or adverting to national security information;

(ii) replacing the national security information with summaries, extracts or transcriptions of the evidence sought to be used, or by a statement of facts, whether agreed by the parties or persons involved in the inquiry or not;

(iii) replacing the national security information with evidence to similar effect obtained though unclassified means or sources;

(iv) concealing the identity of any witness or person identified in, or whose identity might reasonably be inferred from, national security information or from its use in the conduct of the inquiry (including oral evidence), and concealing the identity of any person who comes into contact with national security information;

(v) the use of written questions and answers during evidence which would otherwise be given orally;

(vi) the use of technical means by which the identity of witnesses and contents of national security information may be protected, for example, through the use of closed-circuit television, computer monitors and headsets;

(vii) restrictions on the people to whom any national security information may be given or to whom access to that information may be given. Such restrictions may include limiting access to certain material to people holding security clearances to a specified level;

(viii) restrictions on the use that can be made by a person with access to any national security information; and

(ix) restrictions on the extent to which any person who has access to any national security information may reproduce or disclose that information.

Recommendation 13–3 The recommended *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries do not require a security clearance to access national security information.

Recommendation 13–4 The recommended *Inquiries Act* should empower inquiry members, in determining the use or disclosure of information in the conduct of an inquiry, to request advice or assistance from the Inspector-General of Intelligence and Security concerning:

(a) the damage or prejudice to national security that would, or could reasonably be expected to, result from the use or disclosure; and

(b) whether giving access to the information would divulge any matter communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation to the Australian Government.

Recommendation 13–5 Section 34A of the *Inspector-General of Intelligence and Security Act 1986* (Cth), which relates to information and documents that may be given to the Commission of Inquiry into matters relating to the Australian Secret Intelligence Service (1995), should be repealed.

Recommendation 13–6 The recommended *Inquiries Handbook* should include information on the handling and storage of national security information by inquiries. The information should be developed in consultation with relevant government departments or agencies such as the Protective Security Policy Committee and the Australian Intelligence Community and may incorporate, as appropriate, the standards and procedures in the *Australian Government Protective Security Manual*.

Recommendation 13–7 If requested by members of Royal Commissions and Official Inquiries, the Australian Government should assign appropriately trained personnel to advise the inquiry on the handling and storage of national security information.

14. Inquiries and Courts

Recommendation 14–1 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may refer a question of law to the Federal Court, either on their own motion or pursuant to the request of a participant.

15. Procedures: General Aspects

Recommendation 15–1 The recommended *Inquiries Act* should provide that reports of Royal Commissions and Official Inquiries should not make any finding that is adverse to a person, unless the inquiry has taken all reasonable steps to give notice of proposed adverse findings or the risk or likelihood of adverse findings, and disclosed the relevant material relied upon and the reasons on which such a finding might be based. Further, the inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and the inquiry should properly consider any response given.

Recommendation 15–2 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may allow any person or a person's legal representative to participate in an inquiry to the extent that inquiry members consider appropriate. In making that decision, inquiry members may have regard to factors including:

(a) any direct or special interest a person may have in the matters relevant to an inquiry;

(b) the probability that an inquiry may make a finding adverse to that person's interests; and

(c) the ability of a person to assist an inquiry.

Recommendation 15–3 The recommended *Inquiries Act* should include a provision that, when an inquiry gives an opportunity to a person to respond to potential adverse findings made against him or her in a report, that response, or where appropriate a summary of it, should be published, at the request of that person.

Recommendation 15–4 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may conduct inquiries and gather information as members consider appropriate, subject to any other provisions in the Act and the requirements of procedural fairness. For example, an inquiry may:

(i) conduct interviews;

(ii) hold hearings;

(iii) call witnesses;

(iv) obtain and receive information in any manner it sees fit;

(v) allow or restrict the questioning of witnesses; and

(vi) adjourn an inquiry.

Recommendation 15–5 The recommended *Inquiries Handbook* should address the suitability and use of different kinds of procedures that may be employed by inquiries. For example, the *Inquiries Handbook* may address the manner in which hearings are conducted, the ways in which people may participate in an inquiry, the provision of information to inquiry participants about procedures, and how to accord procedural fairness in the context of different types of inquiry.

16. Procedures: Specific Aspects

Recommendation 16–1 The recommended *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries may:

(a) make directions prohibiting or restricting:

  (i) public access to a hearing;

  (ii) publication of any information that might enable a person to identify a person giving information to the inquiry; and

  (iii) publication of any information provided to the inquiry; and

(b) exercise the power to prohibit or restrict public access or publication on the following grounds:

  (i) prejudice or hardship to an individual;

  (ii) the nature and subject matter of the information that may be involved;

  (iii) the potential for prejudice to legal proceedings;

  (iv) the efficient and effective conduct of an inquiry; and

  (v) any other matter that an inquiry considers appropriate.

Recommendation 16–2 The recommended *Inquiries Act* should provide that, if a Royal Commission or Official Inquiry is inquiring into matters that may have a significant effect on Indigenous peoples, the inquiry should consult with Indigenous groups, individuals or organisations to inform the development of appropriate procedures for the conduct of the inquiry.

Recommendation 16–3 The recommended *Inquiries Act* should provide that, if a person is asked to provide information to a Royal Commission or Official Inquiry, the inquiry must:

(a) comply with a request for an interpreter unless it considers that the person is sufficiently proficient in English; or

(b) appoint an interpreter if the inquiry considers that the person is not sufficiently proficient in English, even though the person has not requested an interpreter.

Recommendation 16–4 The recommended *Inquiries Act* should provide that the Australian Government make public:

(a) the results of any disciplinary, civil or criminal proceedings, initiated as a consequence of recommendations or findings of a Royal Commission or Official Inquiry; or

(b) any decision not to initiate, or to discontinue, such proceedings.

17. Privileges and Public Interest Immunity

Recommendation 17–1 (a) The recommended *Inquiries Act* should empower Royal Commissions, but not Official Inquiries, to require a person to answer a question, or produce a document or thing, notwithstanding such answer or production might incriminate that person or expose the person to a penalty.

(b) The recommended *Inquiries Act* should provide that a Royal Commission must not require a person to answer a question, or produce a document or other thing, about a matter if that person has been charged with an offence, or is subject to proceedings for the imposition or recovery of a penalty in respect of that matter.

Recommendation 17–2 The recommended *Inquiries Act* should provide that statements or disclosures made by a person to a Royal Commission are not admissible in evidence against that person in criminal proceedings, or proceedings for the imposition or recovery of a penalty, in any court of the Commonwealth, of a state or of a territory ('use immunity'). This use immunity should:

(a) apply to statements or disclosures to a Royal Commission, whether in oral or written form;

(b) apply to the fact of the production of a document or other thing to a Royal Commission;

(c) apply to information provided to an officer or member of a Royal Commission in connection with, or in preparation for, giving evidence to a Royal Commission; and

(d) exclude pre-existing documents or things that were not created in order to comply with a notice of the Royal Commission.

Recommendation 17–3 The use immunity referred to in Recommendation 17–2 should not apply to a proceeding in a federal, state or territory court:

(a) in respect of offences under the recommended *Inquiries Act*, or proceedings for enforcement under the *Inquiries Act*;

(b) in respect of the falsity or the misleading nature of the evidence; or

(c) for offences prohibiting interference with evidence or witnesses in relation to Royal Commission proceedings.

18. Statutory Exemptions from Disclosure

Recommendation 18–1 Section 6D(1) of the *Royal Commissions Act 1902* (Cth), which provides that a person may refuse to disclose a secret process of manufacture, should be repealed.

Recommendation 18–2 The recommended *Inquiries Act* should provide that Royal Commissions or Official Inquiries may require a person to answer questions or produce documents or other things, notwithstanding any secrecy provision if the inquiry specifies that the requirement is made notwithstanding that secrecy provision. This power should not apply in the case of:

(a) secrecy provisions that specifically govern the disclosure of information to Royal Commissions or Official Inquiries; and

(b) secrecy provisions as prescribed in regulations under the recommended *Inquiries Act*.

Recommendation 18–3 The recommended *Inquiries Act* should provide that if a person is required to answer questions or produce documents or other things to a Royal Commission or Official Inquiry notwithstanding a secrecy provision, that person is not subject to any criminal, civil, administrative or disciplinary proceedings as a result of providing that information.

19. Offences

Recommendation 19–1 The recommended *Inquiries Act* should provide, with respect to Royal Commissions and Official Inquiries, that a person commits an offence if the person, without reasonable excuse, intentionally refuses or fails to:

(a) swear an oath or make an affirmation when required to do so by an inquiry member;

(b) answer a question when required by do so by an inquiry member, or a person authorised by an inquiry member to ask the question;

(c) comply with a notice requiring a person to attend or appear; or

(d) comply with a notice requiring a person to produce a document or other thing, in the custody or control of that person.

Recommendation 19–2 The recommended *Inquiries Act* should provide that a notice requiring a person to attend or appear before, or requiring a person to produce a document or other thing to, a Royal Commission or Official Inquiry should include:

(a) the consequences of not complying;

(b) what is a reasonable excuse for not complying, as provided in the Act;

(c) the time and date for compliance; and

(d) the manner in which the person should comply with a notice requiring the production of a document or other thing.

Recommendation 19–3 The recommended *Inquiries Act* should provide that the offence of refusing or failing to answer a question is committed only if the person refuses or fails to answer after being informed that it is an offence to do so.

Recommendation 19–4 The recommended *Inquiries Act* should provide that it is a reasonable excuse to refuse or fail to comply with a notice to attend or appear before, or to produce a document or other thing to, a Royal Commission or Official Inquiry if an inquiry member determines that it is impossible or impracticable for the person to comply, for example, for physical or practical reasons.

Recommendation 19–5 The recommended *Inquiries Act* should provide that a reasonable excuse to refuse or fail to produce a document or other thing, or answer a question, includes the fact that the document, thing, or answer:

(a) is protected by client legal privilege, the privilege against self-incrimination, parliamentary privilege, or public interest immunity, subject to the provisions of the recommended Act;

(b) is prohibited from being disclosed by the provision of another Act, subject to the provisions of the recommended Act;

(c) is prohibited from disclosure by an order of a court; or

(d) would have the tendency to interfere with the administration of justice, if disclosed.

Recommendation 19–6 The recommended *Inquiries Act* should provide that it is a defence to a prosecution for a refusal or failure to answer a question, or produce a document or other thing, if the answer, document or other thing was not relevant to the matters into which the Royal Commission or Official Inquiry was inquiring.

Recommendation 19–7 The recommended *Inquiries Act* should provide that, upon receiving a notice requiring attendance or production of documents or other things, a person may make a claim to a member of a Royal Commission or Official Inquiry that he or she has a reasonable excuse for not complying. If the member considers that the claim has been made out, the member may vary or revoke the notice in his or her discretion.

Recommendation 19–8 The recommended *Inquiries Act* should provide that a person commits an offence by contravening a direction of a Royal Commission or Official Inquiry, where that person knew of, or was reckless as to, the existence of that direction. The offence should apply to directions made under the Act concerning national security information, the prohibition or restriction of public access to a hearing, and the prohibition or restriction of publication.

Recommendation 19–9 The recommended *Inquiries Act* should include a legislative note indicating that the following offences apply to Royal Commissions and Official Inquiries:

(a) offences under Part III of the *Crimes Act 1914* (Cth) that prohibit interference with evidence and witnesses;

(b) offences under Parts 7.6 and 7.8 of the *Criminal Code* (Cth) that prohibit certain conduct in relation to Commonwealth public officials; and

(c) offences in the *Crimes Act 1914* (Cth) that restrict the disclosure of information by Royal Commissions and Official Inquiries.

20. Contempt

Recommendation 20–1 The recommended *Inquiries Act* should provide that if a person is disrupting the proceedings of an inquiry, a member of a Royal Commission or Official Inquiry may exclude that person from those proceedings, and authorise a person to use necessary and reasonable force in excluding that person.

Recommendation 20–2 The recommended *Inquiries Act* should provide that, where a person fails to comply with a notice or a direction of a Royal Commission or Official Inquiry, or threatens to do so, the chair of the inquiry may refer the matter to the Federal Court. The Court, after hearing any evidence or representations on the matter certified to it, may enforce such a notice or direction as if the matter had arisen in proceedings before the Court.

Recommendation 20–3 The recommended *Inquiries Act* should provide that a person is not liable to be punished twice for the same act or omission, if the act or omission would constitute both an offence under the recommended Act and, if enforced by the Federal Court, contempt of court.

Recommendation 20–4 The recommended *Inquiries Act* should provide that it is an offence to cause substantial disruption to the proceedings of a Royal Commission or Official Inquiry, with the intention to disrupt the proceedings, or recklessness as to whether the conduct would have that result.

Recommendation 20–5 Section 6O of the *Royal Commissions Act 1902* (Cth), dealing with contempt of Royal Commissions, should be repealed.

21. Penalties, Proceedings and Costs

Recommendation 21–1 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the offences of refusing or failing to swear or affirm, answer a question, or comply with notices requiring attendance or the production of documents or things, is six months imprisonment or 30 penalty units.

Recommendation 21–2 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the offence of contravening a direction concerning the prohibition or restriction of public access to a hearing, or the prohibition or restriction of publication, is 12 months imprisonment or 60 penalty units.

Recommendation 21–3 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the

offence of contravening a direction concerning national security information is two years imprisonment or 120 penalty units.

Recommendation 21–4 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the offence of causing substantial disruption is six months imprisonment or 30 penalty units.

Recommendation 21–5 The recommended *Inquiries Act* should include a provision dealing with the institution of proceedings for offences under the Act in equivalent terms to s 10 of the *Royal Commissions Act 1902* (Cth).

Recommendation 21–6 The recommended *Inquiries Act* should provide for the award of costs in criminal proceedings in terms equivalent to those in s 15 of the *Royal Commissions Act 1902* (Cth), but the part of s 15 dealing with the recovery of penalties for offences under the *Royal Commissions Act* should be repealed.

Executive Summary

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Introduction to the Inquiry

Making Inquiries: A New Statutory Framework represents the culmination of a nine month inquiry by the Australian Law Reform Commission (ALRC) into the operation of the provisions of the *Royal Commissions Act 1902* (Cth), and the question of whether an alternative form or forms of Commonwealth executive inquiry should be established by statute. The *Royal Commissions Act* was one of 59 statutes enacted by the first Parliament of the Commonwealth of Australia. This Inquiry is the first comprehensive review of the Act in its 107 year history.

While the operation and provisions of the *Royal Commissions Act* were a major focus of this Inquiry, the Terms of Reference also required the ALRC to report on a number of other issues. In particular, the ALRC was asked to consider whether:

- a less formal and more cost effective statutory form of Commonwealth inquiry should be established, and, if so, what special arrangements and powers that should apply;

- there is a need to develop special arrangements and powers for inquiries involving matters of national security;

- the 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), are appropriate; and

- the suggestions for changes to the *Royal Commissions Act* proposed or raised by past Royal Commissions should be adopted.

All of these issues are addressed in detail in the 21 chapters and 82 recommendations contained in this Report.

Community consultation

A commitment to ensuring that all stakeholders and interested members of the public have an opportunity to participate in the inquiry is a hallmark of the ALRC's processes. Notwithstanding the tight time frame for this Inquiry, the ALRC produced an Issues Paper, *Review of the Royal Commissions Act* (IP 35), and a Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), before producing this final Report. A brief overview of the relevant issues was contained in IP 35, and 47 questions designed to facilitate participation from interested stakeholders were asked. A more detailed discussion of the relevant issues and 75 specific proposals for reform were contained in DP 75.

The ALRC also used its website to facilitate community education and participation in the Inquiry. It published an *Inquiry Snapshot*, which provided an overview of the issues considered in the Inquiry. An online forum, entitled 'Talk to Us … About Royal Commissions', facilitated public communication by creating a 'talking space'. The forum included a discussion page to encourage comments and a page to facilitate the receipt of electronic submissions.

The ALRC conducted over 70 consultation meetings and roundtables, travelling to Perth, Adelaide, Melbourne, Sydney, Alice Springs, Darwin and Wellington (New Zealand). The ALRC talked to a large number of individuals involved in major inquiries over the past 20 years—including the commissioners in charge of the: Inquiry into the Case of Dr Mohamed Haneef (2008); Equine Influenza Inquiry (2008); Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006); Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005); Inquiry into Australian Intelligence Agencies (2004); Royal Commission into the Building and Construction Industry (2003); HIH Royal Commission (2003); and, Royal Commission into Aboriginal Deaths in Custody (1991).

In addition, meetings were held with solicitors for inquiry participants, barristers, academics, senior public servants, witnesses who have appeared before a Royal Commission or other public inquiry, land councils and other groups representing the interests of Indigenous peoples, members of the media, union representatives, civil libertarians, and key office holders such as the Inspector General of Intelligence and

Security (IGIS) and the Commonwealth Ombudsman. A list of those with whom the ALRC consulted is set out in Appendix 2. In addition, the ALRC received 32 written submissions from a range of stakeholders. A list of submissions is set out in Appendix 1.

Key recommendations

Having listened carefully to the views, concerns and feedback expressed during the extensive community consultation exercise, and conducted its own research and deliberations, the ALRC has developed and presents in this Report a large set of policy recommendations for improving ad hoc, independent, Commonwealth public inquiries. Some of the key recommendations are explained below.

Two tiers of public inquiry

The ALRC recommends that the *Royal Commissions Act* should be amended to provide for the establishment of two tiers of public inquiry. The amended legislation should be renamed the *Inquiries Act* to reflect the multi-layered nature of statutory inquiries.[1]

Royal Commissions should be the highest form of inquiry established to look into matters of substantial public importance. While it was suggested by some stakeholders that the word 'royal' should not be used, the ALRC recommends no change to the title 'Royal Commission'. This is for two main reasons. First, the term 'Royal Commission' is very well-known, which means that it is a clear way to communicate to the public the extraordinary nature of such an inquiry. Secondly, the title 'Royal Commission' is helpful in that it indicates how the highest form of public inquiry is established—namely by the Governor-General of Australia.[2] It is appropriate that the Australian head of state should continue to be responsible for establishing the highest form of public inquiry in Australia. If changes to Australia's system of government result in a change to the way the head of state is chosen—for example, through the election or appointment of a President—it would make sense, at that stage, for the nomenclature to be amended to reflect that position.

It is recommended that the second tier of inquiry be called 'Official Inquiries'. Such inquiries should be established by a minister to look into matters of public importance.

The ALRC recommends that a number of distinctions be drawn between the two tiers of inquiry to ensure that each inquiry has the necessary tools to carry out its investigations without inappropriately infringing on the rights of persons involved with, or affected by, its processes. In addition to the way each inquiry is established,

1 Recommendation 5–1.
2 Recommendation 6–3.

the coercive powers that may be exercised by each tier of inquiry is also a key distinction (see discussion below).[3]

Inquiries handbook

Currently, there is no formal process by which the institutional knowledge of those that have established, conducted and administered inquiries can be captured and passed on. The ALRC recommends, therefore, that the Australian Government should develop and publish an *Inquiries Handbook* containing information for those responsible for establishing and administering inquiries, inquiry members, inquiry participants and members of the public on a range of matters relating to Royal Commissions and Official Inquiries. The *Inquiries Handbook* should include information on the:

- establishment of inquiries;
- appointment of inquiry members;
- administration of inquiries;
- powers, protections and procedural aspects of inquiries; and
- use and protection of national security information by inquiries.[4]

Such a publication would increase awareness of the *Inquiries Act*, and contribute to the overall effectiveness and efficiency of inquiries established under the Act.

The *Inquiries Handbook* should not have statutory force. Inquiries established under the *Inquiries Act* will vary greatly in subject matter and scope, and the *Inquiries Handbook* should not circumscribe the manner in which a particular inquiry is conducted. Indeed, the publication is designed to enhance, rather than restrict, flexibility within the statutory framework for inquiries.

Tabling in Parliament of inquiry reports

The *Royal Commissions Act* does not require the tabling in Parliament of Royal Commission reports. While, in practice, the Australian Government has tended to table such reports promptly, there is no statutory tabling requirement. The ALRC recommends that the *Inquiries Act* should contain a presumption that reports of Royal Commissions and Official Inquiries will be tabled by the Australian Government within 15 sitting days of receiving the inquiry's final report.[5] Such a tabling requirement is in keeping with principles of government openness, transparency and

3 See Ch 5, Table 5.1.
4 Recommendation 6–1.
5 Recommendation 7–2.

accountability, as well as with requirements in similar federal, state and territory legislation.

The ALRC acknowledges that there are circumstances in which parts of a report should not be tabled—for example, when an inquiry report contains classified or security sensitive information. It recommends, therefore, that while the Australian Government generally should table the entire final report of a Royal Commission or Official Inquiry, if it does not do so, it should table a statement of reasons explaining why it has not tabled the whole report.[6] This flexible approach preserves the accountability of the executive to Parliament.

Implementation of report recommendations

While accepting or rejecting recommendations made by an inquiry should be a matter for the Australian Government, it is often difficult to ascertain whether recommendations the government has accepted have been implemented. The ALRC recommends, therefore, that the Australian Government should publish an update on implementation of recommendations of an inquiry that it accepts: one year after the tabling of the final report of a Royal Commission or Official Inquiry; and periodically thereafter to reflect any ongoing implementation activity.[7]

Cost of public inquiries

There is no requirement in the *Royal Commissions Act* for the Australian Government, Royal Commission or other public inquiry to produce information or reports on the predicted, ongoing or final cost of an inquiry. While some Royal Commissions have made available information about costs in their reports, it is often difficult to collate information relating to the costs of individual inquiries. Often it must be done from a range of public sources.

Given the concern about the high costs of inquiries, and the difficulty in accessing existing sources of information about those costs, the ALRC recommends that the *Inquiries Act* should require the Australian Government to publish summary information about the costs of completed Royal Commissions and Official Inquiries within a reasonable time after the inquiry has concluded. Ideally, this could be done in an expenditure statement published on the inquiry's website. At a minimum, summary information should be provided for the following, as separate amounts:

- fees and allowances paid to the head of the inquiry, counsel assisting and solicitors assisting;

- financial assistance provided to witnesses and other participants for legal and non-legal costs;

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6 Ibid.
7 Recommendation 7–3.

- staff costs;
- information and communication technology costs;
- office accommodation; and
- other administrative and operational expenditure.[8]

Inquiry powers

In the *Inquiries Act*, one of the key recommended distinctions between Royal Commissions and Official Inquiries will be the powers conferred on each tier of inquiry. Royal Commissions, as the highest tier, will possess a wider range of coercive and investigatory powers than Official Inquiries. The *Inquiries Act* should set out the powers available to each tier of inquiry, rather than the Australian Government selecting the powers that may be exercised by individual inquiries on an ad hoc basis at the time they are established.[9] The ALRC's preferred approach ensures an appropriate level of transparency in the inquiry's processes and procedures. It may also improve the perception of independence of the inquiry that may not be achieved if the Australian Government is able to select the powers on each occasion when an inquiry is established.[10]

In summary, it is recommended that both Royal Commissions and Official Inquiries should have the power to:

- require the production of documents and other things;
- require the attendance or appearance to answer questions (on oath or affirmation if so directed by the inquiry); and
- inspect, retain and copy any documents or other things.

A Royal Commission, but not an Official Inquiry, should have the power to:

- apply to a judge for an entry, search and seizure warrant, or a warrant for the apprehension of a person who fails to appear or attend; and
- exercise concurrent functions and powers under Commonwealth and state and territory laws.

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8 Recommendation 10–1.
9 The option of selecting powers for each tier of inquiry is discussed in Ch 5.
10 The recommended distinctions between the powers of Royal Commissions and Official Inquiries are depicted in Ch 11, Table 11.1.

Finally, only a Royal Commission should have the power to abrogate client legal privilege or the privilege against self-incrimination.

A statutory framework for handling national security information

The *Royal Commissions Act* does not presently contain any provisions dealing specifically with the protection of information that may prejudice national security during the conduct of an inquiry or after its completion. The ALRC has considered, therefore, whether it is necessary to incorporate special procedures and powers for the protection and use of national security information in the *Inquiries Act*, and has concluded that a statutory regime is warranted. It is important that inquiry members have access to all relevant information, including national security information, and that there be appropriately balanced measures to protect such information.[11]

In determining the use or disclosure of information in the conduct of an inquiry—for example, claims for public interest immunity in respect of national security information or security clearance requirements for inquiry staff and participants—inquiry members may benefit from expert advice, which should be independent to the inquiry and to the provider of the information. The IGIS is ideally qualified to give such advice. The ALRC recommends, therefore, that the *Inquiries Act* should empower an inquiry member to request advice or assistance from the IGIS concerning:

- the damage or prejudice to national security that would, or could reasonably be expected to, result from the use or disclosure; and

- whether giving access to the information would divulge any matter communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation to the Australian Government.[12]

Inquiries affecting Indigenous peoples

The historical and political relationship between Indigenous peoples and the rest of the Australian community is unique. Further, public inquires have affected, and have the potential in the future to affect, the rights and interests of Indigenous peoples. In order to ensure that the special needs of Indigenous peoples participating in an inquiry are addressed adequately by an inquiry, the ALRC recommends that a Royal Commission or Official Inquiry looking into matters that may have a significant effect on Indigenous peoples should be required to consult with Indigenous groups, individuals and organisations to inform the development of procedures for an inquiry.[13]

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11 Recommendations 13–1 and 13–2.
12 Recommendation 13–4.
13 Recommendation 16–2.

This duty to consult would arise only where the inquiry was likely to have a significant effect on Indigenous peoples. For example, it would arise if an inquiry focused on Indigenous interests such as native title, or on the effect of particular social issues on Indigenous groups—the Royal Commission into Aboriginal Deaths in Custody (1991) being an example. The duty would not arise, however, merely because an Indigenous witness was called to give evidence in an inquiry which otherwise had no special bearing on Indigenous interests.

The ALRC also recommends that the *Inquiries Act* should provide that, if a person is asked to provide information to a Royal Commission or Official Inquiry, the inquiry must: comply with a request for an interpreter, unless it considers that the person is sufficiently proficient in English; or, appoint an interpreter if the inquiry considers that the person is not sufficiently proficient in English, even though the person has not requested an interpreter.[14] The ALRC was told during the course of the Inquiry that the lack of competent interpretation services was a particular problem for many Indigenous peoples providing information to inquiries. While it is not necessary that an accredited interpreter should be provided in every case, the interpreter appointed must be competent.

14 Recommendation 16–3.

Part A

Introduction

1. Introduction to the Inquiry

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Background

1.1 Royal Commissions are a form of non-judicial and non-administrative governmental investigation.[1] They are 'institutions of considerable antiquity', whose 'origins are lost in hazy mists of the incompletely recorded past'.[2] What is clear, however, is that they are 'one of the oldest institutions of government'.[3]

1.2 Professors Hugh Clokie and Joseph Robinson note that:

> As the name implies, Royal Commissions owe their foundation to an exercise of the royal prerogative. The source of their existence is to be found in the generally assumed right of the Crown to appoint officials to perform duties temporarily or permanently on behalf of the King.[4]

1.3 The *Royal Commissions Act 1902* (Cth) was one of 59 statutes enacted by the first Parliament of the Commonwealth of Australia.[5] In the Second Reading Speech for the Royal Commissions Bill 1902 (Cth), the then Attorney-General, the Hon Mr Alfred

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1 H Clokie and J Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (1937), 24.

2 Ibid, 24. Clokie and Robinson note that the compilation of the Domesday Book between 1080 and 1086 may 'be regarded as the result of the first Royal Commission of Inquiry': ibid, 28. The history of Royal Commissions is discussed in greater detail in Ch 2.

3 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 16.

4 Ibid, 26.

5 G Sawer (ed) *Australian Federal Politics and Law 1901–1929* (1956), 22.

Deakin MP, noted that similar Acts already existed in several states, and that the appointment of a Royal Commission to inquire into the transport of troops from South Africa to Australia on the *SS Drayton Grange*[6] during the Boer War had highlighted the need to introduce legislation providing Royal Commissions with coercive information-gathering powers.[7]

1.4 The original *Royal Commissions Act* contained only eight provisions. These were similar to those in the *Witnesses (Public Inquiries) Protection Act 1892* (UK).[8] In *X v Australian Prudential Regulation Authority*, Kirby J noted that the language of the UK Act, on which the Australian law was modelled, was 'expressed with high compression':

> Packed into a single section were many words and concepts which today, in the style of contemporary drafting, would be divided up so as to deal separately with different ideas and to avoid the confusion and ambiguity that may attend such a compressed use of the English language.[9]

1.5 The *Royal Commissions Act* has been amended 20 times since its enactment. Some amendments have been of a minor, technical nature. For example, the *Statute Law Revision Act 2008* (Cth) reworded certain provisions to ensure that they contained gender-neutral language. Other amendments, however, have been substantive, addressing deficiencies in the legislation identified by particular Royal Commissions.

1.6 The *Royal Commissions Amendment Act 1982* (Cth), for example, modified the Act, among other things to empower a Royal Commissioner to apply for a search warrant. This amendment was made in response to a request by the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union that the Act be amended to enable Royal Commissions to issue search warrants.[10] In addition, a number of the amendments have been made to facilitate information flows between Royal Commissions and other bodies.[11]

Scope of the Inquiry

1.7 This Inquiry was the first comprehensive review of the *Royal Commissions Act* in its 107 year history. While the operation and provisions of the Act were a major

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6 The Royal Commission on Transport of Troops from Service in South Africa in the SS *Drayton Grange* and the Circumstances under which Trooper H Burkitt was not landed at Adelaide from the SS *Norfolk* (1902).

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 August 1902, 15355 (A Deakin—Attorney-General).

8 *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, [36].

9 Ibid, [71].

10 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security). Powers of a Royal Commission and other public inquiries are discussed in detail in Ch 11.

11 See, eg, *Royal Commissions and Other Legislation Amendment Act 2001* (Cth); *Royal Commissions Amendment (Records) Act 2006* (Cth); *Law Enforcement Integrity Commissioner (Consequential Amendments) Act 2006* (Cth).

focus, the Australian Law Reform Commission (ALRC) also was asked to inquire into and report on a number of other issues. In particular, the Terms of Reference—reproduced at the beginning of this Report—required the ALRC to consider:

> (a) whether there is any need to develop an alternative form or forms of Commonwealth executive inquiry, with statutory foundations, to provide more flexibility, less formality and greater cost-effectiveness than a Royal Commission (particularly whether there would be any advantage in codifying special arrangements and powers that should apply to such alternative forms of inquiry);
>
> (b) whether there is any need to develop special arrangements and powers for inquiries involving matters of national security;
>
> (c) 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
>
> (d) suggestions for changes to the Act proposed or raised by Royal Commissions.

1.8 A major focus of this Inquiry was whether other forms of public inquiry should be established by federal legislation and, if so, the appropriate statutory model for such bodies and their powers, administration and funding.

Matters outside the scope of the Inquiry

1.9 In this Inquiry, the ALRC considered a particular type of 'public inquiry'—one that is conducted on an ad hoc basis by an entity established by, but external to, the executive arm of government. This type of public inquiry includes Royal Commissions and other ad hoc inquiries appointed to investigate issues and make recommendations to government. A review of the operations and constituting Acts of *permanent* independent policy making and investigatory bodies—for example, the Productivity Commission, the Australian Crime Commission, the Australian Human Rights Commission, the Australian Commission for Law Enforcement Integrity, and indeed the ALRC itself—falls outside the scope of this Inquiry. Further, as is discussed in greater detail in Chapter 5, whether a permanent federal anti-corruption agency with broader powers than those of existing permanent bodies should be established is also a matter that is outside the Terms of Reference for this Inquiry.

1.10 The Terms of Reference also expressly direct the ALRC not to consider the appropriateness of restrictions on the disclosure of information to, and the use of information by, Royal Commissions and other forms of public inquiry arising from a claim for client legal privilege. Recommendations concerning client legal privilege in the context of Royal Commissions were made by the ALRC in the report, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (ALRC 107).[12] While the nature of those recommendations relevant to Royal Commissions and other public

12 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), Recs 6–2, 6–5.

inquiries is discussed in Chapter 17, this Inquiry will not revisit those recommendations.[13]

Terminology

1.11 In this Report, references to Royal Commissions and other public inquiries mean a Royal Commission or other public inquiry established by the Australian Government. Where a reference is to a Royal Commission or other public inquiry established, for example, by state or territory governments, the jurisdiction establishing the inquiry will be noted expressly in the text.

Public inquiry

1.12 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC used the term 'public inquiry' rather than 'executive inquiry' when referring to ad hoc, independent, non-Royal Commission inquiries established by government. For the reasons discussed in detail in Chapter 2 of IP 35, the word 'public' rather than 'executive' was used to distinguish this type of inquiry from the many other forms of executive inquiry conducted by government departments and other permanent government agencies.

1.13 In its submission in response to IP 35, the Inspector-General of Intelligence and Security (IGIS) noted:

> In the Issues Paper you have addressed Royal Commissions as 'public inquiries' (defined as ad hoc, independent non-Royal Commission inquiries established by government), distinguishing the latter from 'executive inquiries' (other forms of inquiry conducted by government departments and other permanent government agencies). Such a distinction needs to be viewed with care. Both types are, according to traditional theory, exercises of executive authority. Nor is there of necessity any difference in the degree of independence with which the inquiry can be approached.[14]

1.14 While the ALRC agrees with the observations of the IGIS, the use of the term 'public inquiry' rather than 'executive inquiry' in this Report highlights the fact that, in addition to reviewing the *Royal Commissions Act*, the ALRC is focusing on alternative *forms* of Commonwealth executive inquiry to a Royal Commission. The ALRC does not interpret its Terms of Reference as requiring it to review *all* types of executive inquiry that can be established by the federal government, or instigated by permanent federal government departments and agencies.[15]

1.15 While another term, such as 'public executive inquiry', could perhaps have been used to highlight this distinction, the ALRC has decided to continue to use the term 'public inquiry' in this Report. Further, as is noted below, a name for the alternate form

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13 The recommendations contained in ALRC 107 are being considered by the Australian Government.
14 Inspector-General of Intelligence and Security, *Submission RC 2,* 12 May 2009.
15 The Terms of Reference are set out at the beginning of this Report.

of inquiry the ALRC has been directed to investigate—'Official Inquiries'—has been recommended, which may help to dispel any confusion caused by the ALRC's choice of terminology.

Royal Commissions and Official Inquiries

1.16 In this Report, a recommendation is made to amend the *Royal Commissions Act* to enable the establishment of two tiers of inquiry—'Royal Commissions' and 'Official Inquiries'. A recommendation is also made to change the name of the Act to the *Inquiries Act* to reflect the new statutory structure.[16] Whether the word 'royal' should remain in the title elicited comment from a wide cross-section of stakeholders. It was suggested by some that replacing the word 'royal' would reflect more accurately the status of Australia as an independent, sovereign state. A number of stakeholders noted, however, that the term 'Royal Commission' carries with it a certain gravitas developed over a long period of time, and, perhaps more importantly, has a high degree of public recognition and respect. For the reasons set out in greater detail in Chapter 5, the ALRC recommends that the term 'Royal Commission' be retained to describe the highest form of public inquiry in Australia.

1.17 The ALRC also recommends that the second tier of public inquiry be called an 'Official Inquiry'. This title distinguishes this form of public inquiry from 'Royal Commissions', and accurately reflects the nature of this form of inquiry. Other titles such as 'Public Inquiry', 'Government Inquiry', 'Departmental Inquiry' and 'Ministerial Inquiry' also were considered, but were not adopted for the reasons noted in Chapter 5.

1.18 For ease of reference when referring to past ALRC inquiries, Royal Commissions or other forms of public inquiry, the 'i' in inquiry will be in lower case. Where the ALRC refers to this 'Inquiry', meaning the reference which is the subject of this Report, the first letter of 'inquiry' will be in upper case.

Inquiry participants

1.19 In Chapter 15, the ALRC discusses the circumstances in which it may be more appropriate to conduct an inquiry using procedures of a less formal nature than public hearings—for example, through the use of interviews or the voluntary provision of written information. In this Report, the ALRC has attempted to avoid the terminology used in litigation and criminal proceedings, unless reference is being made to a formal hearing being held by Royal Commissions or Official Inquiries.

1.20 Rather than talking of 'parties' and 'witnesses', for example, reference is made to 'those participating in an inquiry', or 'participants' when referring to those giving information to an inquiry. The term 'witnesses', where used, is restricted to those who give information at a formal hearing. Similarly, the ALRC refers to the provision of

16 See Recommendation 5–1.

'information' in the course of an inquiry, and refers to 'evidence' only where such information is given under oath or affirmation.

Law reform process

1.21 The ALRC is committed to ensuring that all stakeholders and interested members of the community have an opportunity to participate in the Inquiry. In order to facilitate participation, the ALRC employs a variety of consultation strategies.

Consultation documents

1.22 It is the ALRC's standard operating procedure to produce an Issues Paper and a Discussion Paper before producing the final Report. On 6 April 2009, the ALRC released IP 35. The nine chapters of IP 35 contained a brief overview of the relevant issues and contained 47 questions designed to facilitate participation from interested stakeholders. To facilitate discussion, the ALRC also published on its website an *Inquiry Snapshot*, which provided an overview of the matters raised in IP 35.

1.23 *Royal Commissions and Official Inquiries* (DP 75), the second consultation document produced during the course of this Inquiry, contained a more detailed treatment of the issues, and indicated the ALRC's current thinking in the form of 75 specific proposals for reform and seven further questions. Both the Issues Paper and the Discussion Paper may be obtained free of charge from the ALRC in hard copy or CD ROM format, and also may be downloaded free of charge from the ALRC's website, <www.alrc.gov.au>.

Community consultation and participation

1.24 Under the terms of its constituting Act, the ALRC 'may inform itself in any way it thinks fit' for the purpose of reviewing or considering anything that is the subject of an inquiry.[17] One of the most important features of ALRC inquiries is the commitment to widespread community consultation.

1.25 The nature and extent of this engagement is normally determined by the subject matter of the reference. Areas that are seen to be narrow and technical tend to be of interest mainly to experts. Some ALRC references—such as those relating to children and the law, Aboriginal customary law, the protection of human genetic information, and privacy—involve a significant level of interest and involvement from the general public and the media. This Inquiry does not fall squarely into either category given that Royal Commissions and other forms of public inquiry, while procedurally somewhat narrow and technical, often deal with matters of great public interest. In this Inquiry, therefore, accommodation has been made for input by all interested individuals and groups, particularly through the use of the 'Talk to Us' online forum discussed in detail below.

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17 *Australian Law Reform Commission Act 1996* (Cth) s 38.

1.26 During the Inquiry, over 70 consultation meetings and roundtables were held in Perth, Adelaide, Melbourne, Sydney, Alice Springs, Darwin and Wellington (New Zealand) with individuals, government agencies and organisations. The ALRC has talked to past Royal Commissioners, Commissioners who have conducted non-Royal Commission inquiries, judges, counsel assisting, solicitors for participants, barristers, solicitors, academics, senior public servants, witnesses who have appeared before a Royal Commission or other public inquiry, land councils and other groups representing the interests of Indigenous peoples, members of the media, union representatives, civil libertarians, and key office holders such as the IGIS and the Commonwealth Ombudsman. A list of those with whom the ALRC has consulted is set out in Appendix 2.

1.27 In addition, 32 written submissions were received from a range of stakeholders. A list of submissions is set out in Appendix 1. The relatively small number of submissions may be attributable to two factors: the procedurally narrow and technical nature of the Inquiry, and the fact that the ALRC conducted an extensive round of face-to-face consultations.

1.28 While it is the policy of the ALRC not to quote comments made by stakeholders in consultations, the views of the stakeholders with whom it consulted are reflected in this Report. While the ALRC generally refrains from attributing a view to a specific stakeholder consulted, it often does indicate the degree of support for any particular issue. Where a stakeholder's view has been expressed in a submission, that view is often quoted or the submission cited.

Participating in the Inquiry

1.29 There were several ways in which those with an interest in this Inquiry could participate. First, individuals, organisations and government agencies could indicate an expression of interest in the Inquiry by contacting the ALRC or applying online at <www.alrc.gov.au>. Those who wished to be added to the ALRC's mailing list received notices, press releases and a copy of each consultation document produced during the Inquiry.

1.30 Secondly, as has been noted above, written submissions on the two consultation documents produced during the course of the Inquiry—IP 35 and DP 75—could be made to the ALRC. There was no specified format for submissions. The ALRC gratefully accepted anything from handwritten notes and emailed 'dot points', to detailed commentary on matters related to the Inquiry.

1.31 Thirdly, the ALRC maintained an active program of direct consultation with stakeholders and other interested parties. The ALRC is based in Sydney but, in recognition of its national character, conducted consultations around Australia.

1.32 Finally, the ALRC established an online forum entitled 'Talk to Us … About Royal Commissions', which could be accessed through the ALRC website. The forum

was designed to facilitate public communication by creating a 'talking space', and included a discussion page to encourage comments and a page to facilitate the receipt of electronic submissions.

Advisory Committee

1.33 It is standard operating procedure for the ALRC to establish an expert Advisory Committee for each of its inquiries. The members of the Advisory Committee established for the purposes of this Inquiry are noted at the front of this Report. Included are former Royal Commissioners, retired judges, academics, senior lawyers, and members of constituencies affected by the activities of some significant Royal Commissions, such as unions and Indigenous peoples.

1.34 The Advisory Committee met once during the course of the Inquiry to provide advice and assistance to the ALRC. The Advisory Committee has particular value in helping the ALRC to identify the key issues, as well as in providing quality assurance in the research, writing and consultation effort. The Advisory Committee has assisted with the development of proposals for reform, and their advice and comments informed the formulation of the recommendations set out in this Report. The ultimate responsibility for the Report and the recommendations remains, however, with the Commissioners of the ALRC.

Organisation of Report

1.35 This Report is divided into six Parts which, in total, contain 21 chapters. Part A, consisting of chapters one to four, considers matters introductory to the Inquiry, including the historical background of Royal Commissions in England and Australia, an overview of the *Royal Commissions Act*, and a discussion of comparative forms of public inquiry.

1.36 This introductory chapter outlines the background and scope of the Inquiry, matters that fall outside the Inquiry's scope and the ALRC's process of law reform. In Chapter 2, the ALRC discusses the role and purpose of public inquiries. It considers characteristics and functions of public inquiries, and provides an overview of the types of public inquiries that have been conducted at the federal, state and territory levels in Australia.

1.37 Chapter 3 provides an overview of the *Royal Commissions Act*. The primary features of the Act are outlined, followed by a discussion of the issues arising from the structure and drafting of the Act. Chapter 4 focuses on the forms of public inquiry conducted outside the framework of the *Royal Commissions Act*. It considers existing types of public inquiries in federal jurisdictions. It also considers the various models of inquiry found in state, territory and overseas jurisdictions.

1.38 Part B, consisting of chapters five to eight, considers a new statutory framework for public inquiries in Australia. In Chapter 5, the ALRC canvasses new models of public inquiry that may be appropriate at the federal level in Australia. The statutory

requirements of such models are discussed, and the requirements that should rest with the Australian Government upon the completion of an inquiry are also considered. Recommendations are made to establish two tiers of public inquiry, to be called 'Royal Commissions' and 'Official Inquiries'. The distinguishing features of both tiers of inquiry are canvassed, and a recommendation made to rename the *Royal Commissions Act* the *Inquiries Act* to reflect the two-tiered nature of statutory inquiries.

1.39 When it is appropriate to establish a Royal Commission or Official Inquiry, and whether there should be greater guidance on drafting the terms of reference for either type of inquiry, are discussed in Chapter 6. The ALRC also considers how both types of inquiry should be constituted, and whether there is scope for an expert advisor role within the proposed new statutory framework.

1.40 The issues relating to reports and recommendations of Royal Commissions and Official Inquiries established under the recommended *Inquiries Act* are canvassed in Chapter 7. In particular, the ALRC recommends that within 15 sitting days of receiving the final report from a Royal Commission or Official Inquiry, the Australian Government should table in Parliament the report, or, if part of a report is not being tabled, a statement of reasons setting out why the whole report is not being tabled. The ALRC also recommends that the Australian government should publish periodic updates on the implementation of recommendations.

1.41 The administration of Royal Commissions and Official Inquiries, including the types of assistance that may be required by inquiry participants and inquiry members and staff in the conduct of the inquiry, is considered in Chapter 8. The ALRC also examines how administrative, technical and other assistance should be provided to Royal Commissions and Official Inquiries, and considers important issues relating to the records of completed Royal Commissions and Official Inquiries.

1.42 Part C contains two chapters which focus on the cost of public inquiries. Issues relating to the funding and costs of Royal Commissions and Official Inquiries under the *Inquiries Act* are canvassed in Chapter 9. In particular, the ALRC considers the types of costs and expenses incurred in the conduct of inquiries, such as legal costs and the costs of providing assistance to witnesses and parties participating in inquiries. How the cost of Royal Commissions and Official Inquiries might be minimised is considered in Chapter 10.

1.43 Part D, consisting of three chapters, focuses on inquiry powers. Chapter 11 discusses the specific powers that should be conferred on Royal Commissions and Official Inquiries, and concludes that the range of coercive information-gathering powers of the former should be wider than the latter. Other issues are also considered, including: evidence and information obtained in a foreign country; the exercise of concurrent functions and powers under federal and state or territory law; and, the power to refer information and evidence to other persons or bodies relating to contraventions of the law.

1.44 In Chapter 12, the ALRC considers the range of protections that should be conferred on those involved in Royal Commissions and Official Inquiries. The ALRC recommends that the protections should be the same for both forms of inquiry.

1.45 At present, the *Royal Commissions Act* does not contain any specific provisions dealing with the protection of information relating to national security during the course of an inquiry or after a Commission's proceedings have concluded. In Chapter 13, the ALRC recommends special arrangements and powers for Royal Commissions and Official Inquiries which consider matters that may have an impact on national security.

1.46 Matters relating to the conduct of an inquiry are discussed in Part E. Chapter 14 examines the various interactions of inquiries with courts, beginning with supervision through to judicial review and the referral of a question of law by an inquiry to the Federal Court of Australia. Whether proceedings for contempt of an inquiry are appropriate, and the effect of inquiries upon subsequent legal proceedings, are also examined.

1.47 Chapter 15 and 16 examine both the appropriateness and effectiveness of the procedures currently employed by inquiries, and the adequacy of procedural protections afforded to those who are called to appear before an inquiry, and to those who may be affected adversely by an inquiry finding. In particular, the ALRC examines various requirements and measures that may minimise the danger of causing harm unfairly. These include the requirements of procedural fairness; the use of public and private hearings; the use of cross-examination; the authorisation of leave to appear; the taking of evidence from Indigenous witnesses; the provision of information and assistance; and rights of reply.

1.48 Chapters 17 and 18 examine the exemptions from disclosure that are justified in the context of Royal Commissions and Official Inquiries. In particular, the ALRC considers whether the following exemptions should apply to Royal Commission and Official Inquiry proceedings: the privilege against self-incrimination; public interest immunity; parliamentary privilege; other statutory privileges available under the *Evidence Act 1995* (Cth); an exemption under s 6D of the *Royal Commissions Act*, relating to secret processes of manufacture; and secrecy provisions in other statutes. As has been noted above, the applicability of client legal privilege to proceedings of a Royal Commission was considered in ALRC 107.

1.49 Offences and penalties in the context of Royal Commission and Official Inquiry proceedings are considered in Part F. In Chapter 19, the ALRC considers whether the offences in the *Royal Commissions Act* should be retained, and whether similar offences should apply to Official Inquiries. The Act contains four types of offences: offences that punish failures to comply with requirements of the Royal Commission (offences of non-compliance); an offence of contravening a direction of a Royal Commission not to publish specified material; offences that prohibit interference with evidence or witnesses; and, in s 6O, the offence of contempt, which prohibits conduct

that interferes with the work or authority of a Royal Commission. Whether the doctrine of contempt should apply to Royal Commissions or Official Inquiries is discussed in Chapter 20.

1.50 In the final chapter, the ALRC discusses what penalties should apply to the offences proposed in Chapters 19 and 20. Sections 10 and 15 of the *Royal Commissions Act* are also examined. Section 10 deals with the way in which a proceeding for an offence under the Act may be instituted, while s 15 confers a power on a court to award costs in relation to such a proceeding.

Further processes

1.51 This Report was presented to the Attorney-General in CD ROM format on 30 October 2009, with a printed and bound copy to follow. Once tabled in Parliament, the Report becomes a public document,[18] but is not self-executing. The ALRC provides advice and recommendations about the best way to proceed, but implementation is a matter for the Australian Government and others.[19]

1.52 Finally, it should be noted that, in the past, the ALRC has sometimes drafted legislation as the focus of its law reform effort. The ALRC's practice now is not to produce draft legislation unless specifically asked to do so in the Terms of Reference. This is partly because drafting is a specialised function better left to the parliamentary experts, and partly because the ALRC's time and resources are better directed towards determining the policy that will shape any resulting legislation. The ALRC has not been asked to produce draft legislation in this Inquiry, but the recommendations specify the nature of any proposed legislative change.

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18 The Attorney-General must table the Report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

19 The ALRC, however, has a strong record of having its advice followed. About 60% of the ALRC's previous reports have been fully or substantially implemented; about 27% have been partially implemented; 8% are under consideration; and 5% have had no implementation to date.

2. History and Role of Public Inquiries

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Introduction

2.1 In this chapter, the ALRC discusses the role and purpose of public inquiries. It considers characteristics and functions of public inquiries and then provides an overview of the types of public inquiries that have been conducted at the federal, state and territory levels in Australia.

Historical background and trends

2.2 Public inquiries have an extensive history in the United Kingdom (UK). In the 11th century, William the Conqueror appointed Royal Commissioners to investigate land title information in English counties for verification and publication in the Domesday Book.[1] Royal Commissions were used frequently in the Tudor and early Stuart eras (late 15th to mid 17th century) and then declined in popularity over the next two hundred years. The 19th century saw a marked increase in inquiry activity in the UK, with over 350 Royal Commissions established by the UK government between

1 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 278.

1831 and 1900.[2] The factors contributing to this renewed interest are described by Sir William Holdsworth.

> The great social and economic changes which accompanied the industrial revolution, the changes in men's political ideas which resulted directly or indirectly from the French Revolution, the changes in men's ideas as to the expediency of reforms in the law, caused partly by the obvious need for making the reforms required by new social and economic conditions and partly by Bentham's teaching—all contributed to revive enquiries by means of royal commissions … into many legal, social, and economic problems.[3]

2.3 Since 1900, Royal Commissions again have dwindled in popularity and are now 'a statistical speck amongst the many public inquiries held in Britain each year'.[4]

2.4 In Australia, the commission of inquiry mechanism was adopted early—the colony of Victoria enacted legislation for public inquiries with coercive information-gathering powers soon after the Eureka Stockade in 1854.[5] The *Royal Commissions Act 1902* (Cth) was enacted shortly after Federation, and 127 Royal Commissions have been appointed under the Act.[6]

2.5 Professor Scott Prasser has examined trends in the numbers of Royal Commissions appointed by various Australian Governments. He notes that the *Royal Commissions Act* has not been used consistently.[7] For example, 54 Royal Commissions were established between 1910 and 1929, and 33 appointed between 1972 and 1996. Royal Commissions were used little in the decades following the Second World War and relatively infrequently from the mid-1990s to the time of writing in late 2009. Also, as discussed below, the many Royal Commissions established under the *Royal Commissions Act* have differed in nature.

2.6 Historically, Coalition Governments have been less likely than their Labor counterparts to establish Royal Commissions.[8] The Menzies, Holt, Gorton and McMahon Coalition Governments appointed eight Royal Commissions in 22 years (1949–1972). The Howard Coalition Government appointed four Royal Commissions

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2 Ibid, 278.

3 W Holdsworth, *A History of English Law* (7th ed, 1971), vol 13, 272.

4 G Gilligan, 'Royal Commissions of Inquiry' (2002) 35 *Australian and New Zealand Journal of Criminology* 289, 291. In examining the evolution of Royal Commissions in the UK, Gilligan observes that the rise and decline in the rate of inquiries commissioned by the Crown corresponds with the decline and rise of the supremacy of the UK Parliament. In the 20th century, departmental committees have taken over the role once performed by Royal Commissions in the UK: ibid, 290–291.

5 See *Statute of Evidence Act 1864* (Vic) and *Commissions of Inquiry Statute 1854* (Vic). Other colonial governments also enacted legislation to conduct public inquiries in the 19th century: L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 90–91; R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 278, fn 22.

6 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), Appendix 1.

7 Ibid, [3.12]–[3.17].

8 Ibid, Appendix 1.

in 11 years (1996–2007).[9] In contrast, the Whitlam Labor Government appointed 13 Royal Commissions in three years (1972–1975), and the Hawke-Keating Labor Government appointed 12 Royal Commissions in 13 years (1983–1996). This is not a wholly consistent trend, however, as the Fraser Coalition Government appointed eight Royal Commissions in eight years (1975–1983). Further, since coming to office in November 2007, the Rudd Labor Government has not appointed a Royal Commission.

2.7 Since the 1940s, Australian Governments increasingly have appointed non-Royal Commission forms of public inquiry.[10] For example, both the Whitlam Labor and Howard Coalition Governments established more than 70 public inquiries, taskforces, reviews or committees.[11]

2.8 Non-Royal Commission forms of public inquiry are discussed below and in Chapter 4.

Characteristics of public inquiries

Established by the executive

2.9 In Australia, all arms of government conduct some form of inquiry. The judiciary adjudicates on civil and criminal matters of fact and law; legislative committees review and report on proposed and existing laws and practices; and the executive conducts inquiries on matters relevant to policy development and government processes.

2.10 A number of permanent bodies also have been established under legislation to advise the Australian Government on policy development and law reform. These bodies may conduct inquiries and also carry out other functions such as complaint-handling and community education. Examples of these types of bodies include: the Australian Human Rights Commission; the ALRC; the Commonwealth Ombudsman; the Productivity Commission; and the Inspector-General of Intelligence and Security. Other standing bodies advise the Australian Government on issues related to crime and corruption—for example, the Australian Crime Commission and the Australian Institute of Criminology.

2.11 As discussed in Chapter 1, the ALRC is considering a particular type of 'public executive inquiry'—one that is conducted on an ad hoc basis by an entity established by the executive arm of government. This type of inquiry includes Royal Commissions

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9 The Howard Coalition Government also appointed the Equine Influenza Inquiry (2008), which was established under the *Quarantine Act 1908* (Cth) but had most of the powers of a Royal Commission: see *Quarantine Act 1908* (Cth) s 66AZE. Other Royal Commissions appointed by the Howard Government were: the HIH Royal Commission (2003); the Royal Commission into the Building and Construction Industry (2003); the Royal Commission to Inquire into the Centenary House Lease (2004); and the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006).

10 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 50.

11 Ibid, Appendices 6, 9.

and other ad hoc inquiries appointed to investigate issues and make recommendations to government.

Public in nature

2.12 The obvious feature of a public inquiry is that, at least in part, it takes place in the public domain. This means that the inquiry and its processes have a degree of public visibility and accessibility, and members of the public contribute to the inquiry by providing information or other relevant material. Transparent processes play an important role in enhancing the integrity and accountability of an inquiry. Public inquiries promote the contribution of public knowledge and expertise to inquiry decision-making processes that, in turn, may affect government actions. These inquiries may also fulfil an important social function by providing an opportunity for individuals to air grievances against various parties, including governments.[12]

2.13 Referring to an inquiry as 'public', however, does not mean that all inquiry proceedings are held in public. There may be several reasons why it is not appropriate to hold particular inquiry proceedings in public. The interests in conducting inquiry proceedings in public need to be balanced against the protection of the rights and interests of those involved in or affected by the inquiry. This balancing of interests is discussed further in Chapter 16.

2.14 Other elements of a 'public' inquiry include the advertising of an inquiry's existence, scope, and details of public consultations. Upon the completion of a public inquiry, its recommendations, report and other appropriate material are often made widely available—current practice is to make this information available online.[13] Public participation may be on a voluntary or mandatory basis,[14] and may take place in a range of ways, including online forums. Individuals and group representatives also may be able to make formal written submissions to an inquiry.[15]

Perceived independence

2.15 The public is more likely to accept inquiry processes and decisions when the inquiry is perceived to be independent of the executive arm of government and other influential stakeholders.[16] To promote the perception of an inquiry's independence, its

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12 Ontario Law Reform Commission, *Report on Public Inquiries* (1992), 16.

13 Most Royal Commissions and other major inquiries conducted in recent years have individual websites that contain the report of the inquiry and other material. For example, see: *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry .gov.au/> at 4 August 2009.

14 Coercive powers are discussed further in Ch 11.

15 For example, see the National Human Rights Consultation, *Share Your Views—National Human Rights Consultation Submission Form* (2009) <www.humanrightsconsultation.gov.au> at 4 August 2009.

16 The requirement of independence is not set out in Australian legislation establishing public inquiries. In contrast, Irish legislation that provides for the establishment of commissions of investigation expressly states that a commission shall be independent in the performance of its functions: *Commissions of Investigation Act 2004* (Ireland) s 9. In Ch 6, the ALRC recommends that inquiries established under the *Inquiries Act* shall be independent in the exercise of their powers and the performance of their duties and functions: Recommendation 6–5.

membership is usually drawn from outside the executive arm of government—often from the judiciary. Membership of Royal Commissions and other public inquiries is discussed further in Chapters 3 and 6.

2.16 Royal Commissions are sometimes seen to be more independent than other types of inquiries because they are supported by statute.[17] This perception may be enhanced by the fact that Royal Commissions are established by the Governor-General on behalf of the Crown, rather than by Cabinet or individual ministers.[18] Other factors that may affect the perceived independence of an inquiry include the scope of its terms of reference, and whether it is appropriately funded. These issues are discussed in greater detail in Chapters 5, 6 and 9.

Limitations

2.17 Inquiries commissioned by the executive arm of government cannot implement their own recommendations, and are not intended to discharge the functions of the judiciary or legislature. For example, an inquiry that investigates and reports on possible breaches of the civil or criminal law cannot make a legally binding determination, although its investigation may lead to a civil action or criminal prosecution. Similarly, the recommendations made by an inquiry do not automatically become law, although they may inform policy development and legislative amendments introduced into Parliament.

2.18 Finally, public inquiries do not always enjoy coercive powers and protections. Generally, these are conferred on public inquiries by statute. The powers and protections of inquiries established under legislation are discussed further in Chapters 11 and 12.

Functions of public inquiries

2.19 Royal Commissions and other public inquiries may take far longer and cost significantly more than expected.[19] Further, Royal Commissions may make unexpected findings or recommendations critical of the government that appointed them.[20] There are several reasons, however, why governments continue to establish public inquiries.

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17 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 277.

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

19 The cost of inquiries is discussed in Ch 9 and minimising the costs of inquiries is discussed in Ch 10.

20 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [4.6]–[4.14]. For example, the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984) 'surprised both the Commonwealth and state governments in the direction that it took': ibid, [4.7]. In Queensland, the findings of the Inquiry into Possible Illegal Activities and Associated Police Misconduct (1989) (Fitzgerald Inquiry) are credited as a major factor in ending the 30 year rule of the then incumbent Queensland Government: T Sherman, *Executive Inquiries in Australia—Some Proposals for Reform (Law and Policy Paper No 8)* (1997) Australian National University—Centre for International and Public Law, 13.

2.20 On one level, the primary function of a public inquiry is to inquire into, and report on, the subject matter in respect of which it is established by the government.[21] Dr George Gilligan notes that the 'pragmatic' function of a public inquiry, such as a Royal Commission, is to 'investigate an issue for a government, collect information, submit a report and make recommendations'.[22] Gilligan argues persuasively, however, that public inquiries such as Royal Commissions also have a 'broader political, or ideological, function as a management strategy, in particular that of crisis management'.[23]

2.21 The government may establish public inquiries for 'pragmatic' reasons where it:

- is confronted with an issue or problem where immediate action is necessary;
- lacks the expertise or coercive powers to handle an issue or investigation;
- needs to explore a very complex matter in a manner which is beyond the scope of its administrative resources; or
- needs to investigate allegations of impropriety where the government, or an individual working in government, is involved.[24]

2.22 According to Prasser, examples of the second, broader, function include where the government wants to:

- provide the appearance of action when confronted with a controversial issue;
- justify a change in direction from the policy of a previous government, or a policy proposed while in opposition; or
- obtain an independent analysis of a problem when a solution or outcome is already preferred by the government.[25]

2.23 In practice, there will be several issues for a government to consider when determining whether to establish a public inquiry—and, if so, the type of public inquiry that should be established. These issues are discussed below and in Chapter 6.

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21 This function is set out in *Commissions of Inquiry Act 1995* (Tas) s 5.

22 G Gilligan, 'Royal Commissions of Inquiry' (2002) 35 *Australian and New Zealand Journal of Criminology* 289, 289–290.

23 Ibid.

24 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), Figures 4.3, 4.4; Ch 4.

25 Ibid.

Policy and investigatory inquiries

2.24 Public inquiries may consider subject matter that falls within two broad categories:

- issues of policy or law reform (policy inquiries); or
- investigation of facts or allocation of responsibility with respect to incidents or problems (investigatory inquiries).[26]

2.25 Policy and investigatory inquiries fulfil additional functions. Policy inquiries may solve problems relating to systems or processes. These inquiries may advise government on policy development in areas that are novel or particularly complex.

2.26 In contrast, investigatory inquiries determine what happened in particular situations, such as where there has been a major accident or disaster, an allegation of corruption, or the death or wrongful imprisonment or treatment of individuals.[27] The functions of investigatory inquiries include: establishing accountability and responsibility; allowing stakeholders to learn from what happened; providing catharsis or reconciliation; and providing reassurance and rebuilding public confidence.[28]

2.27 In practice, an investigatory inquiry may consider policy and systemic issues that are relevant to the incident or problem being investigated. Similarly, policy inquiries may 'concentrate on the wrong or malfunction in the system and as part of this identify individuals who contributed to such wrongdoing'.[29]

2.28 Justice Ronald Sackville has explained the distinctive techniques of legal policy and investigatory inquiries.

> The first usually involves, among other things, a carefully constructed research program, the systematic gathering of empirical information, inter-disciplinary collaboration, detailed analysis and discussion of policy options, and long-term planning. The second usually requires investigative and policy skills, the ability to identify and follow paper or electronic trails, painstaking analysis of relevant documentation, innovative use of technology and compulsory powers, forensic

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26 Ibid, 22–29. Note that the term 'inquisitorial' sometimes is used interchangeably with the term 'investigatory'. Prasser contrasts his taxonomy with other classification systems. For example, Hallett classifies public inquiries as inquisitorial *or* investigatory; and Borchardt uses three categories of classification—inquisitorial, investigatory and advisory: L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982); D Borchardt, *Commissions of Inquiry in Australia—A Brief Survey* (1991). In this Inquiry, the ALRC has adopted Prasser's system of classifying public inquiries based on their functions.

27 See, for example, the reports of the: Royal Commission on Loss of HMAS Voyager (1964); Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006); and Royal Commission into Aboriginal Deaths in Custody (1991).

28 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [2.17].

29 Ibid, [2.15].

> experience, and the ability to collate and evaluate a vast amount of factual information.[30]

2.29 Several examples of policy and investigatory inquiries in Australia are discussed below.

Types of public inquiries in Australia

2.30 This section provides an overview of the types of public inquiries that have been established at the federal, state and territory level in Australia.

Royal Commissions

2.31 Royal Commissions have been described as 'the most prestigious of executive inquiries in Australia'.[31] Their status is attributed to the fact that they have a statutory basis, are endowed with coercive information-gathering powers, and are generally appointed to inquire into controversial issues.[32] Another important feature of Royal Commissions is their establishment by the Governor-General by Letters Patent.

2.32 The *Royal Commissions Act* provides the Australian Government with a statutory framework for establishing public inquiries with coercive information-gathering powers.[33] Under the Act, the scope of the power to establish a Royal Commission is very broad. The Act provides that the Governor-General, by Letters Patent, may issue a commission 'which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth'.[34] A detailed description of the Act is contained in Chapter 3.

General areas of inquiry by Royal Commissions

2.33 There are a number of general areas into which both policy and investigatory Royal Commissions have inquired since the enactment of the *Royal Commissions Act*.[35] These areas are listed below, with an example of a Royal Commission conducted in that area.[36]

- **administration**—Royal Commission on Australian Government Administration (1976);

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30 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 285–286.

31 T Sherman, *Executive Inquiries in Australia—Some Proposals for Reform (Law and Policy Paper No 8)* (1997) Australian National University—Centre for International and Public Law, 6.

32 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [8.3]–[8.4].

33 The Crown may establish a Royal Commission at common law. Such a Royal Commission, however, does not have coercive information-gathering powers: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 99.

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

35 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), Appendices 1–9.

36 The year in parentheses indicates the year that the inquiry was completed.

- **communications**—Independent Inquiry into Frequency Modulation Broadcasting (1974);
- **constitutional and legal affairs**—Royal Commission on the Constitution (1929);
- **corruption and impropriety**—Royal Commission into Alleged Payments to Australian Maritime Unions (1976);
- **crime**—Royal Commission of Inquiry into Drug Trafficking (1983);
- **defence and national security**—Royal Commission on Australia's Security and Intelligence Agencies (1985);
- **economy, industry policy and assistance**—Royal Commission on the Sugar Industry (1912);
- **employment and industrial relations**—Royal Commission into the Building and Construction Industry (2003);
- **the environment**—Royal Commission into Exploratory and Production Drilling for Petroleum in the Area of the Great Barrier Reef (1975);
- **health**—Royal Commission on Health (1926);
- **Indigenous affairs**—Royal Commission into Aboriginal Deaths in Custody (1991);
- **science and technology**—Royal Commission on Television (1954);
- **trade**—Royal Commission on Meat Export Trade (1914);
- **transport**—Commission of Inquiry into the Relations between the CAA and Seaview Air (1996); and
- **veterans' affairs**—Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam (1985).

Policy and investigatory Royal Commissions

2.34 In the early decades of the 20th century, both policy and investigatory Royal Commissions were appointed regularly. Since the 1970s, however, the majority of Royal Commissions have been investigatory inquiries.[37]

2.35 Examples of early policy Royal Commissions include: the Royal Commission on the Navigation Bill (1906), and the Royal Commission upon the Commonwealth Electoral Law and Administration (1915). During the time of the Whitlam Labor Government, several policy inquiries were issued under the *Royal Commissions Act.* These included the Aboriginal Land Rights Commission (1974) and the Royal Commission on Human Relationships (1978).

2.36 Early investigatory Royal Commissions include: the Royal Commission on the Affray at Goaribari Island, British New Guinea, on the 6th of March, 1904, and the Royal Commission regarding the Contract for the Erection of Additions to the General Post Office, Sydney (1939). More recently, investigatory Royal Commissions have been established to investigate the Chamberlain convictions (1987), the Centenary House lease (2004), and the actions of certain Australian companies in relation to the United Nations Oil-For-Food Programme (2006).

2.37 Some Royal Commissions, while being tasked with inquiring into a particular issue, have also made a number of broad policy recommendations that relate to that issue. Examples of 'mixed' investigatory and policy inquiries include the Royal Commission into Aboriginal Deaths in Custody (1991) and the HIH Royal Commission (2003). Sackville notes that, while the former inquiry was established to investigate the deaths of 99 Indigenous persons in police or prison custody, the inquiry's report included 'a very large number of recommendations designed to address the social, health and economic disadvantages suffered by indigenous people'.[38] Similarly, in investigating the causes of the collapse of the insurance company HIH, the HIH Royal Commission made 61 broad policy recommendations 'on matters of corporate governance, financial reporting and assurance, regulation of general insurance, taxation and general insurance, and a support scheme for policyholders of failed insurers'.[39]

Other federal inquiries

2.38 Some ad hoc public inquiries have been appointed by Australian Governments under legislation other than the *Royal Commissions Act*. In addition, the executive arm of government regularly establishes ad hoc public inquiries, taskforces, committees and

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37 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 50.

38 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 283, fn 43. See also E Johnston, *Royal Commission into Aboriginal Deaths in Custody* (1991), vol 5.

39 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 283, fn 41. See also N Owen, *Report of the HIH Royal Commission* (2003), vol 1, 1xv–1xxiv.

reviews without statutory foundations. These inquiries, however, do not have the same powers as Royal Commissions.

2.39 Ad hoc public inquiries are frequently appointed by the Australian Government to advise it on broad social, economic and cultural issues. Over the past decade or so, non-Royal Commission inquiries have been appointed to consider policies relating to: the arts;[40] consumer affairs;[41] housing and urban affairs;[42] human rights;[43] education;[44] immigration and ethnic affairs;[45] Indigenous affairs;[46] regulation;[47] social security and welfare;[48] sport;[49] and telecommunications.[50]

2.40 Non-statutory forms of public inquiry also may conduct investigations into particular incidents. Recent examples of this type of inquiry include the 2005 inquiry into the immigration detention of Cornelia Rau, and the 2008 inquiry into the case of Dr Mohamed Haneef. These inquiries, however, did not have coercive information-gathering powers.[51] Non-Royal Commission forms of public inquiry are discussed further in Chapters 4 and 5.

State and territory inquiries

2.41 All Australian states and territories have enacted legislation that provides for the appointment of Royal Commissions[52] or other public inquiries with powers and protections.[53] In addition, some public inquiries are established jointly with federal and state or territory governments.[54]

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40 Inquiry into the Contemporary Visual Arts and Crafts Sector (2002).

41 Access Card Consumer and Privacy Taskforce (2008).

42 Taskforce on Urban Design (1994).

43 National Human Rights Consultation (2009).

44 Review of Higher Education (1998).

45 Committee for the Review of the System for Review of Migration Decisions (1992).

46 Northern Territory Emergency Response Review Board (2008).

47 Taskforce on Reducing the Regulatory Burden on Business (2006).

48 Review of the Social Security Review and Appeals System (1997).

49 Independent Review of Soccer (2003).

50 Telecommunications Services Inquiry (2000).

51 A notable exception was the commission of inquiry into the equine influenza outbreak and related quarantine requirements and practices (Equine Influenza Inquiry (2008)): *Quarantine Act 1908* (Cth) s 66AZE. The *Quarantine Amendment (Commission of Inquiry) Act 2007* (Cth) amended the *Quarantine Act* to provide that the commission was vested with most of the powers of the *Royal Commissions Act 1902* (Cth).

52 *Royal Commissions Act 1923* (NSW); *Royal Commissions Act 1968* (WA); *Royal Commissions Act 1917* (SA); *Royal Commissions Act 1991* (ACT).

53 *Constitution Act 1975* (Vic) ss 88B, 88C; *Evidence Act 1958* (Vic) ss 14–21C; *Commissions of Inquiry Act 1950* (Qld); *Commissions of Inquiry Act 1995* (Tas); *Inquiries Act 1945* (NT). Also see: *Special Commissions of Inquiry Act 1983* (NSW); *Public Sector Management Act 1994* (WA) ss 3, 11–14; *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA); *Inquiries Act 1991* (ACT); *Commission of Inquiry (Deaths in Custody) Act 1987* (NT).

54 For example, the Royal Commission into Grain Storage, Handling and Transport (1988) was established jointly with the governments of New South Wales, Victoria, Queensland, Western Australia and South Australia. The Royal Commission of Inquiry into Chamberlain Convictions (1987) was established by the federal and Northern Territory governments. The powers of concurrent federal and state or territory inquiries are considered in Ch 11.

2.42 Prasser observes that the increasing number of Royal Commissions appointed by federal governments from the 1970s was a trend echoed by state governments.[55] Inquiries appointed by state governments in this era, however,

> largely reflected state issues and problems with royal commissions into police corruption, government maladministration, ministerial improprieties and scandals in State financial management.[56]

2.43 Several state governments have now established standing bodies that consider issues of impropriety and corruption.[57] In recent years, state and territory governments have appointed Royal Commissions and other public inquiries to consider issues relating to:

- child protection in Indigenous and non-Indigenous communities—New South Wales (NSW),[58] Northern Territory (NT),[59] South Australia (SA)[60] and Western Australia;[61]
- health and disability services—NSW,[62] Queensland[63] and ACT;[64] and
- deaths of individuals—SA[65] and Tasmania.[66]

2.44 In early 2009, the Victorian Premier John Brumby announced the appointment of a Royal Commission to inquire into the bushfires that occurred in Victoria in

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55 S Prasser, 'Royal Commissions in Australia: When Should Governments Appoint Them? (2006) 65 *Australian Journal of Public Administration* 28, 29.

56 Ibid. For example, inquiries into alleged police misconduct or corruption were appointed in Victoria (1970 and 1975); South Australia (1977 and 1978); NSW (1979 and 1994); Queensland (1987); and Western Australia (2002).

57 For example, there are standing bodies that consider corruption issues in: NSW (Independent Commission Against Corruption, NSW Crime Commission and Police Integrity Commission); Victoria (Office of Police Integrity); Queensland (Crime and Misconduct Commission); and Western Australia (Corruption and Crime Commission).

58 Special Commission of Inquiry into Child Protection Services in NSW (2008), established under the *Special Commissions of Inquiry Act 1983* (NSW).

59 Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007), established under the *Inquiries Act 1945* (NT).

60 Commission of Inquiry: Children on APY Lands (2007); Commission of Inquiry: Children in State Care (2008), established under the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA).

61 Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities (2002), established under the *Public Sector Management Act 1994* (WA).

62 Special Commission of Inquiry into Acute Care Services in NSW (2008), established under the *Special Commissions of Inquiry Act 1983* (NSW).

63 Queensland Public Hospitals Commission of Inquiry (2005), established under the *Commissions of Inquiry Act 1950* (Qld).

64 Board of Inquiry into Disability Services (2001), established under the *Inquiries Act 1991* (ACT).

65 Kapunda Road Royal Commission (2005), established under *Royal Commissions Act 1917* (SA).

66 Office of Inquiry into the Death of Joseph Gilewicz (2000), established under the *Commissions of Inquiry Act 1995* (Tas).

February 2009.[67] State and territory mechanisms used to establish public inquiries are discussed further in Chapter 4.

67 Governor of the State of Victoria, *Terms of Reference—Royal Commission into the 2009 Bushfires* (2009).

3. Overview of the *Royal Commissions Act 1902* (Cth)

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Introduction

3.1 This chapter provides an overview of the *Royal Commissions Act 1902* (Cth) and outlines its primary features. In Chapter 5, the ALRC recommends that the *Royal Commissions Act* should be renamed the *Inquiries Act* and amended to enable the establishment of Royal Commissions and Official Inquiries.[1] Particular aspects of the *Inquiries Act* are discussed in greater detail in other chapters in this Report.

Establishment

3.2 At common law, the Crown has the power to issue a Royal Commission. This power has been described as 'an essential part of the equipment of all executive authority'.[2] A Royal Commission issued pursuant to the Crown's common law powers may inquire into any matter, so long as the inquiry is for a purpose of government.[3] It

1 Recommendation 5–1.
2 *Huddart Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330, 370.
3 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 156.

does not have coercive powers, however, such as the power to compel the attendance of witnesses or require the production of documents.[4]

3.3 The Crown's common law power to issue a Royal Commission is supplemented by s 1A of the *Royal Commissions Act*.[5] This section provides that the Governor-General may, by Letters Patent, issue a commission to a person or persons requiring or authorising him or her to inquire into and report upon 'any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth'. 'Letters Patent' are a type of legal instrument containing public directions from a monarch.[6] Historically, they have been used for a variety of purposes, such as conferring powers or privileges on persons or companies, and creating peerages.[7]

3.4 Section 16A of the *Acts Interpretation Act 1901* (Cth) provides that a reference in an Act to the Governor-General shall be read as referring to the Governor-General acting with the advice of the Executive Council. The Executive Council consists of all ministers of state (ministers and parliamentary secretaries).[8] Accordingly, Royal Commissions are established by the Governor-General on the advice of all ministers.

3.5 In *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd,* it was argued that the *Royal Commissions Act* was invalid because it purported to authorise the Governor-General to establish Royal Commissions with coercive powers to inquire into matters beyond the legislative power of the Commonwealth.[9] While the judgment of the Privy Council in this case cast doubt upon the constitutionality of the Act, a later judgment of the High Court of Australia confirmed that the common law doctrine of severability,[10] as well as s 15A of the *Acts Interpretation Act*, enabled s 1A of the Act to be read as 'validly operating in respect of subjects of inquiry to which Commonwealth powers extend'.[11]

3.6 As noted in Chapter 2, Royal Commissions have been established to inquire into a wide range of matters, including the location of the seat of government,[12] taxation

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4 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 99.

5 In Ch 5, the ALRC discusses the prerogative, or common law, power of the executive to establish a Royal Commission.

6 D Walker, *The Oxford Companion to Law* (1980), 761.

7 Ibid.

8 *Australian Constitution* s 64. Appointments to the Executive Council are for life, although in practice only executive councillors who are members of the current ministry advise the Governor-General: Australian Government Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook* (2005), [2.14].

9 *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644.

10 The doctrine of severability permits a court to read an Act as if unconstitutional sections of the Act were not included.

11 *Lockwood v Commonwealth* (1954) 90 CLR 177*,* 184. Section 15A of the *Acts Interpretation Act 1901* (Cth) provides that Acts are to be read and constructed subject to the *Australian Constitution*.

12 Royal Commission on Sites for the Seat of Government of the Commonwealth (1903).

policy,[13] the *Australian Constitution*,[14] grain storage and handling,[15] the activities of unions,[16] and the 'usual rich array of alleged improprieties'.[17] A Royal Commission cannot inquire into a matter if its inquiry would interfere with the administration of justice.[18] It has been held, for example, that a Royal Commission could not inquire into allegations that a person has been guilty of criminal conduct if a criminal prosecution has been commenced against the person in respect of the alleged conduct.[19] In the United Kingdom, the minister responsible for establishing a public inquiry may suspend the inquiry to enable the determination of civil or criminal proceedings arising out of matters to which the inquiry relates.[20]

Jurisdiction

3.7 The 'jurisdiction', 'charter' or 'terms of reference' of a Royal Commission is set out in the Letters Patent issued by the Governor-General. For the purposes of this Report, the jurisdiction of a Royal Commission is referred to as its 'terms of reference'.

3.8 Section 1A of the *Royal Commissions Act* does not provide any guidance on the framing of the terms of reference for a Royal Commission. It has been held, however, that the word 'matter' in the provision has a wide operation, and that, within constitutional limits, a 'general description of the subject of the inquiry will suffice'.[21]

3.9 Issues for this Inquiry include whether the recommended *Inquiries Act* should provide further guidance about the subject matter of Royal Commissions and Official Inquiries, or the circumstances in which they should be established. These issues are discussed in Chapter 6.

Membership

3.10 Section 1A of the *Royal Commissions Act* empowers the Governor-General to 'issue such commissions, directed to such person or persons, as he or she thinks fit'. Accordingly, Royal Commissioners are appointed by the Governor-General, on the advice of the Executive Council. Commissioners are almost always drawn from outside the government, which enhances the perception that Royal Commissions are independent.[22]

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13 Royal Commission on Taxation of Leasehold Estates in Crown Lands (1919); Royal Commission on Taxation (1934).
14 Royal Commission on the Constitution (1929).
15 Royal Commission into Grain Storage, Handling and Transport (1988).
16 Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984).
17 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 279.
18 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 84.
19 *Hammond v Commonwealth* (1982) 152 CLR 188, 198.
20 *Inquiries Act 2005* (UK) s 13. The power of a minister to suspend an inquiry is discussed in Ch 14.
21 *Boath v Wyvill* (1989) 85 ALR 621, 630.
22 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [6.7].

3.11 As a matter of practice, Royal Commissions are 'largely the province of lawyers'.[23] Of the 38 federal Royal Commissions that have been established since 1970, 32 have been chaired by current or former judges, or legal practitioners.[24] The membership of inquiries that may be established under the recommended *Inquiries Act* is discussed in Chapter 6.

Coercive powers

3.12 Royal Commissions established under the *Royal Commissions Act* have a number of coercive information-gathering powers. For example, they have the power to summon witnesses to give evidence;[25] summon or require witnesses to produce documents or things;[26] and require witnesses to give evidence under oath or affirmation.[27]

3.13 A person who fails to attend a hearing or produce requested documents or things, without reasonable excuse, commits an offence, punishable by a maximum penalty of $1,100 or imprisonment for six months.[28] A person who refuses to be sworn or make an affirmation, or to answer any relevant question asked by a Royal Commission, or legal practitioner assisting or appearing before a Royal Commission, or a person authorised to appear, also commits an offence punishable by the same maximum penalty.[29]

3.14 Royal Commissions established under the Act have other powers that are not strictly information-gathering powers, but which, if exercised, may ultimately result in the acquisition of relevant information. For example, a 'relevant Commission'[30] may authorise a member of the Commission, a member of the Australian Federal Police, or a member of the police force of a state or territory to apply for a search warrant in relation to a matter into which it is inquiring.[31] All Royal Commissions can issue a warrant for the arrest of a witness for failing to attend in answer to a summons.[32]

3.15 Examination of the powers of Royal Commissions raises a number of questions. For example, do all inquiries established under the recommended *Inquiries Act* require the same coercive information-gathering powers? Do the current coercive information-gathering powers adequately balance individual rights and the powers of the state? Are the penalties for offences designed to support the use of a Royal Commission's powers

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23 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 282.
24 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [8.6].
25 *Royal Commissions Act 1902* (Cth) s 2(1)(a).
26 Ibid s 2(1)(b), (2), (3A), (5).
27 Ibid s 2(3).
28 Ibid s 3.
29 Ibid ss 6, 6FA.
30 A 'relevant Commission' is a Commission established by Letters Patent that declare that the Commission is a relevant Commission for the purposes of the provision in which the expression appears: ibid s 1B.
31 *Royal Commissions Act 1902* (Cth) s 4.
32 Ibid s 6B.

appropriate? The powers of Royal Commissions and Official Inquiries established under the recommended *Inquiries Act* are discussed in detail in Part D. Offences and penalties are discussed further in Part F.

Methods of taking evidence

3.16 The *Royal Commissions Act* does not preclude the taking of evidence otherwise than on oath or by affirmation.[33] The provisions of the Act, however, 'envisage that Royal Commissions will obtain evidence mainly through oral hearings'.[34] For example, s 6FA provides that counsel assisting a Commission, or any person or legal practitioner authorised by a Commission to appear before it, may examine or cross-examine any witness about any matter which the Commission deems relevant, so far as the Commission thinks proper. There are not, however, any provisions expressly enabling evidence to be taken in other ways, for example, by affidavit or written statement.

3.17 Royal Commissions have a general discretion to determine whether to conduct their hearings in public or private.[35] When exercising this discretion, a Royal Commission will consider a number of factors, including, for example, whether the risk that a person's reputation will be unfairly damaged outweighs the public interest in conducting a Royal Commission hearing openly.[36]

3.18 The *Royal Commissions Act* also contains some provisions that deal with the publication of evidence given before a Royal Commission. Section 6D(2) of the Act enables a witness to request that a Royal Commission take evidence in private where the evidence relates to the profits or financial position of any person, and it would be unfairly prejudicial to the interests of that person to take the evidence in public. Further, s 6D(3) enables a Royal Commission to direct that any evidence given before it, any document or thing produced to it, or any information that may enable a person who has given evidence before it to be identified, shall not be published.

3.19 The taking of evidence by potential inquiries under the recommended *Inquiries Act* is discussed in detail in Part E.

Privileges and immunities

3.20 A 'privilege' is a right to resist disclosing information that would otherwise be required to be disclosed.[37] A number of privileges exist at common law—namely, the privilege against self-incrimination, client legal privilege, parliamentary privilege and

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33 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 350.

34 Ibid.

35 *Royal Commissions Act 1902* (Cth) s 6D(5).

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

37 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 91.

the privilege in aid of settlement.[38] These privileges, as well as some additional privileges, also exist in statutory form.[39]

3.21 Further, while not strictly a privilege, common law or statutory public interest immunity also prevents the disclosure of certain information—namely, information relating to matters of state—when the public interest in non-disclosure outweighs the public interest in disclosure.[40]

3.22 The *Royal Commissions Act* expressly deals with the privilege against self-incrimination and client legal privilege.[41] It also contains a provision providing that a witness does not have to disclose any 'secret process of manufacture'.[42] The extent to which other common law or statutory privileges apply to Royal Commissions is uncertain, and is discussed in detail in Chapter 17. The application of privileges to inquiries that may be established under the recommended *Inquiries Act* also is discussed in Chapter 17.

Offences

3.23 As noted above, under the *Royal Commissions Act* it is an offence to fail to attend a hearing or produce a requested document or thing, or to refuse to be sworn, or make an affirmation, or answer a relevant question. The Act also contains a number of offence provisions designed to prevent interference with witnesses appearing before a Royal Commission. For example, it is an offence to bribe a person called as a witness before a Royal Commission to give false testimony or to withhold true testimony,[43] to practise any fraud on a person called as a witness before a Royal Commission with the intent of affecting his or her testimony,[44] to prevent a witness from attending before a Royal Commission,[45] or to dismiss an employee for appearing as a witness before a Royal Commission.[46]

3.24 In addition, s 6M makes it an offence to use, cause or inflict any violence, punishment, damage, loss, or disadvantage to any person 'for or on account of' the fact that he or she appeared as a witness before a Royal Commission, gave evidence before a Royal Commission, or produced a document or thing to a Royal Commission.

3.25 In *X v Australian Prudential Regulation Authority*, the High Court held that s 6M did not prevent the Australian Prudential Regulation Authority (APRA) from taking administrative action under the *Insurance Act 1973* (Cth) against witnesses who

38 Ibid, Ch 7.
39 See, eg, *Evidence Act 1995* (Cth) pt 3.10.
40 J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 110.
41 Referred to as legal professional privilege under the Act.
42 *Royal Commissions Act 1902* (Cth) s 6D(1).
43 Ibid s 6I.
44 Ibid 6J.
45 Ibid s 6L.
46 Ibid s 6N.

appeared before the HIH Royal Commission. This was because the administrative action was a proper discharge of APRA's statutory powers and functions, and not 'for or on account of' the evidence that the witnesses gave to the Commission.[47]

3.26 The Act also contains offence provisions preventing interference with evidence. It makes it an offence to give false or misleading evidence,[48] or to destroy documents or things that are or may be required by a Royal Commission.[49]

3.27 It has been noted that the offence provisions in the Act 'have been based very largely on the principles developed by the courts in the exercise of their contempt jurisdiction'.[50] In addition, an act of misconduct that does not constitute an offence under the *Royal Commissions Act* may constitute an offence relating to the administration of justice under pt III of the *Crimes Act 1914* (Cth) or Chapter 7 of the *Criminal Code* (Cth).[51] The offences established by the *Royal Commissions Act*, and the offences that may be established under the recommended *Inquiries Act,* are discussed in detail in Chapter 19. The nature and adequacy of the penalties attached to these offences is discussed in detail in Chapter 21.

Communication of information

3.28 Section 6P of the Act provides that a Commission may communicate any information it obtains that relates to a contravention of a law of the Commonwealth, or of a state or territory, to certain specified people and bodies, such as the Director of Public Prosecutions. In 2003, the Commissioner conducting the Royal Commission into the Building and Construction Industry recommended that the provision be amended to enable Royal Commissions to communicate evidence or information relating to a contravention of any law to 'any agency or body of the Commonwealth, [or] a State or a Territory prescribed by the regulations'.[52] This, the Commissioner noted, would overcome the ambiguity in s 6P(1)(e), which enables the communication of information relating to a contravention of a law to 'the authority or person responsible for the administration or enforcement of that law'.[53] The power of a Royal Commission to communicate information pursuant to s 6P, and the potential power to communicate such information under the recommended *Inquiries Act*, is discussed in Chapter 11.

47 *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, [59].
48 *Royal Commissions Act 1902* (Cth) s 6H.
49 Ibid s 6K.
50 E Campbell, *Contempt of Royal Commissions* (1984), 36.
51 Ibid, 44.
52 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Rec 1(c).
53 Ibid, vol 2, Rec 1(c).

Contempt

3.29 Section 6O(1) of the *Royal Commissions Act* deals with contempt of a Royal Commission, and provides as follows:

> Any person who intentionally insults or disturbs a Royal Commission, or interrupts the proceedings of a Royal Commission, or uses any insulting language towards a Royal Commission, or by writing or speech uses words false and defamatory of a Royal Commission, or is in any manner guilty of any intentional contempt of a Royal Commission, shall be guilty of an offence.
>
> Penalty: Two hundred dollars, or imprisonment for three months.

3.30 The law of contempt is concerned with protecting the administration of justice. Some have argued that the application of the law of contempt in an administrative context is problematic.[54] This is because 'the very touchstone whereby the question of contempt or no contempt is to be judged has been withdrawn and some new criterion must be found'.[55]

3.31 Section 6O(2) of the Act gives certain judicial officers, in respect of a contempt committed in the face of the Commission, all the powers that a justice of the High Court has in relation to a contempt in the face of the Court. Concerns have been expressed that this provision 'is reminiscent of a "star chamber", for it empowers a commissioner to act at once as informant, prosecutor and judge'.[56] In addition, some commentators have questioned the constitutionality of the provision, given that it purports to vest judicial power in an administrative tribunal.[57]

3.32 Some acts that could constitute contempt are already punishable as criminal offences in the *Royal Commissions Act*. For example, it is an offence to refuse to be sworn or make an affirmation, or answer a relevant question. This could also constitute contempt of a Royal Commission. One question is whether conduct which breaches a specific offence provision in the *Royal Commissions Act* also may be punishable under s 6O(1) of the Act.[58] The issue of contempt of inquiries that may be established under the recommended *Inquiries Act*, is discussed in detail in Chapter 19.

Concurrent Commonwealth and state inquiries

3.33 Section 7AA of the Act provides that a Royal Commissioner can perform any functions or exercise any powers conferred on him or her by the Governor of a state, or a minister of a state, provided that the minister has consented to this course. This provision was inserted into the Act in 1982 'to remove doubt as to the capacity of a

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54 See, eg, E Campbell, *Contempt of Royal Commissions* (1984), 42.
55 *R v Arrowsmith* [1950] VLR 78, 85–86.
56 A Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 55.
57 Ibid; E Campbell, *Contempt of Royal Commissions* (1984), 47.
58 E Campbell, *Contempt of Royal Commissions* (1984), 30–31.

Commonwealth royal commission to accept powers and functions given to it by a State government in the form of a parallel commission'.[59]

3.34 In *Sorby v Commonwealth*, Gibbs CJ noted that s 7AA was a 'rather curious provision'[60] because it had been held previously that a Royal Commissioner could perform the functions of a Commissioner conferred on him or her by the Governor of a state while performing similar functions conferred on him or her by the Governor-General.[61] Accordingly, he noted that s 7AA 'seems to have been unnecessary, unless it was intended to be restrictive, in that it makes the consent of the Minister necessary where it was not previously so'.[62] Concurrent inquiries conducted under the *Royal Commissions Act,* and under the recommended *Inquiries Act,* are discussed in Chapter 7.

Custody and use of records

3.35 Section 9 of the *Royal Commissions Act* enables regulations to be made about the custody and use of, and access to, Royal Commission records. It sets out the persons and bodies who may be given custody of Royal Commission records by regulations, and provides that, subject to any regulations to the contrary, a custodian of a record of a Royal Commission may use the record for:

- the purposes of the performance of the custodian's functions and the exercise of the custodian's powers; and

- any other purpose for which the custodian could use the records if the custodian had acquired them in the performance of the custodian's functions or the exercise of the custodian's powers.

3.36 The provision was modelled on the provisions of the *HIH Royal Commission (Transfer or Records) Act 2003* (Cth), which enabled the transfer of certain records of the HIH Royal Commission to the Australian Securities and Investments Commission. It was introduced in 2006 to

> remove any argument that there might be a requirement to provide procedural fairness to persons who could be adversely affected if documents obtained by the Cole Inquiry, or any other royal commission, for its purposes, were to be made available to other persons or agencies and used for other purposes.[63]

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59 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security), 2337.

60 *Sorby v Commonwealth* (1983) 152 CLR 281, 248.

61 See *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211.

62 *Sorby v Commonwealth* (1983) 152 CLR 281, 248.

63 Explanatory Memorandum, Royal Commissions Amendment (Records) Bill 2006 (Cth). The 'Cole Inquiry' referred to in this Explanatory Memorandum is the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme (2006).

3.37 Regulation 8 of the *Royal Commissions Regulations 2001* (Cth) deals with the custody and use of, and access to, the records of the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006). The handling of Royal Commission records, and the records of inquiries that may be established under the recommended *Inquiries Act,* are discussed in detail in Chapter 8.

4. Comparative Forms of Public Inquiry

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Introduction

4.1 In this chapter, the ALRC discusses comparative models of public inquiries. It considers models of inquiry in Australian state and territory jurisdictions, those conducted under the *Defence (Inquiries) Regulations 1985* (Cth), and models of inquiry in overseas jurisdictions.

Models of inquiry in Australian states and territories

4.2 Legislation in all Australian states and territories provides for the establishment of public inquiries with coercive powers. Inquiries without statutory foundations are also established by most state and territory governments. In the next two sections, the ALRC outlines distinctive features of inquiries established by legislation in these jurisdictions. In particular, the ALRC notes where a model of inquiry differs from the *Royal Commissions Act 1902* (Cth) with respect to: establishment and membership of an inquiry; flexibility of processes; and the extent of powers to gather information and protections from legal liability.

4.3 In other chapters of this Report, the ALRC discusses in detail issues concerning: inquiry powers; protection of witnesses and inquiry members; offences; costs; administration; judicial review of inquiry decisions; and government responses to inquiry recommendations.

New South Wales

4.4 In New South Wales (NSW), the Governor has the prerogative power to establish public inquiries. Two statutes confer powers on public inquiries established by the Governor: the *Royal Commissions Act 1923* (NSW) and the *Special Commissions of Inquiry Act 1983* (NSW).[1] For a brief period in 1997–1998, the *Special Commissions of Inquiry Act* (NSW) allowed either or both Houses of Parliament to resolve to authorise the Governor to establish a special commission of inquiry to consider an issue related to parliamentary proceedings.[2]

4.5 While the Governor may appoint any person as commissioner or commissioners of an inquiry established under the *Royal Commissions Act* (NSW),[3] only certain persons may be appointed as commissioners of an inquiry established under the *Special Commissions of Inquiry Act* (NSW). The latter Act provides that a commission may be issued only to a person who is a judge or legal practitioner of at least seven years standing.[4] As well, some powers in the *Royal Commissions Act* (NSW) may be exercised only by a judge of a superior court, or a legal practitioner of seven years standing, who is declared to have these powers in the Letters Patent establishing the Royal Commission.[5]

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1 The *Special Commissions of Inquiry Act* expressly excludes the operation of the *Royal Commissions Act* (NSW): *Special Commissions of Inquiry Act 1983* (NSW) s 4(4). Recent inquiries in NSW tend to have been established under the *Special Commissions of Inquiry Act* rather than under the *Royal Commissions Act* (NSW). See, eg, Special Commission of Inquiry into Acute Care Services in NSW Public Hospitals (2008); Special Commission of Inquiry into Child Protection Services in NSW (2008); Special Commission of Inquiry into Sydney Ferries (2007); Special Commission of Inquiry into Medical Research and Compensation Foundation (2004).

2 This amendment was made to allow the Parliament to authorise an inquiry to be held into certain comments protected by parliamentary privilege and made in relation to the Royal Commission into the New South Wales Police Service (1997): New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 September 1997 (B Debus—Minister for Corrective Services). Part 4A expired six months after its introduction: *Special Commissions of Inquiry Act 1983* (NSW) s 33H. An inquiry established under pt 4A attracted an unsuccessful legal challenge on the basis that certain provisions abrogated freedom of speech: G Griffith, 'The Powers and Privileges of the New South Wales Legislative Council—Arena v Nader' (1998) 9 *Public Law Review* 227.

3 *Royal Commissions Act 1923* (NSW) s 5.

4 *Special Commissions of Inquiry Act 1983* (NSW) s 4(2). However, a commission of inquiry that is issued to a judge does not cease to have force only because the person ceases to be a judge: s 2A. 'Judge' is defined in s 3 of the Act to include judges of the NSW Land and Environment and District Courts, as well as judicial members of the NSW Industrial Relations and Workers' Compensation Commission.

5 *Royal Commissions Act 1923* (NSW) div 2 s 15. Commissioners who are also judges of the Supreme Court of NSW may exercise the special powers without such a declaration by the Governor: s 15(1).

4.6 Both the *Royal Commissions Act* (NSW) and the *Special Commissions of Inquiry Act* (NSW) confer coercive powers upon inquiries appointed under the Acts.[6] In inquiries established under the *Special Commissions of Inquiry Act* (NSW) and the special provisions of the *Royal Commissions Act* (NSW), a commissioner has the same powers, rights and privileges as a judge does with respect to compelling the: attendance of witnesses; answering by witnesses of relevant questions; and production of documents and other material.[7] Further, a commissioner may issue warrants for the apprehension of a witness and the bringing of that witness before the inquiry.[8]

4.7 Not all inquiries enacted under the *Royal Commissions Act* (NSW) and the *Special Commissions of Inquiry Act* (NSW) are empowered to exercise all powers set out in the Acts—both Acts allow the Governor to set limitations on the powers available to inquiries.[9] Professor Enid Campbell observed that a provision of this nature 'provides an element of flexibility not present in the federal Act'.[10]

Victoria

4.8 Currently, there is no general inquiries statute that provides for the establishment of public inquiries in Victoria. The Governor-in-Council, however, may issue commissions and appoint boards of inquiry to any person or persons under the *Constitution Act 1975* (Vic).[11]

4.9 The powers and rules of commissions and boards of inquiry are set out in the *Evidence Act 1958* (Vic).[12] There are few differences between the powers and rules of commissions and boards of inquiry. The coercive powers of both largely reflect those in the federal *Royal Commissions Act.*[13] Several other Victorian Acts provide that the relevant provisions of the *Evidence Act* apply with respect to investigatory inquiries established under those Acts.[14]

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6 Ibid pt 2; *Special Commissions of Inquiry Act 1983* (NSW) pt 3. Further, the *Royal Commission (Police Service) Act 1994* (NSW) was enacted to provide additional powers to the Royal Commission into the New South Wales Police Service, which was appointed under the *Royal Commissions Act 1923* (NSW).

7 *Royal Commissions Act 1923* (NSW) s 18; *Special Commissions of Inquiry Act 1983* (NSW) s 24. Note that the punishment of contempt differs between the two Acts: *Royal Commissions Act 1923* (NSW) s 18B; *Special Commissions of Inquiry Act 1983* (NSW) s 24(d).

8 *Royal Commissions Act 1923* (NSW) s 16; *Special Commissions of Inquiry Act 1983* (NSW) s 22.

9 *Royal Commissions Act 1923* (NSW) s 14; *Special Commissions of Inquiry Act 1983* (NSW) s 5.

10 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [3.7].

11 *Constitution Act 1975* (Vic) ss 88B, 88C. Campbell notes '[t]here appear to be no important differences between the powers of commissions and of boards. Though in practice royal commissions have been reserved for matters of great public importance': H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [3.5].

12 *Evidence Act 1958* (Vic) ss 14–21C.

13 Note, however, that in 1998 the *Evidence Act 1958* (Vic) was amended to confer on commissions or boards of inquiry established under the *Constitution Act 1975* (Vic) powers of entry to premises and inspection and possession of certain documents or things found on the premises: *Evidence Act 1958* (Vic) s 19E.

14 For a list of these Acts, see: Victorian Law Reform Commission, *Implementing the Uniform Evidence Act—Report* (2006), Appendix 12.

4.10 In 2006, the Victorian Law Reform Commission recommended the: repeal of the provisions of the *Evidence Act 1958* that deal with commissions and boards of inquiries; enactment of a Victorian *Royal Commissions Act*; and consequential amendment of several Victorian Acts that incorporate by reference the inquiry provisions of the *Evidence Act 1958*.[15] On 1 January 2010, most provisions of the *Evidence Act 2008* (Vic) will come into force, replacing most provisions of the *Evidence Act 1958*.[16] The *Evidence Act 2008*, however, does not contain provisions dealing with the powers and procedures of public inquiries, and the provisions of the *Evidence Act 1958* relating to inquiries remain in force. At the time of writing in October 2009, draft legislation for the establishment of public inquiries has not been introduced into the Victorian Parliament.

Queensland

4.11 In Queensland, the Governor has the prerogative power to establish a commission of inquiry. Under the *Commissions of Inquiry Act 1950* (Qld), commissions of inquiry with coercive powers may be issued to any person or persons.[17] Unlike most other equivalent Acts in Australian jurisdictions, the *Commissions of Inquiry Act* (Qld) states that the Governor shall establish an inquiry under the Act with the advice of the Executive Council.[18] Further, the Governor in Council may declare that specified provisions of the *Commissions of Inquiry Act* (Qld) apply to inquiries other than those issued under the Act.[19]

4.12 Inquiries established under the *Commissions of Inquiry Act* (Qld) have the power, in certain circumstances, to enter and search premises.[20] The commission may inspect documents and make copies of any material that may be relevant to the inquiry.[21] Further, if the chair of the commission is satisfied that there are reasonable grounds for suspecting that there is relevant material on certain premises, he or she may issue a warrant to police officers to search the premises and seize relevant material.[22]

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15 Ibid, Rec 43. These recommendations were made as a result of the inquiry into uniform evidence law in Australia conducted jointly by the ALRC, Victorian Law Reform Commission and NSW Law Reform Commission: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005).

16 *Evidence Act 2008* (Vic) s 2.

17 *Commissions of Inquiry Act 1950* (Qld) ss 3, 4(1).

18 Ibid 4(1). With respect to the analogous power of the Governor-General under s 1A of the *Royal Commissions Act 1902* (Cth), note that the *Acts Interpretation Act 1901* (Cth) s 16 provides that the reference in an Act to the Governor-General shall be read as referring to the Governor-General acting with the advice of the Executive Council. This is discussed further in Ch 3.

19 *Commissions of Inquiry Act 1950* (Qld) s 4(2).

20 Ibid s 19A. See also H Reed, 'The "Permanent" Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II' (1995) 2 *Australian Journal of Administrative Law* 157, 159.

21 *Commissions of Inquiry Act 1950* (Qld) s 19.

22 Ibid s 19A.

South Australia

4.13 In South Australia, the Governor has the prerogative power to establish a Royal Commission. Coercive powers of Royal Commissions are set out in the *Royal Commissions Act 1917* (SA).[23]

4.14 While there are no requirements in the *Royal Commissions Act* (SA) as to who may be a member of a Royal Commission, there were stringent requirements for one inquiry established under the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA). This Act established a commission of inquiry into the incidence of sexual offences against children resident on the A□angu Pitjantjatjara Yankunytjatjara lands in Central Australia. While the Governor may have appointed any person to be a commissioner of this inquiry, he or she also needed to appoint two assistant commissioners of whom:

- one needed to be male and one female; and
- at least one needed to be of Aboriginal descent.[24]

4.15 Few other Acts providing for the establishment of public inquiries with coercive powers set out restrictions on the gender or ethnicity of an inquiry member. The issue of membership of an inquiry is discussed further in Chapter 6.

Western Australia

4.16 The *Royal Commissions Act 1968* (WA) provides that a Royal Commission with coercive powers may be appointed by the Governor.[25] It mirrors the federal *Royal Commissions Act* in providing a statutory basis for the establishment of Royal Commissions with coercive powers.[26] Other Acts may confer additional powers on inquiries established under the *Royal Commissions Act* (WA).[27]

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23 *Royal Commissions Act 1917* (SA) ss 3, 4.

24 *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 4A(2), (3). In the Commission of Inquiry into Children on APY Lands (2007), the assistant commissioners could have exercised the powers and performed the functions of the commissioner under the Act in accordance with an arrangement entered into with the commissioner: ibid s 4A(4).

25 *Royal Commissions Act 1968* (WA) s 5.

26 Ibid s 5; *Royal Commissions Act 1902* (Cth) s 1A. Also see H Reed, 'The "Permanent" Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part I' (1995) 2 *Australian Journal of Administrative Law* 69, 72.

27 For example, see *Royal Commission (Police) Act 2002* (WA).

4.17 Any person may be appointed as a member of a Royal Commission established under the *Royal Commissions Act* (WA). Unlike equivalent Acts in other jurisdictions, however, the Act also makes special provision for the appointment of members of a select committee of either House of Parliament as members of a Royal Commission.[28] In such a case, a majority of the members shall form a quorum at any meeting, and any decision of a majority of members shall be the decision of the Royal Commission.[29]

4.18 In Western Australia, some public inquiries also may be established by an individual minister. The minister responsible for administering the *Public Sector Management Act 1994* (WA) may direct, in writing, a suitably qualified person or persons to conduct a special inquiry into a matter relating to the Western Australian public sector.[30] Special inquirers appointed under the Act have some coercive information-gathering powers, including the power to enter the premises of any public sector body, and inspect and retain any book, document or writing produced to him or her upon notice in writing.[31]

Tasmania

4.19 In Tasmania, inquiries with coercive powers are established by the Governor under the *Commissions of Inquiry Act 1995* (Tas). Unlike comparable legislation in other Australian jurisdictions, this Act sets out criteria for when a public inquiry may be established. The Governor may direct that a commission of inquiry be made into a matter only when he or she is satisfied that it is both in the public interest and expedient to do so.[32]

4.20 The *Commissions of Inquiry Act* (Tas) provides that one or more persons may be appointed as members of such an inquiry. The Act also sets out the circumstances in which such appointment may be terminated.[33]

4.21 In 2003, the Tasmania Law Reform Institute made several recommendations with respect to the powers of inquiries established under the *Commissions of Inquiry Act* (Tas).[34] These recommendations are discussed in Chapter 11.

Northern Territory

4.22 Under the *Inquiries Act 1945* (NT), either the responsible minister or the Legislative Assembly can appoint, or resolve to appoint, a person or board of inquiry.[35]

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28 *Royal Commissions Act 1968* (WA) s 8.
29 Ibid.
30 *Public Sector Management Act 1994* (WA) s 11. 'Public sector' is defined broadly under the Act to mean all agencies, ministerial offices and non-state emergency service organisations: ibid s 3.
31 Ibid ss 12, 13.
32 *Commissions of Inquiry Act 1995* (Tas) s 4(1).
33 Ibid s 4(5), sch 1.
34 Tasmania Law Reform Institute, *Report on the Commissions of Inquiry Act 1995* (2003).
35 *Inquiries Act 1945* (NT) ss 4, 4A. The minister responsible for administering the *Inquiries Act* is the Chief Minister: Northern Territory, *Administrative Arrangements Order*, 9 February 2009.

If the Legislative Assembly passes a resolution for the appointment of an inquiry, the Administrator of the Northern Territory appoints the board of inquiry or inquiry member. Reports are required to be tabled in the Legislative Assembly.[36]

4.23 Inquiries established under the *Inquiries Act* (NT) have similar powers to those established under the federal *Royal Commissions Act.* In addition, the *Commission of Inquiry (Deaths in Custody) Act 1989* (NT) expressly provided the commissioner of that inquiry with the same powers, protections and privileges as those contained in the federal *Royal Commissions Act.*[37] Concurrent inquiries established jointly by the federal and state or territory governments are discussed in Chapter 11.

Australian Capital Territory

4.24 Royal Commissions and boards of inquiry are appointed by the ACT executive under the *Royal Commissions Act 1991* (ACT) and the *Inquiries Act 1991* (ACT) respectively.[38] The Acts generally are similar, but Royal Commissions and boards of inquiry differ in the scope of their powers. The explanatory memorandum for the bills makes clear the parliamentary intention for the different mechanisms—a Royal Commission is intended to be 'inquisitorial' in nature, whereas a board of inquiry 'provide[s] the Government of the Territory with information on a matter of general importance'.[39]

4.25 Commissioners appointed under the *Royal Commissions Act* (ACT) must be a judge or a person who has been a lawyer for at least five years.[40] There is no similar requirement for the membership of boards of inquiry established under the *Inquiries Act* (ACT).[41] The executive may terminate the appointment of a commissioner of a Royal Commission or member of a board of inquiry on the grounds of misbehaviour or physical or mental incapacity.[42]

Other models of inquiry in Australia

Defence inquiries established by regulations

4.26 Inquiries established under regulations usually consider issues related to national security or the Australian Defence Force (ADF). During, and immediately following, the Second World War, inquiries were conducted under the *National Security (Inquiries) Regulations 1941* (Cth).[43] One such commission of inquiry was the Inquiry

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36 *Inquiries Act 1945* (NT) s 4A. The tabling of reports of inquiries established under the federal *Inquiries Act* recommended in this Report is discussed in Ch 7.

37 *Commission of Inquiry (Deaths in Custody) Act 1987* (NT) s 7.

38 *Royal Commissions Act 1991* (ACT) s 5; *Inquiries Act 1991* (ACT) s 5.

39 Explanatory Memorandum, Royal Commissions Bill 1990, Inquiries Bill 1990, Royal Commissions and Inquiries (Consequential Provisions) Bill 1990 (ACT), 2.

40 *Royal Commissions Act 1991* (ACT) s 6.

41 Section 5 of the *Inquiries Act 1991* (ACT) provides that the 'Executive may appoint 1 or more people as a board of inquiry'.

42 *Royal Commissions Act 1991* (ACT) s 11; *Inquiries Act 1991* (ACT) s 11.

43 These regulations were made under the *National Security Act 1939* (Cth).

Concerning the Circumstances Connected with the Attack Made by Japanese Aircraft at Darwin on 19 February 1942 (1945). This inquiry considered a range of issues, including: damage sustained in the attack; loss of life; accuracy of bombing; whether there was adequate warning of the raid; preparation of defence services; cooperation between various defence services; and changes necessary to ensure defence against recurrence of attacks.[44]

4.27 Currently, inquiries may be conducted under the *Defence (Inquiry) Regulations 1985* (Cth),[45] which enable the establishment of courts and boards of inquiry to inquire into matters related to the ADF.[46] Courts of inquiry are established by, and report to, the Minister for Defence.[47] Boards of inquiry are established by, and report to, the Australian Secretary for Defence, Chief of the Defence Force (CDF), or the Chief Officers of the Navy, Army or Air Force.[48] Courts and boards of inquiry tend to examine issues related to an accident, injury or damage to ADF property.[49]

4.28 In June 2007, the *Defence (Inquiry) Regulations* were amended to provide for the establishment by the CDF of commissions of inquiry.[50] These inquiries may consider service-related deaths and suicides of ADF members.[51] In 2009, a CDF commission of inquiry reported on the loss of HMAS Sydney II in November 1941 and related loss of life.[52]

4.29 At least one member of a court or commission of inquiry established under the *Defence (Inquiry) Regulations* must be a civilian with legal (or, in the case of a commission of inquiry, judicial) experience.[53] Where there is more than one member of an inquiry, the civilian is to be the president of the inquiry.[54] Expert 'assessors' may be appointed to advise members of a board of inquiry.[55] Assessors do not join in the preparation of the report of the inquiry, but may examine the report before it is presented to the appointing authority.[56]

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44 Justice Lowe, *Commission of Inquiry Concerning the Circumstances Connected with the Attack Made by Japanese Aircraft at Darwin on 19 February 1942* (1945).

45 These regulations are made under the *Defence Act 1903* (Cth); *Naval Defence Act 1910* (Cth); and *Air Force Act 1923* (Cth).

46 *Defence (Inquiry) Regulations 1985* (Cth) pts II–III. Combined courts and boards of inquiry also may be appointed: pt III. Further, in certain circumstances, Inquiry Officers may inquire into a matter concerning a part of the ADF: pt 6. The Inspector-General of the ADF also may carry out inquiries: pts 6, 7.

47 Ibid regs 5, 6.

48 Ibid regs 23, 26.

49 Australian Government Department of Defence, *Commission of Inquiry—Frequently Asked Questions* (2009) <http://www.defence.gov.au/coi/inquiries.htm> at 4 August 2009.

50 *Defence (Inquiry) Amendment Regulations 2007* (Cth).

51 *Defence (Inquiry) Regulations 1985* (Cth) reg 109.

52 T Cole, *The Loss of HMAS Sydney II* (2009).

53 *Defence (Inquiry) Regulations 1985* (Cth) regs 4, 6, 112.

54 Ibid regs 7, 112.

55 Ibid reg 8.

56 Ibid reg 19.

4.30 Coercive information-gathering powers are conferred upon members of all inquiries conducted under the *Defence (Inquiry) Regulations*.[57] The regulations also address procedural issues, such as whether inquiries should be conducted in private or public.[58]

Models of inquiry in overseas jurisdictions

4.31 In this section, the ALRC considers models of inquiry in several overseas jurisdictions in which the systems of government are comparable to the Australian system. In addition, a number of these jurisdictions have conducted recent reviews of their inquiries legislation.

United Kingdom

4.32 In the United Kingdom (UK) under the *Inquiries Act 2005* (UK), any minister may establish an inquiry with coercive powers.[59] The *Inquiries Act* (UK) replaced approximately 30 laws for the establishment of inquiries, including the *Tribunals of Inquiry (Evidence) Act 1921* (UK).[60]

4.33 Under the *Inquiries Act* (UK), inquiries may be established to consider particular events that have caused, or have the potential to cause, public concern. A minister may also establish an inquiry if there is public concern that particular events may have happened.[61] Within a reasonably practicable time after establishing an inquiry, the minister needs to inform the relevant Parliament or Assembly of the decision to establish the inquiry, the terms of reference, and the name of the chair of the inquiry.[62]

4.34 The minister responsible for establishing an inquiry appoints its chair, and, in consultation with the chair, any additional inquiry members.[63] The criteria for the membership of an inquiry are not related directly to professional qualifications—rather, inquiry members are appointed on the basis of 'suitability' and 'impartiality'.[64]

4.35 A judge may be appointed as a chair or other inquiry member but he or she does not exercise different powers to a member who is not a judge.[65] In addition to

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57 Ibid pts II–8.
58 Ibid.
59 *Inquiries Act 2005* (UK) s 1. That section defines a 'minister' to mean a minister in the UK, Scotland or Northern Ireland governments or the National Assembly of Wales.
60 See United Kingdom Department of Constitutional Affairs, *Inquiries Act* (2005) <http://www.dca.gov.uk/legist/inquiries.htm> at 4 August 2009.
61 *Inquiries Act 2005* (UK) s 1.
62 Ibid s 6.
63 Ibid ss 4, 7. The minister also sets the terms of reference for the inquiry in consultation with the chair: ibid s 5.
64 Ibid ss 8, 9.
65 Ibid s 10. This section also provides that some judges may be appointed by the minister only in consultation with certain other judges.

appointing inquiry members, the minister may appoint expert 'assessors' to assist panel members. Assessors have an advisory role and do not exercise powers under the *Inquiries Act* (UK).[66]

4.36 The *Inquiries Act* (UK) provides flexibility in other ways. For example, an inquiry commenced other than under the Act may be 'converted' to an inquiry under the Act.[67] A converted inquiry enjoys the same powers and protections as an inquiry commenced under the Act.[68] Another flexible feature of the Act is that the minister responsible for establishing an inquiry may suspend that inquiry temporarily to allow the completion of any investigation, or civil or criminal proceedings, that relate to the inquiry.[69]

Canada

4.37 Two types of inquiries with coercive powers may be established under the *Inquiries Act 1985* (Canada). A 'public' inquiry is established by the Governor-in-Council whenever it considers it would be expedient to do so.[70] A 'departmental' inquiry may be established, with the approval of the Governor-in-Council, by a minister with responsibility for a federal government department.[71] Commissioners of departmental inquiries investigate and report on matters relating to departmental business and the conduct of officials.[72]

4.38 Public and departmental inquiries exercise similar powers with respect to compelling the attendance and answers of witnesses and the production of relevant material.[73] In addition, commissioners of departmental inquiries may enter any public institution and search for relevant material.[74]

4.39 The *Inquiries Act* (Canada) has some elements of flexibility. It provides for the appointment of counsel, experts and assistants to assist the commissioners. These individuals may be delegated the same powers as the commissioners.[75] It also allows the Governor-in-Council to confer on an international commission or tribunal any of the powers conferred on public inquiries. Such a commission or tribunal may exercise these powers in Canada, subject to any conditions or limitations that may be imposed by the Governor-in-Council.[76]

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66 Ibid s 11.
67 Ibid s 15.
68 Ibid ss 15, 16.
69 Ibid s 13.
70 *Inquiries Act 1985* RSC c I-11 (Canada) s 2. Unless the inquiry is regulated by a special law, the Governor-in-Council also may appoint commissioners to conduct the inquiry: ibid s 3.
71 Ibid s 6.
72 Ibid.
73 Ibid ss 4, 5, 7–10.
74 Ibid s 7.
75 Ibid pt III.
76 Ibid pt IV.

New Zealand

4.40 The Governor-General of New Zealand may establish Royal Commissions by use of the royal prerogative. Other public inquiries, including Royal Commissions with coercive powers and protections, also may be established by the Governor-General under the *Commissions of Inquiry Act 1908* (NZ).[77]

4.41 Under the *Commissions of Inquiry Act* (NZ), public inquiries may be established to consider: the administration of government; the operation, necessity or expediency of any legislation; the conduct of any officer in the service of the Crown; disasters or accidents in which members of the public were, or could have been, killed or injured; or any other matter of public importance.[78] Judges may be appointed as members of a public inquiry. Judges, and former judges, of the High Court have additional powers and protections under the Act.[79]

4.42 Public inquiries may be commenced under a very large number of other New Zealand statutes and over 50 statutes incorporate by reference powers of the *Commissions of Inquiry Act* (NZ).[80] In addition, at least 12 Acts provide for the establishment of inquiries to consider issues related to those Acts, with powers akin to inquiries established under the *Commissions of Inquiry Act.*[81]

4.43 In May 2008, the New Zealand Law Commission (NZLC) released a report, *A New Inquiries Act*. Amongst other things, the NZLC recommended the repeal of the *Commissions of Inquiry Act* and the enactment of a statute that provides for the establishment and other aspects of 'commissions of inquiry' and 'government inquiries'.[82] On 29 September 2008, the Inquiries Bill 2008 was introduced into the New Zealand Parliament. At the time of writing in October 2009, the Bill was under consideration by the Select Committee on Government Administration. If passed, the Bill will implement many of the recommendations made by the NZLC.[83]

Ireland

4.44 Statutory commissions with coercive powers and protections may be established under the *Commissions of Investigation Act 2004* (Ireland). Commissions established under this Act may consider issues of significant public concern.[84] Before a commission is established, the Minister for Finance needs to approve a minister's

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77 *Commissions of Inquiry Act 1908* (NZ) s 2.
78 Ibid.
79 Ibid ss 13–13B.
80 These statutes are set out in New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 187–189.
81 Ibid, 190.
82 Ibid, Rec 3.
83 The inquiries legislation proposed by the New Zealand Law Commission and the Inquiries Bill 2008 (NZ) differ with respect to the 'tiers' of inquiry that may be established under the draft legislation. These models are discussed in detail in Ch 5.
84 *Commissions of Investigation Act 2004* (Ireland) s 3.

proposal to establish a commission, and both Houses of Parliament (the Oireachtas) need to resolve to approve the draft proposal.[85]

4.45 The Irish Government also has the power to establish a tribunal of inquiry to consider a matter of 'urgent public importance'.[86] A tribunal of inquiry has coercive powers vested in it by the *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* (Ireland) if both Houses of the Oireachtas pass a resolution to that effect.[87]

4.46 In 2005, the Law Reform Commission of Ireland (LRCI) released a *Report on Public Inquiries Including Tribunals of Inquiry*. The LRCI made a number of recommendations for changes to the current system with respect to: the selection of an appropriate type of inquiry; drafting appropriate terms of reference; the rights of individuals and organisations to be heard and represented; and the awarding of legal costs.[88] Following the release of this report, the Tribunals of Inquiry Bill 2005 (Ireland) was introduced into the Oireachtas. This Bill has also been considered by the Select Committee on Justice, Equality, Defence and Women's Rights. At the time of writing in October 2009, the Bill had not yet been passed.

Singapore

4.47 Two types of public inquiries with coercive powers may be established under the *Inquiries Act 2007* (Singapore). A 'commission of inquiry' may be established by the President of Singapore whenever he or she considers that it would be expedient to do so. Such an inquiry may consider: the conduct of public service officers; the conduct of any public service department or public institution; or any matter, in the opinion of the President, which would be in the public interest.[89]

4.48 A 'committee of inquiry' may be established by any minister whenever he or she considers that it would be expedient to do so. A committee may be established for the purpose of inquiring into: an occurrence involving death, serious personal injury or serious property damage; an occurrence that may endanger public safety or public health; the conduct of a ministry, department or statutory body within the minister's responsibility; or the conduct of an officer employed by, or seconded to, such a body.[90]

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85 Ibid.

86 *Tribunals of Inquiry (Evidence) Acts 1921 to 2004* (Ireland) s 1(1). When Ireland gained its independence in 1922, existing UK law was brought into Irish law.

87 Ibid.

88 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), Ch 11. Also see Irish Government Citizens Information Board, *Citizens Information—Tribunals of Inquiry* (2009) <http://www.citizensinformation.ie/categories/government-in-ireland/national-government/tribunals-and-investigations/tribunals_of_inquiry> at 4 August 2009.

89 *Inquiries Act 2007* (Singapore) s 3(1).

90 Ibid s 9(1).

4.49 Members of commissions and committees of inquiry are appointed by the person establishing the inquiry (appointing authority).[91] At least one member of a commission of inquiry must be a judge of the High Court of Singapore, and at least one member of a committee of inquiry must be a judge of a District Court of Singapore.[92]

4.50 Both types of public inquiry have identical powers with respect to procuring evidence, examining witnesses and compelling attendance of witnesses.[93] Subject to the terms of reference, both types of inquiry may have the power to admit evidence that would otherwise be inadmissible in judicial proceedings, and to hold private hearings.[94]

4.51 The *Inquiries Act* (Singapore) provides for the appointment of a secretary or assessors at the discretion of the appointing authority.[95] The appointing authority may also make rules with respect to the inquiry body—for example on matters of evidence or procedure.[96] With the consent of the appointing authority, an inquiry may be suspended to allow for the completion of any relevant investigation or judicial proceedings.[97]

4.52 Under the *Inquiries Act* (Singapore), an inquiry may report on anything it considers relevant to the terms of reference. It may also make recommendations related to the terms of reference, including 'any recommendations the inquiry body sees fit to make despite not being required to do so'.[98]

91 Ibid s 2.
92 Ibid ss 4(1), 10(1).
93 Ibid sch 1 para 1.
94 Ibid sch 1 paras 5–6.
95 Ibid ss 6–7, 12–13.
96 Ibid ss 15–16.
97 Ibid sch 1 para 2.
98 Ibid sch 1 para 15.

Part B

A New Statutory Framework

5. A New Statutory Framework for Public Inquiries

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Introduction

5.1 One of the main issues for the ALRC in this Inquiry is whether the current arrangements for conducting federal public inquiries, including Royal Commissions, are appropriate, or whether a new statutory model is necessary. In this chapter, the ALRC considers whether, and how, to reform the statutory framework. It canvasses stakeholder views on new models of public inquiry in Australia, and recommends several features of a new model for public inquiries. In Chapter 13, the ALRC makes several recommendations specifically directed towards inquiries dealing with issues of national security.

The current arrangements for public inquiries

5.2 The Australian Government may establish inquiries in several ways. Only certain inquiries, however, have coercive powers.[1] While the executive has the prerogative power to establish public inquiries, this power does not extend to establishing inquiries with coercive powers. Such powers are conferred on public inquiries by legislation enacted by the Australian Parliament.[2]

5.3 Currently, statutory public inquiries may be established under:

- the *Royal Commissions Act 1902* (Cth) (for example, the HIH Royal Commission (2003); Royal Commission into the Building and Construction Industry (2003); and the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry));

- legislation that confers on a particular inquiry specific powers and protections contained in the *Royal Commissions Act* (for example, the Equine Influenza Inquiry (2008) was established under the amended *Quarantine Act 1908* (Cth));

- legislation that provides the executive with the power to establish an inquiry in a general area (for example, the Inquiry into the Manner in which DFAT has dealt with Allegations of Paedophile Activities (1996) (Commonwealth Paedophile Inquiry) was established under the *Public Service Act 1922* (Cth)); and

- legislation establishing permanent bodies to undertake inquiries into a specific area (for example, the *Ombudsman Act 1976* (Cth) provides the Commonwealth Ombudsman with powers to consider and investigate complaints about Australian Government departments and agencies, and the *Inspector-General of Intelligence and Security Act 1986* (Cth) provides the Inspector-General of Intelligence and Security (IGIS) with powers to inquire into the activities of certain intelligence agencies).

5.4 In addition, the Australian Government may establish inquiries without statutory foundation, such as taskforces, committees, panels and departmental and ministerial inquiries. These inquiries may be established to provide advice or develop policy on a diverse range of matters. Examples of this kind of non-statutory policy inquiry include the National Human Rights Consultation (2009) and the Access Card Consumer and Privacy Taskforce (2006).

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1 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 83, 99.

2 The *Royal Commissions Act 1902* (Cth) was enacted by the Australian Parliament under s 51(xxxix) of the *Australian Constitution*, which confers on the Australian Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to matters incidental to the execution of powers vested in the legislature, executive or judicature.

5.5 The Australian Government may also establish investigatory inquiries without statutory foundation. Recent examples of this type of inquiry include the Inquiry into the Case of Dr Mohamed Haneef (2008) (Clarke Inquiry) and the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005).

5.6 Finally, a number of inquiries relevant to Australian Defence Force personnel and matters may be established under the *Defence (Inquiry) Regulations 1985* (Cth). The *Defence (Inquiry) Regulations* are discussed further in Chapter 4, but detailed discussion of these regulations falls outside the scope of this Inquiry.

Is there a need for a new statutory framework?

5.7 Public inquiries have a range of functions, discussed in Chapter 2. In this Inquiry, however, the ALRC has noted a number of shortcomings with the current arrangements for inquiries in Australia. For example, non-statutory inquiries usually have no recourse to the powers necessary to investigate relevant matters.[3] Also, non-statutory inquiries may not provide adequate legal protection to inquiry members and staff. Further, non-statutory inquiries generally do not have the same level of public input as Royal Commissions or other statutory inquiries. In part, this may be a result of insufficient protection afforded to individuals providing information in a public forum—and the lack of consequences for failing to provide information. Consequently, non-statutory inquiries may not have all the information necessary to make the best recommendations.

5.8 There are also issues with statutory inquiries commenced other than under the *Royal Commissions Act.* For example, the *Quarantine Act* was amended to confer on the Equine Influenza Inquiry most, but not all, of the powers contained in the *Royal Commissions Act*. That inquiry also was able to exercise powers under the *Quarantine Act.* Further, the powers available to inquiries not established under the *Royal Commissions Act* are not necessarily equivalent to those enjoyed by Royal Commissions. For example, the Commonwealth Paedophile Inquiry has been criticised on the basis that it did not have adequate powers and protections—including the power to compel a person to give evidence that may tend to incriminate himself or herself.[4]

5.9 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC concluded that there was a need for a new statutory framework for public inquiries in Australia.

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3 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [5.7]. See also A Lynch, *Learning from Haneef* (2009) Inside Story <http://inside.org.au> at 4 August 2009. The ALRC discusses coercive powers in detail in Ch 11.

4 B Bailey, *Examples of Public Sector Inquiries—Commonwealth Paedophile Inquiry* (1996–1997) Department of the Parliamentary Library, Information and Research Services, 13–17.

Submissions and consultations

5.10 There was overwhelming support amongst stakeholders for retaining the highest statutory form of public inquiry—a Royal Commission—as an essential aspect of accountable and transparent government.[5] For example, the Community and Public Sector Union (CPSU) noted that, through their public nature and degree of independence, Royal Commissions 'enhance Australian democracy'.[6] The Law Council of Australia (Law Council) submitted that the 'robust public scrutiny' of governments that may be undertaken by Royal Commissions 'has become increasingly critical in the context of expanding executive power'.[7]

5.11 In addition, there was very strong support among stakeholders for a statutory basis for some non-Royal Commission forms of public inquiry. For example, the Law Council expressed concern that:

> [f]or decades, there has been a trend towards establishing public inquiries without any statutory framework at all. This lack of statutory framework, and corresponding lack of information gathering powers and protections for witnesses, can lead to a lack of public confidence in the ability of the inquiry to obtain all relevant information, despite the integrity of the inquiry head.[8]

5.12 The Law Council went on to note that further consideration should be given to the adoption of legislation that would enable Commonwealth public inquiries to be vested with statutory powers and provided with a statutory framework.

5.13 Similarly, the CPSU emphasised that it was important for some public inquiries to have access to coercive powers.

> One of the more controversial aspects of the recent Clarke Inquiry into the detention of Mohamed Haneef was that the Inquiry was not a Royal Commission. This controversy demonstrates … that the effectiveness of an inquiry is intrinsically linked to the powers on which the inquiry can rely.[9]

5.14 Mr Graham Millar noted there may not be a need for 'an Act to cover inquiries that do not require coercive powers'. For those inquiries that do require such powers, however,

> [t]here is a clear need for an Act to provide the authority for the executive government to appoint a person (or persons) to conduct a high level independent inquiry, and for that person(s) to have the necessary coercive powers to obtain information. … In most cases, such inquiries are conducted openly and, inevitably, they attract considerable public following. Particularly in view of the availability of coercive powers, the Act

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5 See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.
6 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.
7 Law Council of Australia, *Submission RC 9,* 19 May 2009.
8 Ibid.
9 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.

> should provide the person(s) conducting the inquiry, and those assisting the inquiry, with appropriate protections and immunities.[10]

5.15 Other stakeholder concerns about the current framework related to uncertainty about the nature of non-statutory and statutory inquiries not entitled 'Royal Commissions'. For example, some stakeholders queried whether the AWB Inquiry was in fact a Royal Commission, and if so, why the formal title of the inquiry did not include the term.[11] A number of stakeholders expressed surprise upon discovering that the Clarke Inquiry did not enjoy the same powers and protections as inquiries established under the *Royal Commissions Act.* Others suggested that other forms of public inquiry may not enjoy the same perception of independence as Royal Commissions.

5.16 Liberty Victoria submitted that the

> array of models is confusing and poorly understood (if at all) by the general public ... At present, the *Royal Commissions Act* is used as a reference point for other forms of inquiry. While this is a useful device, it also leads to a great deal of confusion as it dilutes the image of Royal Commissions and confuses the public as to the nature and powers of those public inquiries which exercise some, but not all, of the powers under the *Royal Commissions Act*.[12]

5.17 On the other hand, some stakeholders were concerned that a new statutory framework may diminish the importance of Royal Commissions. Millar submitted that the introduction of another type of inquiry would not

> provide any more flexibility, any less formality or any greater cost-effectiveness than the current arrangements and it may add to the confusion that can occur in distinguishing between the many types of government inquiries and reviews that are conducted. I consider that the better approach would be to refine, improve and modernise the current provisions covering Royal Commissions.[13]

5.18 The Australian Government Solicitor (AGS) was concerned about 'over-regulating' public inquiries. With respect to the particular model proposed by the ALRC, discussed below, the AGS was of the view 'that no real advantage would be obtained over the retention of the current Act and its application to particular inquiries as may be considered appropriate'.[14]

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

11 The Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme was established by Letters Patent issued by the Governor-General on 10 November 2005 in accordance with s 1A of the *Royal Commissions Act 1902* (Cth).

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

13 G Millar, *Submission RC 21,* 21 September 2009.

14 Australian Government Solicitor, *Submission RC 31,* 6 October 2009.

ALRC's view

5.19 The ALRC remains of the view that reform in this area is necessary. First, many non-Royal Commission forms of public inquiry need access to coercive information-gathering powers, such as compelling a person to appear and provide answers to an inquiry, to ensure the efficient investigation of a particular issue or event. Secondly, legal protections are necessary to ensure that the way information is collected in an inquiry reflects an appropriate balance between the need to determine the facts and protecting the rights of individuals involved with, or affected by, the inquiry. Finally, legal protections can help to prevent inquiry members and staff from suffering detriment through being appointed to, or employed by, an inquiry.

5.20 Further, stakeholders expressed concern that non-statutory inquiries do not enjoy the same public perception of independence as statutory inquiries. Stakeholders also indicated confusion about the nature, powers and protections of statutory and non-statutory inquiries not called 'Royal Commissions'. These views, taken together, strongly indicate a need for greater clarity around the arrangements for establishing, conducting and concluding public inquiries.

5.21 While the ALRC supports the continued existence of the highest form of public inquiry, it is not desirable to commence all public inquiries under the existing *Royal Commissions Act.* Royal Commissions fulfil particular functions, and it would not be desirable to 'dilute' their perceived importance or prestige by commencing all public inquiries as the 'highest' form of executive inquiry. In addition, the Australian Government is often reticent to establish Royal Commissions.[15] These inquiries are frequently lengthy and expensive, and other forms of public inquiry are often established because they provide more flexible, expeditious and cost-effective options.

5.22 Stakeholders also expressed concerns that Royal Commissions may be diminished by the introduction of another form of statutory inquiry. The executive, however, regularly establishes non-Royal Commission forms of inquiry and there is little evidence that these inquiries diminish the importance of Royal Commissions. On balance, it is the ALRC's view that there should be a new framework that accommodates both Royal Commissions and other public inquiries. As a principal reason for the introduction of such a framework is to ensure appropriate access to coercive powers, and such powers may be conferred on public inquiries only by legislation, this framework should be of a statutory character. Another advantage of a statutory framework is that it can clearly set out other issues related to public inquiries, for example, the protections available to participants.[16]

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15 Details about the Royal Commissions and other public inquiries established by past and previous Australian Governments are set out in Ch 2.

16 In Ch 12, the ALRC discusses protections for inquiry members and inquiry participants under the recommended statutory framework.

5.23 In the following section, the ALRC considers the most appropriate model for such a statutory framework.

Options for reform

5.24 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked, if the Australian Government were to introduce a new statutory framework for conducting public inquiries, should the most appropriate model take the form of:

- a general inquiries statute;
- a dual statutory structure;
- a permanent inquiries body; or
- another option?[17]

A general inquiries statute

5.25 In IP 35, the ALRC suggested that one option for reforming the current federal model would be to replace the *Royal Commissions Act* with a general Act for public inquiries.[18] The Act could provide for the establishment of all public inquiries, regardless of the nature of the inquiry or the powers that it requires.[19] A general inquiries statute could also contain separate sections dealing with inquiries that are less formal than a Royal Commission. A statute of this nature would be similar to the Canadian and proposed New Zealand models for public inquiry discussed in Chapter 4.

5.26 An advantage of a general inquiries statute may be that it provides a cohesive framework for all public inquiries with respect to: inquiry hearings and other procedures; the review of decisions; and consistent government responses to inquiry recommendations.

5.27 There may be some drawbacks, however, to such an approach.[20] For example, Mr Tom Sherman has noted that there may be 'an inevitable tendency to give all relevant powers and protections to the official inquiry with the result that it becomes a royal commission in disguise'.[21]

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17 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Questions 5–1, 5–2.

18 Ibid, [5.5].

19 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [3.12].

20 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [5.8].

21 T Sherman, *Executive Inquiries in Australia—Some Proposals for Reform (Law and Policy Paper No 8)* (1997) Australian National University—Centre for International and Public Law, 18.

Dual statutory structure

5.28 In IP 35, the ALRC suggested that another way to address the issues with the current model is to retain the *Royal Commissions Act* and enact another statute to provide for the establishment of non-Royal Commission forms of inquiry with a range of powers and protections. The ALRC noted that a dual statutory structure would have the advantage of preserving the Royal Commission model and its associated prestige, while at the same time providing a flexible statutory framework for other public inquiries. On the other hand, this approach may unnecessarily preserve fundamental problems with the current Royal Commission model. Further, a dual statutory structure may result in unnecessary fragmentation of regulation.[22]

Permanent inquiry bodies

5.29 The third option suggested by the ALRC in IP 35 was to establish a new permanent body to conduct some or all public inquiries, or to task an existing body (or bodies) with conducting these inquiries.[23] The ALRC queried whether this task may be carried out more effectively and appropriately by standing bodies, rather than ad hoc inquiries.[24] For example, in the context of law reform, Justice Ronald Sackville has suggested that permanent law reform bodies are under utilised in the formulation of legal policy.[25]

5.30 The ALRC noted that the advantages of a permanent inquiries body include the: potential saving of costs in setting up an inquiry; retention of institutional knowledge; and capacity to conduct preliminary research to determine whether a full inquiry is necessary.[26] On the other hand, it suggested that there may not be a consistent or ongoing need for a standing body. Royal Commissions are established relatively infrequently, and maintaining a permanent inquiries body may be an inefficient use of resources. Further, it may be better to attract and appoint staff, and determine the administrative structure and powers of each inquiry, on an 'as needs' basis.[27]

Discussion Paper proposal

5.31 Submissions and consultations on IP 35 did not indicate one clearly favoured statutory model for ad hoc public inquiries. In DP 75, the ALRC proposed that Royal Commissions and other public inquiries should be established under a general inquiries

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22 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [5.9]–[5.10].

23 Ibid, [5.12].

24 Ibid, [4.20].

25 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 285–286.

26 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [5.13]. See also Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [2.38]–[2.46].

27 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [5.13]. See also Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [2.38]–[2.46].

statute that makes provision for two tiers of ad hoc public inquiry.[28] It also asked whether there should be a mechanism in place by which the jurisdiction and powers of existing bodies, such as the Commonwealth Ombudsman and the IGIS, could be expanded temporarily to conduct particular public inquiries.[29]

Submissions and consultations

General inquiries statute

5.32 Several stakeholders with whom the ALRC consulted supported the introduction of a general inquiries statute.[30] In its submission on IP 35, Liberty Victoria expressed the view that all public inquiries should 'be created by reference to the one piece of legislation'.

> This would avoid confusion and allow the public (and anyone involved in an inquiry) to understand the nature of the inquiry and its place within the broader scheme of public inquiries. This may lead to cost savings for all involved and would streamline the formation and conduct of inquiries.[31]

5.33 In its submission on DP 75, Liberty Victoria submitted:

> The proposed *Inquiries Act* represents an innovative and contemporary means of holding Government to account. It is important that civil liberties are not eroded by the process of inquiry and Liberty believes the ALRC's proposals largely succeed in balancing civil liberties against effective public inquiries.[32]

5.34 The Law Council initially supported a dual statutory structure, but noted that the ALRC's proposal in DP 75 'effectively meets its concerns about the need for a statutory basis for both forms of inquiries'. It expressed support for

> a Commonwealth *Inquiries Act* as a mechanism to provide robust public scrutiny of government action. The Law Council considers that Royal Commissions and Official Inquiries conducted under the *Inquiries Act* should: be as open and accessible to the public as possible; have access to all relevant information; employ transparent and fair processes; and be conducted at arm's-length from the Executive. The proposed Official Inquiries should be able to be undertaken reasonably expediently, and be less expensive and more flexible than Royal Commissions so that they present an appropriate alternative for relevant inquiries.[33]

5.35 A number of other stakeholders made submissions that indicated broad support for the model proposed in DP 75.[34] As noted above, the AGS did not see a need for

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28 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 5–1.

29 Ibid, Question 5–1.

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

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

32 Liberty Victoria, *Submission RC 26,* 27 September 2009.

33 Law Council of Australia, *Submission RC 30,* 2 October 2009.

34 See, eg, Accountability Round Table, *Submission RC 29,* 30 September 2009; Australian Intelligence Community, *Submission RC 28,* 28 September 2009; Community and Public Sector Union, *Submission RC 25,* 22 September 2009; Australian Collaboration, *Submission RC 24,* 22 September 2009.

reform of the statutory framework, nor did it support the model proposed by the ALRC.[35]

Dual statutory structure

5.36 The Department of Immigration and Citizenship (DIAC) supported a dual statutory structure,

> [DIAC] sees value in preserving the *Royal Commissions Act* as a separate piece of legislation which retains the full complement of powers and protections of current Royal Commissions. In addition, DIAC sees value in the creation of an additional general statute which would underpin the creation and operation of general ad-hoc public inquiries and would provide minimum protections and ability to adjust powers to best achieve the inquiry's terms of reference.[36]

A new permanent inquiries body

5.37 DIAC also supported the establishment of a permanent inquiries body to conduct Royal Commissions and other public inquiries, noting that the benefits of such a body would include cost savings, administrative expertise and independence.[37] Few of those with whom the ALRC consulted, however, supported the establishment of a permanent inquiries body.[38] Millar submitted that, while it would be useful to have readily available expertise for the conduct and support of inquiries, a permanent inquiries body established 'solely for that purpose' was unlikely to be cost-effective. Further,

> [p]ersons conducting inquiries are appointed for their particular qualifications, expertise and standing in relation to the subject of the inquiries. It is unlikely that members of a permanent inquiry body would have the range of expertise required to conduct a diversity of inquiries. There may also be questions about the independence of members of a permanent inquiry body.[39]

Use of existing inquiry bodies

5.38 Some stakeholders supported the practice of referring some inquiries to standing bodies. For example, while supporting a general inquiries statute, Liberty Victoria submitted that:

> Depending on the nature of the public inquiry, there is also merit in the use of standing bodies such as the ALRC, Ombudsman and others. However, such bodies must be independent and have guaranteed funding to ensure their independence (perceived and actual) from government.[40]

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35 Australian Government Solicitor, *Submission RC 31,* 6 October 2009.
36 Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009.
37 Ibid.
38 See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.
39 G Millar, *Submission RC 5,* 17 May 2009.
40 Liberty Victoria, *Submission RC 1,* 6 May 2009. See also Liberty Victoria, *Submission RC 26,* 27 September 2009.

5.39 The IGIS and the Australian Intelligence Community (AIC) noted that the Office of the IGIS was an appropriate body to undertake public inquiries into matters of national security. For example, the AIC submitted that:

> The IGIS has the standing powers of a Royal Commission and was established specifically to provide a mechanism for independent oversight of the intelligence community, where direct and open accountability to the public is not always possible. The IGIS can require any person to answer questions and produce relevant documents, can take sworn evidence and is able to enter the premises of any AIC agency. The IGIS can also access any information deemed relevant to the review function, including ministerial directions and authorisations to agencies. The IGIS also conducts all inquiries in private. As the IGIS also holds appropriate security clearances, and has a range of approaches available for the conduct of an inquiry (either by own-motion or at the request of government), the AIC considers the IGIS is a natural first option to pursue a line of inquiry into the AIC or its activities.[41]

5.40 The IGIS drew attention to

> the great difference in cost between [the Office of the IGIS], a standing body which is flexible and inquisitorial in approach, and ad hoc inquiries and Royal Commissions which are relatively formal, borrow significantly from the common law adversarial approach, engage commissioners and significant numbers of lawyers at substantial rates of pay, and must be established anew on every occasion.[42]

5.41 Similarly, the Australian Commission for Law Enforcement Integrity (ACLEI) noted that s 71 of the *Law Enforcement Integrity Commissioner Act 2006* (Cth) provides an existing mechanism for commencing public inquiries relating to integrity and corruption in certain law enforcement agencies. ACLEI noted that its staff could be a useful resource to Royal Commissions and Official Inquiries on 'investigative strategy and specialised legal issues'.

> The exercise of intrusive, covert powers in conjunction with coercive hearings requires considerable experience, and the establishment of systems and cooperative arrangements to support their effectiveness. It would be inadvisable for Inquiries to be given these types of powers without strategic and technical support.[43]

5.42 Mr Don McKenzie submitted that there were resourcing, jurisdictional and procedural issues in using existing bodies such as ACLEI to conduct inquiries. He suggested that, in its current circumstances, ACLEI

> would not provide a strong administrative basis to provide support for the establishment and administration of ad hoc inquiries. A new anti-corruption agency, with a broader jurisdiction generating a steady stream of capacity developing work may be in a better position to provide this support, particularly if this additional role

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41 Australian Intelligence Community, *Submission RC 28,* 28 September 2009. See also Australian Intelligence Community, *Submission RC 12,* 2 June 2009; Inspector-General of Intelligence and Security, *Submission RC 2,* 12 May 2009.

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

43 Australian Commission for Law Enforcement Integrity, *Submission RC 18,* 14 September 2009.

> was contemplated and provided for, legislatively and administratively, at the time of its establishment.[44]

5.43 Mr Kym Bills submitted:

> the ATSB [Australian Transport Safety Bureau] and Inspector of Transport Security already undertake inquiries/investigations to a high standard and perhaps it would be more efficient to augment the relevant legislation (for example to allow for the possibility of hearings that are protected legally) than to face public pressure to set up a likely more expensive inquiry under the proposed *Inquiries Act*.[45]

5.44 In addition, the Commonwealth Ombudsman submitted that:

> Where the proposed scope of an inquiry is broadly consistent with what is already able to be done by an oversight agency, another option might be that the oversight agency could be tasked with the whole of the inquiry, and given any necessary, temporary, expansion to its powers, functions and resources for the purpose of conducting the inquiry. The temporary powers and functions could become operative when, for example, a Minister makes a request to the agency or when Parliament (or a Committee) so determines.[46]

5.45 The Commonwealth Ombudsman suggested that the minister responsible for administering the *Ombudsman Act* should be able to initiate such an expansion by referring a matter to the Commonwealth Ombudsman for inquiry. It noted that, in Victoria, either House or a Committee of the Parliament can refer a matter to the Ombudsman of Victoria. The Commonwealth Ombudsman did not prefer this approach.

> Under that procedure the Ombudsman could be required to investigate matters that are not related to the standard jurisdiction of the Ombudsman. There is also a risk that the Ombudsman could be drawn inappropriately into a political controversy, especially if the upper house is not controlled by the Government.[47]

5.46 On the other hand, Millar had

> serious doubts about the appropriateness and practicality of the executive government temporarily expanding the jurisdiction and powers of existing bodies to conduct executive inquiries, particularly when the Parliament has specified the jurisdiction and powers of those bodies in their enabling legislation.[48]

ALRC's view

5.47 A new permanent inquiries body should not be established to conduct public inquiries. Public inquiries, and investigatory inquiries in particular, are established by

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44 D McKenzie, *Submission RC 27,* 28 September 2009.
45 K Bills, *Submission RC 19,* 17 September 2009.
46 Commonwealth Ombudsman, *Submission RC 13,* 4 June 2009.
47 Commonwealth Ombudsman, *Submission RC 32,* 8 October 2009.
48 G Millar, *Submission RC 21,* 21 September 2009.

the Australian Government on an irregular basis.[49] There may be extended periods without inquiries and other periods in which multiple inquiries are commenced. Further, there are a number of existing standing bodies that have the capacity to conduct investigatory and policy inquiries. The ALRC, therefore, queries whether there is sufficient work to justify the funding of a new inquiries body for ad hoc inquiries.

5.48 Further, Royal Commissions and other public inquiries may differ greatly with respect to both subject matter and process. There may be limited utility in the Australian Government funding a new permanent body staffed by persons with knowledge, skills and experience specific to only certain types of inquiry.

5.49 McKenzie has raised the important issue of the establishment of a permanent anti-corruption agency with a broader jurisdiction than existing bodies. In Chapter 1, the ALRC notes that it is only considering a particular type of 'public inquiry'—namely, one that is conducted on an ad hoc basis by an entity established by, but external to, the executive arm of government. Whether a permanent agency or inspector should be established to consider matters of integrity and corruption in the Australian Government is a different issue and is outside the terms of reference for this Inquiry.

5.50 The ALRC sees merit, however, in formalising arrangements for the establishment and administrative support of Royal Commissions and other ad hoc public inquiries. This may streamline processes and reduce costs. Arrangements for administrative support are discussed further in Chapter 8.

5.51 In the ALRC's view, some public inquiries, including inquiries dealing with some national security matters, should be referred to existing statutory bodies, such as the ACLEI, ATSB, IGIS or the Commonwealth Ombudsman.[50] In some circumstances, it may be appropriate for the legislation establishing such bodies to be amended to address powers and processes for a particular inquiry. The ALRC agrees with Millar that amending the powers and jurisdiction conferred by statute on individual bodies should be done by Parliament on a case-by-case basis. A member of the executive should not be able to confer on a statutory body more intrusive powers and a wider mandate than the Parliament intended. Detailed discussion of the legislation establishing existing standing bodies is outside the scope of this Inquiry.

One inquiries statute

5.52 Royal Commissions and other public inquiries should be established under a general inquiries statute that makes provision for two tiers of ad hoc public inquiry. For

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49 In Ch 2, the ALRC discusses the varied nature of the numerous Royal Commissions and other public inquiries that have been established by previous Australian Governments.

50 These issues are discussed in greater detail later in this chapter and in Ch 13. Note that, in the context of national security, the ALRC recommends that the *Inquiries Act* should empower members of Royal Commissions and Official Inquiries, in determining the use or disclosure of information in the conduct of an inquiry, to request advice or assistance from the IGIS with respect to certain matters: Recommendation 13–4.

several reasons, the enactment of a single Act is preferable to multiple statutes—or importing sections of the *Royal Commissions Act* into existing legislation, as occurred in 2007 to enable the establishment of the Equine Influenza Inquiry outside the *Royal Commissions Act*.

5.53 First, a single statute promotes access to the law. It provides a more straightforward way for those affected by inquiries, and others seeking to ascertain the law relevant to inquiries, to access this information through a single entry point. It is preferable for public inquiries that require coercive powers to be established within a clearly identified statutory framework which sets out available powers and privileges, rather than gain access to some powers by reference to that framework.

5.54 Secondly, a single inquiries statute clarifies the relationship between different tiers of inquiry.[51] There may be less scope for separate statutes to explain the correlation, if any, between such inquiries. Further, a single statute reduces unnecessary duplication in drafting. It enhances consistency in regulation when the Act is introduced, and when amendments are made to the regulatory regime. Also, a single statute may be more likely to fall within the administrative responsibility of a single minister, in turn developing administrative consistency from inquiry to inquiry. Ultimately, a single inquiries statute makes good regulatory sense, and may reduce some of the costs associated with regulating public inquiries.

5.55 Finally, a single inquiries statute will preserve the prestige of Royal Commissions. Under the ALRC's recommended framework, Royal Commissions may still be established under inquiries legislation. The sections of the Act addressing Royal Commissions could be contained in a different part from those sections addressing other forms of public inquiry, as is the case in Canadian and proposed New Zealand legislation. Flexibility as to the type of inquiry that may be commenced within a single statute may obviate the concerns that members of the executive have with commencing an inquiry entitled a 'Royal Commission'.

5.56 In the ALRC's view, therefore, the *Royal Commissions Act* should be amended to enable the establishment of two tiers of public inquiry. These legislative amendments would not preclude the executive from establishing other types of executive inquiry, for example, departmental inquiries. This is discussed further in Chapter 6. Amending the *Royal Commissions Act* may require consequential amendments to provisions of other federal legislation that refer to the Act. A number of provisions and regulations that may require consequential amendment are set out in Appendix 6.

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51 The relationship between tiers of inquiry is discussed later in this chapter.

5.57 Further, any amendment of the *Royal Commissions Act* should also involve a redrafting of the Act. The Act evinces a variety of drafting styles. Some of its provisions were inserted in the early 1900s, and have remained largely unaltered,[52] while others were inserted as recently as 2006.[53] The older provisions in the Act are archaic and contain outdated language and complex sentence structure that has caused difficulties of judicial interpretation.[54] In addition, the fact that the Act has been amended on so many occasions means that its structure is somewhat haphazard, and there is no discernible logic to the sequencing or numbering of the Act's provisions.

Titles of inquiries and new inquiries legislation

5.58 Should the title, *Royal Commissions Act*, be retained? Some countries with a similar colonial heritage to Australia, and some Australian states and territories, have Acts that enable the executive to establish ad hoc public inquiries with coercive powers that are not called Royal Commissions. The removal of the word 'royal' from the name of certain public inquiries, and legislation enabling the establishment of public inquiries, may reflect more accurately the status of Australia as an independent, sovereign state.

5.59 The name of legislation enabling the establishment of public inquiries will depend on its content. The Australian Government Office of Parliamentary Counsel provides advice to drafters on naming legislation:

> you should take particular care when naming Bills to ensure that the names you choose are as informative as possible (within reason) and do not cause unnecessary confusion to the Parliament or to any other users of legislation. … this involves avoiding names that could easily be confused with the names of other current Bills.[55]

5.60 Comparative jurisdictions do not use consistent nomenclature. In the United Kingdom, 'inquiries' may be established under the *Inquiries Act 2005* (UK). In Canada, 'public' and 'departmental' inquiries may be established under the *Inquiries Act 1985* (Canada). In New Zealand, currently, 'commissions of inquiry' and 'royal commissions' may be established under the *Commissions of Inquiry Act 1908* (NZ). 'Public' and 'government' inquiries and 'royal commissions' may be established under the Inquiries Bill 2008 (NZ), which was before the New Zealand Parliament at the time of writing in October 2009. In Singapore, 'commissions' and 'committees' of inquiry may be established under the *Inquiries Act 2007* (Singapore). In Ireland, 'commissions of investigation' may be established under the *Commissions of Investigation Act 2004* (Ireland) and 'tribunals of inquiry' may be established under the *Tribunals of Inquiry (Evidence) Acts* (Ireland).

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52 See, eg, *Royal Commissions Act 1902* (Cth) s 1A.

53 See, eg, Ibid ss 6AA, 6AB.

54 See, eg, *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630, 650–652.

55 Australian Government Office of Parliamentary Counsel, *Drafting Direction No 1.1—Long and Short Titles of Bills and References to Proposed Acts*, 4. This advice is provided to drafters in relation to determining the 'short name' of a Bill. Separate advice is provided to drafters determining the 'long name' of a Bill.

5.61 In DP 75, the ALRC proposed that the *Royal Commissions Act* should be amended rather than repealed, and renamed the *Inquiries Act.*[56]

Submissions and consultations

5.62 In consultations, stakeholders had differing views on whether the *Royal Commissions Act* was an appropriate title for legislation establishing public inquiries. Some stakeholders indicated that the term 'Royal' was outdated. Further, it was suggested that the term 'Royal Commission' implied the use of the prerogative power, which is misleading given that coercive powers are conferred on Royal Commissions by legislation.

5.63 Stakeholders did not express strong views about an alternative name for the highest form of public inquiry or the legislation establishing such inquiries. Millar thought that, if it were deemed necessary to make a change to the name of the enabling legislation, appropriate names may include 'Independent Commissions of Inquiry Act' or 'Supreme Commissions of Inquiry Act' on the basis that the name of the legislation would indicate the nature of the inquiry.[57] Other suggestions for a new name of the highest form of inquiry included 'Commission of Inquiry', 'National Commission' and 'Australian National Commission'.[58]

5.64 On the other hand, most stakeholders supported the retention of the term 'Royal Commission', whether in legislation establishing public inquiries or the name of the inquiry itself. Frequently, this view was expressed with an acknowledgement that the term may not reflect the independent nature of the Australian system of government. On balance, however, most stakeholders suggested that the term carried with it a certain gravitas and status that had developed over more than a century. The well-understood term provided a straightforward way for the public to distinguish between the highest form of public inquiry and other inquiries. For example, while Liberty Victoria strongly supported change to the model for public inquiries, it submitted that 'Royal Commission' is an inquiry title which has 'high public recognition and respect'.[59]

5.65 In a roundtable discussion at the Northern Territory Law Society it was noted that, following the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), Royal Commissions have a particular significance for Indigenous peoples. For example, calls for a Royal Commission and references to RCIADIC often follow a negative interaction between law enforcement authorities and Indigenous peoples.[60]

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56 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 5–1(b).

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

58 See, eg, Civil Liberties Australia, *Submission RC 17,* 19 May 2009.

59 Liberty Victoria, *Submission RC 1,* 6 May 2009. See also Liberty Victoria, *Submission RC 26,* 27 September 2009.

60 Northern Territory Law Society, *Roundtable,* 22 May 2009.

5.66 As noted above, Millar was of the view that there was no need to reform the model for conducting public inquiries and, therefore, he did not see the need to rename the *Royal Commissions Act.* He was also concerned that '[t]he proposed re-naming of the *Royal Commissions Act 1902* to the *Inquiries Act* might give rise to further confusion'.[61]

ALRC's view

5.67 If the ALRC's recommended model is accepted, the title *Royal Commissions Act* would no longer reflect the content of the legislation—which would provide for the establishment of two tiers of public inquiry. The amended Act, therefore, requires a new name.

5.68 The ALRC recommends that new legislation establishing Royal Commissions and other public inquiries should be called the *Inquiries Act.* The ALRC does not agree that this name will give rise to confusion. It is a succinct and accurate description of the nature of the recommended Act. Also, the recommended title does not conflict with titles of existing Commonwealth legislation. Finally, it is broad enough to cover the establishment of Royal Commissions and other forms of public inquiry.

5.69 In relation to the actual titles of each tier of inquiry, the ALRC is reticent to recommend a change to the title, 'Royal Commission'. This is for two main reasons. First, the term 'Royal Commission' is extremely well-known, which means that it is a clear way to communicate to the public the extraordinary nature of such an inquiry. The ALRC notes how important this was in the New Zealand context, where the New Zealand Law Commission (NZLC) recommended the abolition of Royal Commissions with statutory powers, preferring the introduction of 'public' inquiries—very similar to existing Royal Commissions—and 'government' inquiries. The New Zealand Government did not accept this recommendation in full, introducing legislation into the New Zealand Parliament that would enable the establishment of public inquiries, government inquiries *and* Royal Commissions, all with statutory powers.[62]

5.70 Secondly, the title 'Royal Commission' is helpful in that it indicates how the highest form of public inquiry is established. While Royal Commissions with statutory powers are established under the *Royal Commissions Act* rather than by exercise of the prerogative power, the Act provides that the Governor-General, as the representative of the monarch of Great Britain, is responsible for their establishment. As the ALRC recommends in Chapter 6, the Australian head of state should continue to be responsible for establishing the highest form of public inquiry in Australia. If changes to Australia's system of government result in a change to the way the head of state is chosen—for example, through the election or appointment of a President—it would make sense, at that stage, for the title of the highest form of inquiry to be amended to reflect that position.

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61 G Millar, *Submission RC 21,* 21 September 2009.

62 Inquiries Bill 2008 (NZ).

5.71 The ALRC did not receive any feedback on an appropriate title for the recommended second tier of inquiry. One title that may reflect the nature of this type of inquiry is 'Official Inquiry'. This title is clearly recognisable and distinct from 'Royal Commission'. The ALRC does not prefer the term 'public inquiry' for the reason that, while material such as terms of reference and reports may be published as part of such an inquiry, it may not be appropriate to hold all inquiry hearings in public.[63] The ALRC is also concerned that referring to a second tier of inquiry as a 'government', 'departmental' or 'ministerial' inquiry may cast doubt over the perceived independence of such an inquiry.

5.72 The ALRC acknowledges, however, that the issue of nomenclature requires further consultation and ultimately will be an issue for the political and drafting processes. The priority for the ALRC is to ensure clarity with respect to the features of its recommended two-tier model. For the purposes of this Report, the term 'Official Inquiries' will be used to distinguish second tier inquiries from Royal Commissions.

Recommendation 5–1 The *Royal Commissions Act 1902* (Cth) should be:

(a) amended to provide for the establishment of two tiers of public inquiry—Royal Commissions and Official Inquiries;

(b) renamed the *Inquiries Act*; and

(c) updated to reflect modern drafting practices.

Nature of inquiries in the recommended model

5.73 The recommended statutory framework is intended to enhance clarity, transparency and accountability, and preserve, as far as possible, the rights of individuals. As the federal executive already has the prerogative power to establish public inquiries, albeit without formal powers, a statutory framework for inquiries needs to be designed in such a way that ensures its use.

5.74 The Law Council highlighted the importance of this balance, noting that a second tier of inquiry needs to 'provide effective scrutiny of government action' but also needs to be

> seen as an attractive tool for government to utilise as an alternative to establishing a Royal Commission. This means making sure that inquiries conducted under the Act

63 In Ch 16, the ALRC discusses when it may be appropriate for inquiries to hold hearings in private.

> can be undertaken relatively quickly, with less expense and greater flexibility than those conducted under the [*Royal Commissions Act*].[64]

5.75 The statutory framework recommended in this Report has been designed to achieve these aims.

Overview of distinctions between tiers of inquiry

5.76 The ALRC recommends a number of distinctions between each tier of inquiry to ensure that each inquiry has the necessary tools to carry out its investigations without inappropriately infringing on the rights of persons involved with, or affected by, its processes. What coercive powers may be exercised by each tier of inquiry is a key distinction. In Chapter 11, the ALRC includes a table that identifies the specific powers that it recommends may be available to Royal Commissions and those that may be available to Official Inquiries. The other distinctions are discussed in detail in other sections of this Report.

Table 5.1: Distinctions between Royal Commissions and Official Inquiries

Feature	Royal Commissions	Official Inquiries
Established by and reports to	Governor-General	Minister
Powers	Wide range of coercive powers, for example, may apply for warrants to exercise entry, search and seizure powers or to apprehend a person who does not appear	Reduced range of coercive powers
Concurrent inquiries	May have concurrent functions and powers conferred under state and territory laws	May not have concurrent functions and powers conferred under state and territory laws
Privilege against self-incrimination	May be abrogated (with a use immunity)	May not be abrogated
Client legal privilege	May be abrogated as stipulated in Letters Patent	May not be abrogated

Investigatory and policy inquiries

5.77 Since the time of the Whitlam Labor Government, Royal Commissions and other statutory inquiries have rarely been established for the sole purpose of considering matters of policy. There are now several other bodies from whom the executive can obtain independent advice—for example, the ALRC was established in 1975, the Australian Human Rights Commission in 1986, and the Productivity

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

Commission in 1998. The functions of these bodies include reporting to the executive on policy or law reform matters. Further, parliamentary committees have been utilised for policy advice far more frequently since the 1970s.[65]

5.78 It is anticipated that a key consideration for the executive in deciding whether to establish a Royal Commission or Official Inquiry will be the powers that should be available to the potential inquiry. It follows, therefore, that the recommended framework should be used to establish inquiries that may require coercive powers and the ability to abrogate privileges associated with these powers.

5.79 This approach is not intended to preclude the establishment of a policy inquiry within the recommended statutory framework; nor is it intended to preclude an investigatory inquiry from making policy recommendations related to its findings. As discussed in Chapter 2, inquiries rarely can be characterised as solely 'investigatory'. For example, the RCIADIC (1991) and the HIH Royal Commission (2003) were tasked primarily with investigating wrongdoing but also made broad recommendations directed towards reforming the criminal justice and corporate governance systems respectively.

Selecting powers and associated privileges for each inquiry

5.80 How should the circumstances in which coercive powers are conferred on inquiries be determined? In 1977, the Law Reform Commission of Canada took the view that Commissions should be armed with coercive powers only when they were undertaking investigatory inquiries of major importance.[66] In 1966, the Royal Commission on Tribunals of Inquiry in the United Kingdom took a similar view, recommending that the use of coercive powers by inquiries should be limited to 'matters of vital public importance concerning which there is something in the nature of a nation-wide crisis in confidence'.[67]

5.81 The NZLC, in a recent review of the equivalent New Zealand laws, considered whether inquiries legislation should have a 'menu' of powers, procedures and immunities that could be applied to each inquiry on a case-by-case basis. It decided against such a process on the basis that it is not always possible to determine what powers will be required by an inquiry.

> For instance, in what appears to be a straightforward policy inquiry, it may not become clear until later that commercial or professional interests will dissuade key witnesses from giving evidence on relevant matters. The menu option also provides

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65 See, eg, the discussion of the development of Senate parliamentary committees since 1970 in H Evans, *Harry Evans: My 40 Years of Canberra Joy* (2009) Crikey <http://www.crikey.com.au/2009/07/24/harry-evans-my-40-years-of-canberra-joy/> at 24 July 2009.

66 Law Reform Commission of Canada, *Commissions of Inquiry*, Working Paper 17 (1977), 23. See also H Reed, 'The "Permanent" Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II' (1995) 2 *Australian Journal of Administrative Law* 157, 157.

67 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), [26].

> ground for politically motivated horse-trading and litigation at the inception of, and during an inquiry, around which powers are or are not needed. … The idea that commissioners may need to go back to Government to seek additional coercive powers in such cases is unattractive, as it may undermine the independence of a commission. Nor would it be appropriate for courts to be able to order additional powers since this could encourage inquiry participants to seek judicial intervention.[68]

5.82 The NZLC concluded that it would be preferable for all inquiries to 'have recourse to statutory powers should they be needed'.[69] It was of the view that coercive powers encouraged the cooperation of those involved with an inquiry, and inquiries should have appropriate tools to carry out their tasks. The NZLC also noted that there was no evidence to suggest that such powers had been abused in New Zealand inquiries.[70] It is worth noting, however, that existing and proposed New Zealand inquiries legislation does not provide for the extensive range of coercive powers that may be exercised under the Australian *Royal Commissions Act.*

5.83 In IP 35, the ALRC asked whether it was desirable for different inquiries to have different powers conferred on them in certain circumstances, and what those circumstances might be.[71] In DP 75, the ALRC rejected the 'menu of powers' approach and proposed that the *Inquiries Act* should set out the specific powers that are conferred on Royal Commissions and Official Inquiries.[72]

Submissions and consultations

5.84 In the context of improving flexibility and minimising costs, DIAC supported inquiries having 'access to coercive powers that best suit the purpose of the inquiry'. It also noted that:

> when selecting coercive powers under statute, there should be a formal approval process where coercive powers can be selected and approved. There should correspondingly be some limitations on what coercive powers can be chosen, for example, powers that should remain within the exclusive realm of Royal Commissions.[73]

5.85 McKenzie expressed concern that the Australian Government frequently commences inquiries outside the *Royal Commissions Act*. He submitted that, while the ALRC's proposal for a new *Inquiries Act*

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68 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [2.35].
69 Ibid, [2.36].
70 Ibid.
71 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–2.
72 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 5–2.
73 Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009.

> creates greater flexibility than exists at the moment, making it more likely that governments will operate within the legislation, there remains some significant inflexibility that may culminate in governments continuing to work around the Act.[74]

5.86 McKenzie suggested that a model that allowed the Australian Government to select the powers that may be exercised by a particular inquiry 'has all the flexibility that governments could possibly ask for'. He suggested:

> A hybrid approach might be to have two default tiers. Each will provide a base inquiry operation from which governments can deviate within the confines of the legislation according to the needs of the incident inquiry.[75]

5.87 On the other hand, in its submission on DP 75, Liberty Victoria supported the ALRC's proposal to 'set out and delineate the specific powers that are conferred on Royal Commissions or Official Inquiries'.[76] The Law Council agreed 'that a suite of powers should be set out for both Royal Commissions and Official Inquiries, with greater powers being available to Royal Commissions'.[77]

5.88 With specific reference to Royal Commissions, the CPSU was strongly of the view that legislation should make clear what powers may be exercised by an inquiry. The chair of the inquiry then should determine how to use the powers conferred by the statute. The CPSU submitted that, if the executive were able to determine which powers were available to an inquiry,

> the powers available to one Royal Commission may differ to another. This creates problems in how the findings of a Royal Commission are perceived. If a Royal Commission inquiry is hampered because certain powers were not given to it, the findings of that Commission should not be given the same standing as another Royal Commission which was fully empowered to investigate the issues. It is simply a matter of not comparing like with like.[78]

5.89 The CPSU also was concerned about 'politicising' Royal Commissions.

> A Government may yield to public pressure to hold a Royal Commission into a particularly controversial issue, but then refuse to grant it the requisite powers to properly conduct the inquiry. The potential for this to occur weakens the legitimacy and standing of Royal Commissions.[79]

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74 D McKenzie, *Submission RC 27,* 28 September 2009.
75 Ibid.
76 Liberty Victoria, *Submission RC 26,* 27 September 2009.
77 Law Council of Australia, *Submission RC 30,* 2 October 2009.
78 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.
79 Ibid.

5.90 In consultations, a number of other stakeholders supported the approach taken by the ALRC. As noted above, a number of stakeholders made submissions that generally supported the model proposed in DP 75.[80]

ALRC's view

5.91 While a 'menu of powers' approach is more flexible, in the ALRC's view the Australian Government should not be able to determine what specific powers may be exercised by an inquiry at the time that it establishes that inquiry. As discussed in Chapter 11, Royal Commissions and other public inquiries can often be characterised as 'fishing expeditions'. At the outset of certain inquiries, it may be clear that the inquiry does not require any coercive powers. For example, a policy inquiry such as the National Human Rights Consultation is unlikely to require coercive powers to carry out its task of considering the best form of human rights protection in Australia. It may be less clear at the outset of an investigatory inquiry, however, which specific powers will be necessary for it to carry out its task. Allowing the executive to select and stipulate the specific powers that may be exercised by an inquiry at the time of establishing that particular inquiry may not be the most efficient option. The ALRC agrees with the NZLC that it could increase the likelihood of 'politically motivated horse-trading' about what powers are needed by a particular inquiry.

5.92 While inquiry members may be able to seek, and be granted, additional powers while an inquiry is on foot, there are reasons why this may not be desirable. It may politicise the inquiry process and affect its perceived independence. Amending an inquiry's powers midway through an inquiry may also affect the way in which information is provided.[81] For example, if an inquiry is subsequently given powers to compel a person to provide information, that person then may be able to make a claim for immunity over the use of that information. Also, seeking an extension of powers likely will result in delay, which, among other things, will increase the overall cost of an inquiry.

5.93 While flexibility is important, this should not be the overriding consideration when determining the powers available to an inquiry, and the associated privileges that may be abrogated in that inquiry. Enhancing clarity in the arrangements for establishing and conducting public inquiries is one of the main aims in designing a new statutory framework. The ALRC is concerned that stipulating which powers may be exercised by a particular inquiry will lead to confusion about the nature of inquiries established under the *Inquiries Act*. On the one hand, allowing the executive to determine the specific powers that apply to a particular inquiry may lead to all inquiries being provided with all available coercive powers and the ability to abrogate all associated privileges. There is a risk that inadequate consideration will be given to the

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80 See, eg, Accountability Round Table, *Submission RC 29,* 30 September 2009; Australian Intelligence Community, *Submission RC 28,* 28 September 2009; Community and Public Sector Union, *Submission RC 25,* 22 September 2009; Australian Collaboration, *Submission RC 24,* 22 September 2009.

81 These issues are discussed in Part E.

appropriate balance between exercise of powers and infringement of the rights of individuals. On the other hand, the executive may not provide certain inquiries with powers that may be necessary in specific circumstances, limiting that inquiry's capacity for investigation and affecting the perception of independence of inquiries conducted within the recommended statutory framework.

5.94 As discussed in Chapters 11 and 17, it is the ALRC's view that the ability of an inquiry to exercise the most significant coercive powers, and abrogate fundamental privileges, should be available only to Royal Commissions. In other words, only Royal Commissions should have the ability to: exercise powers to authorise the application for entry, search and seizure warrants and for the issue of warrants for the arrest of those who fail to appear before it when called; partially abrogate the privilege against self-incrimination; and, if set out in the Letters Patent, abrogate client legal privilege. One option may be to preserve the full suite of powers for a Royal Commission and allow the executive to select from a 'menu' of powers only when establishing an Official Inquiry. It is highly likely, however, that the executive would routinely allocate to an Official Inquiry the remaining powers. These powers are fundamental to the conduct of an investigatory inquiry, and include the power to compel the attendance of persons and production of documents and other things.[82]

5.95 It is the ALRC's view that the recommended *Inquiries Act* should set out the powers available to Royal Commissions and Official Inquiries. The ALRC's approach ensures a clear delineation between the two tiers of inquiry. It also has greater flexibility than the current arrangements.

5.96 Under the *Inquiries Act*, the executive may determine whether a Royal Commission or Official Inquiry should be established. The chair of the inquiry will have control over which, when and how powers available to that inquiry under the Act may be exercised.

Recommendation 5–2 The recommended *Inquiries Act* should set out the specific powers that are conferred on Royal Commissions and Official Inquiries.

Relationship between tiers of inquiry

5.97 An important element of the ALRC's recommended statutory model is the relationship between Royal Commissions and Official Inquiries, and the relationship between these inquiries and other inquiries that are established outside the ALRC's

82 A full list of the powers that the ALRC recommends should be available to Royal Commissions and Official Inquiries, and the application of privileges associated with those powers, is set out in a table in Ch 11.

recommended statutory model. Very little feedback was received by the ALRC on these issues.

5.98 In IP 35, the ALRC noted that the *Inquiries Act* (UK) enables the 'conversion' of an inquiry commenced other than under the Act to an inquiry under the Act.[83] A converted inquiry enjoys the same powers and protections as an inquiry commenced under the Act.[84] The process for the conversion of an inquiry is set out in s 15 of the *Inquiries Act* (UK):

> (1) Where—
>
> (a) an inquiry ('the original inquiry') is being held, or is due to be held, by one or more persons appointed otherwise than under this Act,
>
> (b) a Minister gives a notice under this section to those persons, and
>
> (c) the person who caused the original inquiry to be held consents,
>
> the original inquiry becomes an inquiry under this Act as from the date of the notice or such later date as may be specified in the notice (the 'date of conversion').

5.99 The *Inquiries Act* (UK) provides that, before converting an inquiry in this way, the relevant minister needs to consult the chair of the original inquiry.[85] The minister also needs to consult with the chair of the inquiry before providing him or her with terms of reference that differ from those provided to the original inquiry.[86]

5.100 In DP 75, the ALRC proposed that a similar mechanism should be included in the *Inquiries Act.* The ALRC proposed that this mechanism should provide for the conversion of Official Inquiries into Royal Commissions.[87] It also noted that the mechanism also should make clear what process needs to be followed in the case of such a conversion.[88]

5.101 As discussed elsewhere in this Report, an inquiry's exercise of coercive powers may seriously impact on the rights of individuals. The extent of the coercive powers available to Royal Commissions, and the partial abrogation of the privilege against self-incrimination, are reasons why Royal Commissions should be established only in extraordinary circumstances. In the ALRC's view, therefore, it is not desirable for the executive to establish a Royal Commission on the basis that the inquiry *may* require access to these powers. It would be preferable for the executive to establish an Official

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83 *Inquiries Act 2005* (UK) s 15. See also Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [4.48].

84 *Inquiries Act 2005* (UK) ss 15, 16.

85 Ibid s 15(3).

86 Ibid s 15(7).

87 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 5–3. Liberty Victoria supported this proposal: Liberty Victoria, *Submission RC 26,* 27 September 2009.

88 Ibid, [5.84].

Inquiry, and if it transpires that the inquiry actually requires the more extensive powers of a Royal Commission, convert the Official Inquiry into a Royal Commission.

5.102 The ALRC recommends that the Governor-General should provide his or her consent for a conversion from an Official Inquiry to a Royal Commission. This is consistent with the ALRC's recommendation in Chapter 6 that the Governor-General should be the authority that establishes a Royal Commission.[89] There is no need to require the consent of inquiry members, as they should not be able to prevent a conversion between inquiries by withholding consent. The ALRC acknowledges, however, that it is likely that the views of the inquiry members will be canvassed by the executive before a decision to convert the Official Inquiry to a Royal Commission is made. The ALRC is also of the view that the minister who established the Official Inquiry should not be required to consent to the conversion of the inquiry to a Royal Commission.[90] In practice, the Governor-General acts on the advice of the Federal Executive Council, and as a practical matter the view of a single minister is unlikely to override those of the several ministers who form the Council.

5.103 The recommended mechanism should also apply to converting inquiries commenced outside the recommended statutory framework into Royal Commissions. Further, the Australian Government should be able to convert an inquiry established other than under the *Inquiries Act* into an Official Inquiry.

Recommendation 5–3 The recommended *Inquiries Act* should include a mechanism that allows the Australian Government, in accordance with other provisions of the Act:

(a) with the consent of the Governor-General, to convert an Official Inquiry into a Royal Commission;

(b) to convert an inquiry established other than under the recommended Act into an Official Inquiry; and

(c) with the consent of the Governor-General, to convert an inquiry established other than under the recommended Act into a Royal Commission.

89 Recommendation 6–2.

90 In Ch 6, the ALRC recommends that a minister should be able to establish an Official Inquiry.

Accountability mechanisms for inquiries

5.104 An issue raised late in this Inquiry was whether there should be accountability mechanisms for federal public inquiries. McKenzie suggested that the exercise of inquiry powers should be subject to some form of oversight.

> The ICAC [Independent Commission Against Corruption in New South Wales] has benefited from the establishment of the position of Inspector to the ICAC. People who have concerns about the operation of the ICAC can go to this office and these concerns can be resolved, to the benefit of individuals, the ICAC and the community. The mere existence of this accountability mechanism enhances the care that commission operatives take in their activities.[91]

5.105 McKenzie went on to suggest that:

> If a broad based anti-corruption agency was established at a Commonwealth level, with an Office of the Inspector oversighting it, a government could under revised legislation for commissions of inquiry designate the inspector of the anti-corruption agency as the inspector for the ad hoc commission of inquiry.[92]

5.106 Another issue is whether there should be some mechanism to review inquiry findings. Professor Geoffrey Lindell has suggested that the executive should be able to seek non-binding advice on the need for a new inquiry on part or all of the subject of a previous inquiry.[93]

5.107 As noted above, the ALRC is considering arrangements for public inquiries established on an ad hoc basis. The desirability of establishing a 'broad based' anti-corruption body at the federal level is outside the Terms of Reference for this Inquiry.

5.108 With respect to Royal Commissions and Official Inquiries, it is the ALRC's view that existing accountability mechanisms are sufficient. First, Royal Commissions and Official Inquiries are established by the executive and are therefore ultimately accountable to the Parliament according to the convention of responsible government.[94] Secondly, some decisions made by Royal Commissions and Official Inquiries may be subject to judicial review.[95] Thirdly, an oversight body of the nature proposed by McKenzie may be seen as impacting adversely on the independence of Royal Commissions and Official Inquiries. Further, as discussed in Chapter 7, if the executive disagrees with the recommendations made by a Royal Commission or Official Inquiry, it is not bound to implement those recommendations. If the executive is seriously concerned about the findings made by an inquiry that it established, or the way in which that inquiry exercised its powers, there is no reason why it could not

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91 D McKenzie, *Submission RC 27,* 28 September 2009.
92 Ibid.
93 G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 84.
94 Responsible government is discussed further in Ch 6.
95 In Ch 14, the ALRC discusses the types of matters in inquiries that may be subject to judicial review, for example, breaches of procedural fairness.

conduct its own evaluation of an inquiry, and if it deems it necessary, establish another inquiry to consider such issues.[96]

5.109 The ALRC also notes that a number of bodies have expertise in oversight of the exercise of coercive powers by certain bodies. In certain circumstances, it may be useful for a Royal Commission or Official Inquiry to seek advice from bodies such as ACLEI, IGIS or the Commonwealth Ombudsman. Such assistance may be provided on an informal basis, or it could be provided by staff seconded to an inquiry.

96 An example of this is the Inquiry into the Centenary House Lease (2004), which was established under the *Royal Commissions Act 1902* (Cth) to consider, in part, the Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House (1994). The terms of reference for the Inquiry into the Centenary House Lease required the Inquiry to consider, amongst other things, 'whether the resources provided to the 1994 Inquiry, the absence of counsel assisting, or the particular processes adopted, adversely affected the 1994 Inquiry'. Note that the first Royal Commission was established by the Keating Labor Government, and the second was established by the Howard Coalition Government.

6. Establishment

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Introduction

6.1 In this chapter, the ALRC discusses the development and publication of an *Inquiries Handbook.* It then discusses when it is appropriate to establish a Royal Commission or Official Inquiry, and whether there should be greater guidance on drafting the terms of reference for either type of inquiry. The ALRC also considers

how both types of inquiry should be constituted, and whether there is scope for an expert advisor role within the recommended new statutory framework.

Inquiries Handbook

6.2 Those involved in Royal Commissions and Official Inquiries, and members of the general public with an interest in a specific inquiry, may benefit from having access to information, in the form of a government publication, about matters relating to the establishment, conduct and administration of inquiries established under the recommended *Inquiries Act*. Such a publication could capture existing institutional knowledge, increase awareness of the Act, and contribute to the overall effectiveness and efficiency of inquiries established under the Act.

6.3 The New Zealand Department of Internal Affairs has published guidelines entitled *Setting Up and Running Commissions of Inquiry* (2001). The guidelines deal with matters such as the: establishment of inquiries; appointment of commissioners and staff; planning of an inquiry; procedural options available to an inquiry; and management of the budget, documentation, media and information technology. The guidelines do not prescribe how an inquiry should be conducted, but rather provide general information to those responsible for establishing inquiries, inquiry members, inquiry participants and members of the general public.

6.4 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75) the ALRC proposed that the Australian Government should develop and publish an *Inquiries Handbook.*[1] The ALRC made a number of proposals addressing the type of guidance that should be included in the *Inquiries Handbook*.[2] The matters covered were similar to those included in the New Zealand guidelines.

Submissions and consultations

6.5 The majority of stakeholders who commented on this proposal expressed support for the development of an *Inquiries Handbook*.[3] Mr Graham Millar submitted that the *Inquiries Handbook* should address a range of issues covering the establishment, operation and closure of an inquiry. Millar was of the view that the *Inquiries Handbook* should provide practical guidance rather than be overly prescriptive. In his view, the Australian Government should have the necessary flexibility to cater for the wide range of matters that could be the subject of an inquiry.[4]

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1 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–4.

2 Ibid, Proposals 8–1, 8–2, 9–4, 12–3, 13–6, 15–2.

3 For example, see Liberty Victoria, *Submission RC 26,* 27 September 2009; Community and Public Sector Union, *Submission RC 25,* 22 September 2009; National Archives of Australia, *Submission RC 20,* 18 September 2009.

4 G Millar, *Submission RC 21,* 21 September 2009.

6.6 The Australian Collaboration submitted that the *Inquiries Handbook* should contain guidance regarding the different nature of inquiries that may be established under the *Inquiries Act*.[5]

6.7 In consultations, several stakeholders observed that the *Inquiries Handbook* would need to be regularly monitored and updated to remain useful.

ALRC's view

6.8 The Australian Government should develop and publish an *Inquiries Handbook* containing guidance for those responsible for establishing inquiries, inquiry members, inquiry participants and members of the general public on a range of matters relating to Royal Commissions and Official Inquiries. An *Inquiries Handbook* would be a useful way of ensuring that relevant institutional knowledge is readily available to those establishing, conducting and administering inquiries. It also would facilitate the communication of information about the conduct of an inquiry to inquiry participants and members of the public.

6.9 Specific recommendations regarding the content of the *Inquiries Handbook* are made in other sections of this Report.[6] In summary, the *Inquiries Handbook* should address matters such as: the establishment of inquiries; appointment of inquiry members; administration of inquiries; powers, protections and procedural aspects of inquiries; and the use and protection of national security information by inquiries.

6.10 The *Inquiries Handbook* should not have statutory force. Inquiries established under the *Inquiries Act* will vary greatly in subject matter and scope, and the *Inquiries Handbook* should not circumscribe the manner in which a particular inquiry is conducted under the Act. Indeed, the *Inquiries Handbook* is designed to enhance, rather than restrict, flexibility within the statutory framework for inquiries.

6.11 In Chapter 8, the ALRC recommends that a single Australian Government department should be responsible for updating and monitoring the *Inquiries Handbook*.[7] In addition, the *Inquiries Handbook* should be easily accessible—for example, it could be published on the website of that department, or on the websites of individual Royal Commissions and Official Inquiries.

Recommendation 6–1 The Australian Government should develop and publish an *Inquiries Handbook* containing information for those responsible for establishing inquiries, inquiry members, inquiry participants and members of the general public on a range of matters relating to Royal Commissions and Official Inquiries, including the:

5 Australian Collaboration, *Submission RC 24,* 22 September 2009.
6 Recommendations 6–2, 6–6, 8–1, 8–2, 9–4, 12–3, 13–6, 15–5.
7 Recommendation 8–2.

(a) establishment of inquiries;

(b) appointment of inquiry members;

(c) administration of inquiries;

(d) powers, protections and procedural aspects of inquiries; and

(e) use and protection of national security information by inquiries.

Factors for consideration before an inquiry is established

6.12 As noted in Chapter 3, there is very little guidance in the *Royal Commissions Act 1902* (Cth) as to when a Royal Commission should be established. The Act provides that the Governor-General may establish a Royal Commission to consider 'any matter specified in the Letters Patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose or any power of the Commonwealth'.[8] Outside of the Act, there is little publicly available guidance on when it may be appropriate to establish a Royal Commission or other type of executive inquiry.

6.13 The Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984) (Costigan Royal Commission) suggested the introduction of a more principled approach to decisions to establish Royal Commissions.[9] It was noted in the report of that Royal Commission that not all 'aberrant' or unexplained conduct may warrant an executive inquiry. Instead, there should be a 'complaint of substance' or a 'reasonable suspicion based on "articulable facts" of past, present or future criminal activities'.[10] This view reflected the fact that inquiries can have a profound effect on those who are involved with them—indeed, even the act of calling a person to appear before an inquiry may have a permanent negative impact on the reputation of that person.[11] The report also cautioned that, with the aim by trying to ascertain responsibility for illegal conduct, the attention of the executive may be 'diverted' from potential infringement of civil liberties.[12]

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

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

10 Ibid.

11 Ibid, vol 2, 92–93, 98–100.

12 Ibid, vol 2, 102.

6.14 Another issue for the executive to consider before establishing an inquiry is whether it may adversely affect future legal proceedings. For example, an inquiry may cause delay in commencing legal proceedings, and evidence gathered by an inquiry may be afforded certain protections from subsequent use.[13]

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

6.16 Legislation in other jurisdictions provides some guidance about whether a Royal Commission or similar inquiry should be established. Legislation in Tasmania enables the Governor to establish a Royal Commission if he or she is satisfied that it is both in the public interest and expedient to do so.[14] Legislation in the United Kingdom (UK) enables inquiries to be established into events that have caused, or may cause, 'public concern'.[15] Currently, legislation in New Zealand sets out a list of matters which may be the subject of a public inquiry, including 'any matter of public importance'.[16] If passed, the Inquiries Bill (before the New Zealand Parliament at the time of writing in October 2009) would enable inquiries to be established to consider 'any matter of public importance'.[17]

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

- the likely consequences of not holding an inquiry;
- whether, if an inquiry were held, the likelihood that its recommendations would assist the development of improved policies; and

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13 These issues are discussed in Chs 14 and 17.
14 *Commissions of Inquiry Act 1995* (Tas) s 4.
15 *Inquiries Act 2005* (UK) s 1.
16 *Commissions of Inquiry Act 1908* (NZ) s 2.
17 Inquiries Bill 2008 (NZ) cl 6(2), (3). This conforms to the view expressed by the New Zealand Law Commission that the other categories were redundant: New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec R7.

- whether other mechanisms would be more appropriate (for example, criminal proceedings).[18]

6.18 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether legislation establishing public inquiries should provide further guidance about the circumstances in which such inquiries should be established, and what those circumstances should be.[19] In DP 75, the ALRC proposed that the *Inquiries Act* should provide that:

- a Royal Commission may be established if it is intended to inquire into a matter of substantial public importance; and

- an Official Inquiry may be established if it is intended to inquire into a matter of public importance.[20]

6.19 The ALRC also asked whether the Australian Government should be required to consider certain matters before establishing a Royal Commission or Official Inquiry. For example, it queried whether the proposed *Inquiries Act* should require the Australian Government to consider:

- whether a Royal Commission or Official Inquiry is the best way to achieve the Australian Government's objectives, or whether it would be more appropriate to achieve these objectives another way, for example, through inquiry by an existing body or through civil or criminal proceedings;

- whether the recommendations of a Royal Commission or Official Inquiry would facilitate government policy making; and

- whether powers are required and, if so, which powers, having regard to the subject matter and scope of the inquiry?[21]

Submissions and consultations

6.20 With respect to the proposal that a Royal Commission must consider a matter of 'substantial public importance' and an Official Inquiry a matter of 'public importance', the Law Council of Australia (Law Council) noted the approach taken in the UK and submitted that legislation establishing public inquiries should include criteria to be

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

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

20 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–1.

21 Ibid, Question 6–1.

considered before inquiries are established.[22] Millar submitted that, generally, if an inquiry does not require coercive powers, it 'does not need to be a Royal Commission'.[23]

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

6.22 The Community and Public Sector Union (CPSU) submitted that:

> It is appropriate that the legislation clearly distinguish between the purpose for which a Royal Commission should be established and the purpose for which an Official Inquiry should be established. Such a provision should be easy to understand and will provide a simple way for the public to assess whether they believe the government has handled the issue subject to inquiry appropriately.
>
> It is apposite that there be set criteria which is considered by the Australian Government prior to commencing a Royal Commission or Official Inquiry. Both of these measures will increase public awareness as to the purpose of Royal Commissions and Official Inquiries and the ends to which they should be directed. This has the potential to improve public understanding and therefore increase transparency. The independence of any form of public inquiry should be guaranteed by the legislation.[24]

6.23 On the other hand, a number of those with whom the ALRC consulted expressed concern that including legislative requirements of this nature would give rise to judicial review. The Australian Government Solicitor (AGS) submitted that

> the introduction of legislative threshold requirements for different types of inquiry, namely, on the one hand, 'a matter of substantial public importance', and on the other, 'a matter of public importance', will bring with it the risk that challenges will be made on the basis that the requisite satisfaction to establish the inquiry has not been met. Thus, what should, essentially, be a political judgment, may be exposed to judicial scrutiny.[25]

6.24 Liberty Victoria supported the distinction between Royal Commissions and Official Inquiries, although it also questioned how and where those terms would be defined.[26] Similarly, Dr Ian Turnbull noted that:

> Whilst the term 'substantial' is used frequently in legal writing and has been judicially considered often, should some attempt be made to further define 'substantial public

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22 Law Council of Australia, *Submission RC 9,* 19 May 2009. See also Law Council of Australia, *Submission RC 30,* 2 October 2009.
23 G Millar, *Submission RC 5,* 17 May 2009.
24 Community and Public Sector Union, *Submission RC 25,* 22 September 2009.
25 Australian Government Solicitor, *Submission RC 31,* 6 October 2009.
26 Liberty Victoria, *Submission RC 26,* 27 September 2009.

> importance'? Is it more or less than 'public interest' (a term not well understood)? Or is 'public importance' equivalent to a policy issue of the Government at the time? Should it be stated just who is to make that determination?[27]

6.25 Turnbull agreed that the Australian Government should be required to consider matters such as whether a Royal Commission or Official Inquiry is the best way to achieve the Australian Government's objectives. He queried, however, whether a requirement to 'consider' such matters would require the Australian Government to apply the test.[28]

6.26 The Australian Commission for Law Enforcement Integrity submitted that its

> intrusive law enforcement and inquisitorial powers are matched to the difficulty of the issues being investigated. This principle may be useful in deciding what powers should be given to a Royal Commission or to an Official Inquiry.[29]

6.27 The Australian Intelligence Community (AIC) suggested additional criteria should be considered before the establishment of a Royal Commission or Official Inquiry.

> The AIC further suggests that guidance/direction noting the availability of the IGIS [Inspector-General of Intelligence and Security] to examine events or issues involving discussion of national security-classified information could be included amongst the criteria to be considered in determining whether a Royal Commission or an Official Inquiry should be established and which powers should appropriately be afforded to such a body.[30]

ALRC's view

6.28 As noted in Chapter 2, Royal Commissions and other public inquiries have important functions, such as determining what happened in a particular situation and providing a forum for public catharsis. The ALRC is mindful, however, that persons may be negatively affected by any involvement with a Royal Commission or Official Inquiry. Further, inquiries—and particularly Royal Commissions—may be very costly exercises. There should be some guidance, therefore, on when inquiries should be established. Such guidance is particularly necessary if the ALRC's recommendation for the introduction of a new form of statutory inquiry—the Official Inquiry—is accepted.

6.29 For a number of reasons, however, the ALRC has moved away from the test proposed in DP 75. First, the ALRC notes that key distinctions between the recommended two tiers of inquiry are the scope of the powers available, and the privileges enjoyed by persons appearing before an inquiry. In government deliberations before establishing an inquiry, therefore, these matters, and the degree of public

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27 I Turnbull, *Submission RC 22,* 21 September 2009.
28 Ibid.
29 Australian Commission for Law Enforcement Integrity, *Submission RC 18,* 14 September 2009.
30 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.

importance associated with the subject matter of the inquiry, should be given equal weight. Secondly, the ALRC agrees with stakeholders that a statutory formulation of the type proposed in DP 75 may result in attempts to stall inquiries by commencing actions for judicial review. The ALRC notes this is even more likely if the test for establishing a Royal Commission or Official Inquiry is more detailed than that proposed in DP 75—in other words, if a statutory test also included a requirement to consider what powers and privileges are necessary in a potential inquiry.

6.30 While other options were not suggested in submissions or consultations, the ALRC has considered how else to address this issue. One option is for the *Inquiries Act* to include a statutory test, similar or more detailed to the one proposed in DP 75, and also allow a minister to issue a conclusive certificate that provides that a decision to establish an inquiry is not judicially reviewable. The ALRC queries the utility of including a non-justiciable test in the *Inquiries Act*. Moreover, a power to issue conclusive certificates is inconsistent with moves to enhance government openness, accountability and transparency. In 1995, the ALRC and Administrative Review Council noted such considerations in recommending a scaling back of the ministerial power to issue conclusive certificates in the context of freedom of information.[31] On 6 October 2009, the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) received royal assent. This Act removes the power of a minister to issue a conclusive certificate for all exemption provisions in the *Freedom of Information Act 1982* (Cth) and the *Archives Act 1983* (Cth).[32] The ALRC does not see any compelling reason to introduce conclusive certificates in the public inquiries context.

6.31 Another option may be to include an objects clause or provision in the *Inquiries Act* that provides information about the jurisdiction and powers of Royal Commissions and Official Inquiries. The Office of the Parliamentary Counsel (OPC) describes objects provisions as follows:

> Some objects provisions give a general understanding of the purpose of the legislation. … Other objects provisions set out general aims or principles that help the reader to interpret the detailed provisions of the legislation.[33]

6.32 An objects provision, therefore, is a provision that guides the interpretation of the legislation in which it is contained. It is not intended to impose requirements additional to those set out in other provisions of the legislation. While the OPC may

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31 Australian Law Reform Commission and Administrative Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, ALRC 77 (1995), Rec 40A (ALRC), Rec 40B (ARC). See also Rec 41 (ALRC and ARC).

32 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) schs 1, 2. The Act also provides that existing conclusive certificates will be revoked if and when a new request for access to a document or record covered by a certificate is received. See also Explanatory Memorandum, Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008 (Cth).

33 Office of Parliamentary Counsel, *Working with the Office of Parliamentary Counsel: A Guide for Clients* (3rd ed, 2008), 33.

decide to include an objects provision in the recommended *Inquiries Act* for purposes of interpretation and clarification, in the ALRC's view it is not appropriate for the Act to contain an objects provision that effectively contains a threshold test for establishing different tiers of inquiry.

6.33 On balance, it is the ALRC's view that the matters the government should consider when deciding to establish an inquiry should be addressed in the *Inquiries Handbook*.[34] Such guidance should include:

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

Recommendation 6–2 The recommended *Inquiries Handbook* should address when it is appropriate to establish a Royal Commission or Official Inquiry. This guidance should include a consideration of:

(a) the level of public importance—matters of substantial public importance being more appropriate for Royal Commissions and matters of public importance being more appropriate for Official Inquiries;

(b) whether powers are required and, if so, which powers are appropriate, having regard to the subject matter and scope of the inquiry;

(c) whether the recommendations of a Royal Commission or Official Inquiry will facilitate government policy making; and

34 Recommendation 6–1.

(d) whether a Royal Commission or Official Inquiry is the best way to achieve the Australian Government's objectives, or whether it is more appropriate to achieve these objectives in another way—for example, through an inquiry by an existing body or through civil or criminal proceedings.

Establishing authority

6.34 As noted in Chapter 3, Royal Commissions with statutory powers are established by the Governor-General acting on the advice of the Federal Executive Council.[35] In light of the ALRC's recommendation that the *Royal Commissions Act* be amended to enable the establishment of Royal Commissions and Official Inquiries, and renamed the *Inquiries Act*, two specific issues arise. First, should the current arrangements in the *Royal Commissions Act* for establishing Royal Commissions continue under the recommended *Inquiries Act*? Secondly, who should establish Official Inquiries?

6.35 The issue of how different inquiries should be established was recently considered by the New Zealand Law Commission (NZLC). It recommended the enactment of a general Act that enabled the establishment of two tiers of inquiry—'public inquiries' and 'government inquiries'. In the NZLC's model, a principal distinguishing feature between these inquiries would be the way in which they are established. The NZLC intended public inquiries to have a similar stature and be established in the same way as inquiries established under the existing *Commissions of Inquiry Act 1908* (NZ)—that is, by the New Zealand Governor-General by Order in Council. On the other hand,

> [g]overnment inquiries are designed to remove the need for non-statutory ministerial inquiries. They should be appointed by a Minister and should report directly to the Minister.[36]

6.36 In IP 35, the ALRC asked whether legislation establishing Royal Commissions and other public inquiries should address who should be able to establish such inquiries. It suggested that establishing authorities may include the Governor-General, the Cabinet, a Minister, or one or both Houses of Parliament.[37] In DP 75, the ALRC

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

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

37 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 5–3(a). See also G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 21–24.

proposed that the Governor-General should continue to establish Royal Commissions, and that ministers should establish Official Inquiries.[38]

Submissions and consultations

6.37 With respect to Royal Commissions, Millar submitted:

> Royal Commissions are appointed by the Governor-General on the advice of the executive government. They are therefore 'creatures' of the executive government and, in practice, they result from Cabinet Decisions made by the Prime Minister and senior ministers. This long-standing practice seems to work well and, in the context of our system of government, I am not aware of any good reasons to depart from it.[39]

6.38 The Law Council supported the existing arrangements for establishing Royal Commissions.

> This requirement reflects the gravity of a matter of substantial public importance which necessitates the provision of a full suite of powers for the conduct of the inquiry.[40]

6.39 The Law Council supported

> the establishment of Official Inquiries with a more limited suite of powers by Ministers for matters of public importance. … the Law Council considers that the ability of Ministers to establish statutory Official Inquiries should lead to greater use of such inquiries in appropriate cases. In particular, the Law Council hopes that the availability of Official Inquiries would lead to the establishment of such inquiries in situations similar to that of the cases of Dr Haneef and Cornelia Rau.[41]

6.40 The AGS did not agree that a new statutory framework for inquiries was necessary. In this context, it suggested that the issue of who should establish a Royal Commission was a decision for government and should not be set out in legislation.[42] Further,

> [e]ven if there was the ability for another type of inquiry to be established by direction of a Minister, we think it likely that before any such inquiry was established, the same deliberations of the Government as are involved in establishing a Royal Commission would end up being involved … Further, we think there is likely to be some concern within government at the prospect that a Minister could, without recourse to Cabinet, establish an Official Inquiry (which, it is proposed, would enjoy some coercive powers) into matters which may involve another agency.[43]

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38 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–2.
39 G Millar, *Submission RC 5,* 17 May 2009.
40 Law Council of Australia, *Submission RC 30,* 2 October 2009.
41 Ibid.
42 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
43 Australian Government Solicitor, *Submission RC 31,* 6 October 2009.

6.41 With respect to whether Parliament should have a role in establishing inquiries, a suggestion was made in consultations that each Royal Commission could be established under the general *Royal Commissions Act* and a short enabling Act. There was limited support, however, for the Parliament to be involved in the establishment of individual inquiries. Stakeholders also noted that, as a practical issue, there may be resourcing issues for an inquiry not established by the executive arm of government.

ALRC's view

6.42 To ensure openness, transparency and accountability, the body establishing an inquiry should be set out in the *Inquiries Act*. The Act should provide that the Governor-General should establish Royal Commissions and ministers should establish Official Inquiries. The ALRC agrees with those stakeholders who suggested that the Parliament should not have a role in establishing individual Royal Commissions or Official Inquiries. If the executive wants to commence an inquiry, it should have the flexibility to do so. If the Parliament deems it necessary to inquire into a matter, there are other mechanisms available.[44]

Royal Commissions

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

Official Inquiries

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

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

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44 In Ch 5, the ALRC discusses the enhanced role of parliamentary committees since the 1970s.

6.46 Public servants should not be able to establish a statutory inquiry with coercive powers. As discussed in Chapter 2, the decision to establish a public inquiry is inherently political and, therefore, should not be made by public servants at any level.

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

6.48 The main features of responsible government are collective ministerial responsibility and individual ministerial responsibility.[45] An effect of collective ministerial responsibility is that, if the government loses the confidence of the House of Representatives, the entire ministry must resign or the Prime Minister should recommend to the Governor-General that the House be dissolved and an election called.[46] If dismissal of an individual minister is warranted, this action tends to be taken by the Prime Minister rather than by Parliament.[47] In 1976, the Royal Commission on Australian Government Administration noted that:

> there is little evidence that a minister's responsibility is now seen as requiring him to bear the blame for all the faults and shortcomings of his public service subordinates, regardless of his own involvement, or to tender his resignation in every case where fault is found. The evidence tends to suggest rather that while ministers continue to be held accountable to Parliament in the sense of being obliged to answer to it when Parliament so demands, and to indicate corrective action if that is called for, they themselves are not held culpable—and in consequence bound to resign or suffer dismissal—unless the action which stands condemned was theirs, or taken on their direction, or was action with which they ought obviously to have been concerned.[48]

6.49 The ALRC notes that s 4 of the *Ministers of State Act 1952* (Cth) has the effect of providing that parliamentary secretaries are appointed as ministers for constitutional purposes.[49] Further, the effect of s 19 of the *Acts Interpretation Act 1901* (Cth) is that a minister may authorise a non-portfolio minister or a parliamentary secretary to act on his or her behalf.[50] These provisions enhance flexibility in how statutory inquiries may be established because parliamentary secretaries also would be able to establish Official Inquiries.

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45 Parliament of Australia—House of Representatives, *House of Representatives Practice* (2005), 47–50.
46 Ibid, 47.
47 Ibid, 49. The Senate may pass a censure motion against an individual minister in the House of Representatives or Senate, but ministers who are the subject of such motions have not resigned in the past.
48 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), 59–60.
49 Amended by *Ministers of State and Other Legislation Act 2000* (Cth).
50 Amended by the *Acts Interpretation Amendment Act 1998* (Cth).

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

Evidence of establishment

6.51 Finally, the ALRC notes that s 16(1) of the *Royal Commissions Act* provides that evidence of the establishment of a Royal Commission will be the Letters Patent signed by the Governor-General, or a copy of the Letters Patent certified by an inquiry member.[51] This provides for the proof of establishment of a Royal Commission in related legal proceedings. The *Inquiries Act* should contain a provision equivalent to s 16(1). Further, the Act should include an equivalent provision that is applicable to an Official Inquiry, which provides that the evidence of the establishment of an Official Inquiry should be the terms of reference signed by a minister, or a copy of those terms of reference certified by an inquiry member. Stakeholders did not raise this issue in this Inquiry; rather, the ALRC makes this recommendation to ensure that this provision applies to Official Inquiries in addition to Royal Commissions.[52]

Recommendation 6–3 The recommended *Inquiries Act* should provide that:

(a) the Governor-General establishes Royal Commissions; and

(b) ministers establish Official Inquiries.

Recommendation 6–4 The recommended *Inquiries Act* should provide that:

(a) the Letters Patent, or a copy of the Letters Patent certified by an inquiry member, is evidence of the establishment of a Royal Commission; and

51 Letters Patent are discussed in Ch 3.

52 In this Report, the ALRC makes other recommendations to ensure that existing provisions in the *Royal Commissions Act* apply to Official Inquiries. For example, in Ch 11, the ALRC recommends that the *Inquiries Act* should contain provisions, applicable to both Royal Commissions and Official Inquiries, equivalent to those in ss 7A, 7B, 7C, 16(2) and 16(3) of the *Royal Commissions Act 1902* (Cth): Recommendation 11–5.

(b) the terms of reference, or a copy of the terms of reference certified by an inquiry member, is evidence of the establishment of an Official Inquiry.

An inquiry's terms of reference

6.52 Whether there needs to be guidance about the drafting of an inquiry's terms of reference is an issue closely related to the establishment of an inquiry. As noted in Chapter 3, the *Royal Commissions Act* does not provide any guidance on the framing of the terms of reference for a Royal Commission. The drafting of the terms of reference for an inquiry, however, is fundamental to its success. Terms of reference that are too wide can lead to unnecessary cost, complexity and delay, and can leave an inquiry 'floundering in a wilderness of possible avenues of investigation'.[53] In addition, carefully defined terms of reference may 'limit the opportunities for wide-ranging investigations without the safeguards associated with investigations by traditional law enforcement agencies'.[54]

6.53 Terms of reference that are too narrow can undermine the efficacy of an inquiry. Some Royal Commissions have been criticised for the narrowness of their terms of reference. For example, the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry) was criticised for having terms of reference that were so narrow that they did not enable relevant issues to be examined adequately.[55]

6.54 In IP 35, the ALRC asked whether legislation establishing public inquiries should address the framing of terms of reference for a Royal Commission in greater detail.[56] The ALRC also sought views on whether the Act should attempt to address the content of terms of reference.[57] In DP 75, the ALRC did not recommend that the *Inquiries Act* contain any such requirements.

Submissions and consultations

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

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

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

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

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

57 Ibid, [3.13].

6.56 The Law Council supported the introduction of statutory provisions that would require the executive to consult with the chair of an inquiry before setting or amending the terms of reference for a Royal Commission or Official Inquiry.[58]

6.57 Other stakeholders were not in favour of a statutory requirement for the Australian Government to do or consider certain things before formulating terms of reference. Commenting on Royal Commissions, Millar submitted:

> The usual practice is that the person being appointed as Commissioner is consulted on the terms of reference before they are finalised and, if there is a need for subsequent amendments, it is also usual practice for the Commissioner to be consulted before the amendments are made. … this practice seems to work well and I do not see any need for it to be covered by legislation.[59]

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

> AGS doubts the need for statutory prescription regarding consultation on draft terms of reference, or as to requirements regarding publication of terms of reference, or dealing with the amendment of terms of reference during the course of an inquiry. We are not aware of any difficulties which have arisen as a result of the Act not prescribing these matters. For example, it is relatively commonplace for the terms of reference of Royal Commissions and inquiries to be amended during the life of an inquiry, often more than once.[60]

ALRC's view

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

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

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58 Law Council of Australia, *Submission RC 30,* 2 October 2009.
59 G Millar, *Submission RC 5,* 17 May 2009.
60 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.

Appointment of inquiry members

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

6.62 Currently, the Governor-General may issue a Royal Commission to one or more persons 'as he or she thinks fit'.[61] The *Royal Commissions Act* does not provide any further guidance on the appointment of Royal Commissioners. As Professor Scott Prasser has explained,

> appointing members to a public inquiry, unlike other government or public service positions, is not undertaken via advertisement or formal selection processes; rather, it is achieved by private 'soundings' of potential candidates, usually between the relevant minister's office and the department. This process may take considerable time, as locating those who are competent, have the appropriate status, and are available and willing, is not always easy.[62]

6.63 While there is no requirement in the *Royal Commissions Act* that a person with a legal background must be appointed, most Royal Commissions are chaired by current or former judges or legal practitioners. This has been the case for 32 of the 38 federal Royal Commissions that have been established since 1970.[63]

6.64 Legislation in the UK provides guidance both in terms of procedure and eligibility. The *Inquiries Act 2005* (UK) requires the minister responsible for establishing an inquiry to consider whether a recommended member of an inquiry panel has the necessary amount of expertise,[64] and prohibits the appointment of a person if it appears to the minister that he or she has a direct interest in the inquiry or a close association with an interested party to the inquiry.[65] Further, it requires the minister to consult with the chair of the inquiry before appointing any other members to an inquiry panel,[66] and to consult with certain senior members of the judiciary before appointing a judge as a panel member.[67]

6.65 The NZLC recently recommended that new inquiries legislation in New Zealand should provide that inquiries be independent from the executive:

> the integrity of an inquiry's work and its outcome are reliant on the extent to which it is viewed as independent. The principle that justice should be done and be seen to be

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61 *Royal Commissions Act 1902* (Cth) s 1A.
62 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [6.21].
63 Ibid, [8.6].
64 *Inquiries Act 2005* (UK) s 8. See also *Commissions of Investigation Act 2004* (Ireland) s 7.
65 *Inquiries Act 2005* (UK) s 9.
66 Ibid s 4(3).
67 Ibid s 10.

> done applies to inquiries as well as courts. An inquiry's independence should be made clear, rather than simply inferred.[68]

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

Eligibility of serving judges

6.67 Another issue that has attracted comment in Australia is the use of serving judges to conduct Royal Commissions.[69] The *Royal Commissions Act* expressly contemplates the appointment of judges to conduct Royal Commissions, as s 6O of the Act confers additional powers on a Commissioner who is also a judge (including a judge of a federal court) to punish contempt.[70]

6.68 It has been observed that judges are appointed as Royal Commissioners for a number of reasons. First, they possess skills and abilities that may be useful in an investigative inquiry, such as the ability to collect, collate and analyse evidence, assess the credibility of witnesses, and make findings of fact.[71] Secondly, they may enhance the perception of the independence and impartiality of a Royal Commission.[72]

6.69 One concern, however, is that using serving judges to inquire into politically controversial matters could undermine public confidence in the individual judge[73] or the judiciary as a whole.[74] It also has been argued that judges do not always possess the relevant skills to conduct a Royal Commission. For example, in evidence before the House of Commons Public Administration Select Committee, Lord Laming stated:

> I would like to suggest that there are few judges who have managed a big workforce, managed a public agency, managed big budgets in competing priorities, dealt with the party political machine, both locally and nationally, dealt with trade unions going about their perfectly legitimate business and dealt with the media day by day.[75]

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

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

70 In Ch 20, the ALRC recommends that a contempt power should not be included in the *Inquiries Act*.

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

72 Ibid.

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

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

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

6.70 It has long been established that judicial officers may act in administrative roles if they are acting in their personal capacity (ie, as *persona designata*).[76] Professor George Winterton has noted that it is unlikely that the consensual appointment of a judge of a state court to a federal Royal Commission would present a constitutional problem.[77] Following the decision of the High Court in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[78] (*Wilson*), however, there may be a question whether a judge currently serving on a federal court may be a member of a Royal Commission or an Official Inquiry. In *Wilson*, a Federal Court judge was nominated to provide a report in her personal capacity to a minister pursuant to s 10 of the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth).[79] A majority of the High Court found that this conferred a non-judicial function on a federal judge in a way that was incompatible with the holding of judicial office under Chapter III of the *Australian Constitution*.[80]

6.71 The majority in *Wilson* indicated that, in some circumstances, serving federal judges may be appointed to Royal Commissions. This was on the basis that Royal Commissioners perform different functions to those of a reporter appointed under s 10 of the *Aboriginal and Torres Strait Islander Heritage Act*—in particular, members of Royal Commissions generally determine facts and apply the law, rather than advise a minister on whether he or she should make a particular decision. Relevant considerations for deciding whether the appointment of a serving federal judge to a Royal Commission is compatible with the holding of judicial office under Chapter III would include the terms of reference of the Royal Commission, and the legislation enabling its establishment.[81] In *Wilson,* Justice Gaudron also noted that, historically, 'it is necessary to bear in mind that, to a large extent, functions [of Royal Commissions] were not carried out by Ch III judges'.[82]

6.72 The policy of the Federal Court generally is not to allow a Federal Court judge to be appointed as a Royal Commissioner, although there may be circumstances in which such appointment may be possible. An appointment may be made only with the agreement of the Chief Justice. Before approaching an individual judge, the executive

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

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

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

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

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

81 Ibid.

82 Ibid, 69.

should first consult with the Chief Justice, who in turn should conduct further consultation.[83]

6.73 In DP 75, the ALRC proposed that the *Inquiries Act* should provide that Royal Commissions and Official Inquiries 'shall be independent in the performance of their functions'.[84] It also proposed that the *Inquiries Handbook* should address the appointment of members of Royal Commissions and Official Inquiries. The matters addressed by the *Inquiries Handbook* should include:

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

(b) whether inquiry members should have certain attributes (for example, gender or cultural attributes).[85]

Submissions and consultations

Serving and retired judges

6.74 Commenting on Royal Commissions, the Law Council submitted:

> There are numerous reasons why judicial officers are viewed as the appropriate members of society to undertake this role. Firstly, judicial officers possess the skills and experience that make them uniquely qualified to conduct public inquiries, which generally require the examination of evidence, fact finding, assessment of the credibility of witnesses and setting out reasons for decisions. Secondly, judicial officers bring to a public inquiry a necessary perception of independence and impartiality from government and afford a sense of authority to the proceedings. These skills are particularly necessary when the inquiry is examining issues of conduct, as opposed to inquiries into social or economic policy.[86]

6.75 The Law Council noted that drawbacks of appointing serving judges as inquiry members inquiry included: potentially politicising judges; undermining judicial independence; and 'depleting already scarce judicial resources'. Further, judges may not have the necessary skills to conduct a specific inquiry. On balance, the Law Council was not opposed to the appointment of serving judges as inquiry members. Where possible, however, the Law Council preferred the appointment of a 'suitably qualified senior member of the profession or retired judicial officer'.[87]

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

84 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–3.

85 Ibid, Proposal 6–4.

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

87 Ibid. See also Law Council of Australia, *Submission RC 30,* 2 October 2009.

6.76 If a serving judge were to be appointed as an inquiry member, the Law Council suggested that this should be done in accordance with procedures set out by the Council of Chief Justices of Australia and New Zealand, which are similar to those of the Federal Court, discussed above. In its submission in response to DP 75, the Law Council suggested that such procedures should be set out in the *Inquiries Handbook.*[88]

6.77 It was noted in consultations that it was important for inquiry members to have a strong understanding of procedural fairness issues. In that context, it would be more appropriate for those with judicial experience to conduct inquiries as even experienced barristers have not had the same level of experience with respect to the requirements of procedural fairness. Training for inquiry members was also raised; the suggestion being that training was essential for inquiry members, regardless of whether they had judicial experience, because conducting an inquiry required a particular skill set. Further, it was noted that Australian lawyers and judges were trained in adversarial processes, which differ significantly from inquisitorial processes of inquiry.

Other criteria

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

> have sufficient qualifications and experience to conduct inquiries effectively. Typically this would require Commissioners to have judicial or at least post admission legal experience. However, in some instances, it may be more appropriate to have someone with equivalent qualifications in other fields. The key requirement being that the Commissioner is competent for the type of inquiry and ostensibly independent of Government.[89]

6.79 On the other hand, Millar cautioned against prescribing any criteria for the appointment of inquiry members on the basis that this 'may have the effect of eliminating the most suitable appointee(s) to conduct a particular inquiry'.[90] The AGS also doubted whether it was necessary to prescribe the process or criteria for appointment of inquiry members.[91]

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

> Selection of personnel should be entirely merit based, but should also recognise the nature and sensitivities of the inquiry. For instance, a public inquiry into indigenous issues should be headed by an indigenous person or someone with appropriate experience and knowledge. However, the overriding consideration must be his or her independence and objectivity (both in fact and as a public perception).[92]

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88 Law Council of Australia, *Submission RC 30,* 2 October 2009.
89 Liberty Victoria, *Submission RC 1A,* 12 May 2009.
90 G Millar, *Submission RC 5,* 17 May 2009.
91 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
92 Liberty Victoria, *Submission RC 1A,* 12 May 2009.

6.81 The CPSU noted the 'lack of broad representation among members of Royal Commissions and other inquiries'. It submitted:

> It is appropriate that the proposed handbook deal with these issues, with a view to broadening representation (with special attention given to the representation of women and people from Culturally and Linguistically Diverse Backgrounds).[93]

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

6.83 The President of the Administrative Appeals Tribunal (AAT), the Hon Justice Garry Downes, indicated that, within the AAT,

> there is a repository of considerable acknowledged, independent expertise in a wide range of government activity. Members of the Tribunal should be considered as appropriate persons to conduct inquiries. The Tribunal also has suitable facilities for the conducting of public inquiries.[94]

Independence of inquiry members

6.84 The Australian Collaboration strongly supported the proposal that both Royal Commissions and Official Inquiries should be independent in the performance of their functions.[95] The Accountability Round Table preferred a stronger statement that Royal Commissions and Official Inquiries 'have a duty to act independently in the exercise of their functions, powers and duties'. It also noted that a legislative provision 'should ensure that breach of the statutory obligation would be justiciable before the courts'.[96]

6.85 The Law Council supported

> the inclusion of a principle of independence in the *Inquiries Act* similar to the provision in the *Commissions of Investigation Act 2004* (Ireland), which has been referred to by the ALRC. … The inclusion of such a principle would reinforce other provisions in the current [*Royal Commissions Act*] and the proposed *Inquiries Act* which support the independence of Royal Commissions and Official Inquiries. Such provisions include those provisions dealing with the powers and immunities of inquiry members and the reporting obligations associated with inquiries.[97]

ALRC's view

6.86 It is appropriate for the person or authority that establishes an inquiry to appoint members of that inquiry. The Governor-General or minister that establishes an inquiry should consider, on a case-by-case basis, the skills, knowledge and experience

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93 Community and Public Sector Union, *Submission RC 25,* 22 September 2009.
94 G Downes, *Advice Correspondence*, 8 September 2009.
95 Australian Collaboration, *Submission RC 24,* 22 September 2009.
96 Accountability Round Table, *Submission RC 29,* 30 September 2009.
97 Law Council of Australia, *Submission RC 30,* 2 October 2009.

necessary to conduct that particular inquiry. There is no evidence that suggests that, currently, the executive fails to consider these matters.

6.87 The ALRC agrees with the Accountability Round Table that the independence of inquiry members should be clearly set out in legislation. The *Inquiries Act* should provide that inquiry members shall be independent in the exercise of their powers, and in the performance of their duties and functions. This will help to ensure public confidence in the independence of the inquiry. It also may allay some of the concerns in *Wilson* with respect to the independence of serving federal judges acting as inquiry members.

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

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

6.90 The appointment of inquiry members, however, should be addressed in an *Inquiries Handbook*. In particular, there should be some guidance concerning the necessary skills, knowledge and experience that an inquiry member should have. The ALRC suggests that many inquiries will require the involvement of those with legal, judicial or tribunal experience. For example, given that Royal Commissions may exercise significant coercive powers, it may be more appropriate to appoint a person who has an in-depth understanding of such powers. Many other inquiries, however, may benefit from having inquiry members with skills, knowledge or experience within the subject matter of a specific inquiry. If an inquiry is not likely to abrogate privileges or have serious adverse legal implications for those involved, a person without prior experience in the use of coercive powers may still be a suitable inquiry member due to their particular skills, knowledge and experience.

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

6.92 The ALRC also agrees with President Downes that members of tribunals may be appropriate candidates for appointment as inquiry members. Tribunal members, in addition to those with judicial experience, may have the requisite experience necessary to conduct an inquiry—and in particular an investigatory inquiry. If, in a particular inquiry, it is deemed necessary to appoint an inquiry member with legal, judicial or tribunal experience, the establishing authority should consider precisely what experience is necessary. The ALRC notes that the experience of a legal practitioner is not entirely analogous with the experience of a judge. An advocate's role is to argue or defend a particular case, whereas a judge is tasked with determining questions of fact and law based on the evidence, and to ensure that procedural fairness is afforded to the parties. As discussed in Chapter 15, it is envisaged that inquiries conducted under the recommended *Inquiries Act* will be more inquisitorial in nature than the procedure adopted in Australian courts.

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

6.94 Finally, the ALRC notes a lack of broad representation among members of Royal Commissions and other inquiries. For example, the only federal Royal Commission chaired by a woman reported in 1978.[98] Establishing authorities should consider ensuring a broader representation on inquiries established under the *Inquiries Act*. Whether inquiry members should have certain attributes—such as gender or cultural attributes—should also be considered by those establishing an inquiry.[99] Guidance on these matters could be included in the *Inquiries Handbook.*

6.95 Whether national security issues and information may be raised in an inquiry is another matter that should be considered when appointing an inquiry member. While the ALRC recommends in Chapter 13 that members of Royal Commissions and Official Inquiries should not be *required* to obtain a security clearance to access national security information, in certain inquiries it may be desirable to appoint a person who holds, or may obtain, a security clearance.[100] Guidance on this matter should be included in the *Inquiries Handbook.*

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

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

100 Recommendation 13–3.

Recommendation 6–5 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries shall be independent in the exercise of their powers and in the performance of their duties and functions.

Recommendation 6–6 The recommended *Inquiries Handbook* should provide guidance on the appointment of members of Royal Commissions and Official Inquiries. This guidance should include, having regard to the subject matter and scope of the inquiry, whether potential inquiry members:

(a) have the skills, knowledge and experience to conduct the inquiry;

(b) should have certain attributes (for example, gender or cultural attributes); and

(c) should hold or obtain a security clearance.

Multi-member inquiries

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

6.97 Currently, Royal Commissions can be conducted by one or more commissioners.[101] It has been noted that investigatory Royal Commissions—that is, Royal Commissions established to investigate a particular matter, such as the cause of a particular disaster or an allegation of corruption—tend to have fewer members than Royal Commissions established to provide policy advice. Only 18.5% of investigatory Royal Commissions appointed since 1950 have had more than one member, while 53% of the policy Royal Commissions appointed since this time have been multi-member Commissions.[102]

6.98 In IP 35, the ALRC sought feedback from stakeholders on multi-member inquiries.[103] In DP 75, the ALRC proposed that the *Inquiries Act* should provide that both Royal Commissions and Official Inquiries may have more than one inquiry member.[104]

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101 *Royal Commissions Act 1902* (Cth) s 1A.
102 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), [2.29].
103 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [3.19].
104 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–5.

Submissions and consultations

6.99 Millar submitted that, in some inquiries, it may be appropriate to have several inquiry members with a mix of qualifications.[105] The Law Council agreed that there should be

> provision for more than one member to be appointed to a Royal Commission or Official Inquiry. The Law Council agrees with the ALRC view that multi-member inquiries should increase the diversity of skills, knowledge and experience within an inquiry and result in a more efficient use of government resources through the sharing of the workload of an inquiry.[106]

6.100 In consultations, the majority of stakeholders who commented on this issue supported the appointment of more than one inquiry member for similar reasons. Depending on the subject-matter of the inquiry, it also may be appropriate for persons with certain attributes or characteristics to be appointed as inquiry members. Further, it was suggested that multi-member inquiries may be an efficient use of government resources, with multiple inquiry members able to share the inquiry workload.

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

ALRC's view

6.102 The ALRC notes that most recent Royal Commissions have had one member. Notwithstanding this, the ALRC agrees with stakeholders who suggested that there are several advantages to appointing more than one member in some inquiries. The recommended *Inquiries Act*, therefore, should provide that Royal Commissions and Official Inquiries may have more than one inquiry member. The chair of a multi-member inquiry, however, should have responsibility for making certain decisions. In other chapters of this Report, the ALRC notes where it is appropriate for the chair of an inquiry to make a decision.[107]

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

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105 G Millar, *Submission RC 5,* 17 May 2009.
106 Law Council of Australia, *Submission RC 30,* 2 October 2009.
107 See, eg, Recommendation 20–2.

Recommendation 6–7 The recommended *Inquiries Act* should provide that both Royal Commissions and Official Inquiries may have more than one inquiry member.

Legal practitioners assisting an inquiry

6.104 In this section, the ALRC considers whether the current arrangements for the appointment and role of counsel and solicitors assisting an inquiry are appropriate and should be included in the recommended *Inquiries Act.* Arrangements for appointing other staff members for inquiries are discussed in Chapter 8. Remuneration issues are considered in Chapter 9.

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

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

6.106 Recent practice has been to appoint both counsel and solicitors to assist Royal Commissions, referred to as 'counsel assisting' and 'solicitors assisting'.

Counsel assisting

6.107 At the outset of the AWB Inquiry, the Attorney-General appointed four counsel to assist the inquiry. These appointments were based on the recommendations of the Commissioner in charge of the inquiry, the Hon Terence Cole QC (Commissioner Cole). In turn, as noted in the inquiry report, Commissioner Cole based his recommendations on a shortlist of candidates drawn up by the AWB Inquiry in consultation with the Australian Government Attorney-General's Department (AGD). Commissioner Cole noted that efforts were made to select 'experienced barristers who possessed a range of skills and expertise relevant to the areas of investigation and law the Inquiry was likely to encounter'.[108]

6.108 In contrast, the report of the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission) noted that, at the outset of the inquiry, expressions of interest were invited by persons interested in becoming counsel assisting the inquiry. On the basis of applications received, and on the

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

recommendations of Commissioner Cole (who was also the Commissioner in charge of this inquiry), the Attorney-General appointed 13 counsel to assist the inquiry.[109]

6.109 While the Act does not define the nature of the role of counsel assisting, in practice he or she has a number of onerous duties, such as to identify and obtain all relevant evidence for the Commission.[110] It has been noted that counsel assisting an inquiry

> can play an important role in interacting with witnesses and will play a central role in hearings, where they are held, by making opening and closing statements, calling witnesses, and where appropriate, examining or cross-examining witnesses.[111]

Solicitors assisting

6.110 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.[112]

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

- interviewing potential witnesses and assisting with the preparation of witness statements;
- assisting in obtaining, analysing and preparing material to be presented by counsel assisting;
- aiding counsel assisting to finalise submissions arising from hearings;
- providing specialist legal advice; and
- carrying out related legal services.[113]

6.112 The Building Royal Commission again provides a contrast. In this inquiry, expressions of interest were sought from persons or firms interested in providing legal support to the inquiry. Solicitors were appointed by the inquiry in accordance with

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109 This number included three Queen's Counsel and one Senior Counsel: T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, [21]–[22].

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

111 Ibid, [13.3].

112 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).

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

criteria contained in its guidelines.[114] The inquiry noted that it may be an advantage if solicitors were able to draw on existing support structures and additional legal and other resources. The other criteria required the prospective solicitors to:

- Be able to commence work with the Commission in the immediate future;
- Be able to operate effectively and efficiently over the whole period of the Commission's inquiry;
- Be able to be based in Melbourne, but have the capacity to support hearings in all capital cities; and
- Be able to demonstrate that [the legal team] has no current or potential conflicts of interest, actual or perceived.[115]

6.113 A number of applications were received by the inquiry.[116] Only the AGS was able to fulfil all the criteria, so it provided all the solicitors that assisted the Building Royal Commission.[117]

6.114 In IP 35, the ALRC asked whether legislation establishing Royal Commissions or other public inquiries should set out criteria for the appointment of counsel and solicitors assisting, and if so, what these criteria should be.[118] In DP 75, the ALRC proposed that the *Inquiries Act* should provide that:

- in consultation with members of Royal Commissions and Official Inquiries, the Attorney-General may appoint legal practitioners to assist inquiry members; and
- legal practitioners assisting an inquiry are independent of inquiry members.[119]

Submissions and consultations

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

- the Commissioner's personal experience and soundings in relation to prospective appointees
- the mix of skills required for the particular inquiry

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114 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, [29].
115 Ibid, vol 22, [29]–[30].
116 Ibid, vol 22, [31].
117 Ibid.
118 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–2.
119 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–6.

- the availability of the appointees for the duration of the inquiry ie they may need to be away from their practice for some time
- any issues of conflict, and
- the location of the inquiry.[120]

6.116 The AGS submitted:

> We do not see that there is any marked difference in the underlying nature of the roles to be performed by counsel and solicitors assisting and for that reason we consider that it probably is desirable that solicitors as well as counsel are engaged on the same basis by being 'appointed' within the meaning of s 6FA [of the *Royal Commissions Act*].[121]

6.117 The Law Council suggested that the chair of a second tier of inquiry should be able to appoint counsel assisting. It noted that this was the approach taken in other jurisdictions.[122]

6.118 The role of legal practitioners appointed to assist inquiries attracted some comment. The AGS favoured a flexible approach to determining the role of a legal practitioner assisting, suggesting that the most appropriate system 'will depend upon the Commissioner's own preferences and the nature and breadth of the matter the subject of inquiry'. It noted that legal practitioners need to carry out independent tasks such as marshalling and tendering evidence as well as advising inquiry members.[123]

6.119 The AGS suggested that, in some cases,

> it may be appropriate to have a structure that builds in a degree of separation between the commissioner and the investigative process. This might be necessary in cases where the parties before the commission are conducting themselves in an adversarial manner and are likely to make collateral challenges to a commissioner's authority, for example, where there has been an allegation of bias.[124]

6.120 The AGS noted circumstances in which an inquiry member was criticised for not being inquisitorial and relying too heavily on counsel and solicitors assisting.[125]

6.121 The Law Council supported the ALRC's proposal that legal practitioners should be independent. In the Law Council's view, the proposal reinforced the 'traditional position of an independent profession'.[126] On the other hand, a number of stakeholders suggested that the appointment and role of counsel assisting did not need to be

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120 G Millar, *Submission RC 5,* 17 May 2009.
121 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
122 Law Council of Australia, *Submission RC 30,* 2 October 2009. See also Law Council of Australia, *Submission RC 9,* 19 May 2009.
123 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
124 Ibid.
125 Ibid.
126 Law Council of Australia, *Submission RC 30,* 2 October 2009.

addressed in legislation. Mr Kym Bills suggested that the ALRC's proposed legislative criterion of independence should be clarified

> so that the independence of legal practitioners assisting an inquiry is not such that they could go off on a frolic of their own regardless of the wishes of inquiry members. Governance arrangements for inquiries need to be clear.[127]

6.122 In consultations, it was noted that statutory provisions in inquiries legislation addressing counsel assisting indicated that an inquiry would be conducted in an adversarial way. It was suggested that any statutory requirement of independence would be undermined in practice, as legal practitioners do communicate with, and generally take some form of instruction from, inquiry members. It also was noted that a statutory requirement of independence is unnecessary as legal practitioners have existing professional obligations.

ALRC's view

6.123 The ALRC notes stakeholder views that inquiries tend to be dominated, sometimes unnecessarily, by lawyers. If inquiry members adopt an adversarial approach—for example, public hearings in which examination and cross-examination is allowed—the need for the advocacy experience of counsel or solicitors may be necessary. Not all inquiries established within the ALRC's recommended statutory framework will need to adopt such an adversarial procedure.

6.124 The best way to address the dominance of lawyers in inquiries, however, is not to exclude them from the recommended *Inquiries Act* provisions that deal with the appointment and role of legal practitioners assisting Royal Commissions and Official Inquiries. In many inquiries, it will be appropriate to appoint legal practitioners. A statutory provision could set out a general appointment process for legal practitioners. A statutory provision also could make clear what protections are enjoyed by a legal practitioner assisting an inquiry.[128] A legal practitioner assisting an inquiry, however, should not be able to exercise coercive information-gathering powers.[129]

6.125 The recommended *Inquiries Act* should preserve the current arrangements for appointing legal practitioners to assist an inquiry. It is appropriate for a person other than an inquiry member to have a role in the appointment of legal practitioners assisting. It is the ALRC's view, therefore, that the Attorney-General should continue to make these appointments. In practice, inquiry members will need to work closely with legal practitioners. Inquiry members should be consulted before legal practitioners are appointed to assist an inquiry, and this requirement should be made clear in the *Inquiries Act*.

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127 K Bills, *Submission RC 19,* 17 September 2009.

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

129 This is discussed further in Part D.

6.126 The *Inquiries Act* should not specify that legal practitioners are independent of inquiry members. As stakeholders noted, such a requirement may cause problems in practice. The ALRC agrees that inquiry members should determine how inquiries established under the Act are to be conducted. A statutory requirement for the independence of legal practitioners assisting an inquiry is unnecessary as legal practitioners are already subject to professional ethical obligations. A Royal Commission or other statutory inquiry falls within the definition of a court for the purposes of nearly all the *Model Rules of Professional Conduct and Practice* (Model Rules), which were developed by the Law Council and adopted in revised form in 2002. The Model Rules inform a number of rules in Australian jurisdictions.[130]

6.127 Finally, the ALRC notes that the AGS has provided solicitors to assist most recent Royal Commissions. This continuity improves institutional memory between inquiries. In several cases, the AGS may be the only firm without a conflict of interest. In the ALRC's view, however, the *Inquiries Act* should not stipulate that legal assistance to inquiries established under the Act be reserved for, or 'tied' to, the AGS.

Expert advisors

6.128 In this section, the ALRC considers whether the *Inquiries Act* recommended in this Report should provide for the appointment of expert advisors. The *Inquiries Act 2005* (UK) provides for the appointment of expert 'assessors' to assist inquiry members. Assessors have an advisory role and do not exercise powers under the Act.[131] The Explanatory Notes to the Act state:

> The role of assessors will vary from inquiry to inquiry, but in essence they are experts in their own particular field whose knowledge, where necessary, can provide the panel with the expertise it needs in order to fulfil an inquiry's terms of reference. For example in the Victoria Climbié inquiry, four expert assessors, including a consultant paediatrician and a detective superintendent, joined the chairman, Lord Laming. Assessors do not have any of the inquiry panel's powers and are not responsible for the inquiry report or findings. An assessor could be appointed for the duration of the inquiry, but it would also be possible to appoint an assessor only for part of the inquiry, to assist when evidence on a particular subject was being considered.[132]

6.129 In the context of Federal Court proceedings, O 34B of the *Federal Court Rules* (Cth) provides for the appointment of a person with specialised knowledge to assist a judge ('expert assistant'). An expert assistant may be appointed only with the consent of the parties, and may not provide evidence in the proceedings. Further, an

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130 See, eg, the *Barristers' Rules 2008* (NSW). Also note that the ALRC made a number of recommendations about professional obligations of legal practitioners and the Model Rules in its 2000 Report, *Managing Justice* (ALRC 89). For further information about professional obligations of legal practitioners, see S Ross, *Ethics in Law* (2nd ed, 1998).

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

132 Parliament of United Kingdom, *Explanatory Notes to Inquiries Act* (2005), [23].

expert assistant may provide assistance only on issues identified by the Court or Judge, and in the form of a written report.[133]

6.130 In its 2000 Report, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89), the ALRC considered the appointment of expert assistants and assessors under federal legislation and the *Federal Court Rules* (Cth). The ALRC noted several benefits of an expert advisory role, but also noted some stakeholders had concerns about the scope of such a role.[134] The ALRC recommended that the Federal Court should continue to develop appropriate procedures and arrangements, in consultation with legal professional and user groups, to allow judges to benefit from expert assistance in understanding the effect or meaning of expert evidence.[135]

6.131 In IP 35, the ALRC also sought feedback on whether it was always appropriate for those assisting an inquiry to be legal practitioners.[136] In DP 75, the ALRC proposed that the *Inquiries Act* should provide that Royal Commissions and Official Inquiries may appoint an expert or experts in any field as an advisor to provide technical or specialist advice.[137]

Submissions and consultations

6.132 Several stakeholders supported the introduction of a more general advisor role in legislation establishing public inquiries. The Law Council noted that expert advisors would be able to provide detailed knowledge on a particular subject arising in an inquiry.[138] Some stakeholders suggested that Royal Commissions do not need to be dominated by lawyers. It was suggested that appointing non-legal advisors would not undermine the role of legal practitioners, but rather would enhance the information and advice available to inquiries.

6.133 Turnbull queried whether the *Inquiries Act* should provide that experts should be independent of inquiries. He also queried whether there should be an obligation on an inquiry to do more than 'consider' expert advice.[139]

6.134 In consultations, it was noted that the use of expert advisors may save time and resources. It was also noted that a statutory provision empowering an inquiry member to appoint an expert advisor may be an important safeguard against any challenges that otherwise may be made to such appointment. It was also suggested that the *Inquiries Act* should allow inquiries to engage all staff as required.

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133 *Federal Court Rules* (Cth) O 34B r 3.
134 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [7.148]–[7.157].
135 Ibid, Recs 85, 76.
136 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [6.14].
137 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 6–7.
138 Law Council of Australia, *Submission RC 30,* 2 October 2009.
139 I Turnbull, *Submission RC 22,* 21 September 2009.

ALRC's view

6.135 The *Inquiries Act* should provide for the appointment of 'expert advisors' to Royal Commissions and Official Inquiries. This will allow for the appointment to an inquiry of a non-legal advisor where an inquiry member has legal experience rather than a detailed knowledge of the subject-matter of the inquiry. It also will allow for the appointment of a legal advisor where an inquiry member is appointed because he or she has experience with the subject-matter of the inquiry but does not have extensive legal knowledge.

6.136 In the ALRC's view, there is no need for the *Inquiries Act* to stipulate that an advisor is independent of the inquiry member, and inquiry members should not be required to take into account the views of an advisor. This would decrease flexibility. The advisor role should be as adaptable as possible—for example, an advisor may be appointed for part or all of an inquiry.

6.137 The *Inquiries Act* should make clear, however, that an advisor may not exercise coercive information-gathering powers under the Act. Further, given that expert advisors are appointed to assist inquiry members, it is appropriate for the advisor to be appointed by those members.

6.138 It is the ALRC's view that the *Inquiries Act* does not need to provide for the appointment of other staff. It has not heard any feedback in this Inquiry that suggests that the appointment of staff has been a problem for Royal Commissions and other inquiries. In Chapter 8, the ALRC recommends that an Australian Government department should be allocated responsibility for the administration of Royal Commissions and Official Inquiries.[140] This department could assist inquiries with the appointment of staff, should this be required.

Recommendation 6–8 The recommended *Inquiries Act* should provide that, in consultation with members of Royal Commissions and Official Inquiries, the Attorney-General may appoint legal practitioners to assist inquiry members.

Recommendation 6–9 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may appoint an expert or experts in any field as an advisor to provide technical or specialist advice.

140 Recommendation 8–2.

7. Reports and Recommendations

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Introduction

7.1 In Chapter 5, the ALRC recommends that the *Royal Commissions Act 1902* (Cth) should be renamed the *Inquiries Act* and amended to enable the establishment of Royal Commissions and Official Inquiries.[1] In this chapter, the ALRC considers issues relating to reports and recommendations of Royal Commissions and Official Inquiries established under the recommended *Inquiries Act*. In particular, the ALRC considers whether there should be any government follow-up in response to inquiry reports and recommendations.

7.2 As discussed in Chapter 2, the primary function of a public inquiry is to inquire into, and report on, the subject matter in respect of which it is established by the executive arm of government. Public inquiries, therefore, have an advisory function—the executive is not required to implement inquiry recommendations. Further, there are no obligations on the executive to table in Parliament reports of Royal Commissions or other public inquiries, respond to inquiry recommendations, or publish updates on implementation of recommendations.

1 Recommendation 5–1.

Inquiry reports

7.3 The reporting stage of an inquiry is an essential component of the inquiry process. Members of Royal Commissions make findings about wrongdoing or recommendations for action or reform, and deliver these findings to the Governor-General in the form of a report.[2]

7.4 The ALRC did not hear concerns from stakeholders about the process for delivering reports, and sees benefit in preserving a similar process for the delivery of reports of inquiries established under the recommended *Inquiries Act.* In other words, an inquiry established under the Act should report to the authority that establishes it. Further, while inquiry staff and others assisting an inquiry also may assist in the preparation of an inquiry report, the ALRC's view is that inquiry members should be responsible for an inquiry's report and recommendations.

7.5 If the ALRC's recommendations in Chapter 6 are accepted, Royal Commissions would continue to report to the Governor-General, and Official Inquiries would report to a minister. Generally, an Official Inquiry would report to the minister that established it, but in some circumstances it may be appropriate for it to report to another minister. The effect of s 19 of the *Acts Interpretation Act 1901* (Cth) is that a minister may authorise a non-portfolio minister or a parliamentary secretary to act on his or her behalf. Further, ss 19B and 19BA of the *Acts Interpretation Act* provide that the Governor-General may make orders directing that statutory provisions may have effect with respect to substituted ministers where: the ministerial position specified in a statutory provision no longer exists; or where a reference to a minister is inconsistent with changed administrative arrangements. In the ALRC's view, these provisions adequately address potential situations where it is no longer appropriate or possible for an Official Inquiry to report to the minister that established it.

Recommendation 7–1 The recommended *Inquiries Act* should provide that:

(a) Royal Commissions report to the Governor-General; and

(b) Official Inquiries report to the minister that established the Official Inquiry.

Tabling reports in Parliament

7.6 The effect of tabling a report in Parliament is that it is made public. The standing orders of the Senate and House of Representatives provide that all documents

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

presented to the chamber are authorised for publication.[3] Further, significant documents tabled in either House of Parliament are contained in the *Parliamentary Papers Series*, which is distributed to several libraries in Australia.

7.7 The *Royal Commissions Act* does not require the tabling in Parliament of a report prepared as a result of an inquiry established under that Act. In this respect, the Act differs from other federal legislation that requires the tabling of reports of reviews or inquiries, such as s 12 of the *Productivity Commission Act 1998* (Cth), s 23 of the *Australian Law Reform Commission Act 1996* (Cth) and ss 46 and 46M of the *Australian Human Rights Commission Act 1986* (Cth).

7.8 In addition, several state and territory Acts address the tabling in Parliament of reports prepared by public inquiries. The Victorian and South Australian Parliaments have enacted legislation to provide for the tabling of reports resulting from specific inquiries.[4] In Queensland, the *Commissions of Inquiry Act 1950* (Qld) provides that a report received by a minister *may* be tabled in the Legislative Assembly.[5] In the ACT, the *Royal Commissions Act 1991* (ACT) and *Inquiries Act 1991* (ACT) also provide that the Chief Minister *may* present a report, or part of a report, to the Legislative Assembly.[6] If this does not take place, however, the Chief Minister is required to provide a written explanation to the Legislative Assembly.[7]

7.9 In practice, the Australian Government has tended to table Royal Commission reports promptly.[8] The tabling of Royal Commission reports is noted briefly in Australian Government guidelines that address the tabling of government documents.

> Some documents are required to be tabled by statute. These include annual reports and reports of the Australian Law Reform Commission and the Productivity Commission. Other documents that are tabled include Treaties and reports of Royal Commissions. …
>
> The [Department of the Prime Minister and Cabinet] Tabling Officer should be consulted well in advance in regard to the tabling of reports of Royal Commissions. Factors to be considered include whether:

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3 Parliament of Australia—House of Representatives, *Standing and Sessional Orders* (1 December 2008), Standing Order 203; Parliament of Australia—Senate, *Standing and Sessional Orders*, 1 June 2009, Senate Order 167.

4 *Longford Royal Commission (Report) Act 1999* (Vic) s 4; *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 11. Also see the *Bushfires Royal Commission (Report) Act 2009* (Vic). The *Royal Commissions Act 1923* (NSW) sets out the requirements for tabling reports when the Parliament is not sitting: *Royal Commissions Act 1923* (NSW) s 14B.

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

6 *Royal Commissions Act 1991* (ACT) s 16; *Inquiries Act 1991* (ACT) s 14A.

7 *Royal Commissions Act 1991* (ACT) s 16A; *Inquiries Act 1991* (ACT) s 14B.

8 For example, recent Royal Commission reports tabled in Parliament include D Hunt, *Report of the Inquiry into the Centenary House Lease* (2004) and T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006): Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2004, 101 (P Ruddock—Attorney-General); Commonwealth, *Parliamentary Debates,* House of Representatives, 27 November 2006, 45 (P Ruddock—Attorney-General).

- a ministerial statement is to be made by the Minister to coincide with the tabling of the report, and
- the volume of the report requires any special arrangements to be considered for copy requirements.[9]

7.10 Reports tabled in Parliament attract parliamentary privilege, which means that civil or criminal actions cannot be taken against 'an officer of a House' who lays a document before either House of Parliament.[10] Notwithstanding this, there may be reasons why there should be restrictions on the tabling of some parts of an inquiry report. For example, parts of a report may disclose national security information, or identify or adversely affect a person who was not the subject of an adverse finding.[11] Royal Commissions are also exempt from the operation of the *Privacy Act 1988* (Cth), which means that such inquiries do not need to comply with privacy principles such as those dealing with disclosure of personal information.[12]

7.11 In its Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that the *Inquiries Act* should contain a presumption that reports of Royal Commissions and Official Inquiries should be tabled by the Australian Government within 15 sitting days of receiving the final report.[13] The ALRC noted that there may be reasons why the whole report of an inquiry should not be tabled in Parliament. In such circumstances, it proposed that, within 15 sitting days, the Australian Government should table a statement of reasons why the whole report is not being tabled.[14]

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9 Australian Government Department of the Prime Minister and Cabinet, *Guidelines for the Presentation of Government Documents to the Parliament (Including Government Responses to Committee Reports, Ministerial Statements, Annual Reports and Other Instruments)*, [2.2], [4.34].

10 *Parliamentary Privileges Act 1987* (Cth) s 10.

11 Also note that, in Ch 15, the ALRC recommends that an inquiry should not make any findings that are adverse to a person unless the inquiry has taken all reasonable steps to give notice of proposed adverse findings or the risk or likelihood of adverse findings, and disclose the relevant material relied upon and the reasons on which such a finding might be based. Further, the inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and the inquiry should properly consider any response given: Recommendation 15–1.

12 *Privacy Act 1988* (Cth) s 7(1)(a)(v). In 2008, the ALRC expressed the view that Royal Commissions should continue to be exempt from the operation of the *Privacy Act.* It also recommended that the Department of the Prime Minister and Cabinet, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines for Royal Commissions: Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), Rec 38–1. If the ALRC's recommendations in this Report are accepted, the *Privacy Act* may require consequential amendment to exclude acts and practices of Official Inquiries: see Appendix 6.

13 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 7–2.

14 Ibid.

Submissions and consultations

7.12 Most stakeholders supported the introduction of a tabling requirement for Royal Commission reports. For example, the Community and Public Sector Union (CPSU) submitted that, while the executive generally does table inquiry reports,

> it would be preferable that such reporting requirements were contained in the legislation. … In deciding to hold a Royal Commission inquiry, the Government has obviously determined that the particular issue is of such significance that the expense and time involved in Royal Commission proceedings are justified. It should follow, therefore, that it is incumbent on the Government to properly publish and respond to its findings.[15]

7.13 The Law Council of Australia (Law Council) supported a statutory requirement to table inquiry reports.

> The need to formally inform Parliament of the recommendations of a Royal Commission or other form of public inquiry has been recognised in other jurisdictions. For example, section 26 of the [*Inquiries Act 2005* (UK)] provides a requirement that the findings of a public inquiry be laid before Parliament.[16]

7.14 Mr Kym Bills also supported a tabling requirement.

> Under the *Transport Safety Investigation Act 2003* [Cth] the ATSB [Australian Transport Safety Bureau] is required to publish its investigation reports when completed and this works well. However, when the ATSB has occasionally conducted investigations for other jurisdictions under the legislation of the relevant State, the relevant Department and/or Minister has sometimes delayed release of the final report for many months because of perceived political sensitivities or other priorities. This can compromise action to improve future safety.

7.15 On the other hand, the Australian Government Solicitor (AGS) did not support a statutory requirement to table inquiry reports.

> In our experience, it is the usual practice of governments to table in Parliament reports by Royal Commissions and other public inquiries. … [W]e see these as matters for the government of the day.[17]

7.16 Further, the AGS was concerned that

> [a] requirement to table an inquiry report within a specific time period such as 15 days may only hinder best effect being given to some recommendations of an inquiry or lead to them being treated with a higher secrecy than might have been the case where there was unfettered discretion as to when to table the report.

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15 Community and Public Sector Union, *Submission RC 10,* 22 May 2009. See also Accountability Round Table, *Submission RC 29,* 30 September 2009; Liberty Victoria, *Submission RC 26,* 27 September 2009; Community and Public Sector Union, *Submission RC 25,* 22 September 2009; K Bills, *Submission RC 19,* 17 September 2009.

16 Law Council of Australia, *Submission RC 9,* 19 May 2009. See also Law Council of Australia, *Submission RC 30,* 2 October 2009.

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

> In our view, Parliamentary accountability itself will generally be an adequate guard against any excessive disposition to secrecy by governments in handling inquiry reports.[18]

7.17 It was also suggested in consultations that there was no need to include a tabling requirement in inquiries legislation because an inquiry report would be tabled in Parliament to attract parliamentary privilege. It was also noted that, even if there was a requirement to table inquiry reports, this would not guarantee parliamentary scrutiny of a report tabled at a busy time.

7.18 Some stakeholders directly addressed the tabling of reports arising from non-Royal Commission forms of inquiry. In consultations, concerns were expressed that a failure to table reports of any inquiry would create public suspicion—particularly if hearings were held in private, or an inquiry found there was no wrongdoing.

7.19 Stakeholders noted that a requirement to table the report of an inquiry should not always require the tabling of that report in its entirety. For example, Liberty Victoria submitted that 'reports from public inquiries should be tabled in Parliament (redacted or amended as necessary)'.[19] Further, the Law Council suggested that consideration should be given to 'means to protect personal information or information concerning national security'.[20] Mr Graham Millar noted that a requirement to table reports should be 'subject to any confidentiality requirements for part or all of a particular report'.[21]

7.20 The CPSU suggested that a statutory tabling requirement should set out a specified time period in which that report should be tabled.[22] Another stakeholder supported a mandatory tabling period of 15 days.[23] On the other hand, Millar submitted that

> a requirement that reports of such inquiries be tabled within 15 sitting days could result in the government having a little over a month to respond to the reports if the Parliament is sitting at the time. This may not be an adequate timeframe for the government to provide a considered response.[24]

7.21 The Australian Intelligence Community (AIC) supported a requirement to table inquiry reports. It also suggested that

> consideration be given to clarifying that Commission members would be able to seek advice from the IGIS [Inspector-General of Intelligence and Security] for the purpose of determining whether to table a report or part of a report.[25]

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18 Australian Government Solicitor, *Submission RC 31,* 6 October 2009.
19 Liberty Victoria, *Submission RC 1,* 6 May 2009.
20 Law Council of Australia, *Submission RC 9,* 19 May 2009.
21 G Millar, *Submission RC 5,* 17 May 2009.
22 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.
23 K Bills, *Submission RC 19,* 17 September 2009.
24 G Millar, *Submission RC 21,* 21 September 2009.
25 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.

ALRC's view

7.22 The *Inquiries Act* recommended in this Report should contain a presumption that reports of Royal Commissions and Official Inquiries will be tabled. With respect to Royal Commissions, such a requirement merely formalises an existing practice and should not result in a significant additional burden on government. Further, a tabling requirement for Royal Commissions and Official Inquiries is in keeping with principles of government openness, transparency and accountability, and requirements in similar federal, state and territory legislation.

7.23 The ALRC agrees there are circumstances in which parts of a report should not be tabled in Parliament—for example, when an inquiry report deals with matters of national security. One option is to prescribe in the *Inquiries Act* categories of information that may form the basis of excisions from an inquiry report. In the ALRC's view, this is not the best approach. An exhaustive list in such a provision may not cover all relevant situations, and, if it includes a catch-all provision, may leave too much discretion in the hands of the executive. Instead, the ALRC recommends that the Australian Government should table the entire final report of a Royal Commission or Official Inquiry, and if it does not table a part or parts of the report, it should also table a statement of reasons explaining why it has not tabled the whole report. This is comparable to the ACT inquiries legislation, discussed above. It is a flexible approach that preserves the accountability of the executive to Parliament.

7.24 The ALRC notes that the Australian Government may consult with a number of stakeholders in determining whether to table a whole report. For example, if the inquiry report contains matters relevant to national security, it may be appropriate to consult with the IGIS and similar bodies. It also may be appropriate for inquiry members to conduct such consultations so that they can advise the Australian Government to treat particular parts of a report as confidential.

7.25 Inquiry reports should be tabled within a specified time period. Legislation requiring the tabling in Parliament of the reports of inquiries conducted by standing bodies generally include a requirement that such reports are to be tabled by the relevant minister within 15 sitting days, and occasionally within 25 sitting days.[26]

7.26 Given that the inquiries established under the *Inquiries Act* should consider matters of public importance—and, in the case of Royal Commissions, substantial public importance—reports should be tabled in a period less than 25 sitting days after their receipt by the Australian Government. In the ALRC's view, a period of 15 sitting days is a reasonable time for the Australian Government to make an inquiry report public.

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26 For examples of statutory provisions requiring the tabling of comparable reports within 15 sitting days, see *Australian Law Reform Commission Act 1996* (Cth) s 23; *Ombudsman Act 1976* (Cth) s 19; *Australian Human Rights Commission Act 1986* (Cth) s 46. Section 12 of the *Productivity Commission Act 1998* (Cth) provides that a comparable report needs to be tabled within 25 sitting days.

7.27 Finally, if Recommendation 7–1 is accepted, Royal Commissions will report to the Governor-General. As a matter of practice, therefore, the Governor-General should ensure that the relevant minister has a copy of the report of a Royal Commission soon after the Governor-General receives it, so that the minister is able to table that report within the required time period.

Recommendation 7–2 The recommended *Inquiries Act* should provide that, within 15 sitting days of receiving the final report from a Royal Commission or Official Inquiry, the Australian Government should table in Parliament the report or, if a part of the report is not being tabled, a statement of reasons why the whole report is not being tabled.

Government responses to public inquiries

7.28 Another issue for this Inquiry is whether the recommended *Inquiries Act* should require the Australian Government to respond formally to recommendations made in an inquiry report. This response could be in the form of a ministerial statement or other formal response in Parliament, or in another form. Currently, the *Royal Commissions Act* does not contain any such requirement.

7.29 In practice, the federal minister tabling a report from an inquiry appointed under the *Royal Commissions Act* may inform Parliament of the government's position on the report generally. For example, when tabling the report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme (2006), the Hon Philip Ruddock MP stated that, '[a]s recommended, the government will establish a task force of relevant Australian government agencies to consider possible prosecutions in consultation with the Commonwealth Director of Public Prosecutions' and would 'move speedily' to consider other recommendations made in the inquiry.[27]

7.30 Further, a federal minister may deliver a formal ministerial statement. When tabling the report of the Royal Commission to Inquire into the Centenary House Lease, the then Attorney-General, the Hon Philip Ruddock MP, made a ministerial statement supporting the findings of the Royal Commission.[28]

7.31 A recent South Australian Act expressly sets out an obligation for the government to respond to recommendations made in two specific inquiries. The *Commissions of Inquiry (Children in State Care and Children on APY Lands) Act 2004*

27 Commonwealth, *Parliamentary Debates,* House of Representatives, 27 November 2006, 45 (P Ruddock—Attorney-General).

28 Commonwealth, *Parliamentary Debates,* House of Representatives, 9 December 2004, 101 (P Ruddock—Attorney-General).

(SA) required the minister responsible for administering the Act to respond in Parliament to the recommendations made in those two inquiries.[29]

7.32 In addition to making a formal response in Parliament to a report of a Royal Commission or other public inquiry, federal ministers may make a public statement through a press release.[30] The Australian Government also has published official responses to some Royal Commission recommendations.[31]

7.33 In December 2008, the Australian Government released its response to an inquiry that was not established under the *Royal Commissions Act*—the Clarke Inquiry into the Case of Dr Mohamed Haneef (Clarke Inquiry). The Clarke Inquiry has its own website, which contains the report from the inquiry and other information.[32] In addition, this website contains a hyperlink to the website of the Australian Government Attorney-General's Department, which contains the Government's response to the Clarke Inquiry.[33]

7.34 In IP 35, the ALRC asked whether the Australian Government should be required by statute within a specific time frame to respond to recommendations made by Royal Commissions and other public inquiries.[34] In DP 75, the ALRC expressed the view that the proposed *Inquiries Act* should not require the government to provide a response to recommendations made by Royal Commissions and Official Inquiries.[35]

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29 *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 11A. This Act provided for the establishment of two inquiries to consider: allegations of failure on the part of government agencies, employees or other relevant persons to investigate or appropriately deal with allegations concerning sexual offences against children under the guardianship, custody, care or control of the South Australian Minister responsible for the protection of children; and the incidence of sexual offences against children resident on the Anangu Pitjantjatjara Yankunytjatjara lands in Central Australia.

30 Upon the tabling of the report of the inquiry into the HIH Royal Commission, the then Treasurer, the Hon Peter Costello MP, suggested in a press release that the Australian Government supported 'in-principle' some of the inquiry's recommendations, and would 'consider expeditiously the Report's other recommendations and announce further details of its response': P Costello (Treasurer), 'Report of the HIH Royal Commission' (Press Release, 16 April 2003).

31 For example, in 1992 the Keating Government released a response to the Royal Commission into Aboriginal Deaths in Custody (1991): Australian Government, *Aboriginal Deaths in Custody—Response by Governments to the Royal Commission* (1992).

32 *Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008) <www.haneefcaseinquiry.gov.au/> at 4 August 2009.

33 Australian Government Attorney-General's Department, *Australian Government Responses to the Clarke Inquiry and other Counter-Terrorism Reviews—December 2008* (2008) <www.ag.gov.au> at 4 August 2009.

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

35 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [7.34].

Submissions and consultations

7.35 Liberty Victoria submitted that inquiry reports should 'require a formal government response within 90 days. Ideally both the report and the government's response should be available online'.[36]

7.36 The CPSU agreed that the Australian Government should be required to respond to recommendations made by an inquiry.

> Royal Commissions have often inquired into matters that are highly controversial, such as the AWB Inquiry. If the Government can hide behind the auspices of a Royal Commission inquiry without ever having to deal with the substantive issues and recommendations coming out of that inquiry in a meaningful way, Royal Commissions will be a potential tool for eroding openness and transparency in government, rather than enhancing it.[37]

7.37 The Law Council suggested that new inquiries legislation could include a more formal requirement for a minister to respond in Parliament. It cautioned, however, that

> [w]hile Governments are generally quick to provide some form of public statement in response to the findings of a Royal Commission, this is generally not followed by any formal commitment to implement the recommendations.[38]

7.38 In its submission on DP 75, the Law Council further submitted hat

> the Government should also provide reasons why it has not accepted certain recommendations and should provide its response to the recommendations as soon as practicable after it has received them.[39]

7.39 The AGS did not support a statutory requirement for the Australian Government to respond publicly to recommendations made by Royal Commissions and other public inquiries. It suggested that responding to inquiry recommendations was usual practice, and, in any event, a matter for the government of the day.[40]

7.40 In consultations, a number of stakeholders queried the utility of requiring the Australian Government to provide a response to inquiry recommendations.

ALRC's view

7.41 The recommended *Inquiries Act* should not require the Australian Government to provide a formal response in Parliament, or any other response, to reports of Royal Commissions and Official Inquiries. If the ALRC's recommendation with respect to tabling inquiry reports is accepted, a minister tabling a report or statement generally

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36 Liberty Victoria, *Submission RC 1,* 6 May 2009.
37 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.
38 Law Council of Australia, *Submission RC 9,* 19 May 2009.
39 Law Council of Australia, *Submission RC 30,* 2 October 2009.
40 Australian Government Solicitor, *Submission RC 15,* 18 June 2009. See also Australian Government Solicitor, *Submission RC 31,* 6 October 2009.

will make some comment about the Australian Government's response to recommendations. If members of Parliament are concerned that a minister does not do so, or disagree with his or her comments, that minister will be subject to parliamentary scrutiny in the usual way.

7.42 The ALRC notes concerns that positive comments about inquiry recommendations, made by the Australian Government at the time it releases an inquiry report, do not always mean that those recommendations will be implemented. The Australian Government may need some months to consider precisely how to implement recommendations made by Royal Commissions and Official Inquiries. The ALRC's view, therefore, is that requiring the Australian Government to respond to inquiry recommendations at the time of tabling an inquiry report would be of limited practical benefit to the public. A more pressing issue is whether there should be a requirement to provide information about actual implementation of inquiry recommendations.

Implementation of recommendations

7.43 Given the many and varied functions of public inquiries, their effectiveness is measured in a number of ways, for example, by implementation of reports, critical feedback from experts, judicial and academic citation of reports, or even the way that recommendations affect popular thinking on social issues.[41] Implementation of recommendations is one important measure of the effectiveness of inquiries. In this section, the ALRC considers whether the recommended *Inquiries Act* should require the Australian Government to provide information about implementation of recommendations made by Royal Commissions and Official Inquiries.

7.44 The *Royal Commissions Act* does not require the Australian Government to provide updates on implementation of Royal Commission recommendations. The *Commissions of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) again provides a contrast. The minister responsible for administering that Act is required to provide a number of ongoing reports in Parliament on the implementation of the recommendations arising from these inquiries.[42]

7.45 Currently, the Australian Government provides ad hoc updates on implementation of recommendations made by public inquiries. One example of comprehensive online reporting relates to a recent inquiry that was appointed under the *Quarantine Act 1908* (Cth). The website of the Equine Influenza Inquiry (2008) contains the report from, and other information about, the inquiry.[43] It also contains a

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41 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 202, 216–220.

42 *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 11A.

43 *Equine Influenza Inquiry* (2008) <www.equineinfluenzainquiry.gov.au/> at 4 August 2009. Note that the Equine Influenza Inquiry had many of the same powers as commissions established under the *Royal Commissions Act 1902* (Cth).

link to the Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) website.[44] It also provides access to the Government's official response to the inquiry report, and a telephone number for general inquiries about the report and the Government's response. The DAFF website also provides a link to the website of the Australian Quarantine Inspection Service, which provides extensive information about ongoing implementation of recommendations, including Implementation Status Reports.[45]

7.46 There is no central body or website, however, that provides access to official responses to Royal Commission recommendations. Further, there is no central body or website that tracks implementation of accepted recommendations. The most recent inquiries conducted under the *Royal Commissions Act* have their own websites from which the inquiry reports, and other material, may be downloaded. These websites, however, do not contain information about the Government's response to the reports or actual implementation of recommendations.[46]

7.47 In Australia, there is no dedicated body that assists with the implementation of recommendations made by Royal Commissions or other public inquiries.[47] This may be contrasted with recent amendments to New Zealand Cabinet practice. Upon the completion of a project referred to the New Zealand Law Commission (NZLC) by the New Zealand Government, the NZLC prepares on behalf of the relevant minister the Cabinet position paper on the report.[48] If the minister and relevant Cabinet Committee approves of the paper, it is submitted to a Cabinet committee for approval of the recommendations.[49] If Cabinet accepts the recommendations, and a Bill is required,

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44 Australian Government Department of Agriculture Fisheries and Forestry, *Equine Influenza Inquiry Report and Response* (2008) <www.daff.gov.au/about/publications/eiinquiry/> at 4 August 2009.

45 Australian Government Australian Quarantine and Inspection Service, *Equine Influenza Inquiry—The Government's Response* (2008) <www.daff.gov.au/aqis/about/eiimplementation> at 4 August 2009.

46 See, eg, *The HIH Royal Commission* (2003) <www.pandora.nla.gov.au/pan/23212/20030418-0000/www.hihroyalcom.gov.au/index.html> at 4 August 2009; *Royal Commission into the Building and Construction Industry* (2003) <www.pandora.nla.gov.au/pan/24143/20040427-0000/www.royalcombci.gov.au/index.html> at 4 August 2009; *Inquiry into the Centenary House Lease* (2004) <www.ag.gov.au/agd/www/centenaryhome.nsf> at 4 August 2009; *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry.gov.au/> at 4 August 2009.

47 The establishment in 2005 of the Office of the Building and Construction Commissioner represents a partial implementation of a recommendation of the Royal Commission into the Building and Construction Industry: T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 1, 27, 29; Australian Government Office of the Building and Construction Commissioner, *About Us* (2009) <www.abcc.gov.au/abcc/AboutUs/> at 4 August 2009.

48 New Zealand Department of the Prime Minister and Cabinet, *Cabinet Office Circular [CO (07) 4]—Law Commission: Processes for Project Selection and Government Response to Reports*, 2 August 2007, [12]. This Cabinet paper is to reflect 'the views of the Minister and all relevant agencies, and incorporating split recommendations where there is no consensus'. This takes place unless the NZLC is otherwise directed by the relevant minister.

49 Ibid.

Cabinet will add this Bill to the Legislation Programme.[50] The New Zealand Cabinet Office monitors the progress of responses to NZLC reports.[51]

7.48 In IP 35, the ALRC asked whether the Australian Government should be required to make publicly available information about its implementation of recommendations made by Royal Commissions or other public inquiries.[52] In addition, the ALRC asked whether a government department or some other permanent body should be required to coordinate the government's response to, and monitor the implementation of, recommendations made by Royal Commissions or other public inquiries.[53]

7.49 In DP 75, the ALRC proposed that the *Inquiries Act* should require the Australian Government to publish an update on implementation of recommendations of an inquiry that it accepts: one year after the tabling of the final report of a Royal Commission or Official Inquiry; and periodically thereafter to reflect any ongoing implementation activity.[54] The ALRC also expressed the view that the Australian Government should have primary responsibility for tracking the implementation of recommendations made by inquiries established under the Act.[55]

Submissions and consultations

7.50 Stakeholders almost uniformly agreed that the decision to implement inquiry recommendations is a matter for government. The Law Council also noted, however, that:

> [t]he failure to implement key recommendations threatens to undermine the public's confidence in Royal Commissions as an effective form of public scrutiny of executive action. It also challenges the effectiveness of Royal Commissions and other forms of Inquiry as mechanisms to achieve policy change.[56]

7.51 Other stakeholders supported the introduction of a requirement to provide information about implementation of recommendations. For example, the Construction, Forestry, Mining and Energy Union submitted that, where an inquiry recommends an ongoing process of reform, the Australian Government should provide periodic updates to Parliament on the status of each recommendation.

> In our experience, the present lack of any positive obligation in this respect gives too much scope for the Government to avoid dealing with controversial or inconvenient recommendations and fails to provide sufficient finality to the proceedings,

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50 Ibid, [13]–[14].
51 Ibid, [11].
52 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 5–5(c).
53 Ibid, Question 5–6.
54 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 7–2.
55 Ibid, [7.52].
56 Law Council of Australia, *Submission RC 9,* 19 May 2009. See also Law Council of Australia, *Submission RC 30,* 2 October 2009.

> particularly for individuals or organisations against whom adverse findings have been made.[57]

7.52 Liberty Victoria suggested that the Australian Government should provide such information 'in a timely manner' once an inquiry had concluded.[58] In its submission on DP 75, Liberty submitted that

> the Government should be *required* to provide post tabling updates; ideally after 1, 2 and 5 years and responding to each and every recommendation within a given Report. Finally, Liberty urges that any requirement to provide progress reports be applied to tabled, partially tabled and non-tabled reports.[59]

7.53 Millar submitted that, to ensure 'more accountability and transparency in the follow-up of Royal Commission reports', inquiries legislation could require:

> within a period between one year and two years after the inquiry report is tabled, the tabling of a report by the government (which could be in the form of a ministerial statement) on the outcome of the government's response to the inquiry report; the government's report should specify whether any subsequent such reports will be made to the Parliament (an interim government report to the Parliament could also be presented before the one to two year period).[60]

7.54 In the context of recommending a new framework for public inquiries, Civil Liberties Australia suggested that the executive

> should be required to report, one month before any election, the recommendations/implementation from National Commissions held in the current and preceding parliamentary term, including noting those under way.[61]

7.55 The CPSU emphasised the importance of adequate funding for government agencies tasked with implementing inquiry recommendations.

> We also note that the value and viability of recommendations coming out of Royal Commissions or public inquiries depends on the Government's willingness to appropriately resource and fund the implementation of those recommendations.[62]

7.56 On the other hand, it was suggested in consultations that funding the implementation of inquiry recommendations may prioritise funding of some issues over other issues that, while important, were not the subject of inquiry.

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57 Construction, Forestry, Mining and Energy Union, *Submission RC 8,* 17 May 2009. See also Accountability Round Table, *Submission RC 29,* 30 September 2009; Australian Collaboration, *Submission RC 24,* 22 September 2009.

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

59 Liberty Victoria, *Submission RC 26,* 27 September 2009.

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

61 Civil Liberties Australia, *Submission RC 17,* 19 May 2009.

62 Community and Public Sector Union, *Submission RC 10,* 22 May 2009. See also Community and Public Sector Union, *Submission RC 25,* 22 September 2009.

7.57 With respect to coordinating the implementation of inquiry recommendations, Liberty Victoria supported the creation of a new small body to 'be tasked with coordinating and tracking all public inquiries'. It suggested that such a body could publish information about inquiries on a public inquiries website.[63] In consultations, another stakeholder suggested that existing bodies, such as the Commonwealth Ombudsman, could be responsible for reviewing implementation of recommendations.

7.58 Mr Ian Mackintosh suggested that

> updates should be published at not more than 6 month intervals on a website maintained by a permanent 'Inquiries Body' that accepts, registers, collates, publishes, acts as a Public First Face for all 'Royal and Official Inquiries'.[64]

7.59 The CPSU was concerned that the creation of a coordinating department or body may be counterproductive if this meant that

> other agencies did not have to take responsibility for problems within that agency or that the coordinating department merely impeded the implementation of recommendations within other agencies by creating another level of oversight. It is also likely that implementation by the relevant agency of the specific recommendations of a Royal Commission serves to enhance that agency's processes and procedures more generally.[65]

7.60 The AGS submitted that:

> In practice, relevant investigatory and prosecution agencies are responsible for acting on a Royal Commission or Inquiry's recommendations, once the government response has been decided on. With policy inquiries the relevant department with responsibility for the area of policy in question will be responsible for coordinating the implementation of the government's policy response.
>
> Whether the establishment of a permanent body to undertake these roles would be justifiable and if so the extent of its resources would be a matter for government to assess having regard to the past trends in the establishment of such inquiries. The sporadic nature of Royal Commissions and similar inquiries is likely to be a relevant factor to consider in assessing whether such a role would be justified.[66]

ALRC's view

7.61 The decision to implement recommendations made by Royal Commissions and Official Inquiries should be a matter for the Australian Government. The ALRC notes, however, that it is difficult to ascertain whether recommendations made by most recent Royal Commissions and other public inquiries have been implemented, and agrees that there should be more information available about implementation of recommendations made by Royal Commissions. As the same principles of government openness, transparency and accountability apply to Official Inquiries, there should be an

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63 Liberty Victoria, *Submission RC 1,* 6 May 2009.
64 I Mackintosh, *Submission RC 23,* 21 September 2009.
65 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.
66 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.

obligation on government to track implementation of recommendations made by both tiers of inquiry established under the recommended *Inquiries Act*, and make the results of such tracking publicly available.

7.62 The ALRC is also of the view that there is no need to create a permanent body solely for the purpose of tracking implementation. The ALRC is concerned about placing an onerous burden for tracking implementation of recommendations on small existing bodies, such as the Commonwealth Ombudsman and the IGIS. This does not preclude the Australian Government from delegating this function to existing bodies, as appropriate.

7.63 Further, the Australian Government should not be required to table in Parliament information about the implementation of inquiry recommendations that it has accepted. Instead, the Australian Government should publish this information in electronic form, for example, on a website. While inquiry reports should be tabled in Parliament, the ALRC sees no need to require the Australian Government to account to Parliament on an ongoing basis about recommendations it is not required to implement. The ALRC notes that, if this recommendation is accepted, the Australian Government still may be questioned in Parliament about information published online. Further, it is the ALRC's view that a requirement to provide updates on implementation should apply only to recommendations that the Australian Government accepts.

7.64 With respect to appropriate time periods for the publication of information about implementation of recommendations, the Australian Government should be required to publish this information one year after tabling the report of an inquiry or the statement of reasons why part of a report is not being tabled. This time period allows appropriate time for the Australian Government to determine how to deal with the issues raised by an inquiry. Further, it does not preclude the Australian Government from publishing information about implementation of inquiry recommendations within the year following the tabling of an inquiry report. The ALRC also recommends that, after one year, the Australian Government should publish, on a periodic basis, information that reflects any ongoing implementation activity.

7.65 Finally, the ALRC notes there are already government processes in place for the coordination of implementation of recommendations made by Royal Commissions. If the ALRC's recommendation to introduce Official Inquiries is accepted, these processes should extend to the coordination of recommendations made by Official Inquiries. The ALRC, therefore, does not recommend that a particular government department or some other permanent body be responsible for the coordination of implementation of recommendations established under the *Inquiries Act.*

Recommendation 7–3 The recommended *Inquiries Act* should provide that the Australian Government should publish an update on implementation of recommendations of an inquiry that it accepts: one year after the tabling of the final report of a Royal Commission or Official Inquiry; and periodically thereafter to reflect any ongoing implementation activity.

8. Administration and Records

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Introduction

8.1 Royal Commissions and other public inquiries are often appointed at short notice and may relate to incidents or events that have not been the subject of previous public scrutiny. Some or all inquiry members and staff may have had little or no involvement in other inquiries and may be unfamiliar with the practical aspects of establishing and conducting such an inquiry. As the New Zealand Law Commission (NZLC) has noted, because inquiries occur infrequently, they may encounter difficulties from a lack of institutional knowledge, and each time an inquiry is appointed, there may be 'some reinvention of the wheel'.[1]

8.2 In this chapter, the ALRC discusses the administration of Royal Commissions and Official Inquiries, including the types of assistance that may be required to support the conduct of an inquiry. The ALRC discusses ways in which to preserve institutional knowledge acquired from previous Royal Commissions and inquiries and how administrative, technical and other assistance should be provided to Royal Commissions and Official Inquiries.

8.3 The ALRC also discusses important issues relating to the records of completed Royal Commissions and Official Inquiries. The utility of such inquiries depends in large part upon the extent to which their findings and recommendations are able to be acted upon and the uses to which their records may subsequently be put.

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1 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 35–36.

Administrative assistance for inquiries

8.4 Customarily, responsibility for providing administrative support for Royal Commissions and certain other inquiries within the Australian Government has been allocated in accordance with the *Administrative Arrangements Order*.[2] The Australian Government Attorney-General's Department (AGD) currently holds this responsibility, although it has been allocated to other departments in the past. For example, the then Department of Finance and Administration was the designated department from 1998, until responsibility was transferred to the AGD in November 2001.[3] The Department of Finance and Administration provided administrative support, in the initial stages, to both the HIH Royal Commission and the Royal Commission into the Building and Construction Industry (Building Royal Commission).[4]

8.5 While there is no permanent central body, such as a federal inquiries office, that has responsibility for providing administrative assistance to Royal Commissions and other public inquiries, several individuals have accumulated significant institutional knowledge in the administration of inquiries. These include senior departmental officers in the AGD and the Department of the Prime Minister and Cabinet (PM&C),[5] as well as those who have acted as executive officers in recent inquiries.

8.6 Typically, when a new Royal Commission or public inquiry is announced, the administrative apparatus for the inquiry is not yet in existence. The inquiry members must be formally appointed and the inquiry established. The executive officer is often one of the first personnel to be appointed and he or she oversees the inquiry's establishment including staffing, accommodation, hearing room facilities, office services and information and communication technology infrastructure.

8.7 There are no formal procedures or criteria for the appointment of the executive officer. The role is generally understood to encompass responsibility for the practical issues of setting up and managing the administration and operation of the inquiry processes, including its budget and finances. In recent inquiries, the executive officer has been contracted on an ad hoc basis when the inquiry is established and the role often has been filled by former or seconded senior public servants. These individuals have previous experience in running inquiries, and are familiar with public administration, the financial accountability of public bodies, and with the workings of government.

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2 Commonwealth of Australia, *Administrative Arrangements Order*, 25 January 2008 [as amended 1 May 2008, updated 1 July 2008].

3 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, Ch 5.

4 N Owen, *Report of the HIH Royal Commission* (2003), [2.1]; T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, Ch 5.

5 The Department of the Prime Minister and Cabinet has portfolio responsibility for the *Royal Commissions Act 1902* (Cth) pursuant to the Commonwealth of Australia, *Administrative Arrangements Order*, 25 January 2008 [as amended 1 May 2008, updated 1 July 2008].

8.8 A significant amount of planning and organisation is required to establish and run an inquiry such as a Royal Commission. In the preliminary stages, assessments of the administrative and technical requirements of the inquiry must be made, having regard to the likely size and duration of the inquiry, the number and type of participants and the proposed methods of inquiry. Any difficulties encountered in these preliminary stages—for example, unavailability of accommodation or hearing rooms—may impact on the capacity of the inquiry to report within the timeframe set out in its terms of reference.

8.9 While there is accumulated institutional knowledge within the Australian Government relating to the administration of inquiries, as described above, there are no formal mechanisms in place to consolidate and preserve this knowledge—for example, in a handbook or in written guidelines. The ALRC's recommendation for the development of an *Inquiries Handbook* is aimed at preserving such institutional knowledge.[6]

8.10 In contrast, the New Zealand Department of Internal Affairs—which provides some administrative assistance to Royal Commissions and Commissions of Inquiry[7]—has produced guidelines. These are called *Setting Up and Running Commissions of Inquiry*, and provide information to all parties involved with a public inquiry. The guidelines address matters relevant to ministers considering the establishment of an inquiry, members of the public appearing before an inquiry and those involved in the conduct and administration of inquiries such as inquiry members and staff.[8]

8.11 The guidelines provide a comprehensive overview of Royal Commissions and Commissions of Inquiry in New Zealand. In relation to the running of inquiries, the guidelines describe the 'planning phase' pertaining to matters of strategy, timetabling and procedures. This phase requires input from commissioners, counsel assisting, the executive officer, the inquiry departmental liaison officer and any other supporting officials. Specific guidance is also provided in relation to the following:

- administration, personnel and finance;
- information management and information technology;
- media and communications strategy;
- checklist for running hearings;

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6 See Recommendation 6–1 and accompanying discussion in Ch 6.

7 New Zealand Government Department of Internal Affairs, *Services—Commissions of Inquiry* (2009) <http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Commissions-of-Inquiry-Index?OpenDocument&ExpandView> at 4 August 2009.

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

- drafting the report;
- presenting and distributing the report;
- archiving;
- reviewing processes at the conclusion of an inquiry; and
- summary of responsibilities.

8.12 In its 2008 report, *A New Inquiries Act*, the NZLC noted that these guidelines were an important resource for government, inquiry members and participants.[9] The Commission recognised that legislative changes could 'only go so far in ensuring that inquiries, once in operation, are conducted in the most effective and efficient manner'.[10]

8.13 Another model for providing administrative assistance to inquiries was recommended by the Law Reform Commission of Ireland (LRCI) in its *Report on Public Inquiries, Including Tribunals of Inquiry*. The LRCI recommended the establishment of a Central Inquiries Office.[11] The LRCI considered that such a body

> would provide those charged with establishing and running public inquiries easy access to precedents and guidance on a wide variety of matters pertinent to their inquiry, including legislation, procedural issues, the drafting of terms of reference and administrative matters.[12]

8.14 There are also examples of ad hoc inquiries, although generally not Royal Commissions, receiving administrative and other support from existing permanent bodies or government departments with portfolio responsibility for the subject matter of the inquiry.[13] Courts and tribunals may also have existing facilities, such as hearing rooms, which can be used for the conduct of inquiry hearings. For example, the hearing rooms of the Administrative Appeals Tribunal have been used by Royal Commissions and other inquiries on a number of occasions in recent times.[14]

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9 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 36.

10 Ibid.

11 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [2.51].

12 Ibid, [2.47].

13 For example, administrative assistance was provided to the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005) by the then Department of Immigration and Multicultural and Indigenous Affairs. The Department also provided secretariat support to the Inquiry into the Circumstances of the Vivian Alvarez Matter (2005) until responsibility for completing the investigation was transferred to the Commonwealth Ombudsman: Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009.

14 For example, the HMAS Sydney II Commission, the Equine Influenza Inquiry and the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme occupied the Administrative Appeals Tribunal's hearing rooms in Sydney.

Submissions and consultations

8.15 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC sought stakeholder views on the types of administrative assistance—such as budgeting, technological or other guidance—that may be required by Royal Commissions and other public inquiries. The ALRC also asked how such assistance should be provided, including whether a permanent central body should have a role in providing such assistance.[15]

8.16 Liberty Victoria submitted that the administrator of an inquiry should be someone with administrative experience outside government and, ideally, a person who had been employed outside the public sector for 12 months before their engagement by the inquiry. This would help to ensure the independence of the administrator. In addition, it recommended that such a person should be appointed by the inquiry chair and possess at least five years experience in administrative management, of which at least two years should be outside government.[16]

8.17 Liberty Victoria submitted that it would be more economical to have a 'standing inquiry administrative service', but was concerned that this may lead to bias and influence from government and other interested bodies. It noted that such a body also was unlikely to stay commercially competitive. It suggested that an independent inquiries body tasked with retaining institutional knowledge and providing cost savings could be modelled on a hybrid version of the Legal Representation Office in New South Wales and the Central Inquiries Office proposed by the LRCI. Notwithstanding this suggestion, Liberty Victoria was still of the view that inquiries should have the flexibility and independence to engage their own administrative support staff.[17]

8.18 The Australian Government Solicitor (AGS) submitted that in its experience, when establishing a Royal Commission or public inquiry, assistance in a broad range of areas is required, such as:

- obtaining premises, hearing room facilities and office equipment;
- obtaining and installing information technology infrastructure;
- obtaining document management systems;
- security for premises, documents and staff;
- engaging staff;

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

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

17 Ibid. Funding for a legal representation office is discussed in Ch 9.

- securing access to library and research services; and
- establishing media liaison.[18]

8.19 The AGS noted that there was often little, if any, lead time between the announcement of an inquiry and the commencement of its investigations. It noted that the development and retention of a body of knowledge within the AGD regarding the conduct and administration of inquiries had contributed very significantly to the effective establishment and conduct of recent inquiries. In the view of the AGS, it was important to preserve the 'corporate memory' gained from the conduct of previous inquiries. It noted that the infrequent appointment of Royal Commissions and similar inquiries was likely to be a relevant factor to consider when assessing whether the establishment of a permanent body to support such inquiries would be justified.[19]

8.20 The Victorian Society for Computers and the Law (VSCL) noted that information technology infrastructure for inquiries was often rushed into existence, custom built from the ground up, and, upon completion of the inquiry, torn down and disposed of. As a result, the Australian Government repeatedly had to meet the costs of new infrastructure for each Royal Commission or inquiry. The skills and experience gained by those supporting the inquiry were lost when the information management system was decommissioned.[20]

8.21 The VSCL was of the view that these issues could be addressed by the establishment of a permanent secretariat. It suggested that such a secretariat could:

- be a repository for the knowledge required to conduct inquiries efficiently;
- develop and maintain guidelines and standards relating to the effective collection, processing, submission and management of information for inquiries;
- allow newly established inquiries to source existing knowledge and apply the necessary management controls within a short space of time; and
- develop a benchmarked project management methodology that could be applied to inquiries as required.

8.22 The VSCL noted, however, that a permanent hearing facility dedicated to Royal Commissions and public inquiries would become obsolete and be costly to maintain. Instead, the VSCL suggested that the necessary infrastructure be shared with the courts. This would also give inquiries access to experienced information technology personnel who were familiar with the demands of hearing-based systems. Finally, the

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18 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
19 Ibid.
20 Victorian Society for Computers and the Law, *Submission RC 3,* 12 May 2009.

VSCL proposed that a panel of providers be established to pre-qualify potential vendors and service providers of inquiry-related systems to speed up the process of engaging contractors to support inquiries at short notice.

8.23 Mr Graham Millar, previously the Executive Officer of the Equine Influenza Inquiry (2008) and the Deputy Secretary of the HIH Royal Commission (2003), observed that the nature of the administrative support required could vary with each inquiry. Recent practice has involved a mix of direct departmental support and contracted support, with the AGD remaining at arm's length from the day-to-day management of the inquiry. Millar submitted that the present arrangements worked well. The AGD was a readily available source of administrative support, yet still allowed the inquiry to operate with the required level of independence.[21]

8.24 The Department of Immigration and Citizenship (DIAC) provided a secretariat to two recent inquiries into immigration matters—the Inquiry into the Circumstances of the Vivian Alvarez Matter (2005) (Comrie Inquiry) and the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005) (Palmer Inquiry). The secretariat coordinated information flows and dealings between DIAC and the inquiries. DIAC had responsibility for many of the administrative tasks, including negotiating the employment arrangements of staff that had been independently selected by the inquiries, selecting temporary office space, managing information technology issues, managing various contracts which supported the function of the inquiries, and developing the rules and procedures by which DIAC and the inquiry secretariats interacted. DIAC submitted that there would be a benefit in having resources and experience readily available in a central agency, thereby negating the set-up costs and time taken to establish inquiries.[22]

8.25 The Commonwealth Ombudsman suggested that options be considered to enable inquiries to be supported through an existing agency. Such an agency could provide the expertise needed to deal with routine administration in a consistent and predictable way, and to deal with administrative matters arising from the inquiry after it had reported.[23]

8.26 Civil Liberties Australia suggested an arrangement whereby staff for inquiries could be drawn from existing personnel in agencies such as coroners' courts and the various Attorneys-General departments at federal, state and territory levels.[24]

8.27 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that a single Australian Government department, rather than a permanent administrative body, should be allocated responsibility for matters

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21 G Millar, *Submission RC 5,* 17 May 2009.
22 Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009.
23 Commonwealth Ombudsman, *Submission RC 13,* 4 June 2009.
24 Civil Liberties Australia, *Submission RC 17,* 19 May 2009.

pertaining to the administration of Royal Commissions and Official Inquiries.[25] The majority of stakeholders who addressed the issue in submissions supported the proposal.[26]

8.28 It was suggested in consultations, however, that such an arrangement should not preclude other departments and agencies from playing a role in the administration of inquiries in appropriate circumstances. Nor should it limit the potential input from officers in other departments, especially those with previous experience in establishing and administering inquiries. To ensure that an element of flexibility was retained, it was the view of some of those consulted that the ALRC's proposal should not take the form of a legislative requirement in the *Inquiries Act.*

8.29 In DP 75, the ALRC also proposed that the *Inquiries Handbook* should provide guidance on matters pertaining to the administration of inquiries, such as records management.[27] The National Archives of Australia (National Archives) expressed strong support for such a proposal, noting that it should result in improved records management practices in future inquiries.[28] The ALRC received limited additional feedback from stakeholders on this proposal.

ALRC's view

8.30 Before the HIH Royal Commission, established in 2001, there had not been a Royal Commission since the Commission of Inquiry into the Relations between the CAA and Seaview Air (1996). After the HIH Royal Commission and the Building Royal Commission concluded in early 2003, a period of more than a year elapsed before the establishment of the Royal Commission to Inquire into the Centenary House Lease, which was conducted between June and December 2004. About one year later, in November 2005, the Australian Government announced the establishment of the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (AWB Inquiry). No federal Royal Commissions have been appointed since the AWB Inquiry. Ten months after the conclusion of the AWB Inquiry, however, the Australian Government announced another major public inquiry—the Equine Influenza Inquiry—which would exercise many of the powers of a Royal Commission.

8.31 While public inquiries other than Royal Commissions have been conducted during this time, there are often significant periods during which no Royal Commission or other major public inquiry is taking place. In the ALRC's view, having regard to

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25 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–2.

26 Community and Public Sector Union, *Submission RC 25,* 22 September 2009; Australian Collaboration, *Submission RC 24,* 22 September 2009; I Turnbull, *Submission RC 22,* 21 September 2009; National Archives of Australia, *Submission RC 20,* 18 September 2009. Mr Don McKenzie was in favour of using existing agencies as a basis for the administration of ad hoc inquiries such as Royal Commissions and Official Inquiries: D McKenzie, *Submission RC 27,* 28 September 2009.

27 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–1.

28 National Archives of Australia, *Submission RC 20,* 18 September 2009.

recent trends, there is unlikely to be a consistent and continuing need for a permanent administrative body to support inquiries.

8.32 While some stakeholders advocated the establishment of a permanent administrative body, their concerns generally focused on the following:

- the need to retain institutional knowledge in relation to the administration of inquiries to ensure that inquiries can be established rapidly and conducted efficiently and effectively;
- the need for inquiries to access to appropriately skilled personnel to provide administrative and technical assistance; and
- the need for inquiries to have flexibility and control over their own administration to ensure their independent operation.

8.33 In the ALRC's view, these concerns can be addressed without establishing a permanent administrative body for Royal Commissions and Official Inquiries. Institutional knowledge about the administration of inquiries can be captured through the development of written guidance to be included in the *Inquiries Handbook*.[29] Even if there are extended periods during which no inquiries are held, or if personnel who have previous experience in the administration of inquiries are unavailable, the *Inquiries Handbook* will provide a framework for those conducting and administering inquiries that can be adapted to the particular circumstances of the inquiry.[30]

8.34 It would be appropriate for the Australian Government to engage a person with substantial experience in the administration of inquiries to prepare guidance in consultation with relevant stakeholders. Such guidance should be included in the *Inquiries Handbook* and should address matters pertaining to the administration of inquiries, for example:

- recruitment;
- accommodation;
- budget and finance;

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29 The ALRC discusses the recommended *Inquiries Handbook* in Ch 6.

30 The reports of previous Royal Commissions and inquiries are another useful source of information relating to the administration of inquiries: see T Morling, *Report of the Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House* (1994); N Owen, *Report of the HIH Royal Commission* (2003), [2.1]–[2.21]; T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22; D Hunt, *Report of the Inquiry into the Centenary House Lease* (2004), Appendix H; T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10; M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), Appendix B.

- information and communication technology; and
- records management, including archiving.

8.35 In the ALRC's view, the current arrangement—namely, that an Australian Government department is allocated responsibility for providing administrative support to Royal Commissions and certain other inquiries—appears to work satisfactorily. It is recommended, therefore, that the Australian Government should continue to allocate responsibility for the administration of Royal Commissions and Official Inquiries to a single Australian Government department. While that department—presently the AGD—may change from time to time, administrative responsibility for Royal Commissions and Official Inquiries should be allocated to a single department rather than be shared by multiple departments.

8.36 The ALRC envisages that this department, while retaining primary responsibility for an inquiry, could delegate particular administrative or technical tasks to other departments or agencies in appropriate circumstances, having regard to the subject matter and operational requirements of that inquiry. In this regard, the ALRC notes the need for flexibility expressed by some stakeholders. As such, the ALRC does not consider that this arrangement, if adopted, requires statutory action. Consistent with existing practice, it would be appropriate for a single department, such as the AGD, to be nominated under the *Administrative Arrangements Order*. In appropriate circumstances, the responsible department could arrange for administrative assistance and support to be provided by existing permanent bodies, such as the Commonwealth Ombudsman, if resources are available.

8.37 An appropriate section within the AGD, or suitably experienced officers within the department, should continue to be allocated the task of providing administrative, technical and other assistance to Royal Commissions and Official Inquiries established under the *Inquiries Act*. While this need not be their sole task, the section or officers should have the capacity to prioritise the provision of such assistance at short notice to ensure the efficient and expedited establishment and operation of Royal Commissions and Official Inquiries as they are appointed. The ALRC notes that the tasks involved in providing administrative assistance to inquiries are already well understood within the AGD and may include the following:

- assisting with matters preparatory to the formal establishment of the inquiry;
- providing assistance to inquiry members and staff to ensure an efficient and expedited establishment process and the conduct of the inquiry; and

- at the conclusion of the inquiry, facilitating the prompt transfer of an archival copy of the records of the inquiry to the National Archives.[31]

8.38 In addition, the ALRC recommends that the role also include responsibility for monitoring and updating the *Inquiries Handbook*. This may involve communication with relevant departments on specific matters, for example, seeking advice from National Archives on the management of inquiry records for inclusion in the *Inquiry Handbook.*

8.39 Streamlining administrative arrangements for inquiries under the *Inquiries Act* could also be achieved by ensuring that the roles and responsibilities of those involved in the administrative aspects of an inquiry—including inquiry staff and departmental officers within the responsible department—are clearly defined in the *Inquiries Handbook*. In particular, the ALRC notes the importance of the role of the executive officer in ensuring the efficient and effective conduct of an inquiry. Executive officers facilitate and coordinate administrative or technical assistance provided by the responsible department. They administer the inquiry at the direction of the inquiry members and at arm's length from the Australian Government. In the ALRC's view, the selection criteria and responsibilities of the executive officer of an inquiry should be set out in the *Inquiries Handbook*.

8.40 As discussed in Chapter 6, inquiries are to be independent in the exercise of their powers and the performance of their duties and functions.[32] This has been, and should continue to be, reflected in the manner in which the Australian Government delivers administrative, technical and other assistance to inquiries. Inquiry members should exercise overall control over inquiry administration and should be capable of engaging their own staff and contractors.

Recommendation 8–1 The recommended *Inquiries Handbook* should provide guidance on matters pertaining to the administration of inquiries, for example:

(a) recruitment;

(b) accommodation;

(c) budget and finance;

(d) information and communication technology; and

(e) records management, including archiving.

31 Recommendations regarding the archiving of inquiry records are discussed later in this chapter.
32 Recommendation 6–5.

Recommendation 8–2 The Australian Government should allocate responsibility for the administration of Royal Commissions and Official Inquiries to a single Australian Government department. The role of that department should include responsibility for the following tasks:

(a) assisting with matters preparatory to the formal establishment of the inquiry;

(b) providing assistance to inquiry members and staff to ensure an efficient and expedited establishment process and conduct of the inquiry;

(c) at the conclusion of the inquiry, facilitating the transfer of an archival copy of the records of the inquiry to the National Archives of Australia; and

(d) monitoring and updating the recommended *Inquiries Handbook.*

Inquiry records

8.41 Inquiry records may fall into the following broad categories:

- administrative records concerning the setting up and operation of the inquiry;
- financial records of the inquiry;
- hearings records, such as transcripts;
- investigative records, including written statements where the inquiry is compiling evidence or taking evidence from witnesses;
- documents either produced to, or seized by, an inquiry; and
- working papers of the inquiry members and legal team.

8.42 In this section, the ALRC considers issues relating to the records of completed Royal Commissions and Official Inquiries including custody, use, public access and archiving.

Custody and use of inquiry records

8.43 Provisions dealing with the custody and use of records of a Royal Commission were inserted into the *Royal Commissions Act 1902* (Cth) in 2006.[33] Section 9(1) defines 'Royal Commission record' as a record that was produced by, given to or obtained by a Royal Commission and is no longer required for the purposes of the Commission, including copies of such records. Section 9(2) enables regulations to be made in relation to the custody, use and transfer of, and access to, records of Royal Commissions.

8.44 Following the insertion of s 9 into the *Royal Commissions Act*, reg 8 of the *Royal Commissions Regulations 2001* (Cth) was made to deal specifically with the records of the AWB Inquiry (other than those records relating to the administration and financial management of the inquiry and the report itself). The regulation provided that the records were to be kept in the custody of the Secretary of PM&C. It set out the circumstances in which PM&C, as custodian of the records, could provide the records to other persons or bodies, including for law enforcement purposes and to provide advice on the administration of a law of the Commonwealth, state or territory.[34]

8.45 The provisions in s 9 of the *Royal Commissions Act* were modelled on earlier legislation that was specifically enacted to enable the transfer of certain records of the HIH Royal Commission to the Australian Securities and Investments Commission.[35] In essence, s 9 obviates the need to provide procedural fairness to persons who could be adversely affected if documents obtained by a Royal Commission for its purposes were to be made available to other persons or agencies and used for other purposes.[36]

Archiving of inquiry records

8.46 The records of Royal Commissions are Commonwealth records and as such are subject to the provisions of the *Archives Act 1983* (Cth). Section 22 of the *Archives Act* provides that:

> (2) The Commonwealth is entitled to the possession of records kept by a Royal Commission ... that are no longer required for the purposes of the Commission, and all such records shall be deemed to be Commonwealth records for the purposes of this Act.
>
> (3) Records referred to in subsection (2) shall be kept in such custody as the responsible Minister directs and the Archives is not entitled to the care of any such records except in accordance with such a direction.
>
> (4) A direction given by a Royal Commission ... prohibiting the publication of any document or matter does not apply to the provision of public access under this Act to

33 *Royal Commissions Amendment (Records) Act 2006* (Cth).
34 *Royal Commissions Regulations 2001* (Cth) reg 8(5).
35 *HIH Royal Commission (Transfer or Records) Act 2003* (Cth).
36 Explanatory Memorandum, Royal Commissions Amendment (Records) Bill 2006 (Cth). Issues relating to procedural fairness and inquiries are discussed in Chs 15 and 16.

> any records that are in the open access period or to the publication by any person of any records that are available for public access in accordance with this Act.

8.47 As a result of s 22(3), there is no mechanism for the automatic transfer to National Archives of the records of Royal Commissions. There must be a ministerial direction to effect a transfer.

8.48 As a matter of practice, the records of recent Royal Commissions relating to their administration (such as those relating to organisation, staffing, financial matters and travel arrangements) have been transferred to the AGD, while the substantive records of Royal Commissions (such as transcripts, exhibits, submissions, research papers and interim and final reports) have been transferred to PM&C.[37] There is no timeframe within which departments with custody of inquiry records must transfer the records to the care of National Archives, subject to the open access requirements of the *Archives Act* which generally provides for access after 30 years.[38]

8.49 There appears to be no consistent practice as to when the transfer of Royal Commission records to National Archives takes place. For example, the records of the Royal Commission on Espionage (1955) were not transferred to National Archives until 1984, shortly before the open access period was due to commence.[39] In contrast, some digital records of the AWB Inquiry and the Royal Commission of Inquiry into the Centenary House Lease were transferred by PM&C to National Archives in 2006–2007.[40]

Other methods of access to inquiry records

8.50 National Archives facilitates online access to selected Royal Commission and inquiry records in the open access period including reports, transcripts, audio recordings and exhibits.[41]

8.51 Most Royal Commissions and other major inquiries conducted in recent years have individual websites that contain the report of the inquiry and other material such as terms of reference, exhibits, witness statements, submissions and background

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37 Department of the Prime Minister & Cabinet and the Attorney-General's Department, *Consultation RC 41*, 15 May 2009.

38 In some cases approval has been given for the special or accelerated release of Royal Commission records before they are 30 years old: P Nagle and R Summerrell, *Aboriginal Deaths in Custody, The Royal Commission and its Records, 1987–91—Research Paper No 2* (2002) National Archives of Australia.

39 National Archives of Australia, *Series notes for series A6216—Original Signed Copy of the 'Report of the Royal Commission on Espionage'*, <www.naa.gov.au> at 9 July 2009.

40 National Archives of Australia and National Archives of Australia Advisory Council, *Annual Reports 2006–07*, 132.

41 Selected records of a number of Royal Commissions are available electronically on the National Archives of Australia website, including records of the Royal Commission into British Nuclear Tests in Australia (1985), the Royal Commission on Television (1954), the Royal Commission into Aboriginal Deaths in Custody (1991) and the Royal Commission on Espionage (1955): Australian Government, *National Archives of Australia—Homepage*, <www.naa.gov.au> at 9 July 2009.

papers.[42] Public access to these websites is maintained following the completion of the inquiry either by an Australian Government department, such as PM&C or the AGD, or through PANDORA, which is an Australian web archive hosted by the National Library of Australia.[43]

8.52 Access to Royal Commission and inquiry reports is facilitated through legal deposit requirements and the Commonwealth Library Deposit and Free Issue Schemes.[44] These arrangements, however, would not generally extend to inquiry records.

8.53 In addition to the *Archives Act*, which regulates access to records older than 30 years, there are a number of different pieces of Commonwealth legislation that may affect access to inquiry records. In particular, the *Freedom of Information Act 1982* (Cth) provides for public access to documents kept by Australian Government departments which are less than 30 years old.[45]

Submissions and consultations

8.54 In response to IP 35, the AGS noted that a myriad of issues could arise in the period following the completion of an inquiry relating to the retention, management and use of records and information arising from an inquiry. The AGS observed that the AGD, together with PM&C, had experience in dealing with such issues and it was important to maintain corporate memory regarding the retention and use of Royal Commission records. Any uncertainty or inefficiency regarding the transfer, retention and use of records could limit the effectiveness or Royal Commissions and other inquiries.[46]

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42 See, eg, *The HIH Royal Commission* (2003) <www.pandora.nla.gov.au/pan/23212/20030418-0000/www.hihroyalcom.gov.au/index.html> at 4 August 2009; *Royal Commission into the Building and Construction Industry* (2003) <www.pandora.nla.gov.au/pan/24143/20040427-0000/www.royalcombci.gov.au/index.html> at 4 August 2009; *Inquiry into the Centenary House Lease* (2004) <www.ag.gov.au/agd/www/centenaryhome.nsf> at 4 August 2009; *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry.gov.au/> at 4 August 2009; *Equine Influenza Inquiry* (2008) <www.equineinfluenzainquiry.gov.au/> at 4 August 2009; *Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008) <www.haneefcaseinquiry.gov.au/> at 4 August 2009.

43 PANDORA is an acronym for the phrase 'Preserving and Accessing Networked Documentary Resources of Australia'. Titles in the archive are selected according to selection guidelines developed by the National Library of Australia and its partners and the guidelines are published on the PANDORA website: National Library of Australia and Partners, *PANDORA—Australia's Web Archive*, <http://pandora.nla.gov.au> at 1 July 2009.

44 Under s 201 of the *Copyright Act 1968* (Cth) and various state Acts, a copy of any work published in Australia must be deposited with the National Library of Australia and the appropriate state library.

45 For the purposes of the *Freedom of Information Act 1982* (Cth), records of a Royal Commission that are in the care of National Archives are taken to be documents of an agency and to be in the possession of the Department administered by the Minister administering the *Royal Commissions Act 1902*, currently the PM&C: see *Freedom of Information Act 1982* (Cth) s 13.

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

8.55 In DP 75, the ALRC proposed that the provisions for the custody and use of records equivalent to those in s 9 of the *Royal Commissions Act* should be included in the *Inquiries Act*.[47]

8.56 National Archives submitted that the records of Royal Commissions, as part of the archival resources of the Commonwealth, should be preserved in such a way that they can be made available for public access in accordance with the *Archives Act*. It submitted that the *Inquiries Act* should make it clear that subsequent public access to such records is to be governed by the relevant provisions of the *Archives Act*, notwithstanding any interim directions of the Inquiry.[48]

8.57 The ALRC also proposed that there should be a legislative requirement for the transfer of an archival copy of the records of Royal Commissions and Official Inquiries to National Archives at the conclusion of the inquiry, unless directed otherwise by the relevant minister.[49]

8.58 National Archives agreed that such records should be placed in its care as soon as practicable after the completion of an inquiry. It recognised, however, that it was sometimes necessary for interim custody and access arrangements to be made for these records. As such, National Archives submitted that records should be transferred as soon as practicable after completion of the inquiry and, in any case, within five years of completion of the inquiry.[50]

8.59 National Archives also highlighted that inquiry records are increasingly available in electronic form on existing document management systems. In the view of National Archives, this would streamline the prompt transfer of inquiry records, including inquiry websites. It suggested that an 'access copy' of inquiry records could be kept by the responsible department to enable any residual matters to be dealt with.

8.60 The Australian Collaboration and the Accountability Round Table agreed that inquiry records should be lodged with National Archives. In addition, they submitted that there should be a requirement that inquiry material also be lodged with the National Library of Australia.[51]

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47 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–3.

48 National Archives of Australia, *Submission RC 20,* 18 September 2009.

49 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–4.

50 National Archives of Australia, *Submission RC 20,* 18 September 2009.

51 Accountability Round Table, *Submission RC 29,* 30 September 2009; Australian Collaboration, *Submission RC 24,* 22 September 2009.

8.61 In DP 75, the ALRC's final proposal with respect to inquiry records was that Royal Commissions and Official Inquiries be required to comply with the standards determined, or record-keeping obligations imposed, by National Archives.[52]

8.62 National Archives supported this proposal, noting that it would ensure that inquiry records were managed in an effective and efficient manner and, where possible, in electronic formats. It would also enable the transfer of archival records to take place electronically and allow for the efficient destruction of any remaining records.

8.63 National Archives suggested that general advice on records management should be provided in the *Inquiries Handbook.* In addition, National Archives noted that it could provide specific advice on records management and archiving issues to inquiry staff at all stages of an inquiry.[53]

ALRC's view

8.64 Issues relating to the retention and subsequent use of records of concluded Royal Commissions and other inquiries are critically important. Inquiry records may have a significant impact on the extent to which the findings and recommendations of such bodies can be used for the purposes of law enforcement, advice on the administration of laws, and implementation of inquiry recommendations.[54]

8.65 The ALRC has not identified any shortcomings in the existing arrangements in the *Royal Commissions Act* and the *Royal Commissions Regulations* introduced in 2006. These arrangements have facilitated the effective transfer of custody of the records of both the HIH Royal Commission and the AWB Inquiry, and have provided necessary clarification of the purposes for which those records may be used by other persons and bodies. In the ALRC's view, it is appropriate that provisions equivalent to those in s 9 of the *Royal Commissions Act*—including the power to make regulations in relation to specific inquiries—be incorporated in the *Inquiries Act* to govern the transfer, custody and use of the records of both Royal Commissions and Official Inquiries.

8.66 Arrangements should be in place to ensure an appropriate level of ongoing public access to the reports and records of completed inquiries—for example, by maintaining inquiry websites. In particular, it is highly desirable to continue the practice of developing and maintaining a public website for Royal Commissions and other inquiries, both during and after their completion. As the current arrangements for hosting and maintaining inquiry websites are ad hoc, the responsible Australian Government department should allocate responsibility for this task to an appropriate

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52 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 8–5.

53 National Archives of Australia, *Submission RC 20,* 18 September 2009.

54 The use that can be made of inquiry records during the currency of the inquiry, including the power of an inquiry to make referrals of information or evidence to other agencies, is discussed in Ch 11.

agency or service provider and set out any such arrangements in the *Inquiries Handbook*.[55]

8.67 The *Inquiries Handbook* and the *Inquiries Act* should include arrangements for the conservation and preservation of records of completed inquiries. These records form part of the existing and future archival resources of the Commonwealth and should be made available for public access in accordance with the *Archives Act.*

8.68 First, the ALRC recommends that the arrangements for the transfer of inquiry records to National Archives be streamlined by amending the *Archives Act* to enable the transfer of a copy of those records for archival purposes as soon as practicable after the completion of the inquiry. There should be a consistent approach to the transfer of such records and there should be a presumption that National Archives receive an archival copy of those records at the completion of the inquiry. This will not prevent an access copy of the records being kept by the department or body nominated as custodian by regulation. It will, however, preserve an archival copy of inquiry records and avoid the risk of their becoming interspersed with those of the department or body with custody of the records.

8.69 In DP 75, the ALRC proposed that the presumption that an archival copy of the records be transferred to National Archives after the conclusion of an inquiry should only be reversed if the relevant minister directs otherwise. On further consideration, the ALRC prefers the approach put forward by National Archives—namely, that if the transfer of an archival copy cannot not take place immediately after the conclusion of the inquiry, there should be a requirement that the transfer be facilitated within five years of the conclusion of the inquiry.

8.70 In forming this view, the ALRC notes the willingness of National Archives to provide advice and assistance to Royal Commissions and Official Inquiries in relation to records management and archiving issues. The ALRC has also taken into account the increasing use of sophisticated information and communication technology systems for records management and document processing by inquiries, and the capacity of National Archives to manage transfers of inquiry records in electronic formats. This should ease the administrative burden of transferring inquiry records to National Archives.

8.71 Secondly, the ALRC recommends that the record-keeping and document management systems used by inquiries should conform to guidance and standards issued by National Archives. This will ensure that inquiry records are appropriately administered during their active life and are transferred to the care of National Archives in a form that enables their preservation and public access as part of the

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55 The ALRC recommends that the Australian Government should allocate responsibility for the administration of Royal Commissions and Official Inquiries to a single Australian Government department: Recommendation 8–2.

archival resources of the Commonwealth. As noted by National Archives, any advice that it develops for Royal Commissions and Official Inquiries could be included in full in the *Inquiries Handbook* or, alternatively, in summary form with links to detailed advice on the National Archive's website. This, in turn, could be updated from time to time.

8.72 It is appropriate for Royal Commissions and Official Inquiries to seek advice and assistance from National Archives—in accordance with its statutory functions under the *Archives Act*—in relation to creating, keeping and managing inquiry records in an efficient and economical manner and in a manner that will facilitate their use as part of the archival resources of the Commonwealth.[56] The *Archives Act* also enables National Archives to provide, on request, training of staff responsible for keeping current inquiry records.[57]

8.73 Finally, the ALRC notes that a large volume of material—including reports, witness statements, exhibits and submissions—remains available to the public through archived inquiry websites on the internet. Australian library and information services provide a good level of internet access services to members of the public who cannot otherwise access the internet. In these circumstances, the ALRC is not persuaded that a new legislative requirement for inquiry records to be lodged with the National Library of Australia is necessary.

Recommendation 8–3 The recommended *Inquiries Act* should provide for the custody and use of records of Royal Commissions and Official Inquiries in terms equivalent to those in s 9 of the *Royal Commissions Act 1902* (Cth).

Recommendation 8–4 Section 22 of the *Archives Act 1983* (Cth) should be amended to require the transfer of an archival copy of the records of Royal Commissions and Official Inquiries to the National Archives of Australia:

(a) as soon as practicable after the conclusion of the inquiry, subject to any directions made by the minister to whose ministerial responsibilities the records most closely relate; and

(b) in any event, within five years of the conclusion of the inquiry.

Recommendation 8–5 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries comply with the standards determined, or record-keeping obligations imposed, by the National Archives of Australia.

56 *Archives Act 1983* (Cth) s 5(2)(c).
57 Ibid s 6(1)(j)–(k).

Part C

Funding and Cost of Inquiries

9. Funding and Costs

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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:

- remuneration of commissioners or inquiry members;

- remuneration of counsel[1] and solicitors assisting the inquiry, contractors and consultants, and other staff members;
- travel;
- business and residential accommodation;
- information and communication technology; and
- document management and stationery.[2]

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 *Inquiries Act* recommended in this Report. The CPGs would apply to the process of procuring other types of services from contractors, consultants and providers of information and communication technology.

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;

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1 The use of 'counsel' in this context refers to a class of legal practitioners, also known as barristers, whose work is focused on performing advocacy before a court and advisory work.

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

- legal representation for those authorised to participate as a party to an inquiry;
- attending, or appearing before, an inquiry;
- 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.

Legal assistance

9.6 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 principles in the *Report of the Royal Commission on Tribunals of Inquiry* published in the United Kingdom ('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.[3] As noted by Dr Stephen Donaghue, however, procedural fairness does not require the provision of public funding for legal representation before Royal Commissions.[4]

9.7 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.[5] The AGD has produced 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) could apply to the AGD for the payment of reasonable legal costs and expenses.[6] Under the guidelines produced by the AGD, the criteria for awarding such assistance included that:

- 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 therefore likely to be involved to a major degree in those proceedings; or

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

4 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 192. The requirements of procedural fairness in the context of inquiries is discussed in Chs 15 and 16.

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

6 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.

- cross-examination of the applicant was likely to assist the inquiry.[7]

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

> (a) 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
>
> (b) 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
>
> (c) 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.[8]

9.9 The Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission) adopted a similar procedure, with financial assistance for legal costs associated with the inquiry being made available in certain circumstances through the AGD. The inquiry 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, or the production of documents to, the inquiry, the Building Royal Commission included on its website a link to the AGD's guidelines for financial assistance. The Final Report of the Building Royal Commission noted that as the inquiry 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.[9]

9.10 Public funding for legal representation before permanent commissions is available 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.[10] The provision of such 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.[11]

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

8 Ibid.

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

10 *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.

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

9.11 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.[12] 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.[13] 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.

9.12 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 [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.[14]

9.13 Royal Commissions do not generally have the power to order that legal expenses be paid for by government.[15] 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.[16] The Act

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12 Ibid, 194.

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

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

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

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

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.[17]

9.14 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.[18] 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

9.15 Under s 40 of the *Inquiries Act 2005* (UK), the chair of an inquiry may award reasonable amounts to a person for 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 chair would then make decisions in individual cases.[19] In addition, the *Inquiries Rules 2006* (UK) set out detailed provisions for the determination, assessment and payment of awards for legal representation.[20]

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17 Ibid s 36(2).

18 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.

19 Parliament of United Kingdom, *Explanatory Notes to Inquiries Act* (2005).

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

9.16 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.[21]

9.17 In its 2005 report on inquiries, 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.[22] Under proposed Part 9 of the Tribunals of Inquiry Bill 2005 (Ireland), the chair 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.[23]

9.18 In its 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'.[24] To this end, it recommended that an inquiry should be given express power to recommend to the department responsible for that inquiry 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.[25] 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;
- 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.[26]

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

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

23 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. At the time of writing in October 2009, the Bill was before the House of Deputies (Dáil Éireann).

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

25 Ibid.

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

9.19 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.[27] Such assistance encompasses both legal representation and legal advice or help (for example, help with drafting submissions to an inquiry).[28]

Costs of attendance or appearance

9.20 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.

9.21 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 scale of costs in the *High Court Rules 2004* (Cth).[29] 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.[30]

9.22 In the Building Royal Commission, witnesses who were summoned to appear were provided with a statement of rights and obligations. Claims from witnesses were approved by the Secretary to the Building Royal Commission, with cheques for the approved amounts being forwarded by the AGD. No distinction was made between claims from witnesses who had been summonsed and those who appeared voluntarily.[31]

Costs of production

9.23 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

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27 Ibid cl 19(3).
28 Ibid cl 19(4).
29 *Royal Commissions Regulations 2001* (Cth) reg 7(1).
30 Ibid reg 7(2). For the purposes of the regulation, a Commission includes a Commissioner authorised in writing by the Commission: 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).
31 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 41.

pursuant to a summons or notice to produce issued by a Royal Commission. The Building Royal Commission 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.[32]

Other non-legal assistance

9.24 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.[33] 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'.[34] 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.[35]

Submissions and consultations

9.25 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 elicited a range of stakeholder views.

9.26 Dr Ian Turnbull suggested that the use of government departments or other quasi-government bodies or authorities to provide or fund legal assistance to witnesses may have an impact on the independence or the appearance of independence of an inquiry.[36]

9.27 The Australian Government Solicitor (AGS) felt there were no policy reasons for the Australian Government to provide, as opposed to meeting the expenses of, legal or other assistance.[37]

9.28 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

32 Ibid, vol 2, 80.
33 Providing information about inquiry procedures and issues relating to Indigenous peoples is discussed in Ch 16.
34 *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 8(3).
35 E Mullighan, *Children in State Care Commission of Inquiry—Allegations of Sexual Abuse and Death from Criminal Conduct* (2008), 16.
36 I Turnbull, *Submission RC 6,* 16 May 2009.
37 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.

inquiries. It did not express a view as to whether such assistance should be provided by a permanent federal government body like the LRO.[38]

9.29 In relation to funding the costs of inquiry participants, Turnbull was of the opinion that legal representation for witnesses should only be allowed in exceptional circumstances and that such costs should not be publicly funded.[39] In contrast, Liberty Victoria submitted that the funding of public inquiries, including funds for legal advice and the reasonable expenses of witnesses, should be provided for in legislation.[40]

9.30 Mr 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 funding limits on 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.[41]

9.31 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.[42]

9.32 The Law Council noted that adverse findings by a Royal Commission or public inquiry could have significant negative effects on an individual. An individual may need legal assistance but may not be able to afford such assistance. 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.[43]

9.33 The Law Council observed that government-funded legal representation may not be required in all public inquiries, or for all individuals involved in public inquiries. Such representation was crucial, however, if a person was the subject of adverse

38 Law Council of Australia, *Submission RC 9,* 19 May 2009.
39 I Turnbull, *Submission RC 6,* 16 May 2009.
40 Liberty Victoria, *Submission RC 1,* 6 May 2009.
41 G Millar, *Submission RC 5,* 17 May 2009.
42 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
43 Law Council of Australia, *Submission RC 9,* 19 May 2009.

allegations, or the inquiry concerned a person's conduct. On this issue, the Law Council agreed with the following statement by the NZLC:

> 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.[44]

9.34 The Law Council submitted that funding for legal representation of witnesses who are not necessarily under investigation also may be required in certain circumstances. It endorsed the criteria set out in the *Commissions of Inquiry Act* (Tas) for determining 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.

9.35 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 suggested that persons participating in Royal Commissions should be able to apply for legal assistance from schemes established by the Commonwealth specifically for the purposes of providing legal assistance in public inquiries.[45]

9.36 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 servants frequently appeared before Royal Commissions and other public inquiries in their work capacity. Further, 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.[46]

9.37 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.[47]

9.38 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 Inquiry into the Case of Dr Mohamed

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44 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 113.
45 Law Council of Australia, *Submission RC 9,* 19 May 2009.
46 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.
47 Ibid.

Haneef (2008) (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'.[48]

9.39 DIAC also noted that before the commencement of the Clarke Inquiry, relevant departmental officers were advised of the assistance available to them under Appendix E of the *Legal Services Directions* (Assistance to Commonwealth employees for legal proceedings). DIAC recommended that legal and non-legal advice and representation should be readily available to junior and inexperienced officers, especially if witness protections were not 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.[49]

9.40 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that the AGD should have responsibility for determining whether the costs of legal and related assistance of inquiry participants should be met, having regard to specified criteria, modelled on those found in the *Commissions of Inquiry Act* (Tas).[50]

9.41 Turnbull and the Law Council supported this proposal.[51] In particular, the Law Council welcomed the formalisation of a scheme for legal assistance for witnesses and inquiry participants, provided sufficient resources were made available under such a scheme. It was also in favour of a scheme whereby matters relating to the provision of legal assistance to inquiry participants would be determined by the AGD, and substantive matters relating to the conduct of the inquiry would be determined by inquiry members.[52]

9.42 The CPSU considered that the proposal accurately identified the factors that should be taken into account when determining whether such costs should be met by the Australian Government. The CPSU submitted that Australian Government employees who were required to give evidence about matters relating to their employment should have all their costs met.[53]

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48 Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009.
49 Ibid.
50 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 9–1.
51 Law Council of Australia, *Submission RC 30,* 2 October 2009; I Turnbull, *Submission RC 22,* 21 September 2009.
52 Law Council of Australia, *Submission RC 30,* 2 October 2009.
53 Community and Public Sector Union, *Submission RC 25,* 22 September 2009.

9.43 Millar submitted that providing a statutory basis for assistance to inquiry participants may provide a higher level of certainty for such participants. He noted, however, that this could lead to an increase in the overall costs of inquiries.[54]

9.44 In DP 75, the ALRC also proposed that individuals and organisations be paid a sum sufficient to meet their reasonable expenses for complying with notices to produce documents or other things.[55] In addition, it proposed that individuals required to attend or appear before Royal Commissions and Official Inquiries be paid expenses in accordance with the scale of costs for witness expenses in the *High Court Rules*.[56]

9.45 The Law Council submitted that these proposals were a further means of achieving a balance between the powers of inquiry members and the rights of inquiry participants. The Law Council was in favour of the Attorney-General fixing the rates to be paid at the commencement of the inquiry to increase transparency in relation to the payment of expenses associated with production.[57] It indicated that the scale of costs in the *High Court Rules* was an appropriate basis upon which to determine the amounts to be paid to individuals for their attendance at inquiries.[58]

9.46 Millar submitted that these proposals would lead to increased inquiry costs. He noted that under current arrangements, organisations and individuals met their own costs of producing documents and other things, and witnesses were paid attendance fees only if they applied for reimbursement. Millar was of the view that there was no clear case for automatic government assistance to those producing material to inquiries. According to Millar, witnesses often did not apply for appearance fees other than out of pocket expenses. In addition, many witnesses would be covered for the cost of their appearance by their employers. Accordingly, Millar submitted that requiring the payment of such fees in all circumstances was unnecessary and would add to the overall cost of inquiries.[59]

9.47 Mr Kym Bills expressed similar views, suggesting that a requirement that expenses be paid was likely to create a significant administrative burden in addition to the costs of such payments.[60]

ALRC's view

9.48 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 notes that the majority of stakeholders

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54 G Millar, *Submission RC 21,* 21 September 2009.
55 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 9–2.
56 Ibid, Proposal 9–3; *High Court Rules 2004* (Cth) sch 2.
57 Law Council of Australia, *Submission RC 30,* 2 October 2009.
58 Ibid.
59 G Millar, *Submission RC 21,* 21 September 2009.
60 K Bills, *Submission RC 19,* 17 September 2009.

were in favour of the Australian Government funding legal and related costs of witnesses and other inquiry participants in appropriate circumstances.

9.49 The ALRC has not identified a need for a permanent government body to provide legal and other assistance to inquiry participants. As public inquiries have been appointed sporadically in the past, the workload of a permanent body is likely to be variable and it may not be a cost-effective method of delivering legal and other assistance to inquiry participants.[61]

9.50 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.[62]

9.51 Another option 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. In contrast, 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.

9.52 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.

9.53 The ALRC recommends that the *Inquiries Act* should include provisions modelled on the non-statutory financial assistance schemes that have been

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

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

administered by the AGD in past inquiries. Specifically, the *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 *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.

9.54 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 generally appropriate that legal assistance be approved for such persons if their involvement in Royal Commissions and Official Inquiries 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 recommended above.

9.55 The ALRC notes that payments under financial assistance schemes are currently subject to prescribed limits and may only cover part of the costs of an individual's legal representation. Under the recommended 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. Such information could be included in the *Inquiries Handbook* and updated from time to time.

9.56 In relation to the costs of production, the *Inquiries Act* should provide that individuals and organisations required to produce documents or other things in compliance with a notice issued by a Royal Commission or Official Inquiry, may claim a sum sufficient to meet their reasonable expenses. As the scale of costs in the *High Court Rules* does not presently prescribe any amount for expenses of this nature, appropriate amounts could be fixed at the commencement of an inquiry by the Attorney-General, or determined at any stage of the inquiry in response to a claim by an inquiry participant. The claimant could then be reimbursed accordingly.

9.57 This recommendation differs slightly from the equivalent provision in s 6G of the *Royal Commissions Act* in that it vests in the Attorney-General, rather than the inquiry, the power to decide the amounts to be paid. 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.

9.58 In relation to the costs of attendance and appearance before an inquiry, such as travel and accommodation expenses and other allowances, the *Inquiries Act* should incorporate provisions equivalent to those in the *Royal Commissions Act*. Specifically, the *Inquiries Act* should provide that individuals required to attend or appear before Royal Commissions and Official Inquiries may claim expenses in accordance with the High Court Scale. 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.

9.59 Inquiry participants may not always require, or claim, reimbursement of expenses incurred as a result of their participation in an inquiry. For example, a person's employer may approve leave in order for them to appear before an inquiry as a witness. A government department or agency that is required to produce documents to an inquiry may not seek reimbursement of the costs of production. It is preferable that the *Inquiries Act* incorporate a sufficient level of flexibility so that expenses claims can be determined on a case by case basis. The ALRC has, therefore, modified the proposals in DP 75 relating to the costs of production and the costs of attendance, to clarify that there is no automatic right to payment of such costs. Rather, individuals and organisations may make a claim and, once the claim is determined by the relevant decision maker, are to be reimbursed accordingly.

9.60 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. The ALRC has not identified any need for the funding of such assistance by the Australian Government to be required by legislation. Under the recommended *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.

9.61 As discussed in Chapter 16, it is appropriate that information about certain rights and entitlements conferred by the *Inquiries Act*, such as grants of funding for legal representation and reimbursement of expenses, be provided to inquiry participants and included in the *Inquiries Handbook*.

Recommendation 9–1 The recommended *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.

Recommendation 9–2 The recommended *Inquiries Act* should provide that individuals and organisations may claim 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 and the claimant is to be reimbursed accordingly.

Recommendation 9–3 The recommended *Inquiries Act* should provide that individuals required to attend or appear before Royal Commissions and Official Inquiries may claim expenses in accordance with the *High Court Rules 2004* (Cth).

Other inquiry costs

9.62 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 payments and expenses relating to counsel assisting the inquiry and solicitors assisting the inquiry, and inquiry members.

9.63 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

those costs are paid from the inquiry's own budget.[63] The inquiry may then be responsible for recruiting and engaging other inquiry staff.

Inquiry legal costs

9.64 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,[64] not including travel and accommodation costs for the inquiry's legal team.[65]

9.65 Currently, legal practitioners assisting an inquiry may be appointed 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.[66] As a matter of practice, however, it is usual for counsel assisting to be appointed under s 6FA of the *Royal Commissions Act* and for a firm of solicitors to be engaged to instruct counsel and assist the inquiry.[67]

Counsel assisting

9.66 Most Royal Commissions and some Official Inquiries may need 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.

9.67 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'.[68] 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*.

9.68 When engaging counsel, the Australian Government relies on its position as a major purchaser of legal services where negotiating the level of fees payable to

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

64 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. Further details of the costs of Royal Commissions are contained in Table 10.1 in Ch 10 of this Report.

65 Ibid, vol 22, 45.

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

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

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

counsel.[69] 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 in October 2009, $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.

9.69 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 Commissions or public inquiries such as those that apply to legal practitioners undertaking legal aid work in New South Wales.[70]

9.70 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'.[71] 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.[72] These rates were subject to a daily cap.[73] These rates and the daily cap have not been made public.

9.71 The Australian Government has had a longstanding practice of not disclosing details of the daily fees paid to counsel.[74] Two 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. Secondly, it is thought that publishing daily fees may disadvantage the Commonwealth when negotiating rates with individual counsel.[75]

Solicitors assisting

9.72 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

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69 Ibid, Appendix D, [1].

70 For example, Legal Aid New South Wales publishes fee scales for state and Commonwealth matters on its website <www.legalaid.nsw.gov.au> at 12 June 2009.

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

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

73 Ibid, Appendix 10, 129.

74 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.

75 Ibid.

to be contracted by the Australian Government to provide legal services to Royal Commissions and inquiries, including instructing counsel assisting.[76]

9.73 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.[77] The terms of engagement, 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.[78]

9.74 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.[79] 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 inquiry 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 work temporarily interstate, the inquiry met the costs of reunion travel.[80]

9.75 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.[81] 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 arm's

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

77 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).

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

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

80 Ibid.

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

length from the AGD.[82] Another example is the Equine Influenza Inquiry (2008). The AGS was appointed as solicitors assisting while another private law firm was engaged to represent the Commonwealth as a party to the inquiry.[83] No information is publicly available regarding the terms and conditions of engagement or whether the appointments were subject to a competitive tendering process.

Other jurisdictions

9.76 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.[84]

9.77 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.[85] 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).

9.78 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).[86] The LRCI recommended flexible arrangements in order to attract the most experienced applicants at competitive prices.[87] Further, the LRCI recommended that a tribunal of inquiry should be able to engage a particular lawyer for remuneration agreed upon by the parties.[88]

9.79 Under the *Inquiries Act 2005* (UK), the responsible minister has a discretion to pay the expenses of counsel or solicitors assisting an inquiry[89] and there are no legislative provisions prescribing the manner of their engagement and remuneration.

Inquiry members

9.80 As noted in Chapter 6, inquiry members are usually appointed relatively quickly, often before the inquiry is publicly announced. The Australian Government currently has a broad discretion to appoint inquiry members and the ALRC does not

82 Ibid, 94; M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 289.
83 I Callinan, *Equine Influenza: The August 2007 Outbreak in Australia—Report of the Equine Influenza Inquiry* (2008), 2.
84 New Zealand Government Department of Internal Affairs, *Setting Up and Running Commissions of Inquiry* (2001), 40.
85 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [13.7].
86 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), Ch 7.
87 Ibid, [7.50], [7.58]–[7.59].
88 Ibid, [7.58].
89 *Inquiries Act 2005* (UK) s 39.

recommend that criteria be prescribed in the *Inquiries Act*.[90] 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.

9.81 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 judicial officers, are paid remuneration and allowances as determined by the Remuneration Tribunal.[91]

9.82 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). 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.

Submissions and consultations

9.83 In its consultations, the ALRC heard a range of views about how legal practitioners assisting an inquiry should be engaged and remunerated. 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 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.

9.84 Millar submitted that the existing arrangements worked well and seemed to take into account 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.[92]

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

91 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.

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

9.85 In contrast, Turnbull was in favour of a scale of fees being included in legislation and queried whether negotiated fees could be justified when effectively only 'routine lawyering and advocacy' were involved.[93]

9.86 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.[94]

9.87 In DP 75, the ALRC proposed that guidance on the engagement and remuneration of legal practitioners assisting an inquiry should be included in the *Inquiries Handbook*. It was the ALRC's view that terms of engagement and remuneration should, as far as practicable, be negotiated on a commercially competitive basis according to a list of relevant factors.[95]

9.88 Liberty Victoria agreed that guidance on the engagement and remuneration of legal practitioners assisting should be contained in the *Inquiries Handbook.* It was also of the view that such terms should, as far as practicable, be negotiated on a commercially competitive basis according to the ALRC's proposed list of relevant factors.[96]

9.89 While Turnbull expressed support for the ALRC's proposal, his preference was for a scale of fees to be applied to determine the remuneration of legal practitioners assisting.[97]

ALRC's view

Inquiry members

9.90 In Chapter 6, the ALRC emphasises 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. It follows, therefore, that the *Inquiries Act* should not provide that the remuneration and allowances paid to inquiry members be determined by the Remuneration Tribunal.

Legal practitioners assisting

9.91 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

93 I Turnbull, *Submission RC 6,* 16 May 2009.
94 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
95 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 9–4.
96 Liberty Victoria, *Submission RC 26,* 27 September 2009.
97 I Turnbull, *Submission RC 22,* 21 September 2009.

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, such as those set out in Appendix D of the *Legal Services Directions*.

9.92 The ALRC has considered whether a scale of costs should be prescribed 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.

9.93 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.

9.94 In order to promote consistency and transparency, encourage competition and ensure the efficient, effective and ethical use of public resources, the *Inquiries Handbook* should provide guidance on issues relating to the engagement and remuneration of legal practitioners appointed to assist inquiries established under the *Inquiries Act*.[98] For example, the negotiated 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 wide-ranging and involve extensive investigatory work, it may be more appropriate for caps to apply to particular stages or events in the individual inquiry.[99]

9.95 It is appropriate for existing approved Commonwealth rates for individual counsel to be used as a reference point in negotiating the fees to be paid to counsel assisting.[100] Other relevant factors may include the normal market rates of counsel, the

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98 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.

99 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.

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

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.

9.96 In Chapter 10, the ALRC recommends that summary information about the costs of inquiries be made publicly available.[101] 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.

Recommendation 9–4 The recommended *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 *Inquiries Handbook* 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:

  (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).

101 Recommendation 10–1.

Records management and information and communication technology

9.97 Records management and information and communication technology infrastructure constitute a significant cost for inquiries. In the recently completed Commission of Inquiry into the Loss of HMAS Sydney II (2009), for example, the document management contractors were engaged at a cost of $2.07 million out of a total expenditure of $6.66 million.[102] In the Building Royal Commission, expenditure on document management and information and communication technology totalled $13,970,165.[103] This figure represents almost 20% of the total expenses of the inquiry.

9.98 There appears to be a limited number of external providers of records management and information and communication technology services to inquiries. The same provider has been engaged in all four Royal Commissions held since 2001,[104] and a number of other major inquiries, including the Equine Influenza Inquiry and, most recently, the Commission of Inquiry into the Loss of HMAS Sydney II.[105]

9.99 For reasons of urgency, the open tendering procedures under the CPGs often are not followed in relation to the appointment of external providers of document management and information technology support to inquiries. Instead, direct sourcing procurement processes invite potential suppliers to make submissions, thereby avoiding tender requirements.[106]

9.100 Given the significant costs of document management and information and communication technology support, limited competition among external providers and the departure from usual Commonwealth procurement procedures, close consideration should be given to whether appropriate infrastructure and support can be provided by the AGD or another Australian Government department or agency. In the Clarke Inquiry, for example, the information and communication technology infrastructure of the AGD was used for the electronic records and communications of the inquiry. Procedures were implemented to protect the inquiry's systems, such as restricting the access of officers of the AGD (except technical support staff as required).[107]

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102 T Cole, *The Loss of HMAS Sydney II* (2009), Appendix D, 328.

103 This figure has been adjusted to 2008 dollars using the Reserve Bank of Australia's Annual Inflation Calculator and represents expenditure to 28 February 2003: Commonwealth, *Parliamentary Debates*, Senate, 14 May 2003, 11155.

104 N Owen, *HIH Royal Commission: Reasons for Ruling No 04/02* (2002), Appendix F; T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22; D Hunt, *Report of the Inquiry into the Centenary House Lease* (2004), Appendix H; T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10.

105 I Callinan, *Equine Influenza: The August 2007 Outbreak in Australia—Report of the Equine Influenza Inquiry* (2008), Appendix B; T Cole, *The Loss of HMAS Sydney II* (2009), Appendix D.

106 See, eg, T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10, 132. See also, Australian Government Department of Finance and Administration, *Commonwealth Procurement Guidelines* (2008).

107 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 290.

9.101 As recommended in Chapter 8, detailed guidance on matters pertaining to the administration of inquiries, including information and communication technology and records management, should be provided in the *Inquiries Handbook*.[108] Factors such as the volume of relevant material, the number of participants and the need for public hearings may provide some indication of the types of records management and information and communication technology services the inquiry is likely to require. Such guidance should be targeted at assisting those involved in future inquiries to evaluate the nature of the services required and ensure that value for money is provided by external providers of such services.

Method of funding inquiries

9.102 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*.[109]

9.103 As noted by Millar, Royal Commissions are usually appointed shortly after the need arises with an expectation of early commencement.[110] 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. This consists of an additional appropriation issued under an Advance to the Finance Minister (AFM).[111]

> 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 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.[112]

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108 Recommendation 8–1.

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

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

111 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/budget/budget-process> at 20 October 2009.

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

9.104 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.[113] 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.[114] All other costs directly related to the inquiry were met from the inquiry's own budget.[115]

9.105 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).[116] 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.[117]

9.106 Another method of funding inquiries is through a 'standing appropriation' or 'special appropriation' in the recommended *Inquiries Act*.[118] 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.[119] Special appropriation bills often do not specify an amount or duration. Those providing funds for an indefinite period are said to give standing appropriation.[120]

9.107 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;
- certain legal costs of witnesses;

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

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

115 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).

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

117 Ibid s 39(4), (5).

118 Professor Enid Campbell has suggested the introduction of a permanent appropriation to cover the expenses of witnesses in Royal Commissions: H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 345.

119 Department of Finance and Deregulation, *Appropriation Bills* <www.finance.gov.au/budget/budget-process> at 20 October 2009.

120 Ibid.

- certain allowances for witnesses; and
- certain compensation to witnesses for loss of income.[121]

9.108 The use of standing appropriations and their significance in terms of parliamentary accountability was examined by the Senate Standing Committee for the Scrutiny of Bills (Senate Committee) in its *Fourteenth Report of 2005*.[122] 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.[123] 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.[124] 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'.[125]

Submissions and consultations

9.109 In the Issues Paper, *Review of the Royal Commissions Act* (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.[126] In DP 75, the ALRC concluded that the current arrangements for funding inquiries were appropriate.[127]

9.110 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. 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 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.

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

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

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

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

125 Ibid, 272.

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

127 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [9.97]–[9.100].

> 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.[128]

9.111 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; and
- allocating funding based upon an independent auditor's estimate of the funds required for an inquiry.

9.112 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.[129]

ALRC's view

9.113 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.

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

9.115 On the other hand, the funding of inquiries cannot be open-ended and inquiries must be financially accountable. Accordingly, the ALRC does not recommend that the *Inquiries Act* incorporate a standing appropriation. A standing appropriation limits accountability and scrutiny of public expenditure on inquiries and diminishes the scope for parliamentary control through the annual appropriations process.

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128 Liberty Victoria, *Submission RC 1,* 6 May 2009.
129 G Millar, *Submission RC 5,* 17 May 2009.

9.116 For the above reasons, the ALRC does not recommend that Royal Commissions and Official Inquiries be funded through a standing or special appropriation. It is appropriate that funding should 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.[130]

130 In Ch 8, the ALRC recommends that administrative responsibility for Royal Commissions and Official Inquiries be allocated to a single Australian Government department, presently the AGD: Recommendation 8–2. Issues relating to the jurisdiction of inquiry members to award costs are discussed in Ch 10.

10. Minimising Costs

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Introduction

10.1 The costs of Royal Commissions and other public inquiries must be balanced against the benefits of conducting such inquiries. In this chapter, the ALRC examines the costs of previous Royal Commissions and other public inquiries and discusses some of the key sources of information about these costs. It then examines various methods for minimising costs under the statutory framework for Royal Commissions and Official Inquiries recommended in this Report.

Sources of information about costs

10.2 There is no requirement in the *Royal Commissions Act 1902* (Cth) for the Australian Government to disclose information about the costs of individual Royal Commissions. It is possible, however, to obtain information relating to the costs of individual inquiries from a range of public sources.

Reports of Royal Commissions and public inquiries

10.3 In recent times, it has been customary for Royal Commission reports to include some, albeit limited, information about the budget and costs of the inquiry. For example, information relating to the budget and expenditure of the Inquiry into Certain

Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry) was set out in the final report.[1] This included information about the initial budget allocated to the inquiry and the increases in that allocation following the extension of the reporting date. A lump sum figure, reflecting total expenditure as at the reporting date, was also included in the report.[2] This figure would not have been 'final' in the sense that it may not have included publication and wind-up costs incurred after the reporting date.

10.4 The *Report of the HIH Royal Commission* also contained information about the funding of the Commission.[3] Initial funding was provided from the resources of the then Department of Finance and Administration (which was later reimbursed from the Commission's budget). Subsequently, the Commission was allocated its own budget, which was increased when the reporting date was extended. No increase was sought for a later extension of the reporting date. The report noted that the Australian Government Attorney-General's Department (AGD) received separate funding to administer financial assistance for the legal and related costs of people appearing before the Royal Commission and applications for assistance were dealt with by the department, not the Commission.

10.5 The *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008) contained a brief statement outlining the budget of the Inquiry.[4] The inquiry was funded under the budget appropriation of the AGD. The inquiry administered most of the budget and met all costs directly related to the inquiry such as salary and associated expenses, premises, office services, information technology, transcription services, advertising, report production and printing, hearings, interviews and a public forum. The balance of the inquiry's budget was administered by the AGD, primarily for the provision of financial assistance to members of the public who were asked to provide submissions or statements to the inquiry.[5]

10.6 In contrast, neither the *Report of the Inquiry into the Centenary House Lease* nor the *Report of the Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House* included any information regarding the budget or expenditure of the inquiry.[6] Further, no mention was made of budget or costs in the

1 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), 135–136.
2 At the end of October 2006 expenditure was $9,124,361.00.
3 N Owen, *Report of the HIH Royal Commission* (2003), [2.2].
4 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 292.
5 Ibid.
6 D Hunt, *Report of the Inquiry into the Centenary House Lease* (2004); T Morling, *Report of the Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House* (1994).

reports of the Equine Influenza Inquiry (2008) or the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005).[7]

10.7 As these examples show, whether information about the budget of Royal Commissions and public inquiries is published in the final report is left to the discretion of the chair of the inquiry, with practice varying from inquiry to inquiry. With the exception of the *Final Report of the Royal Commission into the Building and Construction Industry*,[8] only general information about the overall budget and expenditure has been made available in reports. The ALRC has not identified any examples of a breakdown of costs being provided in the report of an inquiry.

Departmental resources

10.8 The AGD, which is responsible for administrative support for Royal Commissions and certain other inquiries under the Commonwealth *Administrative Arrangements Order*, may publish information relating to the amounts allocated to individual Royal Commissions and other inquiries in its Portfolio Budget Statements, Additional Estimates Statements and Annual Reports. The figures are estimates only and show the total amount appropriated to each inquiry without any breakdown of costs.

10.9 Lists of contracts published by Australian Government departments are another source of information about amounts paid to contractors engaged to provide legal and other services to Royal Commissions and inquiries. Departments and agencies are required, under the Senate Order on Departmental and Agency Contracts (Senate Order), to publish a list of contracts which provide for payment of $100,000 or more.[9] The list must indicate, among other things, the: name of the contractor; amount to be paid under the contract; subject matter of the contract; and commencement and duration of the contract. The Senate Order also requires the list of contracts to be accessible from the website of the relevant department or agency.[10]

10.10 As the Senate Order only requires that access be provided to lists for the previous 12-month reporting period, historical lists of contracts may not be accessible on departmental websites. Further, the description of the subject matter of the contract may be insufficient to identify the services as having been provided to a particular Royal Commission or other inquiry.

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7 I Callinan, *Equine Influenza: The August 2007 Outbreak in Australia—Report of the Equine Influenza Inquiry* (2008); M Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005).

8 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22, 43–45.

9 Departmental and agency contracts in Commonwealth, *Standing Orders and Other Orders of the Senate* (2009), 127–128.

10 Ibid.

Parliamentary materials

10.11 More specific information about the costs of individual Royal Commissions and other inquiries may become public through evidence given at estimates hearings before the Senate[11] and in answers to questions in Parliament. This has occurred in relation to most Royal Commissions and some public inquiries in recent times, as discussed below.

10.12 One example is the costs incurred by the Australian Government in relation to the appointment and conduct of the Commission of Inquiry into the Relations between the CAA and Seaview Air (1996). The responsible minister provided a detailed breakdown of the total cost of the inquiry, legal costs met by the Commonwealth in respect of each of the parties involved, sums paid to each of the participating legal firms and costs of a non-legal nature.[12]

10.13 The expenditure of the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission) was subject to ongoing and close scrutiny in the Senate estimates process. The executive officers of the Royal Commission and officials from the AGD were called to answer questions at estimates hearings on numerous occasions. At the conclusion of the Building Royal Commission, a detailed breakdown of expenditure was provided on behalf of the Attorney-General in answer to a question in Parliament. The information included a breakdown of amounts paid in fees and allowances to each of the thirteen counsel engaged to assist the inquiry, and the total expenditure on the Commissioner's accommodation, Comcar and travel allowances.[13]

10.14 Similarly, information relating to the total budgeted costs of the Royal Commission to Inquire into the Centenary House Lease (2004) was provided in answer to a parliamentary question shortly before the Commissioner presented his report. This included specific amounts for the costs of advertisements, office accommodation, information technology, media liaison services, printing, financial assistance and legal costs.[14] Likewise, the Attorney-General provided information in answer to a question

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11 Twice each year estimates of proposed annual expenditure of government departments and authorities are referred by the Senate to eight legislation committees for examination and report. These estimates are contained in the main appropriation bills introduced into Parliament as part of the budget (usually in May) and in the additional appropriation bills introduced later in the financial year (usually in February): Parliament of Australia—Department of the Senate, *Senate Brief No 5—Consideration of Estimates by the Senate's Legislation Committees* (2009), 1.

12 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 1997, 3408–3410 (J Sharp—Minister for Transport and Regional Development).

13 Commonwealth, *Parliamentary Debates*, Senate, 14 May 2003, 11154–11156 (C Ellison—Minister for Justice and Customs).

14 Commonwealth, *Parliamentary Debates*, Senate, 16 November 2004, 101 (C Ellison—Minister for Justice and Customs).

in Parliament regarding the total expenditure on the AWB Inquiry—including total salary and other remuneration paid to the Commissioner and counsel assisting.[15]

10.15 More recently, officers from the AGD were called to give evidence during estimates hearings before the Senate Standing Committee on Legal and Constitutional Affairs in relation to the appropriation for the Inquiry into the Case of Dr Mohamed Haneef (2008) (Clarke Inquiry).[16] At the time of the hearing, the inquiry had not yet concluded. Further information regarding the final breakdown and total expenditure has come to light through parliamentary processes.[17]

Other jurisdictions

10.16 Inquiries legislation in other Australian jurisdictions does not require the formal disclosure of costs associated with an inquiry. The requirements in comparable overseas jurisdictions are discussed below.

United Kingdom

10.17 Before the enactment of the *Inquiries Act 2005* (UK), there was no statutory obligation to publish information about the costs of an inquiry, although it had become the practice to do so.[18] In its examination of the use of investigatory inquiries by government, the House of Commons Public Administration Select Committee recommended that the responsible minister should announce a broad budget figure fairly early on in the inquiry process. Any increases over the announced limits would have to be explained publicly at the end of the inquiry when final costs were published.[19]

10.18 There is now a statutory provision—s 39(6) of the *Inquiries Act* (UK)—that requires the responsible minister, within a reasonable time after the end of an inquiry, to publish the total amount of what has been paid (or remains liable to be paid) for inquiry expenses.

10.19 The first inquiry established under the *Inquiries Act* (UK)—the Public Inquiry into the September 2005 Outbreak of E.coli O157 in South Wales—did not include any information about the budget or costs of the inquiry in the final report.[20] At the

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15 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2007, 180 (P Ruddock—Attorney-General).

16 Commonwealth, *Official Committee Hansard,* Senate Standing Committee on Legal and Constitutional Affairs, 27 May 2008, 91–92.

17 Australian Government Attorney-General's Department, *Senate Standing Committee on Legal and Constitutional Affairs—Answer to Question No 114* (23 February 2009). As noted above, some information about the budget was included in the report of the Clarke Inquiry.

18 United Kingdom Department of Constitutional Affairs, *Consultation Paper—Effective Inquiries* (2004), [115].

19 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [127].

20 H Pennington, *The Public Inquiry into the September 2005 Outbreak of E.coli O157 in South Wales* (2009).

conclusion of the inquiry, however, information about legal fees, travel, hotel accommodation and expenses of counsel assisting was set out in an 'Expenditure Statement' published on the inquiry's website.[21]

Canada

10.20 The Alberta Law Reform Institute recommended in 1992 that detailed estimates of the cost of a public inquiry should be prepared when the inquiry is established or as soon thereafter as is practicable. The Institute recommended that estimates be tabled and published in the government gazette at the time of approval and that the same procedures apply to any changes in the estimates that were needed from time to time.[22] This recommendation has not been adopted in the *Public Inquiries Act 2000* RSA c P–39 (Alberta). Nor does the federal equivalent—the *Inquiries Act 1985* RS c I–11 (Canada)—contain any formal requirements for the disclosure of the costs of public inquiries.

New Zealand

10.21 There is no requirement under the *Commissions of Inquiry Act 1908* (NZ) for the disclosure of the costs of public inquiries, either at the time of their establishment or following their conclusion. The Department of Internal Affairs, which administers most public inquiries in New Zealand, receives an approved budgeted amount for each inquiry.[23] Accordingly, information about the costs of a specific inquiry could be ascertained through an examination of the budget documentation for that Department. The Inquiries Bill 2008 (NZ), which at the time of writing in October 2009 is before the New Zealand Parliament, does not contain any requirements for the disclosure of inquiry budgets or costs.

Ireland

10.22 Under the *Commissions of Investigation Act 2004* (Ireland), the minister responsible for the operation of the commission must ensure that, as soon as possible after the terms of reference are set, an accompanying statement is prepared containing an estimate of the costs of the commission and the length of time it will take. This must be published in the official Irish gazette and such other publications as the minister considers appropriate.[24] Following the establishment of the first Commission under the *Commissions of Investigation Act* in April 2005—which examined the Garda investigation into the Dublin and Monaghan bombings of 1974—a notice published in the gazette estimated legal fees, salaries and other administrative costs would total €604,880 for a six month period.[25]

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21 The Public Inquiry into the September 2005 Outbreak of E.coli O157 in South Wales, *Expenditure Statement,* < http://wales.gov.uk/ecoliinquiry/?lang=en > at 20 October 2009.

22 Alberta Law Reform Institute, *Proposals for the Reform of the Public Inquiries Act*, Report No 62 (1992).

23 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [14.7].

24 *Commissions of Investigation Act 2004* (Ireland) s 5(2)(b); Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [1.17].

25 *Iris Oifigiúil, (Commission of Investigation, Dublin and Monaghan Bombings of 1974—Statement of Costs and Timeframe for Investigation),* 13 May 2005, 477.

10.23 The Tribunals of Inquiry Bill 2005 (Ireland) requires a tribunal, in consultation with the responsible minister, to prepare a statement containing, among other things, an estimate of all the costs (including the legal costs of third parties) likely to be incurred by the inquiry. The statement must be prepared within a specified timeframe following the appointment of the tribunal and laid before Parliament by the responsible minister 'as soon as may be after it has been prepared'.[26] Further, when a tribunal of inquiry submits a final or interim report to the responsible minister, it must also provide a financial statement which is then laid before Parliament.[27] The financial statement must specify 'all known costs incurred in consequence of the inquiry' including, as separate items:

- the tribunal's legal costs;
- the tribunal's administrative costs; and
- legal costs of third parties.[28]

Costs of public inquiries

10.24 In this section, the ALRC provides details about the costs incurred by previous Royal Commissions and public inquiries. As noted above, there are a number of publicly available sources of information, including budget documentation, annual reports and parliamentary materials. Where possible, actual figures have been used but in some instances only estimates are publicly available. The figures presented in Tables 10.1 and 10.2 have been adjusted to 2008 dollars using the Reserve Bank of Australia's Annual Inflation Calculator, except for those inquiries concluded in 2008–2009.[29]

Costs of Royal Commissions

10.25 Justice Ronald Sackville describes the factors that contribute to the high costs of Royal Commissions:

> Investigations into factual matters, especially alleged impropriety or misconduct, tend to be time-consuming and to require the services of highly paid professionals. The investigative techniques utilised are often elaborate, especially where the conduct under investigation is clandestine in nature. The cost of hearings at which practising lawyers appear to assist the Commissions and to represent interested parties can be

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26 Tribunals of Inquiry Bill 2005 (Ireland) cl 8 (as amended in 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).

27 Ibid cl 10(5).

28 Ibid cl 10(8).

29 Reserve Bank of Australia, *Inflation Calculator* (2009) <http://www.rba.gov.au/calculator/calc.go> at 12 October 2009. Annual expenditure on an inquiry has been adjusted for inflation according to the year of expenditure, and then combined to reach the total approximate cost in 2008 dollars. Where annual expenditure is not ascertainable, the total approximate cost has been adjusted from the year of completion of the inquiry to 2008 dollars.

very substantial indeed. Moreover, a Royal Commission incurs start-up costs that an existing agency can usually avoid.[30]

10.26 The following table provides an indication of the estimated costs of recent Royal Commissions.

Table 10.1: Estimated Cost of Selected Recent Royal Commissions

Name of Royal Commission	Date[31]	Estimated cost (in 2008 dollars)
Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme	10 November 2005–24 November 2006	$10,539,635[32]
Royal Commission to Inquire into the Centenary House Lease	24 June 2004–6 December 2004	$4,356,738[33]
Royal Commission into the Building and Construction Industry	29 August 2001–24 February 2003	$76,693,726[34]
HIH Royal Commission	29 August 2001–4 April 2003	$45,331,958[35]

30 R Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 274, 286.

31 The listed dates refer to the date on which the terms of reference for the inquiry were issued and the date on which the inquiry reported.

32 This represents total expenditure to 28 February 2007, not including legal assistance to witnesses: Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2007, 180 (P Ruddock—Attorney-General). See also, Australian Government, *Portfolio Budget Statements 2006–2007—Attorney-General's Portfolio* (2006), 36; Australian Government, *Portfolio Budget Statements 2007–2008—Attorney-General's Portfolio* (2007), 44. Note that budget statements often reflect estimated, rather than actual, costs.

33 This figure comprises the total budgeted costs for the inquiry, including: AGD staff; financial assistance for inquiry participants; the Royal Commissioner; legal practitioners assisting; inquiry staff; advertisements; office accommodation; information technology; media liaison services; printing and other services: Commonwealth, *Parliamentary Debates*, Senate, 16 November 2004, 101 (C Ellison—Minister for Justice and Customs); Commonwealth, *Parliamentary Debates*, Senate, 9 December 2004, 118 (C Evans—Leader of the Opposition in the Senate); Australian Government, *Portfolio Additional Estimates Statements 2004–2005—Attorney-General's Portfolio* (2005), 18.

34 This figure represents the costs of the Royal Commission to 31 October 2003. Future budgeted costs were estimated to be $750,000 (unadjusted for inflation): Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 2003, 28913 (P Ruddock–Attorney-General). See also, Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2003, 23896 (J Hall); Australian Government, *Portfolio Additional Estimates Statements 2001–2002—Finance and Administration Portfolio* (2002), 14; Australian Government, *Portfolio Budget 2002–2003—Attorney-General's Portfolio* (2002), 32; Australian Government, *Portfolio Budget 2003–2004—Attorney-General's Portfolio* (2003), 39.

35 This figure represents the costs of the Royal Commission to 31 October 2003. Future budgeted costs were estimated to be $80,000 (unadjusted for inflation): Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 2003, 28913 (P Ruddock–Attorney-General). See also, Australian Government, *Portfolio Additional Estimates Statements 2001–2002—Finance and Administration Portfolio* (2002), 13; Australian Government, *Portfolio Budget 2002–2003—Attorney-General's Portfolio* (2002), 32; Australian Government, *Portfolio Budget 2003–2004—Attorney-General's Portfolio* (2003), 39.

Commission of Inquiry into the Relations between the CAA and Seaview Air	25 October 1994–9 October 1996	$11,224,677[36]
Royal Commission into Aboriginal Deaths in Custody	16 October 1987–9 May 1991	$50,298,709[37]

Costs of other ad hoc public inquiries

10.27 Other forms of inquiry are generally less costly than most Royal Commissions. The following table provides an indication of the estimated costs of recent non-Royal Commission public inquiries.

Table 10.2: Estimated Cost of Selected Recent non-Royal Commissions

Name of Public Inquiry	Date	Estimated cost (in 2008 dollars)
Commission of Inquiry into the Loss of HMAS Sydney II	28 March 2008–July 2009	$6,600,000[38]
Inquiry into the Case of Dr Mohamed Haneef	13 March 2008–21 November 2008	$2,807,000[39]
Equine Influenza Inquiry	25 September 2007–12 June 2008	$8,025,000[40]
Fuel Tax Inquiry	8 July 2001–15 March 2002	$4,775,806[41]

36 This figure represents the total cost incurred by the Australian Government in relation to the appointment and conduct of the Commission. Information about associated costs, not available for most other inquiries, was also reported to Parliament (eg, $5,585,660 for legal assistance for parties; $392,070 for legal costs of the Department of Transport and Regional Development; $10,713,424 paid to participating legal firms; and $918,309.93 for non-legal costs: Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 1997, 3408 (J Sharpe—Minister for Transport and Regional Development).

37 This figure includes running costs, financial assistance and the costs of instructing solicitors incurred by the then Department of Administrative Services but does not include costs incurred in other government portfolios: Commonwealth, *Parliamentary Debates*, Senate, 11 April 1991, 2317 (N Bolkus—Minister for Administrative Services).

38 This figure represents expenditure as at June 2009 as taken from the report of the Inquiry: T Cole, *The Loss of HMAS Sydney II* (2009), Appendix D, 328.

39 This figure represents the most recent estimate of the costs of the inquiry provided by the Australian Government: Australian Government Attorney-General's Department, *Senate Standing Committee on Legal and Constitutional Affairs—Answer to Question No 114* (23 February 2009). The total budget allocated to, and administered by, the inquiry was $3,840,000: Australian Government, *Portfolio Budget Statements 2008–2009—Attorney-General's Portfolio* (2008), 28. An additional $350,000 was administered by the Attorney-General's Department for the provision of financial assistance: M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 292.

40 Australian Government, *Portfolio Budget Statements 2008–2009—Attorney-General's Portfolio*, 28. The initial budget allocation for the inquiry was $11,490,000: Australian Government, *Portfolio Additional Estimates Statements 2007–2008—Attorney-General's Portfolio*, 14. Unspent funds were subsequently reappropriated to the Clarke Inquiry into the Case of Dr Mohamed Haneef: Commonwealth, *Official Committee Hansard,* Senate Standing Committee on Legal and Constitutional Affairs, 27 May 2008, 62.

41 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 2003, 12413 (B McMullan—Shadow Minister for Treasury, Finance and Small Business).

Independent Review of Energy Market Directions	September 2001–November 2002	$4,775,806[42]
Commission of Inquiry into the Lemonthyme and Southern Forests	8 May 1987–6 May 1988	$3,545,091[43]

Publication of budgets or expenses

10.28 There is no requirement in the *Royal Commissions Act* for the Australian Government, Royal Commission or other public inquiry to produce information or reports on the predicted, ongoing or final cost of an inquiry. Some Royal Commissions, as outlined above, have made available some information about costs in the report released as a result of the inquiry.[44] Some estimates of costs are also available in budgets prepared by Australian Government departments.[45] To date, however, much of the information in the public domain about actual ongoing or final costs of Royal Commissions and other public inquiries has been made available in Senate Budget Estimates Committee hearings or upon questioning in Parliament of government members. In contrast, Australian Government agencies, or permanent bodies established by statute, generally are required to provide detailed annual reports with information about actual revenue and expenses.[46]

10.29 A requirement for Royal Commissions or other public inquiries to publish budgets or information about costs would provide greater transparency and focus attention on the costs associated with the inquiry and the need to ensure efficiency.[47] Such a requirement also would be in line with public accountability mechanisms. On the other hand, it has been suggested by the LRCI that the requirement to publish ongoing budget figures may detract from the work of public inquiries.[48]

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42 Commonwealth, *Parliamentary Debates*, Senate, 21 March 2002, 1269 (N Minchin—Minister for Finance and Administration). This figure represents the allocated budget, not actual expenditure.

43 Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 1988, 2176 (G Punch). This figure includes costs incurred by the Commission itself as well as expenditure in relation to grants, administrative, legal and publication costs by the Department of the Arts, Sport, the Environment, Tourism and Territories from within departmental appropriations.

44 See, eg, T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 10; T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 22.

45 See, eg, Australian Government, *Portfolio Budget Statements 2006–2007—Attorney-General's Portfolio* (2006).

46 See, eg, Australian Law Reform Commission, *Annual Report 2007–08*, 91–117; Commonwealth Ombudsman, *Annual Report 2007–08*, Appendix 5; Human Rights and Equal Opportunity Commission, *Annual Report 2007–08*, 181–213; Inspector-General of Intelligence and Security, *Annual Report 2007–08*, 76–104.

47 Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [7.35].

48 Ibid.

10.30 Professor Enid Campbell has argued against a requirement for a detailed breakdown of expenses for a Royal Commission:

> [t]his mode of financial administration is more appropriate to an on-going organisation which is better able, in the light of experience, to estimate its expenditure fairly precisely. It is not appropriate to organisations whose life rarely extends beyond two years.[49]

10.31 An important question for the ALRC in this Inquiry is whether, in the interests of openness, transparency and accountability in the expenditure of public funds, as well as promoting greater efficiency, the Australian Government should be subject to more formal reporting requirements with respect to Royal Commissions and other public inquiries. In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC sought stakeholder views on a number of issues relating to the costs of inquiries, including whether the Australian Government should be required to make publicly available:

- more detailed information about legal fees of counsel and solicitors assisting;[50]
- at the outset of the Royal Commission or other public inquiry, the proposed budget for the inquiry;[51]
- during the Royal Commission or other public inquiry, interim reports on costs associated with the inquiry;[52] and
- upon the completion of a Royal Commission or other public inquiry, a breakdown of the costs of the inquiry.[53]

Submissions and consultations

10.32 In consultations, stakeholders generally recognised that there was a need for transparency in the expenditure of public funds by inquiries. The majority of stakeholders supported greater disclosure of the costs of individual Royal Commissions and inquiries. Some expressed the view, however, that it would not be practical to require the Australian Government to publish details of the budget of an inquiry at the time of establishment. It was noted that, until an inquiry is underway, it is often difficult for the government and inquiry members to predict the total costs that might be incurred. It was suggested, therefore, that any requirement relating to the publication of budgets and expenses be imposed at the conclusion of an inquiry.

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

50 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–1.

51 Ibid, Question 6-7(a).

52 Ibid, Question 6-7(b).

53 Ibid, Question 6-7(c).

10.33 In its response to IP 35, Liberty Victoria submitted:

> Like government, inquiries should be accountable for the funds they spend. In practice this means that inquiries should have a budget and be required to provide a financial report at the end of the inquiry; including summaries for funds spent on legal advice, administration, witnesses, travel, etc. Although Liberty does not oppose the disclosure of all costs, summary information should suffice ...
>
> Such financial accountability would not only increase public confidence, but would also encourage inquiries to reduce costs and reflect upon the expertise of the inquiry administrator. The use of summary reporting would also avoid privacy concerns except where a summary category was specific to a single person.[54]

10.34 Civil Liberties Australia was also in favour of maximum openness and reporting by inquiries, including accounting for funds spent.[55]

10.35 The Construction, Forestry, Mining and Energy Union (CFMEU) supported the introduction of requirements for the Australian Government to provide information about the proposed budget of an inquiry, interim reports on costs and a breakdown of the costs upon completion of the inquiry.[56]

10.36 In contrast, Mr Graham Millar observed that there are already 'established parliamentary and other protocols for the publication of the total payments to contractors, and the total of fees paid to individual lawyers and law firms assisting Royal Commissions are invariably published in accordance with these protocols'.[57]

10.37 Similarly, the Australian Government Solicitor (AGS) stated 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.[58]

10.38 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that the Australian Government be required to publish summary information about the costs of inquiries within a reasonable time.[59] A majority of stakeholders who addressed the issue were in favour of this proposal.[60] The Law Council described it as 'a step towards greater transparency and accountability for the executive in relation to the administration of justice'.[61]

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54 Liberty Victoria, *Submission RC 1,* 6 May 2009.
55 Civil Liberties Australia, *Submission RC 17,* 19 May 2009.
56 Construction, Forestry, Mining and Energy Union, *Submission RC 8,* 17 May 2009.
57 G Millar, *Submission RC 5,* 17 May 2009.
58 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
59 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 10–1.
60 Liberty Victoria, *Submission RC 26,* 27 September 2009; Community and Public Sector Union, *Submission RC 25,* 22 September 2009; G Millar, *Submission RC 21,* 21 September 2009; K Bills, *Submission RC 19,* 17 September 2009.
61 Law Council of Australia, *Submission RC 30,* 2 October 2009.

10.39 Millar queried whether such information would include all costs to the Australian Government, including those costs incurred by agencies other than those primarily involved, and those costs incurred by inquiry participants outside the public sector. Dr Ian Turnbull was of the view that an estimate of the expected cost should be published at the commencement of an inquiry.[62]

ALRC's view

10.40 There are a number of existing sources of information about the costs of individual Royal Commissions and public inquiries. In the ALRC's view, however, these sources are not readily accessible to the general public. Moreover, information often comes to light in a piecemeal fashion. There is no formal procedure for the disclosure of information about costs of completed Royal Commissions and inquiries. The extent of the information that is made public often depends upon the political process—namely, whether politicians ask questions about the costs of individual inquiries in Parliament or during estimates hearings. Although a substantial amount of information has come to light through these processes, practice has varied from inquiry to inquiry and has been driven, to some degree, by political factors.

10.41 It can be difficult to predict accurately at the outset how much a Royal Commission or inquiry will cost, and factors that can contribute significantly to the costs. For example, the complexity of the issues, the number of inquiry participants, the need for public hearings and the administrative and technological requirements of the inquiry, may not be known until the inquiry is underway. Experience has also shown that inquiries frequently require extensions of their reporting date and, therefore, additional budget allocations. For this reason, a requirement that the Australian Government publish information about the budget of an inquiry and provide interim reports on costs may be of limited use.

10.42 Given the concern about the high costs of inquiries, and the difficulty in accessing existing sources of information about those costs, the ALRC is of the view that the recommended *Inquiries Act* should require the Australian Government to publish summary information about the costs of completed Royal Commissions and Official Inquiries within a reasonable time after the inquiry has concluded. Ideally, this could be done in an expenditure statement published on the inquiry's website.

10.43 The ALRC notes that associated costs may not be included in the inquiry budget. For example, government departments and agencies may incur costs associated with the production of documents to an inquiry or the provision of legal representation to employees appearing before an inquiry. Individuals and organisations outside the public sector may incur similar types of costs due to their participation in an inquiry.

62 I Turnbull, *Submission RC 22,* 21 September 2009.

10.44 These indirect costs are difficult to quantify and precise information, especially in respect of the private sector, may not be readily available. The requirement to publish summary information, therefore, should be confined to the direct costs and budget expenditure of an inquiry, as detailed below, rather than to other indirect costs incurred by the Australian Government and the private sector.

10.45 In the ALRC's view, the expenditure statement should include a breakdown of the budget and expenditure of the inquiry. At a minimum, summary information should be provided for the following, as separate amounts:

- fees and allowances paid to inquiry members;
- fees and allowances paid to counsel assisting;
- fees and allowances paid to solicitors assisting;
- financial assistance provided to witnesses and other participants for legal and non-legal costs;
- staff costs;
- information and communication technology costs;
- office accommodation; and
- other administrative and operational expenditure.

Recommendation 10–1 The recommended *Inquiries Act* should require the Australian Government to publish an expenditure statement setting out the costs of Royal Commissions and Official Inquiries within a reasonable time after the inquiry has concluded. The statement should include summary information about the costs of an inquiry, including:

- fees and allowances paid to inquiry members;
- fees and allowances paid to counsel assisting;
- fees and allowances paid to solicitors assisting;
- financial assistance provided to witnesses and other participants for legal and non-legal costs;
- staff costs;

- information and communication technology costs;
- office accommodation; and
- other administrative and operational expenditure.

Role of inquiry members

10.46 Some jurisdictions have attempted to minimise inquiry costs by requiring inquiry members to monitor or control costs associated with the inquiry. Under the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA), for example, the Commissioner was required to 'seek to adopt procedures that will facilitate a prompt, cost-effective and thorough investigation of any matter relevant to the Inquiry'.[63] In the Interim Report, Commissioner Mullighan stated that he had attempted to comply with this requirement.[64]

10.47 In the United Kingdom, the *Inquiries Act* (UK) provides that the chair of an inquiry must have regard to the need to avoid unnecessary cost (whether to public funds or to witnesses or others) in making decisions as to the procedure or conduct of an inquiry.[65] Statutory rules made under the *Inquiries Act* include evidentiary and procedural rules that further 'assist the chairman in controlling oral procedures and prevent extensive and costly cross-examination procedures'.[66]

10.48 Similarly, under the Tribunals of Inquiry Bill 2005 (Ireland), tribunals of inquiry would be required to perform their functions in a manner that is 'efficient, effective and expeditious'.[67] The Bill further provides that a 'tribunal shall not inquire into a relevant matter unless it is satisfied that the cost and duration of the inquiry into the relevant matter are likely to be justified by the importance of the facts that are likely to be established in consequence of such inquiry'.[68]

10.49 The Inquiries Bill 2008 (NZ) also requires that inquiry members, in making a decision as to the procedure or conduct of an inquiry, must 'have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry'.[69]

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63 *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 5(1)(b).
64 E Mullighan, *Children in State Care Commission of Inquiry—Interim Report* (2005), 43.
65 *Inquiries Act 2005* (UK) s 17(3).
66 Explanatory Memorandum, Inquiry Rules 2006 (UK), [2.1].
67 Tribunals of Inquiry Bill 2005 (Ireland) cl 21(1).
68 Ibid cl 21(2).
69 Inquiries Bill 2008 (NZ) cl 14(2)(b).

10.50 In IP 35, the ALRC sought stakeholder views on the role inquiry members should play in monitoring and controlling inquiry expenditure, including whether an inquiry member should be required by legislation to monitor and control expenditure.[70] In DP 75, the ALRC expressed the view that such an obligation should not be included in the proposed *Inquiries Act.*[71]

Submissions and consultations

10.51 Millar stated that past Royal Commissioners have taken an 'active interest in the budget and expenditure to the extent that the budget is adequate to fulfil the terms of reference and that expenditure represents value for money'. As Commissioners were responsible for the strategic management of the inquiry process, Millar submitted that the day-to-day management of the inquiry budget and expenditure was best left to the senior support staff.[72]

10.52 Some stakeholders observed that inquiry members are not always closely involved in matters pertaining to the budget and day-to-day expenditure of the inquiry. As their primary role is to investigate and report on the terms of reference of the inquiry, inquiry members may not possess skills and experience in financial management and administration. The practice has been for the budget and expenditure of inquiries to be overseen by the executive officer or secretary of the inquiry, with input from inquiry members as necessary.

ALRC's view

10.53 In the ALRC's view, imposing a statutory obligation on inquiry members to monitor and control expenditure would be of limited use. Inquiries are conducted within the confines of the budget allocated to them by the executive government. Inquiries are financially accountable in their expenditure of public money through a variety of mechanisms. As discussed above, the ALRC recommends that the Australian Government should be required to publish an expenditure statement for individual inquiries.[73] Such a requirement is sufficient to improve transparency and public access to accurate information about the costs of inquiries. It is not clear how imposing an additional statutory obligation upon inquiry members personally to monitor expenditure would lead to any substantial benefit in terms of minimising the costs of inquiries.

10.54 In any event, it would be difficult to measure an individual inquiry member's compliance with a statutory obligation of this nature. It is also difficult to see how such an obligation could be enforced, other than on application for judicial review. As the

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70 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–8.

71 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [10.52]–[10.53].

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

73 See Recommendation 10–1.

conduct of an inquiry involves the expenditure of public funds, there may be a large number of people who may have a sufficient interest to seek judicial review remedies. In the past, however, the courts have displayed some reluctance to allow individuals and organisations to challenge these types of spending decisions.[74] Challenges may also result in substantial delays to the conduct of an inquiry.

10.55 The ALRC recognises, however, that there are many factors that may influence the manner in which an inquiry member chooses to conduct a particular inquiry, and these also have cost implications. These factors include the scope of the terms of reference; the factual or technical complexity of the subject matter; the volume of relevant material; the number of inquiry participants; and the types of procedures that inquiry members choose to employ in an inquiry. Inquiry members must balance these considerations against the need for inquiries to be conducted within an allocated budget and to report within a set timeframe. There is a tendency, however, for Royal Commissions and other forms of inquiry to last longer than anticipated and extensions of time and additional funding are often sought, and granted, by government.[75]

10.56 While the ALRC does not recommend that there should be a statutory obligation on inquiry members to monitor and control expenditure, there are steps that inquiry members can take to minimise costs. An analogy can be drawn with the civil justice system in which the introduction of case management principles has sought to balance the need to resolve disputes justly while also ensuring efficiency and a proportionate allocation of public resources.[76] The efficiency of inquiries may be enhanced if inquiry members have regard to similar considerations when determining the manner in which an inquiry is to be conducted and the types of procedures that will be employed. While inquiry members must give weight to competing factors, as discussed elsewhere in this Report,[77] the ALRC is of the view that it is generally appropriate that careful consideration also be given to the following matters:

- the efficient use of the inquiry's resources;
- the need to deliver the report by the reporting date; and

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74 *Pape v Commissioner of Taxation* [2009] HCA 23, [49].

75 The Royal Commission into Aboriginal Deaths in Custody, which was originally due to report on 31 December 1988, delivered its final report on 15 April 1991. Reports on individual deaths were prepared by individual Commissioners and delivered separately. The HIH Royal Commission, which was originally required to report by 30 June 2002 sought, and was granted, an extension until 4 April 2003. More recently, the reporting date for the AWB Inquiry was extended twice from 31 March 2006 to 24 November 2006.

76 Recent developments at the federal level include the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth), which provides case management powers with statutory foundation. The High Court has recently reaffirmed that case management is a relevant consideration in the attainment of justice: *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27.

77 In particular, procedural fairness obligations, which are discussed in detail in Chs 15 and 16.

- the need to ensure that the conduct of the inquiry is proportionate to the importance and complexity of the issues under examination.[78]

10.57 While those establishing Royal Commissions and Official Inquiries have primary responsibility for ensuring that the reporting date is achievable and adequate funds are provided, inquiry members should endeavour to perform their functions under the *Inquiries Act* within the timeframe and budget set by government.

Jurisdiction to award costs

10.58 In Australia, Royal Commissions and other public inquiries do not have the power to order a person to pay costs. In some overseas jurisdictions, however, public inquiries have the power to order that a person pay the costs of an inquiry or a witness appearing before the inquiry. For example, in New Zealand, a Commission of Inquiry:

> may order that the whole or any portion of the costs of the inquiry or of any party thereto shall be paid by any of the parties to the inquiry, or by all or any of the persons who have procured the inquiry to be held.[79]

10.59 In its 2008 report, *A New Inquiries Act*, the New Zealand Law Commission (NZLC) noted that the power to order the payment of costs had been used rarely.[80] The NZLC was of the view that individuals required to participate in inquiries should not bear potential liability for costs related to actions that took place before the start of the inquiry. It also noted that, unlike in civil cases, cost orders in inquiries 'do not serve the purposes of indemnifying successful litigants; deterring frivolous actions; or encouraging settlement'.[81]

10.60 The NZLC, however, supported the retention of the power to order costs in certain circumstances. It recommended that an inquiry should be able to make an order for the payment of costs if it is satisfied that the conduct of a person has unduly lengthened, obstructed or added undue cost to an inquiry.[82] In such circumstances, the inquiry member may order that costs be paid at a reasonable rate. Further, some or all of the costs may be paid to another participant in the inquiry.[83] Such an order may be made regardless of whether hearings have been held in the inquiry.[84] These recommendations are reflected in cl 29 of the Inquiries Bill 2008 (NZ), which

78 See, eg, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Cth) cl 37M(2).
79 *Commissions of Inquiry Act 1908* (NZ) s 11. See also the *Tribunals of Inquiry (Evidence) Amendment Act 1997* (Ireland) s 6(1).
80 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [7.4].
81 Ibid, [7.5].
82 Ibid, Rec 35.
83 Ibid.
84 Ibid, Rec 36. The NZLC also recommended that such costs orders should be enforceable in any court of competent jurisdiction: Rec 37. For a detailed explanation of the recommendations, see New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Ch 7.

empowers an inquiry to make an award of costs. Once filed in the appropriate court, an award of costs becomes enforceable as a judgment of that court.[85]

Submissions and consultations

10.61 In IP 35, the ALRC asked whether Royal Commissions or other public inquiries should have the power to make an order for costs incurred by the inquiry or a witness appearing before the inquiry and, if so, in what circumstances.[86] In DP 75, the ALRC did not propose that inquiries established under the *Inquiries Act* should be empowered to make an order for the payment of costs.[87]

10.62 In Liberty Victoria's view, a non-judicial inquiry should not have the power to make a costs order against a person, but should be able to make certain recommendations, or be able to apply to a court to have such an order made.[88] Liberty Victoria noted, however, that it may be appropriate for an inquiry to have the power to order a government body or agency to pay certain expenses—for example, witness expenses—but only where the power is clearly defined and there is a right of appeal.

10.63 Millar submitted that empowering an inquiry to make costs orders could have the effect that, in some circumstances, those who are required to appear before, or otherwise assist, an inquiry may alter their behaviour in a way that is detrimental to the outcome of the inquiry.[89] On the other hand, he submitted that there may be advantages in a limited power to make an order for costs against a person or organisation who is obstructing an inquiry, or adding to its costs, or the costs of a party before the inquiry.[90]

10.64 Similarly, Dr Ian Turnbull submitted that inquiries must be able to make costs orders against participants who deliberately delay or otherwise hinder or interfere with the inquiry and such a power must be reviewable.[91] A similar view was expressed by Civil Liberties Australia.[92]

10.65 The AGS submitted that, as Royal Commissions and other ad hoc inquiries impose an unusual burden on those participating in them, any additional burden by way of a costs penalty could be difficult to justify on public policy grounds.[93]

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85 Inquiries Bill 2008 (NZ) cl 29(4).
86 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 6–9.
87 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [10.62]–[10.65].
88 Liberty Victoria, *Submission RC 1,* 6 May 2009.
89 G Millar, *Submission RC 5,* 17 May 2009.
90 Ibid.
91 I Turnbull, *Submission RC 6,* 16 May 2009.
92 Civil Liberties Australia, *Submission RC 17,* 19 May 2009.
93 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.

ALRC's view

10.66 The primary function of inquiries is to investigate issues and provide reports and recommendations to government. They do not determine rights and liabilities and their recommendations are not legally binding. In the ALRC's view, this does not sit comfortably with the purposes of the costs indemnity rule—namely, that an unsuccessful party will usually be ordered to pay the legal costs of the successful party. The purposes served by this rule in civil litigation are not applicable in the context of inquiries.[94]

10.67 Another concern is that conferring a power to award costs upon an ad hoc executive body, appointed for the purpose of reporting and recommending action to government, could be open to question on constitutional grounds. If a power to award costs were incorporated into the recommended *Inquiries Act,* provision would have to be made for the enforcement of costs orders by a court in the exercise of its judicial power.[95] In the ALRC's view, this would be necessary to limit the possibility of constitutional challenge on the ground that the recommended Act purports to confer the judicial power of the Commonwealth on inquiry members. Assuming the power could be drafted in a way that was constitutionally valid, any decision by an inquiry member to award costs against an inquiry participant would entail separate enforcement proceedings in a court and could also be quashed upon judicial review.

10.68 In Chapters 19 and 20, the ALRC recommends the inclusion of several criminal offences relating to non-compliance with the requirements of Royal Commissions or Official Inquiries, and to the disruption of the proceedings of an inquiry. In the ALRC's view, these offences are sufficient to deter inquiry participants from engaging in conduct aimed at delaying, obstructing or increasing the cost of inquiries. The ALRC also notes that, in the jurisdictions in which the power to award costs is available, the power has been exercised rarely. The ALRC does not, therefore, recommend that a power to award costs against an inquiry participant be incorporated into the recommended *Inquiries Act.*

Other methods of minimising costs

10.69 In addition to the recommendations made in this chapter, the ALRC recommends measures throughout this Report that are intended to encourage greater flexibility, less formality and greater cost-effectiveness in the conduct of inquiries. In particular, the ALRC's recommended new statutory framework for public inquiries would introduce a second tier of inquiry which would provide a more flexible, expeditious and cost-effective form of inquiry.

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94 Those purposes are: to assist parties to finance their litigation; aid the settlement process; help minimise the potential for damages awards to be eroded by the costs of litigation; and deter people from pursuing claims and defences: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [4.1].

95 *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2, [2] (Gleeson CJ).

10.70 In Chapter 6, the ALRC considers issues relating to an inquiry's terms of reference. It is observed that terms that are too wide can lead to unnecessary cost, complexity and delay, and can leave an inquiry 'floundering in a wilderness of possible avenues of investigation'.[96] Costs considerations should be taken into account when determining whether it is appropriate to establish an ad hoc inquiry under the *Inquiries Act* and, if so, the appropriate tier of inquiry.

10.71 As discussed in Chapter 6, an alternative to establishing an inquiry is for the Australian Government to make greater use of the various existing permanent bodies that possess the necessary powers and already have existing infrastructure to carry out certain types of inquiries. In some circumstances, it may be more efficient and cost-effective to refer some inquiries to these existing bodies rather than establishing a Royal Commission or Official Inquiry. For example, the direct costs to the Office of the Inspector-General of Intelligence and Security (IGIS) of the Inquiry into the actions taken by ASIO in 2003 in respect of Mr Izhar Ul-Haque and related matters in 2007–2008 totalled $215,000.[97] This is substantially less than the costs of Royal Commissions and other ad hoc public inquiries. While some IGIS inquiries may be more focused in scope than ad hoc inquiries, they deal with complex matters.[98]

10.72 Efficient administration is an important aspect of ensuring the cost-effectiveness of inquiries.[99] In this regard the ALRC recommends, in Chapter 6, that the Australian Government develop and publish an *Inquiries Handbook* containing information for those responsible for establishing inquiries, inquiry members, inquiry participants and members of the general public on a range of matters relating to Royal Commissions and Official Inquiries.[100] As discussed in Chapters 8 and 9, it is suggested that detailed guidance on matters relating to records management and information and communication technology infrastructure should be included in the *Inquiries Handbook*.[101] Such guidance will assist those involved in future inquiries with these more complex aspects of the administration of inquiries and ensure that value for money is provided by external providers of such services. The ALRC notes, in Chapter 8, that it would be appropriate for the Australian Government to engage a person who possesses substantial experience in the administration of inquiries to prepare guidance on these and other matters pertaining to inquiry administration for inclusion in the *Inquiries Handbook*.

10.73 In Chapter 9, the ALRC recommends a number of measures for the funding of certain expenses incurred by inquiries and inquiry participants. It is important that the

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96 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 52.
97 Inspector-General of Intelligence and Security, *Submission RC 2,* 12 May 2009.
98 Ibid.
99 In Ch 8, the ALRC makes several recommendations relating to the administration of inquiries.
100 Recommendation 6–1.
101 As noted in Ch 9, in the HMAS Sydney II Commission of Inquiry, the document management contractors were engaged at a cost of $2.07 million out of a total expenditure of $6.66 million: T Cole, *The Loss of HMAS Sydney II* (2009), Appendix D, 328.

funding of legal representation and other assistance for inquiry participants is monitored carefully throughout the inquiry to ensure that it is provided at an appropriate level and is delivered in the most cost-effective manner. For example, inquiry participants who share a common interest may not require independent legal representation and could be represented by the same lawyers. Further, in determining the required level of skill and expertise of legal practitioners appointed to assist an inquiry, it is appropriate to consider whether the issues in the inquiry require the expertise of Senior Counsel in the role of counsel assisting. An experienced junior counsel may suffice.

10.74 In Chapter 11, the ALRC examines issues relating to the exercise of coercive and other investigatory powers by Royal Commissions and Official Inquiries. The ALRC recommends that inquiry members be able to require information from a person in a form approved by the inquiry.[102] This may facilitate greater use of written statements in inquiries, make proceedings more efficient and reduce the cost of witness examinations. As discussed in that chapter, an inquiry should be able to determine the form in which documents and other things are produced, including in electronic format. This may avoid the significant costs associated with converting material from hard copy to digital form (or vice versa).

10.75 In Chapter 14, the ALRC considers issues relating to inquiries and courts. In particular, it recommends that an inquiry member should be able to refer a question of law to the Federal Court.[103] This mechanism may provide a convenient alternative to judicial review proceedings that are often costly and time-consuming. It also may be a more cost-effective way to resolve issues relating to privilege and public interest immunity without imposing the costs of judicial review proceedings on inquiry participants.

10.76 In Chapters 15 and 16, the ALRC examines the types of procedures inquiries may choose to employ in conducting an inquiry. The ALRC recommends measures to facilitate a more informal and inquisitorial inquiry process.[104] It is envisaged that inquiry members will take account of the cost-effectiveness of particular methods of investigation and inquiry and thereby avoid unnecessary expenditure of public resources and the resources of inquiry participants.

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102 Recommendation 11–4.
103 Recommendation 14–1.
104 Recommendations 15–4, 15–5.

Part D

Inquiry Powers

11. Powers

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Introduction

11.1 In this Report, the ALRC recommends a new statutory framework for establishing Royal Commissions and Official Inquiries.[1] In this framework, one of the key distinctions between Royal Commissions and Official Inquiries is the type of powers conferred on each tier of inquiry. Broadly speaking, Royal Commissions, as the highest tier, will have conferred on them a wider range of coercive and investigatory powers than Official Inquiries. The recommended *Inquiries Act* should set out the powers available to each tier of inquiry rather than the Australian Government

1 The model recommended in this Report is discussed further in Ch 5.

selecting the powers that may be exercised by individual inquiries at the time they are established.[2]

11.2 In this chapter, the ALRC discusses the specific powers that should be conferred on each tier of inquiry under the *Inquiries Act.* The ALRC seeks to ensure that both types of inquiry have sufficient powers to obtain the information required to conduct their investigations and report on their terms of reference. In Chapters 12, 15, 16 and 17, the ALRC makes recommendations regarding the necessary protections of the rights of persons involved in, or affected by, inquiries exercising such powers.

11.3 The chapter commences with an overview of the powers of Royal Commissions and Official Inquiries. It then considers specific coercive information-gathering powers, such as the power to require a person to appear or to produce documents or provide information in other forms. Intrusive investigatory powers, such as entry, search and seizure powers and interception powers, are also considered. The chapter then considers other issues including: evidence and information obtained in a foreign country; the exercise of concurrent functions and powers under Commonwealth and state or territory laws; and the power to communicate information and evidence relating to contraventions of the law to other government bodies.

Overview of powers of Royal Commissions and Official Inquiries

11.4 One of the key differences between Royal Commissions and other types of inquiries and reviews is that Royal Commissions have coercive powers to summon witnesses and gather other evidence.[3] As discussed in Chapter 4, governments can create many other types of boards or inquiries, but unless created under legislation, these will generally lack the coercive powers of a Royal Commission.[4]

11.5 By its very nature, a Royal Commission is a 'fishing expedition'.[5] It is argued that a Royal Commission requires broad powers to ensure that the issues and facts are fully canvassed.

> It would be hard to envisage that the Fitzgerald Commission of Inquiry in Queensland would have uncovered such deep seated corruption in the Police Force and government if Commissioner Fitzgerald did not possess coercive powers. The witnesses he summoned would simply have refused to attend, refused to answer questions that were incriminating or have claimed privilege.[6]

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2 Recommendation 5–2. The option of selecting powers for each tier of inquiry is discussed in Ch 5.

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

4 This is not always the case. For example, the Equine Influenza Inquiry (2008), established under the *Quarantine Act 1908* (Cth), was vested with most of the powers of an inquiry established under the *Royal Commissions Act*.

5 *Ross v Costigan* (1982) 59 FLR 184.

6 H Reed, 'The "Permanent" Commissions of Inquiry—A Comparison with Ad Hoc Commissions—Part II' (1995) 2 *Australian Journal of Administrative Law* 157, 157.

11.6 The extent to which Royal Commissions can call witnesses and require the production of documents is controversial, however, given that they are established by the executive inquiry and are not courts. Dr Janet Ransley has stated that coercive powers

> enable Commissions to unearth hidden evidence, but also have significant and sometimes intrusive impact on the affairs of governments and individuals.[7]

11.7 A key issue for the ALRC is whether both tiers of inquiry under the recommended *Inquiries Act* require powers to undertake their investigations and, if so, which powers. Other law reform bodies also have considered the issue of which powers are appropriate for different forms of executive inquiry. The New Zealand Law Commission (NZLC), in a recent review of the equivalent inquiries legislation of New Zealand, noted that coercive powers can mean that not only those being investigated, but also those asked to appear before a commission, can face significant costs in time and money and risk reputational damage.[8] Nonetheless, the NZLC found that the availability of general powers to call witnesses and require the production of documents is an important feature of most major inquiries.

> We have encountered no dispute that there is a place for inquiries with coercive powers: in a modern complex society the power to constitute an inquiry with coercive powers is essential.[9]

11.8 The coercive information-gathering and other investigatory powers of various Commonwealth bodies were considered by the Administrative Review Council (ARC) in its 2008 report, *The Coercive Information-Gathering Powers of Government Agencies.*[10] The ARC noted that such powers were important administrative and regulatory devices for government and many agencies used them to compel the provision of information, the production of documents and the answering of questions.[11] The ARC put forward a number of best practice principles to be used as a guide to government agencies to ensure fair, efficient and effective use of coercive information-gathering powers.[12]

Submissions and consultations

11.9 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether Royal Commissions and other public inquiries required coercive powers and, if so, whether these powers should depend on the nature of the inquiry.[13] In the

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

8 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [5.4].

9 Ibid, [5.5].

10 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008).

11 Ibid, ix.

12 Ibid, xi–xviii.

13 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–1.

Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC expressed the view that both tiers of inquiry established under the proposed *Inquiries Act* may require coercive powers.[14]

11.10 As noted in Chapter 5, there was strong support amongst stakeholders for retaining Royal Commissions, which already have a broad range of coercive powers if established under the *Royal Commissions Act 1902* (Cth). In addition, there was support for introducing a statutory basis for non-Royal Commission forms of public inquiry.

11.11 Stakeholders generally agreed that coercive powers were required by inquiries, although these powers needed to be balanced by appropriate protections.[15] For example, Liberty Victoria considered it essential that inquiries have sufficient powers to achieve their purposes, including coercive powers to require information. It recommended that public inquiries have broad powers, which may only be exercised as necessary and reasonable.[16]

11.12 The Law Council of Australia (Law Council) recognised the need for Royal Commissions to have strong, and generally coercive, information-gathering powers to provide robust public scrutiny of matters of public importance, including executive action.[17] The Law Council was concerned, however, that in certain areas the *Royal Commissions Act* did not achieve 'the appropriate balance between robust public scrutiny and protecting the rights of participating individuals'.[18] Information-gathering powers must be seen as exceptional, particularly when used in executive rather than judicial processes. In its view, the use of such powers was justified only when necessary to achieve a legitimate purpose and only when accompanied by sufficient protection against their overuse or misuse and by provisions to mitigate their adverse impact on individual rights.[19] It submitted that, in future, public inquiries such as the Clarke Inquiry into the Case of Dr Mohamed Haneef, should not be conducted in the absence of suitable powers and protections.[20]

11.13 The Department of Immigration and Citizenship (DIAC) supported retaining Royal Commissions with all the powers and protections in the *Royal Commissions Act*. DIAC submitted that coercive powers should be used only in investigatory inquiries

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14 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [11.16].

15 Community and Public Sector Union, *Submission RC 10,* 22 May 2009; G Millar, *Submission RC 5,* 17 May 2009; D McKenzie, *Submission RC 27,* 28 September 2009.

16 Liberty Victoria, *Submission RC 26,* 27 September 2009; Liberty Victoria, *Submission RC 1,* 6 May 2009.

17 Law Council of Australia, *Submission RC 30,* 2 October 2009.

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

19 Law Council of Australia, *Submission RC 9,* 19 May 2009. Protections, procedural safeguards, and privileges and immunities are discussed in Chs 12, 15, 16 and 17.

20 The Law Council cited the following as model legislation for such powers and protections: *Special Commissions of Inquiry Act 1983* (NSW); *Commissions of Inquiry Act 1950* (Qld); *Public Sector Management Act 1994* (WA); *Inquiries Act 1991* (ACT); *Inquiries Act 1945* (NT).

that involved major matters of public interest and where there was a strong requirement for public disclosure. In particular, such powers should be used only where there was concern that the inquiry would not otherwise be able to access information.[21]

11.14 The Australian Government Solicitor (AGS) observed that, in many instances, the absence of coercive powers would inhibit the ability of an inquiry to fulfil its terms of reference. The AGS considered that only inquiries which did not involve controversial or contentious matters, or were of a policy nature, would be able to pursue all relevant lines of inquiry in the absence of coercive powers.[22]

11.15 The Law Council, Liberty Victoria and the Community and Public Sector Union (CPSU) also supported the ALRC's view in DP 75 that it was appropriate for more coercive powers to be conferred on Royal Commissions than on Official Inquiries.[23]

ALRC's view

11.16 Both tiers of inquiry under the recommended *Inquiries Act* may require coercive powers to investigate matters effectively and efficiently and report on a particular issue or event. Conferring coercive powers on both Royal Commissions and Official Inquiries ensures that inquiry members have access to all the information necessary to make informed findings and recommendations.

11.17 The ALRC's recommendations are designed to confer powers under the recommended *Inquiries Act* in a manner that is proportionate to the functions performed by Royal Commissions and Official Inquiries. Moreover, the ALRC recognises that it is essential that such powers be exercised only if it is justified by the particular circumstances of the inquiry. The exercise of such powers should only impinge on the rights of individuals in a proportionate and justifiable way.[24] As with other executive bodies that may exercise coercive powers, powers conferred on Royal Commissions and Official Inquiries should be complemented by appropriate rights and protections.[25]

11.18 Official Inquiries may not require the same level of coercive information-gathering and other investigatory powers as Royal Commissions. This reflects the fact that, under the ALRC's recommended statutory model, Royal Commissions would be more likely to investigate major events or problems, while Official Inquiries would be established to inquire into less significant events and be conducted in a more informal setting.

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

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

23 Law Council of Australia, *Submission RC 30,* 2 October 2009; Liberty Victoria, *Submission RC 26,* 27 September 2009; Community and Public Sector Union, *Submission RC 25,* 22 September 2009.

24 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008), 5.

25 These issues are explored in Chs 12, 15, 16 and 17.

11.19 The next section of this chapter discusses the specific powers that the ALRC recommends should be conferred on each tier of inquiry. The distinctions between the recommended powers of Royal Commissions and Official Inquiries, and the application of client legal privilege, the privilege against self-incrimination and direct use immunity, are depicted in Table 11.1.

Table 11.1: Powers of Royal Commissions and Official Inquiries and associated privileges and immunities[26]

Description	Royal Commissions	Official Inquiries
Powers		
Require production of documents and other things	Yes	Yes
Require attendance or appearance to answer questions	Yes	Yes
Require information in an approved form	Yes	Yes
Require evidence on oath or affirmation	Yes	Yes
Administer oath or affirmation	Yes	Yes
Inspect, retain and copy any documents or other things	Yes	Yes
Apply to a judge for a warrant to exercise entry, search and seizure powers	Yes	No
Receive intercepted information	Yes	No
Communicate information relating to contravention of a law	Yes	Yes
Exercise concurrent functions and powers under Commonwealth and state or territory laws	Yes	No
Take evidence and make inquiries overseas	Yes	Yes
Apply to a judge for a warrant for the apprehension of a person who fails to appear or attend	Yes	No
Privileges and immunities		
Client legal privilege can be abrogated[27]	Yes	No
Privilege against self-incrimination can be abrogated	Yes	No
Direct use immunity applies	Yes	No

26 The privilege against self-incrimination and direct use immunity are discussed in Ch 17.

27 The application of client legal privilege to Royal Commissions was the subject of a recommendation by the ALRC in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), Rec 6–2. The application of client legal privilege to Official Inquiries is discussed in Ch 17.

Coercive information-gathering powers

11.20 As discussed above, Royal Commissions and other inquiries need to obtain information in order to report on the matters falling within their terms of reference. Information may be obtained on a voluntary basis or by exercising coercive powers.

11.21 A Royal Commission's general powers to obtain information are similar to those of courts. They also are consistent with the statutory powers conferred on many government agencies to enable them to obtain information in order to fulfil their functions.[28] Such powers typically allow officers of the agency to compel the provision of information, the production of documents and the answering of questions.[29]

Production of documents and attendance to answer questions

11.22 Under the *Royal Commissions Act*, a member of a Royal Commission may summon a person to appear before the Commission at a hearing or to produce documents or other things.[30] A person who fails to attend a hearing or produce the requested documents or things, without reasonable excuse, commits an offence punishable by a maximum penalty of $1,100 or imprisonment for six months.[31]

11.23 In 2001, the *Royal Commissions Act* was amended to empower a Royal Commissioner or member of a Commission to require persons to produce documents or things by notice. Previously, persons could be required to produce documents to a Commissioner only at a formal hearing. This proved impractical in Commissions which required the collection of large numbers of documents, such as the HIH Royal Commission (2003), the proceedings of which prompted the 2001 amendments.[32] In the *Final Report of the Royal Commission into the Building and Construction Industry* (*Building Royal Commission Report*), Commissioner Cole praised these powers for allowing the Commission to compel the production of documents well in advance of hearings, assisting both in the preparation for hearings and identifying avenues for further investigation. That Commission issued 1,692 notices to produce.[33]

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28 For example, agencies such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office have coercive information-gathering powers.

29 See Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008), Appendix A.

30 *Royal Commissions Act 1902* (Cth) s 2. This includes the power to require a person to produce a document that is subject to privilege, although the fact that the document is subject to client legal privilege may still be a reasonable excuse for failing to produce the document. Privilege is discussed in Ch 17.

31 Ibid s 3. Offences and penalties under the *Royal Commissions Act* are discussed in Chs 19, 20 and 21.

32 Supplementary Explanatory Memorandum, Royal Commissions and Other Legislation Amendment Bill 2001 (Cth), 5.

33 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 25.

11.24 The 2001 amendments also clarified that a Commissioner can summon a person to produce documents or things without requiring them to give oral evidence.[34] This was achieved by amending s 2 of the *Royal Commissions Act* to allow that a person may be summoned to appear before the Commission either to give evidence or produce documents or things (or to do both).

11.25 A Royal Commission may also take sworn evidence and may require a person appearing before it to take an oath or affirmation for that purpose.[35] In public inquiries, oral examinations perform a number of functions, including:

- the identification of relevant facts;
- the disclosure of the existence of documents so that they can be seized or their production required; and
- assisting with the interpretation of documents already obtained.[36]

Submissions and consultations

11.26 In IP 35, the ALRC asked for stakeholder views on whether the current powers of a Royal Commission to summon a person to appear before it or to produce documents or things, including by way of notice, were operating effectively in practice and whether other forms of public inquiry should have similar powers.[37]

11.27 In DP 75, the ALRC proposed that both Royal Commissions and Official Inquiries be able to require a person to attend or appear before the inquiry and produce documents or other things.[38] It proposed that inquiry members also be able to require a person to give evidence or answer questions on oath or affirmation.[39]

11.28 Liberty Victoria expressed the view that all levels of inquiry 'should have a broad discretion (power) in how and what they obtain as evidence'.[40] The power to require a person or organisation to attend an oral hearing or produce documents or information was, in its view, a necessary power. Liberty Victoria expressed support for the ALRC's proposals in this regard.[41]

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34 *Royal Commissions and Other Legislation Amendment Act 2001* (Cth) s 4A.
35 *Royal Commissions Act 1902* (Cth) s 2(3).
36 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 62.
37 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–3(a).
38 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–1.
39 Ibid, Proposal 11–2.
40 Liberty Victoria, *Submission RC 1,* 6 May 2009.
41 Liberty Victoria, *Submission RC 26,* 27 September 2009.

11.29 The AGS noted that the power of a Royal Commission to summon a person to appear before it, or to produce documents, generally appeared to be effective.[42]

11.30 The Law Council recommended that public inquiries be provided with coercive information-gathering powers including the power to compel the attendance of witnesses and the production of documents.[43] It supported the ALRC's proposals in DP 75 that Royal Commissions and Official Inquiries should have powers to compel the attendance of witnesses, the production of documents, and the giving of evidence.[44]

ALRC's view

11.31 The availability of information-gathering powers is a fundamental and characteristic feature of Royal Commissions. It is necessary for them to possess the power to obtain information relevant to their terms of reference, by requiring the production of documents and other things or by requiring a person to attend an oral examination or hearing to answer questions. It is equally necessary for Official Inquiries to have such powers.

Documents

11.32 Section 2(3A) of the *Royal Commissions Act*—which empowers the production of documents by written notice—enables an inquiry to gather evidence before the commencement of hearings. Under the recommended new statutory framework, not all inquiries may require formal hearings. In particular, it is envisaged that Official Inquiries will be conducted more informally and perhaps 'on the papers' with a limited number of hearings. To ensure flexibility in the inquiry process, it is appropriate that coercive information-gathering powers may be exercised by way of written notice rather than under summons, which ordinarily requires a person to appear at a particular place at a particular time to produce documents and other things.

11.33 Under the *Royal Commissions Act*, a Royal Commission can also obtain documentary material by summoning a person to appear at a hearing to produce documents or other things specified in the summons.[45] These powers require production only at hearings, and not before. There appears to be no reason to retain the existing distinction between a Royal Commission's power to issue a summons for the production of documents at a hearing and to issue a notice for production of documents by other means. In order to streamline the current procedures, coercive information-gathering powers should be exercisable by written notice. Further, the inquiry member issuing the notice should be able to specify the manner in which documents or other things are to be produced. The notice could require the person to produce the

42 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
43 Law Council of Australia, *Submission RC 9,* 19 May 2009.
44 Law Council of Australia, *Submission RC 30,* 2 October 2009.
45 *Royal Commissions Act 1902* (Cth) s 2(1)(b).

documents covered by the notice at a specified place, on or before a specified date, or require the person to attend in person to produce the documents at a hearing.[46]

11.34 Documents and other materials are often a valuable source of information to an inquiry. As such, it is desirable that both Royal Commissions and Official Inquiries possess the power to issue a notice for the production of documents or other things. It is also desirable that the power be framed in such a way that allows the information-gathering process to commence at the earliest opportunity and prior to any hearings that may be held.

11.35 Taken together, the definition of 'document' in s 1B of the *Royal Commissions Act* and 'record' in s 25 of the *Acts Interpretation Act 1901* (Cth) includes information stored or recorded by means of a computer.[47] It is appropriate that similar definitional provisions are incorporated in the *Inquiries Act* and that an inquiry member issuing a notice for production is able to specify how the person is to produce documents or other things—for example, in an electronic format.[48]

Oral evidence

11.36 Oral evidence can be a major source of information for Royal Commissions and other investigatory inquiries. It is recommended, therefore, that both Royal Commissions and Official Inquiries be empowered to require the appearance of a person at a hearing to give oral evidence or require a person's attendance at an examination to answer questions. The ALRC's recommendations with respect to the privilege against self-incrimination and direct use immunity are discussed in Chapter 17.

11.37 It is desirable that witnesses cooperate with inquiries and provide truthful evidence. It is inevitable, however, that this will not occur in every case. In the ALRC's view, it is necessary to retain the power of a Royal Commission to take oral evidence at a hearing or examination on oath or affirmation and for this power to be conferred on Official Inquiries.[49]

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46 An alternative is to provide that a person may produce documents or things before the date specified in the notice and, unless otherwise directed, is not then required to attend the hearing unless he or she is also required to give evidence at the hearing: see *Administrative Appeals Tribunal 1975* (Cth) s 40(IE).

47 Section 1B of the *Royal Commissions Act 1902* (Cth) defines 'document' to include 'any book, register or other record of information, however compiled, recorded or stored'. 'Record' is defined in s 25 of the *Acts Interpretation Act* to include 'information stored or recorded by means of a computer'.

48 The issue of whether a person can be required by notice to produce a document or other thing not otherwise presently in existence—for example, paper copies of electronic records—will depend on the language and construction of the relevant statutory provisions: see *AB Pty Ltd v Australian Crime Commission* (2009) 175 FCR 296, 304.

49 An oath or an affirmation may be administered by an inquiry member, or a person authorised by an inquiry member: *Royal Commissions Act 1902* (Cth) s 2(3). The power to take evidence on oath or affirmation is also essential to ensure that offences in the *Crimes Act 1914* (Cth) apply. This is discussed in Ch 19.

11.38 The ALRC has considered whether persons other than inquiry members, for example inquiry staff or legal practitioners assisting an inquiry, should be authorised to exercise coercive information-gathering powers in some circumstances. The ALRC has reached the view that this would not be appropriate. The exercise of coercive powers may give rise to penalties for non-compliance and should be exercised only by a person who is sufficiently experienced and, importantly, has ultimate responsibility for the conduct of the inquiry.

Recommendation 11–1 The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to issue notices requiring a person to:

(a) attend or appear before the inquiry; and

(b) produce documents or other things.

Recommendation 11–2 The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to require a person appearing before the inquiry to give evidence or answer questions to swear an oath or make an affirmation. An inquiry member, or a person authorised by an inquiry member, should be empowered to administer an oath or an affirmation to that person.

Powers of arrest

11.39 Section 6B of the *Royal Commissions Act*, originally inserted in 1912,[50] empowers the president or chair of a Royal Commission to issue a warrant for the apprehension of a person who has failed to attend in answer to a summons. Such a warrant authorises the apprehension of a person so that they can be brought before the Royal Commission and detained in custody for that purpose until they are released by order of the president or chair.[51] The apprehension of a person under s 6B of the Act does not relieve that person of any liability for offences or penalties relating to non-compliance with a Royal Commission.[52]

11.40 In New South Wales (NSW), Western Australia and the ACT, Royal Commissions and some public inquiries are empowered to issue arrest warrants on their own motion.[53] In South Australia, the chair of a Royal Commission may issue an arrest warrant or may apply to a magistrate for such a warrant.[54] In Queensland, the chair may make an ex parte application to a magistrate for the issue of a warrant for the

50 *Royal Commissions Act 1912* (Cth) s 7.
51 *Royal Commissions Act 1902* (Cth) s 6B(2).
52 Ibid s 6B(4).
53 *Special Commissions of Inquiry Act 1983* (NSW) s 22; *Royal Commissions Act 1923* (NSW) s 16; *Royal Commissions Act 1968* (WA) s 16; *Royal Commissions Act 1991* (ACT) s 35 (cf *Inquiries Act 1991* (ACT), which does not confer any arrest powers on boards of inquiry).
54 *Royal Commissions Act 1917* (SA) ss 11, 11A.

apprehension of a person who has failed to comply with a summons.[55] The chair may also issue a warrant on his or her own motion for the apprehension of a person who has failed, or probably will fail, to attend before the inquiry.[56]

11.41 In contrast to other state and territory jurisdictions, a Commission of Inquiry in Tasmania cannot, on its own motion, issue an arrest warrant. It must apply to a magistrate for a warrant to have a person apprehended and brought before the Commission.[57]

11.42 The powers of a federal Royal Commission in relation to arrest are somewhat different from those of permanent investigatory bodies such as the Australian Crime Commission (ACC). The ACC can only obtain an arrest warrant on application to a judge of the Federal Court of Australia or of the Supreme Court of a state or territory.[58] A person apprehended pursuant to such a warrant must be brought before a judge who may make orders as to whether they should be admitted to bail, continue in detention or be released.[59]

11.43 The Australian Securities and Investments Commission (ASIC) does not have the power to issue or apply for an arrest warrant. If a person fails to comply with its requirements, however, ASIC may certify the failure to the Federal Court of Australia, which may then inquire into the case and make orders for compliance by that person.[60] This procedure allows the court to use its contempt powers to coerce compliance with ASIC requirements, as any failure to comply with a court order would be punishable as a contempt.[61] Other permanent inquiry bodies, such as the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security (IGIS), do not have any powers to obtain an arrest warrant, although their enabling legislation establishes a number of non-compliance offences for those who refuse or fail to provide information, produce documents or answer a question when required.[62]

11.44 A modern approach to arrest powers in Commonwealth legislation is outlined in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (*Guide to Framing Commonwealth Offences*) published by the Australian Government Attorney-General's Department.[63] Generally speaking, it is considered inappropriate to confer such powers on officers of a regulatory agency unless there is a

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55 *Commissions of Inquiry Act 1950* (Qld) s 5A(1).
56 Ibid ss 8, 9A.
57 *Commissions of Inquiry Act 1995* (Tas) s 27.
58 *Australian Crime Commission Act 2002* (Cth) s 31(1).
59 Ibid s 31(3).
60 *Australian Securities and Investments Commission Act 2001* (Cth) s 70.
61 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [2.59].
62 *Ombudsman Act 1976* (Cth) s 36; *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18.
63 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007).

clearly demonstrated need. Legislation conferring such powers should require that an apprehended person be delivered to a police officer or judicial officer.[64]

Submissions and consultations

11.45 In DP 75, the ALRC proposed that only Royal Commissions, and not Official Inquiries, be conferred with arrest powers. In addition, the ALRC expressed the view that an inquiry member should not be able to issue an arrest warrant on his or her own motion. Instead, the ALRC proposed that inquiry members be required to apply to a judge for a warrant.[65]

11.46 Both the Law Council and Liberty Victoria supported the ALRC's proposal.[66] In particular, the Law Council welcomed the ALRC's proposal that only judges should be empowered to issue an arrest warrant. The Law Council also agreed that such a power should not be conferred on Official Inquiries as such inquiries were less likely to require arrest powers to elicit the cooperation of those required to appear.

ALRC's view

11.47 The ALRC notes that there is an inconsistency between the power of a Royal Commission to issue an arrest warrant on its own motion and the entry, search and seizure powers of a Royal Commission, which may be exercised only under a warrant issued by a judge.[67] Further, Commonwealth investigatory bodies, including those that investigate serious crime, are generally not empowered to issue arrest warrants and must instead obtain such a warrant from a judge.

11.48 Given the potential for the rights and liberties of individuals to be adversely affected by arrest powers, it is appropriate that these be subject to certain limits and safeguards. The ALRC recommends, therefore, that the power in s 6B of the *Royal Commissions Act* should be redrafted in the recommended *Inquiries Act.* Royal Commissions should be required to apply to a judge to issue a warrant for the apprehension and immediate delivery of a person to a police officer or judicial officer.

11.49 It is envisaged that Official Inquiries will be established to inquire into less significant events or problems. It is less likely that arrest powers would be required to elicit the cooperation of those required by notice to appear before an Official Inquiry to give evidence or answer questions. If it is anticipated that a particular inquiry will need such a power, the Australian Government should consider establishing a Royal Commission rather than an Official Inquiry. Alternatively, if that need becomes clear

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64 Ibid, 106.

65 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–3.

66 Law Council of Australia, *Submission RC 30,* 2 October 2009; Liberty Victoria, *Submission RC 26,* 27 September 2009.

67 The ALRC recommends that these powers be retained for Royal Commissions but not extended to Official Inquiries: Recommendation 11–7.

only after an inquiry has commenced, that inquiry can be converted to a Royal Commission under the conversion power recommended by the ALRC in Chapter 5.[68]

11.50 In addition, the ALRC notes that other bodies that conduct inquiries, such as the Commonwealth Ombudsman and the IGIS, appear able to perform their functions in the absence of arrest powers. Other sanctions for non-attendance, which are the subject of recommendations in Chapters 19 and 20, will be available to Official Inquiries under the recommended *Inquiries Act.*

11.51 Arrest powers recommended for Royal Commissions, therefore, should not be extended to Official Inquiries under the recommended *Inquiries Act*.

Recommendation 11–3 The power in s 6B of the *Royal Commissions Act 1902* (Cth), which enables a Royal Commission to issue a warrant for the apprehension of a person who fails to appear before it, should be redrafted in the recommended *Inquiries Act.* Royal Commissions should be required to apply to a judge to issue a warrant for the apprehension and immediate delivery of a person to a police officer or judicial officer. This power should not be conferred on Official Inquiries.

Disclosure of an existing summons or notice

11.52 In the *Building Royal Commission Report*, Commissioner Cole recommended that the *Royal Commissions Act* be amended to empower a Commission:

> by appropriate notice attached to a summons or notice to produce, to prohibit a person from disclosing the fact that he, she or it had received a summons or notice or had spoken with a Royal Commission investigator, subject only to the right to disclose this information for the purpose of obtaining legal advice, with contravention of such a prohibition to be a criminal offence punishable by a fine of $2000 or imprisonment for one year.[69]

11.53 When drafting this recommendation, Commissioner Cole relied on comparable provisions from ss 29A and 29B of the *National Crime Authority Act 1984* (Cth), which have been retained in the corresponding sections of the *Australian Crime Commission Act 2002* (Cth).[70] Why such a power was deemed necessary was not articulated in the report.

11.54 Section 29A provides that an examiner issuing a summons or notice may include a notation prohibiting or restricting disclosure of information about the

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68 Recommendation 5–3.

69 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 80.

70 *Australian Crime Commission Act 2002* (Cth) ss 29A, 29B. See also *Corruption and Crime Commission Act 2003* (WA) s 167.

summons or notice, or any official matter connected with it. The notation can be included only if the examiner is satisfied that failure to do so would reasonably be expected to, or might, prejudice the safety or reputation of a person; the fair trial of a person; the effectiveness of an operation or investigation; or if failure to do so might otherwise be contrary to the public interest. The notation must be accompanied by a written statement setting out the rights and obligations conferred or imposed by s 29B. The notations are cancelled if, after the conclusion of the operation or investigation, there is no evidence of an offence; a decision has been taken not to prosecute; or criminal proceedings have begun. In that case, the Chief Executive Officer of the Australian Crime Commission must serve a written notice of the fact of the cancellation.

11.55 Section 29B then provides that a person served with a summons or notice containing such a notation must not disclose the existence of, or any information about, the summons or notice or any official matter connected with it. The section does not apply if the notation has been cancelled, or after five years from the issue of the summons or notice. The maximum penalty for contravention of the prohibition is 20 penalty units (currently $2,200) or imprisonment for one year.

11.56 The person may, however, disclose information about a summons or notice in accordance with any circumstances specified in the notation, to a legal practitioner for the purpose of obtaining legal advice or representation, or to a legal aid officer for the purpose of obtaining assistance.[71]

11.57 If the person is a body corporate, the person may disclose information about a summons or notice to an officer or agent of the body corporate for the purpose of ensuring compliance with the summons or notice.[72] If the person is a legal practitioner, and they are required to answer a question or produce a document at an examination that is protected from disclosure by client legal privilege, the legal practitioner may disclose it to the person who communicated the information or document in order to obtain his or her agreement that the legal practitioner may comply with the requirement.[73] Those to whom such disclosures have been made are also subject to the same criminal sanctions in case of a subsequent disclosure, with similar provisions allowing disclosure for the purpose of ensuring compliance or obtaining legal advice or representation, or legal aid.[74]

11.58 These provisions were first introduced in 1991, and were explained as follows:

> The major reform contained in the Bill will prevent the disclosure of the existence of process issued by the [National Crime Authority] in the course of its investigations. It will also prevent disclosure of any information about the reference, the investigation or any hearings or proceedings to which the process relates. Previously some

71 *Australian Crime Commission Act 2002* (Cth) s 29B(2)(a)–(c).
72 Ibid s 29B(2)(d).
73 Ibid s 29B(2)(e).
74 Ibid s 29B(3).

> recipients of [National Crime Authority] summonses or notices, such as financial institutions, felt obliged to inform their clients of the receipt of these documents. This has resulted in suspects being alerted to [National Crime Authority] investigations and concealing or destroying evidence or going into hiding. The amendment will help to prevent this happening again, and will clarify the legal position of these institutions.
>
> In addition to this, the amendment will serve to protect the reputation of suspects at a time when the allegations have not been properly investigated. The recipients of the summons or notice have to be given sufficient details about the suspects so that they can determine what information is required. The potential for damage to the reputation of these people through disclosure of the existence of the summons or notice could be significant.[75]

11.59 The ALRC notes that the power to prohibit disclosure of the existence of a summons or notice is uncommon even in the context of anti-corruption bodies or standing crime commissions. Further, the ACC is a permanent body specifically charged with investigating serious crime for the purposes of subsequent legal proceedings. That agency is held accountable in a number of ways, such as through supervisory processes, as well as monitoring by its own Board, and inter-governmental and parliamentary committees.

11.60 In DP 75, the ALRC noted that it was not inclined to recommend that such a power be conferred upon Royal Commissions and Official Inquiries, especially in the absence of any demonstrated need and because investigations of serious crime and corruption could be undertaken at the federal level by other bodies such as the ACC and the Australian Commission for Law Enforcement Integrity (ACLEI). The ALRC did, however, invite stakeholder views on the issue.[76]

Submissions and consultations

11.61 Some stakeholders thought that the power to prohibit the disclosure of the existence of a notice would be a useful mechanism for Royal Commissions and Official Inquiries.[77] The ACLEI suggested that consideration be given to allowing the person establishing the inquiry (either the relevant minister or the Governor-General) to determine whether the power should be conferred on inquiries on a case by case basis.[78]

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75 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1991, 1293 (M Duffy—Attorney-General).

76 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 11–1.

77 Liberty Victoria, *Submission RC 26,* 27 September 2009; I Turnbull, *Submission RC 22,* 21 September 2009.

78 Australian Commission for Law Enforcement Integrity, *Submission RC 18,* 14 September 2009. ACLEI referred to equivalent provisions in the *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 90, 91.

ALRC's view

11.62 The power to prohibit the disclosure of a summons or notice is exceptional. A person served with a notice who discloses the existence of, or any information about, the notice, or any matter connected with it, may be prosecuted. This would, for example, criminalise any communications between a person summoned and his or her spouse or immediate family members. In the ALRC's view, the powers conferred on inquiries should be proportionate to the functions and duties they perform. In the majority of inquiries, it is unlikely that the disclosure of the mere existence of a notice would prejudice the investigations of a Royal Commission or Official Inquiry. If it were considered that such prejudice could occur in the context of a particular inquiry, the Australian Government could seek to confer such a power through the enactment of legislation specific to that inquiry.

11.63 The ALRC is of the view that it would be difficult for an inquiry to monitor a person's compliance with a prohibition on the disclosure of the existence of a notice. If a breach was suspected, the matter would have to be referred to the Commonwealth Director of Public Prosecutions for prosecution through the courts. The ALRC notes that, in recent years, no charges have been brought for offences relating to the disclosure of the existence of a summons under the *Australian Crime Commission Act*.[79]

11.64 The ALRC does not recommend that inquiries established under the *Inquiries Act* be conferred with powers comparable to those found in ss 29A and 29B of the *Australian Crime Commission Act*. Further, for the reasons discussed in Chapter 5 relating to the selection of powers, the ALRC is of the view that the person establishing the inquiry should not be able to confer such a power on an inquiry on a case by case basis. Any such conferral should be done by enacting legislation specific to that inquiry.

Power to require information or written statement

11.65 In 2003, the Royal Commission into the Building and Construction Industry (Building Royal Commission) recommended that the *Royal Commissions Act* be amended to empower a Commission to require a person to provide a written statement about a specified matter.[80] In Commissioner Cole's view, the power would have enabled the Commission to avoid the time and expense of using oral hearings to obtain evidence that could have been presented in written form.

> On one occasion, for example, the Commission sought information from a person who refused to speak to the Commission investigators or provide a statement. The

79 For example, in 2007–08, the ACC issued 895 summonses. No charges were laid in respect of unauthorised disclosure of the existence of a summons. In contrast, eight charges were laid for failure to answer questions, seven for giving false or misleading evidence and two for failing to attend an examination: Australian Crime Commission, *Annual Report 2007–08*, 38–39.

80 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Rec 1(a).

> Commission issued a summons to that witness, convened a hearing in Melbourne, and flew the witness to Melbourne from Perth for the hearing, only to have the witness state in the witness box that he didn't know anything about the matter under investigation. The waste of public time and resources is obvious, and would have been avoided if the witness could have been required to provide a statement.[81]

11.66 In 1976, Professor Enid Campbell also raised questions about whether express provision should be made to permit a person appearing as a witness to give evidence by a sworn written statement or by sending a written statement, verified in such manner as allowed by the Royal Commission.[82]

11.67 A number of Commonwealth statutes empower regulators to require a person to provide information in answer to a notice.[83] Legislation governing the operation of inquiries in overseas jurisdictions also allows a witness to give evidence by way of a written statement. For example, under the *Commissions of Investigation Act 2004* (Hong Kong), Commissions have the power—to the extent that the Commission considers proper—to examine or cross-examine a witness on oath or affirmation or by use of statutory declaration or written interrogatories.[84] Section 19 of the *Inquiries Act 2005* (UK) provides that the inquiry chair may direct a person by notice to provide evidence in the form of a written statement. As indicated in the Explanatory Notes, the potential witnesses normally would be first asked to give information voluntarily and the power of compulsion only used where a person was unwilling to comply with an informal request for information, or a person was willing to comply, but concerned about the consequences of disclosure if they were not compelled to do so.[85]

11.68 Greater emphasis on the use of written statements in Royal Commissions may make proceedings more efficient and reduce the cost of witness examinations. Professor Scott Prasser notes that the emphasis on taking evidence from witnesses in hearings is part of the reason why Royal Commissions 'take so long and cost so much'.[86]

11.69 The use of written statements, however, raises the concern that counsel will be unable to cross-examine witnesses and test evidence. This could be overcome by a Royal Commission making witness statements available early in proceedings where possible. Evidence in the Federal Court is often provided in written witness statements, particularly in trade practices and intellectual property cases. In these cases, the court may make orders for the filing and exchange of witness statements between the parties. When proceedings commence, the witness is sworn, handed a copy of his or her witness statement, asked to identify it and verify that the contents are correct. The

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81 Ibid, vol 2, 24.
82 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 342.
83 *Superannuation Industry (Supervision) Act 1993* (Cth) ss 254, 264; *Life Insurance Act 1995* (Cth) s 131.
84 *Commissions of Investigation Act 2004* (Hong Kong) s 16(1)(c), (d).
85 Parliament of United Kingdom, *Explanatory Notes to Inquiries Act* (2005), 13.
86 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 24.

document is then tendered as the witness's evidence in chief, subject to any objections made on the basis of admissibility. A witness may then be cross-examined on the contents of the statement.[87]

Submissions and consultations

11.70 In IP 35, the ALRC asked whether Royal Commissions and other inquiries should be empowered to direct a person to make a written statement.[88] Some stakeholders thought it was a sensible requirement. It was noted that under the recently enacted *Coroners Act 2008* (Vic), a person can be required to prepare a statement for the purposes of a coronial investigation addressing matters specified by the coroner.[89]

11.71 Other stakeholders expressed reservations about whether such a requirement would operate effectively in practice. Some described the power as 'exceptional' noting that it went beyond the powers conferred on courts. As such, it would require more justification than simply saving the expense of calling a witness to give evidence at a hearing.

11.72 In its submission, the Construction, Forestry, Mining and Energy Union (CFMEU) strongly opposed the proposition that an inquiry should have the power to direct a person to provide a written statement. First, it submitted that the requirement to provide a written statement would represent a further erosion of the principle against self-incrimination. Secondly, the requirement went well beyond the coercive powers traditionally available to any investigatory bodies. It was argued that there was no justification for imposing such a requirement when a person could already be compelled to answer questions and produce documents.[90]

11.73 On balance, the AGS had some doubts that Royal Commissions or other public inquiries should have the power to compel individual witnesses to provide written statements of their proposed evidence. First, the AGS doubted that it would achieve the desired purpose because some potential witnesses would 'comply' by providing only a very brief statement which gave no real indication of the evidence they would give if subjected to reasonably rigorous cross-examination. Further, depending on the circumstances, such a task could be extremely onerous and beyond the capabilities of many witnesses.

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87 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), Ch 7. In an earlier report, the ALRC observed that the provision of witness statements in Federal Court matters was seen to be cost-effective by many practitioners: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [7.198].

88 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–4.

89 *Coroners Act 2008* (Vic) s 42.

90 Construction, Forestry, Mining and Energy Union, *Submission RC 8,* 17 May 2009.

11.74 The AGS considered that a Royal Commission or inquiry should be prepared to receive written statements from witnesses who wish, or are prepared, to provide them. Such a course could assist the Royal Commission or inquiry to receive and deal with evidence in an efficient way. Also, such a course could assist a witness to address relevant issues in an efficient and comprehensive way. The AGS also suggested that consideration be given to extending the protections in s 6DD of the *Royal Commissions Act* to written witness statements provided to a Royal Commission.[91]

11.75 In contrast, Dr Ian Turnbull stated that written statements were appropriate for most witnesses and far more efficient than oral examination.[92]

11.76 Similarly, the CPSU submitted that where coercive powers were available to inquiries, those powers should also include the power to direct a person to provide a written statement. The CPSU described this as a sensible proposal, which was likely to save time and money in the conduct of Royal Commission proceedings.[93]

11.77 In DP 75, the ALRC proposed that inquiry members be empowered to issue a notice requiring a person to provide information in an approved form, such as a written statement. If that person did not provide the information, he or she would be required to attend the inquiry as if he or she had been issued with a notice to appear.[94]

11.78 All stakeholders who addressed this proposal expressed their support for it.[95] Mr Graham Millar supported such a proposal, but submitted that it would be better to reframe it so that attendance by a person was only required if the inquiry member, after receipt or non-receipt of the information, specified that attendance was required. Millar considered that this could avoid unnecessary attendances at the inquiry in cases were there had been only minor non-compliance with the notice that could be addressed through informal contact between inquiry staff and the person required to provide the information.[96]

ALRC's view

11.79 Inquiry members should be empowered under the recommended *Inquiries Act* to issue a notice requiring a person to provide information in a form approved by the inquiry.[97]

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

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

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

94 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–4.

95 Liberty Victoria, *Submission RC 26,* 27 September 2009; I Turnbull, *Submission RC 22,* 21 September 2009.

96 G Millar, *Submission RC 21,* 21 September 2009.

97 The ALRC notes the position in New Zealand where Commissions of Inquiry are empowered to require a person to provide any 'information or particulars' in any form it dictates: *Commissions of Inquiry Act 1908* (NZ) s 4C(1). The NZLC has recently reviewed this power and recommended that it remain largely unchanged: New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), 81–82.

11.80 Written statements have been used extensively in previous inquiries. In the HIH Royal Commission, for example, a large number of witnesses provided written statements but were not requested by counsel assisting or any of the parties' counsel to give oral evidence.[98] Similarly, the majority of those who provided statements and statutory declarations to the Equine Influenza Inquiry did not present oral evidence.[99] The Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry) heard oral evidence from 75 witnesses, but received statements from a further 130 witnesses.[100]

11.81 It is unlikely that these inquiries would have been able to accommodate such a large number of witnesses providing oral evidence at hearings, which are costly and time consuming. Notwithstanding the reservations of the kind expressed by the AGS, the power to require information in the form of a written statement may contribute significantly to the evidence-gathering process and to more rigorous and comprehensive factual findings. Obtaining information other than by way of oral evidence may reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry procedures.

11.82 While it is desirable that information be provided to an inquiry willingly—and past experience indicates that this will often be the case—it is the ALRC's view that the recommended *Inquiries Act* should also confer a power on inquiry members to compel the provision of information if that is justified in the circumstances. It is envisaged that, where appropriate, an inquiry member could require any person to provide information to the inquiry in a form approved by the inquiry. This enables the flexibility to require information to be provided in the form of a written statement or answers to a list of questions or free-form responses to certain matters of interest to the inquiry. In exercising such a power, an inquiry member should take into account relevant considerations such as whether providing information in the form requested would be overly burdensome or beyond a person's capabilities, or proportionate and justified for the performance of the inquiry's functions.

11.83 Information provided in compliance with a notice could be circulated to counsel assisting and other inquiry participants in order to determine whether the person providing it should be required to give further evidence orally. If further examination is not required, the information could be accepted as evidence in the inquiry without the necessity of calling the person. If further examination is to take place, the inquiry member should call the witness and follow a procedure similar to that used in the Federal Court with respect to witness statements, as outlined above.[101] This could provide an incentive for those from whom information is sought to use their best

98 N Owen, *Report of the HIH Royal Commission* (2003), Appendix C.

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

100 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), vol 1, [7.14].

101 Cross-examination of witnesses is discussed in Ch 15.

endeavours to comply—as an alternative to being required to give oral evidence. It is recommended that corresponding protections for a person providing information in this manner be incorporated into the recommended *Inquiries Act*.[102]

11.84 The ALRC agrees with Millar that if a person refuses to provide the information, or does not provide it within the period specified, an inquiry member should then be able to require him or her to attend the inquiry as if he or she had been issued with a notice to appear before the inquiry. If a person does not attend, that person would be liable for offences and penalties imposed for non-compliance with the directions of the inquiry.[103]

11.85 In the ALRC's view, the power to require information in an approved form does not represent a significant extension of the existing powers under the *Royal Commissions Act* to summon a person to appear or produce documents or other things. Analogous powers are available to investigatory bodies under other Commonwealth legislation and to overseas inquiries. The ALRC considers that the power to require information in an approved form should be available to both Royal Commissions and Official Inquiries under the recommended *Inquiries Act*.

Recommendation 11–4 The recommended *Inquiries Act* should empower a member of a Royal Commission or Official Inquiry to issue a notice requiring a person to provide information in a form approved by the inquiry, failing which the member can require the person to attend the inquiry as if he or she had been issued with a notice to attend or appear before the inquiry.

Authority to inquire granted under foreign law

11.86 Section 7A of the *Royal Commissions Act* provides that where the Australian Government has entered into appropriate arrangements with a foreign country for a Royal Commission to be granted an authority under the law of that country to take evidence and conduct inquiries in relation to the subject matter of the Commission, the information and evidence so obtained may be dealt with as if it had been obtained in Australia. This includes the use of that evidence for the purpose of the Royal Commission's report to the Governor-General.[104]

11.87 Section 7B of the *Royal Commissions Act* enables a Royal Commission to take evidence on oath or affirmation outside Australia where arrangements have been made with a foreign country. Evidence so obtained may be dealt with as if it had been taken

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102 Recommendation 17–2. The use immunity that applies to evidence given to an inquiry is discussed in more detail in Ch 17.

103 Offences and penalties are discussed in detail in Chs 19, 20 and 21.

104 *Royal Commissions Act 1902* (Cth) s 7A. Sections 7A, 7B and 7C were inserted into the *Royal Commissions Act* by the *Statute Law (Miscellaneous Amendments) Act (No 1)* 1982 (Cth).

in Australia. Any statement or disclosure made by a witness in the course of giving evidence under the above provisions is not admissible against them in civil or criminal proceedings in Australia.[105]

11.88 Sections 16(2) and (3) of the *Royal Commissions Act* enable certificates to be issued by appropriate ministers as evidence of the existence of arrangements entered into with a foreign country pursuant to ss 7A and 7B of the Act.[106] These certificates can then be used as evidence in related legal proceedings.

11.89 In past Royal Commissions, the practice of obtaining information and evidence from overseas sources has often differed from the procedures set out in the *Royal Commissions Act.*

11.90 In the AWB Inquiry, one source of information was the United Nations, which had established procedures for certain overseas bodies seeking access to information and documents from the Independent Inquiry Committee into the United Nations Oil-for-Food Programme (ICC).[107] The AWB Inquiry was granted access, subject to certain conditions, to documents held by the United Nations. In addition, the United Nations authorised the giving of a formal statement and evidence by one of the staff members of the ICC.[108]

11.91 In the HIH Royal Commission evidence was sought, unsuccessfully, from overseas sources. The Commission encountered difficulties when it sought production of HIH-related documents from parties in the United Kingdom and the United States. Those parties did not respond.[109] A Hong Kong firm said it could not comply with any of the Commission's requests for documents because of the impact of local ordinances.[110] In his Report, Commissioner Owen noted that, since he could not exercise powers of compulsion outside Australia, the lack of cooperation from these overseas sources significantly curtailed the Commission's ability to investigate thoroughly matters related to HIH in those jurisdictions.[111]

11.92 It appears that neither Royal Commission sought to use the powers and procedures in ss 7A and 7B of the *Royal Commissions Act*, which provide for inquiries to be made and evidence to be taken in foreign countries.

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105 *Royal Commissions Act 1902* (Cth) s 7C.
106 Explanatory Memorandum, Statute Law (Miscellaneous Amendments) Bill (No 1) 1982 (Cth).
107 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 4.
108 Ibid, vol 1, [7.11]. The statement was tendered in evidence: Exhibit No EXH_0965, *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry .gov.au/> at 4 August 2009.
109 N Owen, *Report of the HIH Royal Commission* (2003), vol 1, [2.6].
110 Ibid. No further information about these ordinances was included in the Report.
111 Ibid.

Submissions and consultations

11.93 In IP 35, the ALRC asked whether the framework for making inquiries and obtaining evidence overseas in ss 7A, 7B and 7C of the *Royal Commissions Act* is operating effectively and should be extended to public inquiries other than Royal Commissions.[112] In DP 75, the ALRC proposed that the current framework for making inquiries and obtaining evidence overseas in ss 7A, 7B, 7C, 16(2) and 16(3) of the *Royal Commissions Act* be retained in the recommended *Inquiries Act* and be available to both Royal Commissions and Official Inquiries.[113]

11.94 In its response to IP 35, the AGS queried the extent to which any mutual assistance arrangements between Australian and a foreign country would be available to a Royal Commission that was pursuing terms of reference relating to a law enforcement matter.[114] Such an investigation would not involve a prosecution and probably would not amount to a criminal investigation necessary to engage mutual assistance arrangements.[115]

11.95 In consultations, it was suggested that the provisions—which require the Australian Government to enter into appropriate arrangements with foreign countries—are too cumbersome to be used routinely in the conduct of Royal Commissions, which are subject to reporting deadlines and cost constraints. It was also suggested that the framework was time consuming and required significant resources.

11.96 Liberty Victoria was the only stakeholder to address the ALRC's proposal to retain the current framework for making inquiries and obtaining evidence overseas. It expressed support for the proposal.[116]

ALRC's view

11.97 There are constraints on Royal Commissions and other government agencies exercising investigatory powers outside Australia. There is limited scope to address these constraints in legislation other than to introduce provisions that apply extraterritorially.[117] Even then, it would be difficult in respect of persons and

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

113 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–5.

114 Mutual assistance is the process countries use to provide and obtain assistance from overseas governments in criminal investigations and prosecutions and is also used to recover the proceeds of crime: Australian Government Attorney-General's Department, *Extradition and mutual assistance—What is mutual assistance?* <www.ag.gov.au> at 20 July 2009.

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

116 Liberty Victoria, *Submission RC 26,* 27 September 2009.

117 Restrictions on Commonwealth legislative power arising under the common law extraterritoriality doctrine were removed by s 3 of the *Statute of Westminster 1931* (Imp). Since *Polyukhovic v Commonwealth* (1991) 172 CLR 501 (*War Crimes Act Case*) the external affairs power is understood to authorise the enactment of Commonwealth laws relating to any matter that is geographically external to Australia and a connection with Australia may not even be required: see *Horta v Commonwealth* (1994) 181 CLR 183, 194.

organisations based overseas, especially those with no physical presence or connection to Australia. The ALRC has not otherwise identified any legislative means to improve the current procedures that enable Royal Commissions to make inquiries and gather evidence overseas. The ALRC recommends, therefore, that the existing procedures for Royal Commissions be retained under the recommended *Inquiries Act*, and their application extended to Official Inquiries.

11.98 Issues relating to foreign evidence and mutual assistance are also of significance to courts, law enforcement bodies and other agencies, and are not unique to Royal Commissions and inquiries. The Australian Government could give consideration to streamlining the current procedures—through the development of protocols and expedited processes for making arrangements with foreign countries—to ensure that the existing powers can be exercised more effectively in practice by Royal Commissions and Official Inquiries. The ALRC recognises that such arrangements may depend, in large part, upon Australia's foreign policy and relations with foreign countries and has not therefore made a recommendation in this regard.

Recommendation 11–5 The recommended *Inquiries Act* should contain provisions, applicable to both Royal Commissions and Official Inquiries, equivalent to those in ss 7A, 7B, 7C, 16(2) and 16(3) of the *Royal Commissions Act 1902* (Cth), which concern the making of inquiries and taking of evidence outside Australia.

Inspect and copy documents and other things

11.99 The *Royal Commissions Act* allows a Commission, member of a Commission, or other authorised person to inspect, retain and copy any documents or other things produced to the Commission. Section 6F entitles a Commission to retain documents or things 'for so long as is reasonably necessary for the purposes of the inquiry'. A person may request that a document or other thing be returned to them, where retention ceases to be necessary for the purposes of the inquiry.[118]

Submissions and consultations

11.100 In IP 35, the ALRC asked whether the power under the *Royal Commissions Act* to inspect, retain and copy documents was operating effectively.[119] In DP 75, the ALRC proposed that powers to inspect, copy and retain documents, similar to those in s 6F *Royal Commissions Act,* be included in the *Inquiries Act.*[120]

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118 *Royal Commissions Act 1902* (Cth) s 6F.

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

120 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–6.

11.101 The Victorian Society for Computers and the Law (VSCL) observed that the short time frames in which inquiries are established could create inefficiencies in the way information is handled. The VSCL cited the example of 'hundreds of boxes of hard copy documents arriving on the doorstep of the Commission', many of which had 'in fact been printed out of the source organisation's computer systems'. The VSCL noted the costs incurred by the inquiry of scanning this material back into digital form, in an attempt to deal with the large volumes of information delivered. It also noted that, due to the short timeframes involved, inquiries often needed to pay higher than market costs to ensure documents were processed in time to meet the inquiry's deadlines.[121]

11.102 The VSCL suggested that in order to overcome these problems, guidelines or other explanatory material could be created to assist future inquiries and agencies and parties required to produce information to them.

11.103 The Australian Intelligence Community submitted that the *Australian Government Protective Security Manual* (PSM) detailed appropriate steps which ought to be taken by inquiries in handling national security information. It submitted that the inspection, retention and copying of such material should be done in accordance with the PSM.[122]

11.104 Liberty Victoria submitted that inquiries should only take and retain items if that were absolutely necessary. Further, inquiries should compensate or otherwise ensure that individuals and organisations were not unduly inconvenienced by the retention of documents and things by inquiries.[123]

ALRC's view

11.105 The powers of Royal Commissions to inspect, retain and copy documents produced to it are generally operating effectively and should be extended to both tiers of inquiry under the *Inquiries Act.* Royal Commissions and Official Inquiries require flexibility in how they deal with and manage documents and other things produced to them, including powers of inspection, retention and reproduction.

11.106 The ALRC notes the concerns of Liberty Victoria regarding the circumstances in which inquiries may retain documents or other things produced in compliance with a notice. The existing provisions, which should be retained in the *Inquiries Act*, make it clear that retention is only permitted if it remains 'reasonably necessary' for the purposes of the inquiry. In addition, a person is entitled to request the return of documents once these are no longer required by an inquiry. In the ALRC's view, these provisions adequately protect the interests of participants.

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121 Victorian Society for Computers and the Law, *Submission RC 3,* 12 May 2009.

122 Australian Intelligence Community, *Submission RC 28,* 28 September 2009. Issues relating to the handling of national security information by inquiries are discussed in detail in Chapter 13.

123 Liberty Victoria, *Submission RC 26,* 27 September 2009.

11.107 These powers should be clarified, however, to enable Royal Commissions and Official Inquiries to require that documents be produced in a format approved by the inquiry. This may include production by electronic means. These matters are addressed in the ALRC's recommendation regarding the production of documents and other things. It would be appropriate for guidance on these issues to be included in the *Inquiries Handbook*.

Recommendation 11–6 The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to inspect, retain and copy any documents or other things produced to an inquiry in terms equivalent to those in s 6F of the *Royal Commissions Act 1902* (Cth).

Other investigatory powers

Entry, search and seizure powers

Current arrangements

11.108 Historically, Royal Commissions have taken evidence primarily through the use of oral hearings.[124] The numerous state and federal Royal Commissions in the 1980s that dealt with organised crime, corruption and financial scandals, however, created a need for powers that allowed Royal Commissions access to new forms of evidence such as computer records, audio and visual surveillance, and telephone taps.[125]

11.109 In the Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (1984) (Costigan Royal Commission), for example, the traditional methods of collecting and testing evidence by public hearing were ineffective in countering the 'culture of silence' that surrounded the allegations of corruption under consideration in that inquiry.[126] In an interim report, Commissioner Costigan recommended that a Royal Commissioner should have the power to issue a search warrant.[127]

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124 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 350.

125 J Ransley, 'The Powers of Royal Commissions and Controls Over Them' in P Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 22, 24.

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

127 F Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* Interim Report No 4 (1982), 8.

11.110 The Australian Government accepted this recommendation and amended the *Royal Commissions Act* in 1982, subject to the qualification that the warrant must be granted by an independent judicial officer.[128] It also limited the power to apply for warrants to 'relevant Commissions' designated as such in the Letters Patent.[129] In 2001, the Act was amended further to allow the Commission to authorise a police officer, who is assisting the Commission, to apply to a judge for a warrant.[130]

11.111 Under s 4(1A) of the *Royal Commissions Act*, a relevant Commission may authorise a member of the Commission, a member of the Australian Federal Police, or a member of the police force of a state or territory to apply for search warrants in relation to matters into which it is inquiring. A relevant Commission or authorised person may apply for a search warrant where there are:

> (a) … reasonable grounds for suspecting that there may be, at that time or within the next following 24 hours, upon any land or upon or in any premises, vessel, aircraft or vehicle, a thing or things of a particular kind connected with a matter into which the relevant Commission is inquiring … ; and
>
> (b) the relevant Commission, or the person, believes on reasonable grounds that, if a summons was issued for the production of the thing or things, the thing or things might be concealed, lost, mutilated or destroyed …[131]

11.112 Where a judge is satisfied that there are reasonable grounds to issue the warrant, he or she may authorise police officers or other persons named in the warrant to use such assistance or force as is deemed necessary to enter the premises, vessel, aircraft or vehicle and seize anything relevant.[132]

11.113 Royal Commissions may also obtain search warrants under Part 1AA of the *Crimes Act 1914* (Cth). The *Crimes Act* provisions, however, require that there be a suspicion that an offence has occurred before a warrant can be issued. A suspicion that evidence may be destroyed or tampered with may not satisfy this requirement.[133]

11.114 Although entry, search and seizure powers in the *Royal Commissions Act* have been used relatively infrequently in past Royal Commissions, such powers have been described as 'a necessary complement' to the coercive information-gathering powers of Royal Commissions—in particular, because documents or things may be at risk of destruction if a notice or summons is issued requiring their production.[134]

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128 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security); *Royal Commissions Amendment Act 1982* (Cth).

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

130 Ibid s 4(1A). The amendment was inserted by the *Royal Commissions and Other Legislation Amendment Act 2001* (Cth), sch 1, item 4B.

131 *Royal Commissions Act 1902* (Cth) ss 4(1)(a), 4(1)(b).

132 Ibid s 4(3).

133 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 74.

134 Ibid, 73.

State and territory legislation

11.115 Most state legislation governing public inquiries contains similar provisions to the *Royal Commissions Act*.[135] In NSW, Royal Commissioners do not have a specific power to apply for a search warrant, but may use police officers seconded to a Commission to make an application under the *Search Warrants Act 1985* (NSW).[136]

11.116 Under the *Inquiries Act 1945* (NT), no warrant is required. Section 8 of that Act provides that a member of a Commission, or any authorised person, may have access to

> all buildings, places, goods, books, documents and other papers for the purposes of the inquiry in respect of which the Board or Commissioner is appointed, and for that purpose may make extracts from or copies of any such books, documents or papers.

11.117 Section 19A of the *Commissions of Inquiry Act 1950* (Qld) grants a Royal Commissioner, rather than a court, the power to issue a search warrant.[137] Under that section, the inquiry chair can issue a search warrant if he or she is satisfied on reasonable grounds that the premises may contain things relevant to the inquiry, or that there may be evidence of an offence.[138]

11.118 The Tasmania Law Reform Institute (TLRI) considered the issue of search warrants in its 2003 report on Commissions of Inquiry.[139] It noted that the need for a magistrate's authority to issue a warrant operated as a check on the investigatory powers of a commission of inquiry to ensure the power of search and seizure was neither flaunted nor violated.[140] It concluded that there should not be an extension of the existing powers of search and seizure to enable a commission of inquiry in Tasmania to enter, search and seize documents or things without the need for a warrant.[141]

Should inquiries be empowered to issue search warrants?

11.119 The issue of a search warrant is not exclusively an exercise of judicial power, and therefore, a federal Royal Commissioner may be given the power to issue a warrant on his or her own motion.[142] The inclusion of such a power, however, may be contrary to the established policy of the Australian Government. The *Guide to Framing Commonwealth Offences* states that the power to issue a warrant to enter and search

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135 See *Evidence Act 1958* (Vic) s 19E; *Royal Commissions Act 1968* (WA) s 18; *Commissions of Inquiry Act 1995* (Tas) s 24.

136 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 410.

137 A similar provision is also contained in the *Royal Commissions Act 1917* (SA) s 10, and the *Royal Commissions Act 1991* (ACT) s 25(1).

138 *Commissions of Inquiry Act 1950* (Qld) s 19B.

139 Tasmania Law Reform Institute, *Report on the Commissions of Inquiry Act 1995* (2003).

140 Ibid, 9.

141 Ibid, 10.

142 This issue is discussed in greater detail below.

premises should be conferred on magistrates acting in their personal capacity, and not ministers or departmental officers. It also states that 'the greater independence of magistrates and the fact they are not responsible for enforcement outcomes ensures appropriate rigour in the warrant issuing process'.[143]

11.120 A number of overseas law reform bodies have considered whether the powers to search premises and seize documents or things are required by executive inquiries. The NZLC recommended that search and seizure powers should not be conferred on inquiries under the new Act recommended in its report.[144] In its view, public inquiries in New Zealand should not have a role in investigating the sort of criminal or regulatory activity that would require such powers. The NZLC noted, however, the historical differences between Australia and New Zealand in this regard, and in particular, the role that Australian Royal Commissions have played in investigating corruption, and the subsequent creation of permanent anti-corruption bodies.[145] The Law Reform Commission of Ireland also did not recommend the inclusion of a search warrant power in its report on public inquiries.[146]

11.121 In its report on public inquiries in 1992, the Ontario Law Reform Commission recommended enacting a stronger set of criteria for determining whether a search could be authorised. It recommended that a search warrant should be authorised in an inquiry only where:

- the documents or things are material to the subject matter of the inquiry;
- the public interest in obtaining access to the documents or things outweighs the privacy interests of the individual who holds them; and
- there are reasonable grounds to believe the documents or things would not be produced to the inquiry under a normal summons.[147]

11.122 Justice Ronald Sackville has argued that the granting of such extensive powers to Royal Commissions has unduly impacted on the rights of citizens without necessarily being effective in exposing the types of criminal behaviour under investigation.[148] Although search and seizure powers were introduced into the *Royal Commissions Act* to assist the Costigan Royal Commission, Prasser suggests that it was not those additional powers that produced clear evidence of tax evasion and corruption.

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143 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), [9.7].

144 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 20.

145 Ibid, 83.

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

147 Ontario Law Reform Commission, *Report on Public Inquiries* (1992), Rec 8. This recommendation has not been adopted.

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

Rather, it was the Commission's focus on broader research methods and the adoption of a computer information system that allowed disparate data to be analysed.[149]

11.123 In the Building Royal Commission, search warrants were used but they were not a major source of information. According to the Report, six search warrants were issued pursuant to the *Royal Commissions Act* and the information obtained advanced the investigations of the Commission.[150]

Submissions and consultations

11.124 In IP 35, the ALRC asked whether members of Royal Commissions and other public inquiries should have the power to apply for a warrant to search for and seize a document or other thing, or issue such a warrant on his or her own motion, and if so, in what circumstances.[151]

11.125 Liberty Victoria submitted that invasive coercive powers such as search and seizure may sometimes be necessary, but must be balanced against civil liberties. Further, any such powers should be subject to judicial review. Liberty Victoria endorsed the current provisions of s 4 of the *Royal Commissions Act*, which require an application for a search warrant to be made to a judge, and did not support inquiries having inherent search and seizure powers.[152]

11.126 The AGS observed that it appeared out of step with existing policy for a Royal Commissioner to have search and seizure powers and endorsed the position that he or she must seek the issue of a warrant from a judicial officer.[153]

11.127 The AGS also discussed the possibility of extending the grounds upon which a search warrant could be issued, beyond instances in which documents might be concealed, lost, mutilated or destroyed. The AGS had reservations about such an extension. In particular, it noted that the privilege against self-incrimination did not apply to documents seized under warrant and would not be covered by the direct use immunity under s 6DD of the *Royal Commissions Act*.[154] This would mean that documents seized under warrant would be treated differently to documents produced under a summons or notice.[155] Under the Act as presently framed, where documents are seized under warrant, there is no constraint on the availability of those documents for use in evidence against the person from whom they were seized.

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149 S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), 203.

150 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 20.

151 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–5.

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

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

154 The use immunity is discussed in Ch 17.

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

11.128 In DP 75, the ALRC proposed that Royal Commissions, but not Official Inquiries, be empowered to apply to a judge for a warrant to exercise entry, search and seizure powers.[156] The Law Council generally supported Royal Commissions having wider powers than Official Inquiries, including entry, search and seizure powers.[157] Liberty Victoria submitted that it was appropriate for Royal Commissions to apply to a judge for a warrant to exercise such powers.[158]

ALRC's view

11.129 Under the current regime, a Royal Commission cannot enter or search premises or seize documents or things without a search warrant having been issued by a judge. Similarly, the power to issue a search warrant under Part IAA of the *Crimes Act* is reserved for magistrates.[159] This serves as an important check on a Royal Commission's entry, search and seizure powers.

11.130 In the ALRC's view, a Royal Commissioner should not be empowered to issue search warrants on his or her own motion. Instead, entry, search and seizure powers of Royal Commissions should remain exercisable only under warrant issued by a judge. It is preferable to have a judicial officer, independent from the inquiry, determining that the requirements to issue a warrant have been met.

11.131 As noted above, the *Guide to Commonwealth Framing Offences* states that the power to issue warrants to enter and search premises should normally be conferred on magistrates, acting in their personal capacity.[160] Similarly, the exercise of seizure powers is said to require authorisation under warrant.[161] The approach taken in the *Guide to Framing Commonwealth Offences* to the issue of warrants for entry, search and seizure is broadly consistent with the recommendations made by the Senate Committee for the Scrutiny of Bills in its 2000 and 2006 reports on entry, search and seizure provisions in Commonwealth legislation.[162]

11.132 The ALRC notes that ss 4 and 5 of the *Royal Commissions Act*, as presently drafted, do not provide that the power to issue search warrants—which is generally regarded as involving the exercise of non-judicial power—is conferred on judges in

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156 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–7.

157 Law Council of Australia, *Submission RC 30,* 2 October 2009.

158 Liberty Victoria, *Submission RC 26,* 27 September 2009.

159 *Crimes Act 1914* (Cth) s 3C. A search warrant may also be issued by a justice of the peace or other person employed in a court of a state or territory who is authorised to issue search warrants or warrants for arrest, as the case may be.

160 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), [9.7].

161 Ibid, [9.6].

162 Parliament of Australia—Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2000—Entry and Search Provisions in Commonwealth Legislation* (2000). The Committee conducted a further inquiry into the Government's response to its 2000 report, entry and search provisions made since the report and provisions that authorise the seizure of material: Parliament of Australia—Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2006—Entry, Search and Seizure Provisions* (2006).

their personal and voluntary capacity. It is desirable that this be made clear in the recommended *Inquiries Act* for constitutional reasons.

11.133 Conferring non-judicial functions or powers on a judge or magistrate in their capacity as the court or a member of the court to which they belong would be contrary to the independence of the judiciary under the separation of powers doctrine enshrined in Chapter III of the *Australian Constitution*. A judge of the Federal Court or a Federal Magistrate may agree to exercise a non-judicial function if the power is vested in the judge's or magistrate's personal capacity, separate from the court they constitute.[163]

11.134 In the ALRC's view, entry, search and seizure powers should not be conferred on Official Inquiries. The use of such powers by Royal Commissions has been relatively infrequent, and Official Inquiries are even less likely to require this power. Secondly, entry, search and seizure powers are exceptional powers. Their exercise can be highly intrusive. It is appropriate that they be reserved for Royal Commissions as the highest tier of public inquiry. Thirdly, if it is anticipated that a particular inquiry will need entry, search and seizure powers, the Australian Government could establish a Royal Commission instead of an Official Inquiry. If the need for these powers only became clear after an Official Inquiry had commenced, it could be converted into a Royal Commission.[164]

11.135 Finally, the *Royal Commissions Act* does not presently extend the use immunity in s 6DD to material seized under a search warrant. In Chapter 17, the ALRC expresses the view that the immunity should not extend further than the purpose of the privilege against self-incrimination warrants—that is, it should extend only to protect a person from being compelled to testify against him or herself, for example, through the production of documents or the giving of evidence before an inquiry. The ALRC does not recommend, therefore, the extension of the use immunity to material obtained in exercise of entry, search and seizure powers by a Royal Commission.

Recommendation 11–7 The recommended *Inquiries Act* should contain provisions for a Royal Commission, but not an Official Inquiry, to apply to a judge for a warrant to exercise entry, search and seizure powers equivalent to those in ss 4 and 5 of the *Royal Commissions Act 1902* (Cth). The *Inquiries Act* should provide that, if an application for a warrant is made to a judge of a federal court, the judge issues the warrant in his or her personal capacity.

Dealing with intercepted information

11.136 Royal Commissions have no power to initiate the interception of telecommunications. The *Telecommunications (Interception and Access) Act 1979*

163 See, eg, *Grollo v Palmer* (1995) 184 CLR 548.
164 In Ch 5, the ALRC recommends a mechanism for the conversion of inquiries: Recommendation 5–3.

(Cth)[165] was amended in 2001, however, to enable a declared Commonwealth Royal Commission to receive information which has been lawfully intercepted by other agencies, and to use that information in the performance of its functions.[166] A number of Commonwealth and state law enforcement and investigatory agencies are permitted to receive and use such information. The Royal Commission into the New South Wales Police Service was likewise permitted to receive and use such information during its operation.[167]

11.137 In order to receive intercepted information under the provisions of the *Telecommunications (Interception and Access) Act,* a Royal Commission must first be declared eligible by the relevant minister. In making such a declaration, the minister must be satisfied that a Royal Commission is likely to inquire into matters that may involve the commission of a prescribed offence.[168]

11.138 In Queensland, the chair of a commission of inquiry may apply to a Supreme Court judge for approval to use a listening device.[169] The judge must consider a number of factors relating to privacy and public interest before granting approval.[170]

11.139 The use of listening devices by commissions of inquiry was considered by the TLRI in its 2003 report. It was noted that, while such devices may assist the investigations of some commissions, their use was

> a clear invasion of privacy that can constitute a criminal offence. If a person or body is to be granted the power to use such devices then that grant of power must be strictly monitored.[171]

11.140 Notwithstanding this view, the TLRI recommended that a commission of inquiry be able to apply to a magistrate for a warrant to use listening devices, subject to the magistrate being satisfied that there are reasonable grounds for the belief that the use of such a device is necessary and appropriate to obtain evidence relating to a matter relevant to the inquiry. The TLRI also recommended that a magistrate have regard to other factors in granting the warrant, including the extent to which the privacy of any person is likely to be affected, any alternative means of obtaining the evidence sought and the evidentiary value of that evidence.[172]

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165 In 2001, the Act was called the *Telecommunications (Interception) Act 1979* (Cth). The current name of the Act was introduced by the *Telecommunications (Interception) Amendment Act 2006* (Cth).

166 The amendments were made by the *Royal Commissions and Other Legislation Amendment Act 2001* (Cth) ss 8–29.

167 Supplementary Explanatory Memorandum, Royal Commissions and Other Legislation Amendment Bill 2001 (Cth).

168 A prescribed offence is defined in subsection 5(1) of the *Telecommunications (Interception and Access) Act 1979* (Cth) and includes an offence punishable by a maximum penalty of a least three years imprisonment.

169 *Commissions of Inquiry Act 1950* (Qld) s 19C.

170 Ibid s 19C(3).

171 Tasmania Law Reform Institute, *Report on the Commissions of Inquiry Act 1995* (2003), 9–13.

172 Ibid, 11–12.

11.141 The use of intercepted information by Royal Commissions appears to be infrequent. In the Building Royal Commission, for which the 2001 amendments were introduced, information relating to one investigation was received from another agency. Further, the intercepted information had been acquired as a result of telecommunications interceptions conducted by and for the purposes of that agency.[173]

Submissions and consultations

11.142 In DP 75, the ALRC asked whether the provisions in the *Telecommunications (Interception and Access) Act* that permit the communication of intercepted information to Royal Commissions in certain circumstances should also apply to Official Inquiries.[174]

11.143 The Law Council generally supported greater powers being available to Royal Commissions than to Official Inquiries.[175] Liberty Victoria submitted that it was appropriate only for Royal Commissions, as the highest form of inquiry, to receive intercepted information.[176]

11.144 Turnbull described intercepted information as 'very good evidence' and supported both Royal Commissions and Official Inquiries being permitted to receive such information. Turnbull queried whether the receipt of intercepted information by an inquiry would prejudice future criminal proceedings and suggested that such evidence not be covered by use immunity.[177]

11.145 ACLEI noted that it was authorised under the *Telecommunications (Interception and Access) Act* to receive intercepted information about any corruption issue involving the Australian Federal Police or the ACC that may be identified by other integrity agencies or police forces as a result of their telecommunications interception activities.[178]

ALRC's view

11.146 The ALRC does not recommend that Royal Commissions or Official Inquiries should be empowered to initiate the interception of telecommunications. The ALRC does recommend, however, that the existing provisions in the *Telecommunications (Interception and Access) Act*—which permit a body to receive intercepted information from other agencies—be retained in relation to Royal Commissions established under the *Inquiries Act*.

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173 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 20.

174 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 11–2.

175 Law Council of Australia, *Submission RC 30,* 2 October 2009.

176 Liberty Victoria, *Submission RC 26,* 27 September 2009.

177 I Turnbull, *Submission RC 22,* 21 September 2009. Use immunity is discussed in detail in Ch 17.

178 Australian Commission for Law Enforcement Integrity, *Submission RC 18,* 14 September 2009.

11.147 Although intercepted information has been used infrequently by Royal Commissions, there may be circumstances in which it will advance the investigations of a Commission—for example:

- an inquiry is investigating serious misconduct, corruption or criminal conduct;
- an inquiry has been asked to inquire into and report on potential contraventions of the law; or
- those under investigation will not cooperate with the inquiry, or will subvert access to or conceal documents or other material sought by the inquiry.

11.148 It is appropriate that the handling and use of intercepted information by a Royal Commission continue to be strictly regulated by the *Telecommunications (Interception and Access) Act,* including the detailed provisions relating to the admissibility of such information as evidence in legal proceedings.[179]

11.149 Official Inquiries should not be permitted to receive intercepted communications from other agencies. The ALRC does not anticipate that access to intercepted information will be necessary for, or proportionate to, the types of investigations likely to be undertaken by Official Inquiries. If there is a genuine need for a particular inquiry to access intercepted information in order to complete its investigations, it should be constituted as, or converted to, a Royal Commission.[180]

Recommendation 11–8 The provisions in the *Telecommunications (Interception and Access) Act 1979* (Cth) that allow for the communication of intercepted information in certain circumstances should apply to Royal Commissions, but not Official Inquiries, established under the recommended *Inquiries Act.*

Other issues

Communication of information regarding contraventions of the law

11.150 Under s 6P of the *Royal Commissions Act*, a Royal Commission may communicate information or evidence it obtains relating to a contravention of a law of the Commonwealth, or of a state or territory, to certain specified people and bodies—such as the ACC,[181] the Law Enforcement Integrity Commissioner,[182] the Director of

179 A 'proceeding' for the purposes of the *Telecommunications (Interception and Access) Act 1979* (Cth) would include a Royal Commission as it is a body that has power to hear and examine evidence: s 5.
180 Recommendation 5–3.
181 *Royal Commissions Act 1902* (Cth) s 6P(2A).
182 Ibid s 6P(2B).

Public Prosecutions[183] and 'the authority or person responsible for the administration or enforcement of that law'.[184]

11.151 Section 6P was inserted in 1982 and later amended in 1983 to permit a Commission to communicate information or furnish evidence or a document acquired by it to another Royal Commission, where such evidence is considered relevant.[185] Further amendments added the Director of Public Prosecutions to the list.[186] These amendments, which followed the Costigan Royal Commission and the Royal Commission of Inquiry into Drug Trafficking (1983) (Stewart Royal Commission), were intended to assist the prosecution process at the conclusion of a Commission investigating criminal activity.[187]

11.152 In 2001, the breadth of the discretion to refer information was widened to include information relating to contraventions of a law rather than information relating only to the commission of an offence. The amendment, therefore, captured conduct which was unlawful and not only conduct which constituted an offence under Commonwealth, state or territory law.[188] The Act was also amended to extend the provision to a contravention of a law that may attract a civil or administrative penalty, rather than only criminal offences.[189] These amendments were made to facilitate the exchange of information between the HIH Royal Commission and the concurrent investigation by ASIC into HIH's market disclosure.[190] The HIH Royal Commission exercised the referral power on several occasions. Before any such referral, the individuals or entities affected by it were given the opportunity to make submissions.[191]

11.153 In addition to the referral power in s 6P of the *Royal Commissions Act*, the terms of reference may indicate that contraventions of the law should be considered by the Royal Commission and referred to the appropriate authorities. For example, in the HIH Royal Commission the terms of reference directed inquiry into several matters, including:

> whether those decisions or actions might have constituted a breach of any law of the Commonwealth, a State or a Territory and, if so, whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency …

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183 Ibid s 6P(1)(aa).
184 Ibid s 6P(1)(e).
185 Ibid s 6P(2) inserted by *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth) s 3.
186 *Royal Commissions Act 1902* (Cth) s 6P(1)(aa) inserted by the *Director of Public Prosecutions (Consequential Amendments) Act 1983* (Cth) s 30.
187 *Director of Public Prosecutions (Consequential Amendments) Act 1983* (Cth) ss 28–31; Commonwealth, *Parliamentary Debates*, House of Representatives, 17 November 1983, 2883 (L Bowen—Attorney-General).
188 N Hancock, *Bills Digest No 42—Royal Commissions and Other Legislation Amendment Bill 2001*, Department of the Parliamentary Library, Information and Research Services, 9.
189 *Royal Commissions Act 1902* (Cth) s 6P(1A) inserted by *Royal Commissions and Other Legislation Amendment Act 2001* (Cth) s 7.
190 Explanatory Memorandum, Royal Commissions and Other Legislation Amendment Bill 2001 (Cth), 2.
191 N Owen, *Report of the HIH Royal Commission* (2003), vol 1, [2.8].

11.154 In the *Report of the HIH Royal Commission*, Commissioner Owen indicated that he had approached this aspect of the terms of reference by first looking at whether there might have been a breach of the law and, if so, by going on to consider whether the matter should be referred to an agency. In doing so, Commissioner Owen took into account a number of factors including:

- the relative seriousness of the conduct in the context of the failure of HIH;
- the role and involvement of the person concerned in the management and failure of HIH;
- what factors—including the availability of admissible evidence—might impinge on the likelihood (without determining the question) of the agency being able to establish the referred matter to the criminal or civil standard, as the case may be;
- whether any personal or peculiar factors called for special consideration; and
- the public interest in, and regulatory effect of, a successful action.[192]

11.155 This aspect of the terms of reference meant that findings as to possible contraventions and recommended referrals—which were numerous—could be set out in the report instead of adhering to the referral procedure in s 6P of the *Royal Commissions Act*. The *Report of the HIH Royal Commission* recommended that 56 possible breaches of the *Corporations Act 2001* (Cth) and the *Crimes Act 1900* (NSW) be referred to either ASIC or the NSW Director of Public Prosecutions for further investigation.[193] This approach contemplated the transfer of evidence and documents to the relevant authorities at the conclusion of the Royal Commission. Ultimately, however, separate legislation was required to facilitate the transfer of these records.[194] This overcame the requirement to give notice of the transfer to the owners of the documents and enabled ASIC to obtain custody of the Royal Commissions records.[195] As discussed in Chapter 8, the *Royal Commissions Act* was subsequently amended to incorporate similar provisions—now in s 9 of the Act—for the retention and use of records in all Royal Commissions.[196]

11.156 In 2003, the Building Royal Commission recommended that s 6P be amended to enable Royal Commissions to communicate evidence or information

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192 Ibid, vol 1, [1.2.7].

193 S Dudley, *Bills Digest No 181—HIH Royal Commission (Transfer of Records) Bill 2003,* Department of the Parliamentary Library, Information and Research Services, 1.

194 *HIH Royal Commission (Transfer of Records) Act 2003* (Cth).

195 The procedural fairness requirements arose as a result of the High Court decision in *Johns v Australian Securities Commission* (1993) 178 CLR 408.

196 Section 9 of the *Royal Commissions Act 1902* (Cth) was inserted by the *Royal Commissions Amendment (Records) Act 2006* (Cth). Issues relating to custody, use and access to records of completed Royal Commissions are discussed in Ch 8.

relating to a contravention of any law to 'any agency or body of the Commonwealth, a State or a Territory prescribed by the regulation'.[197] In Commissioner Cole's view, the scope of s 6P(1)(e) in its present form, which enables the communication of information relating to a contravention of a law to 'the authority or person responsible for the administration or enforcement of that law', is uncertain.[198] In particular, Commissioner Cole thought that there may be a problem with passing the information to a state crime commission or similar body, as there may be a distinction between bodies which enforce the law and bodies which investigate breaches of a law.

Submissions and consultations

11.157 In IP 35, the ALRC asked whether Royal Commissions and other public inquiries should be able to communicate information relating to a contravention of a law to law enforcement bodies in addition those listed in the *Royal Commissions Act* and, if so, which additional bodies.[199]

11.158 In its response to IP 35, Liberty Victoria submitted that inquiries should be able to communicate information to other bodies, but only where it would not breach a person's civil liberties or where adequate protections were in place. Further, information obtained by an inquiry that revealed criminal conduct should be referred to police for further investigation but, depending on how it was obtained, should not be admissible in later proceedings. Liberty Victoria considered that this would ensure that a person would not withhold information from an inquiry based on a fear that information could be used against him or her at a later date.[200]

11.159 The AGS made a number of comments about the practical operation of the referral power in s 6P of the *Royal Commissions Act*.[201] Referrals had to be made during the currency of the Royal Commission as the power was not exercisable once the report had been delivered. Further, referrals under s 6P required the Commissioner to decide that it was appropriate to refer each piece of evidence or item of information and did not contemplate a 'global' referral of evidence or information. If a particular Royal Commission possessed significant amounts of evidence or information relating to contraventions of the law, the process of making referrals could be time consuming and require significant resources.

197 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Rec 1(c).
198 Ibid.
199 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–8.
200 Liberty Victoria, *Submission RC 1,* 6 May 2009.
201 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.

11.160 The AGS also noted that, where large amounts of evidence are involved, it may not be possible for all referrals to be made before submission of the final report. Further, an affected person would normally have to be put on notice and given the opportunity to make submissions for reasons of procedural fairness.[202]

11.161 The AGS submitted that the interaction between the regime in s 9 of the *Royal Commissions Act*—which provides for the custody and use of records of a Royal Commission—and the scope of the referrals power in s 6P had become complicated and required review and simplification.

11.162 In DP 75, the ALRC expressed the view that both Royal Commissions and Official Inquiries should be able to communicate information about contraventions of the law to agencies responsible for the administration and enforcement of the law. The ALRC was of the view that those agencies should be prescribed by regulation made under the recommended *Inquiries Act*.[203]

11.163 Liberty Victoria supported this proposal.[204] ACLEI submitted that Royal Commissions and Official Inquiries should be empowered to communicate such information to the Integrity Commissioner if it relates to a corruption issue under the *Law Enforcement Integrity Commissioner Act 2006* (Cth). ACLEI also proposed an amendment to the *Law Enforcement Integrity Commissioner Act* to empower the Integrity Commissioner to volunteer information to Royal Commissions and Official Inquiries.[205]

ALRC's view

11.164 Royal Commissions and Official Inquiries established under the recommended new statutory framework should have powers to enable inquiry members to refer evidence or information about contraventions of the law to appropriate law enforcement authorities. The existing referral power in the *Royal Commissions Act*, however, requires clarification in a number of respects before it is incorporated into the recommended *Inquiries Act*.

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202 See *Johns v Australian Securities Commission* (1993) 178 CLR 408. The principles of procedural fairness are discussed in Ch 15.

203 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–8.

204 Liberty Victoria, *Submission RC 26,* 27 September 2009.

205 Australian Commission for Law Enforcement Integrity, *Submission RC 18,* 14 September 2009.

11.165 First, the referral power should be drafted in a way that does not have the effect of requiring inquiry members to make referral decisions in respect of individual items of evidence and information if that is not necessary in the particular circumstances. The recommended *Inquiries Act* could, for example, enable an inquiry member to refer evidence or information that relates to the contravention of any law 'in any manner that he or she considers appropriate'. This would allow a more flexible approach to referrals of information and remove present doubts about the operation of s 6P of the *Royal Commissions Act*. For example, it would enable an inquiry member to decide to refer a class of documents, rather than individual items of evidence or information. In this regard, the ALRC does not recommend that the abrogation of procedural fairness obligations in the context of the transfer of the records of completed Royal Commissions be extended to referrals of information made during the currency of an inquiry.[206]

11.166 Secondly, to avoid doubt, any referral power in respect of information or evidence obtained by a Royal Commission should operate subject to the protections in respect of statements made by witnesses or documents produced to a Royal Commission and the application of client legal privilege. This would ensure consistency with the existing framework for the transfer of records in s 9 of the *Royal Commissions Act*. In particular, s 9(12) preserves the operation of s 6DD of the Act, which provides that certain statements by a witness before a Royal Commission are not admissible in evidence against the witness.[207]

11.167 Thirdly, the referral power should specify the persons and agencies to which information or evidence may be communicated. In the ALRC's view, the *Inquiries Act* should provide that Royal Commissions and Official Inquiries be empowered to communicate information to bodies or persons responsible for the administration or enforcement of the law as prescribed by regulations under the Act. This would enable the list of agencies of bodies to be updated from time to time without requiring legislative amendment of the Act. This approach would still ensure parliamentary oversight through the usual procedures for scrutiny of delegated legislation. Under this approach, ACLEI could be included as a prescribed agency under the regulations.

11.168 Such a process may also remove the need to make specific provision for referrals of information in the terms of reference of an inquiry, although it would not preclude the Australian Government from doing so.

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206 The removal of the obligation to accord procedural fairness to a person who could be adversely affected if documents obtained by a completed Royal Commission are subsequently transferred to other persons or agencies and used for other purposes is contained in s 9(11) of the *Royal Commissions Act 1902* (Cth). Issues relating to the custody, transfer and use of records of completed Royal Commissions are discussed in Ch 8.

207 See Explanatory Memorandum, Royal Commissions Amendment (Records) Bill 2006 (Cth). Section 6DD of the Act is discussed in Ch 17.

Recommendation 11–9 The recommended *Inquiries Act* should empower Royal Commissions and Official Inquiries to communicate information that relates to a contravention, or evidence of contravention, of a law of the Commonwealth or of a state or territory, to bodies or persons responsible for the administration or enforcement of the law as prescribed by regulations under the Act.

Concurrent functions and powers under state laws

11.169 By issuing complementary Letters Patent, federal and state governments may establish a joint Royal Commission.[208] There have been a number of such Commissions in Australia including: the Stewart Royal Commission; the Royal Commission into the Activities of the Australian Building Construction Employees' and Builders Labourers' Federation (1982); and the Royal Commission into Aboriginal Deaths in Custody (1991).

11.170 Royal Commissions may gain access to documents and other material by the use of state legislation in the case of joint inquiries. The Stewart Royal Commission was able to search and seize documents under the *Criminal Code* (Qld) and the *Health Act 1937* (Qld).

11.171 Section 7AA of the *Royal Commissions Act* allows a federal Royal Commission to accept powers and functions given to it by a state government in the Letters Patent of joint Royal Commissions. It was inserted in the Act in 1982 following the decision in *R v Winneke: Ex parte Gallagher*.[209] In that case, the court found that a commissioner could rely on both the federal *Royal Commissions Act* and the relevant state legislation in issuing a summons to a witness where the matter under inquiry fell within both terms of reference.[210] The enactment of s 7AA was intended to remove any doubt about this matter.[211]

11.172 While the coercive powers granted under the *Royal Commissions Act* may be exercised throughout Australia, the powers possessed by a state commission may be exercised only in that state. Campbell notes that during a joint commission, the federal Royal Commission must be careful not to use a state power outside of that state, even where the power is being used in a way that is relevant to the state inquiry.[212] This does not appear to be affected by s 7AA.

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208 E Campbell, *Contempt of Royal Commissions* (1984), 9.

209 *Royal Commissions Amendment Act 1982* (Cth); *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211.

210 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 219.

211 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security). In *Sorby v Commonwealth*, Gibbs CJ noted that the enactment of s 7AA was unnecessary, given the decision in *Re Winneke*: *Sorby v Commonwealth* (1983) 152 CLR 281, 248.

212 E Campbell, *Contempt of Royal Commissions* (1984), 11.

11.173 There also may be issues where subsequent legal proceedings arise from a Commission. In *Giannarelli v The Queen*, two witnesses who had given evidence to the Costigan Royal Commission were charged with perjury. The proceedings were brought in the Supreme Court of Victoria under the *Crimes Act 1958* (Vic). Transcripts of their evidence in the Royal Commission were used as evidence in the case. The High Court overturned the conviction on the basis that the transcripts from the federal Royal Commission should not have been admitted as evidence because s 6DD of the *Royal Commissions Act* does not allow a statement of a witness to be used in evidence against a witness in criminal or civil proceedings in any Australian court.[213]

Submissions and consultations

11.174 In IP 35, the ALRC sought stakeholder views on the exercise of coercive powers by a Royal Commission or other public inquiry established jointly by the Australian Government and the government of a state or territory.[214] In DP 75, the ALRC proposed that only Royal Commissions and not Official Inquiries may have concurrent functions and powers conferred under the *Inquiries Act* and state and territory laws.[215]

11.175 In response to IP 35, the AGS noted that there would always be the prospect of challenges of the type that was involved in *R v Winneke; Ex parte Gallagher*.[216] The AGS observed that close consultation and cooperation between the Australian Government and state or territory governments involved should ensure that the arrangements worked in a way that limits the scope for challenge.[217]

11.176 Turnbull, the only stakeholder to address the ALRC's proposal in relation to concurrent inquiries in DP 75, queried the distinction made between Royal Commissions and Official Inquiries in this proposal.[218]

ALRC's view

11.177 The subject matter of a Royal Commission may have a multi-jurisdictional character or involve events occurring throughout Australia. As such, the ALRC recommends that the power to confer concurrent functions and powers on federal Royal Commissions under state law should be retained in the recommended *Inquiries Act* subject to the following comments. The ALRC has not identified any reason in

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213 *Giannarelli v The Queen* (1983) 154 CLR 212; see P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 631. However, s 6DD does not apply to admissibility of evidence in proceedings for an offence under the *Royal Commissions Act 1902* (Cth).

214 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–9.

215 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 11–9.

216 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211.

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

218 I Turnbull, *Submission RC 22,* 21 September 2009.

principle why these provisions should not also enable the conferral of powers under the law of a territory.

11.178 It is possible that the concurrent sources of power of joint Royal Commissions may give rise to legal complexities from time to time. For example, it may not always be clear whether federal or state powers are being exercised. While these complexities cannot be remedied easily in Commonwealth legislation, the inter-governmental agreement establishing the joint Royal Commission should clarify such issues and ensure that both the terms of reference of the Commonwealth and of the state or territory are—subject to any constitutional or other legal limitations—coextensive.

11.179 In the ALRC's view, only Royal Commissions should be able to exercise concurrent functions and powers under state and territory laws. Under the ALRC's recommended statutory framework, it is envisaged that Official Inquiries will have a limited range of coercive information-gathering and investigatory powers. In contrast, some state and territory legislation confers entry, search and seizure powers and arrest powers on Royal Commissions and other public inquiries.[219] It would not be appropriate to enable the limitations on the powers of Official Inquiries to be sidestepped by the conferral of wider powers under state and territory inquiries legislation.

11.180 As noted in relation to other types of powers in this chapter, a particular inquiry could be constituted as a Royal Commission if coercive powers are also to be conferred by a state or territory. If such powers were to be conferred on an Official Inquiry that had already commenced, the inquiry could be converted to a Royal Commission in accordance with the ALRC's recommendation in Chapter 5.[220]

Recommendation 11–10 The recommended *Inquiries Act* should provide that Royal Commissions, but not Official Inquiries, may have concurrent functions and powers conferred under the Act and state and territory laws.

219 In relation to entry, search and seizure powers, see: *Evidence Act 1958* (Vic) s 19E; *Royal Commissions Act 1968* (WA) s 18; *Commissions of Inquiry Act 1995* (Tas) s 24. In relation to arrest powers, see: *Special Commissions of Inquiry Act 1983* (NSW) s 22; *Royal Commissions Act 1923* (NSW) s 16; *Royal Commissions Act 1968* (WA) s 16; *Royal Commissions Act 1991* (ACT) s 35.

220 Recommendation 5–3.

12. Protection from Legal Liability

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Introduction

12.1 In this chapter, the ALRC examines the protection from legal liability that should be afforded to those involved in the Royal Commissions and Official Inquiries recommended in this Report.

12.2 It discusses the current protection from legal liability afforded under the *Royal Commissions Act 1902* (Cth), the need for such protection, who should be protected, and the form such protection should take. The ALRC also considers whether members of Royal Commissions and Official Inquiries should be able to be compelled to give evidence in court proceedings about their inquiries.

Current protection from legal liability

12.3 Section 7 of the *Royal Commissions Act* protects Royal Commissioners, legal practitioners assisting or appearing before a Royal Commission, and witnesses from incurring legal liability as a result of their participation in a Royal Commission. Section 7 confers upon them the same protection as participants in High Court proceedings. It provides:

> (1) Every such Commissioner shall in the exercise of his or her duty as Commissioner have the same protection and immunity as a Justice of the High Court.

> (2) Every witness summoned to attend or appearing before the Commission shall have the same protection, and shall in addition to the penalties provided by this Act be subject to the same liabilities in any civil or criminal proceeding, as a witness in any case tried in the High Court.
>
> (3) A legal practitioner assisting a Commission or appearing on behalf of a person at a hearing before a Commission has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

12.4 All Australian state and territory legislation governing Royal Commissions provides similar immunities.[1]

12.5 Section 7 of the *Royal Commissions Act* confers upon participants in a Royal Commission the immunities enjoyed by participants in court proceedings at common law. At common law, judges are immune from civil or criminal proceedings for their judicial conduct. Witnesses are immune from civil or criminal proceedings for what they say or do in court, as well as any steps taken in preparation for giving testimony in court.[2] Legal practitioners are immune from civil or criminal proceedings for any work done in court, or 'work done out of court which leads to a decision affecting the conduct of the case in court'.[3] These immunities were developed to: ensure that matters were freely and fully adjudicated before the courts; provide finality in litigation;[4] and ensure the independence of the judiciary.[5]

12.6 Does s 7 of the *Royal Commissions Act* grant any protections beyond these common law immunities? The answer to this is not entirely clear. For example, it is not clear whether s 7 also includes:

- protections conferred by statute on judges, legal practitioners or witnesses;[6]
- privileges available in court, which allow witnesses to refuse to provide certain information;[7] or
- protections for witnesses, in the form of criminal sanctions for interference with witnesses in inquiries.[8]

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1 *Royal Commissions Act 1923* (NSW) ss 6, 11(3); *Special Commissions of Inquiry Act 1983* (NSW) ss 11, 17(3); *Evidence Act 1958* (Vic) s 21A; *Commissions of Inquiry Act 1950* (Qld) ss 14B, 20(1); *Royal Commissions Act 1917* (SA) s 16B; *Royal Commissions Act 1968* (WA) s 31; *Commissions of Inquiry Act 1995* (Tas) s 8; *Royal Commissions Act 1991* (ACT) s 19(1); *Inquiries Act 1945* (NT) ss 5, 15.

2 The scope of this immunity was recently considered in *Commonwealth v Griffiths* (2007) 70 NSWLR 268.

3 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [37]–[45], [86].

4 Ibid, [40]–[41].

5 *Fingleton v The Queen* (2005) 227 CLR 166, [38]–[40].

6 In *Nisselle v Brouwer* (2007) 16 VR 296, [100], a similar immunity was interpreted as conferring such statutory protections.

7 Privileges are discussed in Ch 17. This view was expressed by the then Attorney-General during the passage of the *Royal Commissions Act 1912* (Cth): see Commonwealth, *Parliamentary Debates*, House of Representatives, 30 July 1912, 1388, 1390 (W Hughes—Attorney-General), and by the then Solicitor-General in advice to a Royal Commission: H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4, [9.4]–[9.5].

8 This was explained as the effect of a similar provision in the *Law Enforcement Integrity Commissioner Act 2006* (Cth): see Senate Legal and Constitutional Affairs Committee, *Provisions of: the Law*

Need for protection from legal liability

12.7 Protecting Royal Commissioners, witnesses and legal practitioners from legal liability serves a number of purposes. As the New Zealand Law Commission (NZLC) observed in its recent report, *A New Inquiries Act*, these purposes include the need to:

- promote the fearless pursuit of the truth;
- ensure that the role of inquirer is fairly and efficiently exercised without improper interference;
- safeguard a fair hearing in accordance with natural justice, which should reduce the prospect of error;
- promote the independence of inquirers; and
- ensure that any challenges to the inquiry are through the proper channels, for example, judicial review or political means.[9]

12.8 Section 7 of the *Royal Commissions Act* is used most commonly to protect Royal Commissioners, witnesses and legal practitioners from legal liability for defamatory statements made before or by a Royal Commission.[10] Defamation is the publication of words or matter that is likely to injure the reputation of another. Some inquiries, such as those which investigate allegations of misconduct or impropriety, are likely to injure the reputations of others by their very nature.

12.9 Experience has shown that there is a need for such protection. For example, in *Bretherton v Kaye*, Mr Bretherton brought a defamation action against a Victorian Board of Inquiry into allegations of police corruption, and counsel assisting the board.[11] The action related to statements made by counsel assisting in an opening address to the Board. The judge noted that, if counsel were constantly at risk of actions for defamation in inquiries, 'cautious counsel could well fail in the performance of the duty of fearlessly pursuing the inquiry for truth'.[12] Although the action failed in that case on the grounds that the public interest required that such statements should be protected from a defamation action, the judge indicated that this did not necessarily apply to all proceedings before a board of inquiry.[13] Subsequently, the *Evidence Act 1958* (Vic) was amended to confer statutory protections similar to those in s 7 of the *Royal Commissions Act*.[14]

12.10 Other types of legal action could be taken against inquiry members. For example, claims of negligence have been made, although the High Court has held that

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Enforcement Integrity Commissioner Bill 2006, the Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 and the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006 (2006), [3.75]. These criminal sanctions are discussed in Ch 19.

9 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [10.11].

10 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 310.

11 *Bretherton v Kaye* [1971] VR 111.

12 Ibid, 124.

13 Ibid, 125.

14 *Evidence Act 1958* (Vic) s 21A, amended by *Evidence (Boards and Commissions) Act 1971* (Vic).

those conducting investigations in the public interest do not owe a duty of care to those being investigated.[15]

Submissions and consultations

12.11 While participants in Royal Commissions may be protected by s 7 of the *Royal Commissions Act*, participants in non-statutory inquiries receive no such protection. In consultations, the ALRC heard that those conducting non-statutory inquiries were usually, but not always, offered indemnities against civil or criminal liability by the Australian Government.

12.12 Stakeholders who addressed the issue in this Inquiry unanimously supported this kind of protection from legal liability in relation to Royal Commissions and other forms of public inquiry.[16]

12.13 In its submission, the Department of Immigration and Citizenship (DIAC) noted that, in the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005), state governments participating in the review sought legal arrangements and safeguards for participating in the review. DIAC suggested that:

> automatic statutory access to legal protections for witnesses may have provided more surety for participants and may have helped to negate the requirement for witnesses to seek those protections.[17]

ALRC's view

12.14 There is a clear need for participants in Royal Commissions and Official Inquiries to be protected from legal liability in relation to the conduct of these inquiries. As noted above, such protection enables inquiries to pursue the truth and enables participants to speak freely without fear of being sued. Such protection also ensures the independence of inquiry members. These reasons apply equally to both Royal Commissions and Official Inquiries.

Protection for inquiries

Inquiry members

Qualified immunities

12.15 Given that Royal Commissions are established by the executive arm of government, an argument can be made that it is not appropriate to give members of Royal Commissions and Official Inquiries the same immunity from civil liability as that enjoyed by a Justice of the High Court. Professor Enid Campbell, for example, has suggested that it may be appropriate to give Royal Commissioners similar protection to

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15 *Sullivan v Moody* (2001) 207 CLR 562. See also *Stewart v Ronalds* [2009] NSWCA 277, [55]–[56], [99]–[100], [102]–[104].

16 For example, Commonwealth Ombudsman, *Submission RC 32,* 13 October 2009; Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009; Community and Public Sector Union, *Submission RC 10,* 22 May 2009.

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

that accorded to the Commonwealth Ombudsman under s 33 of the *Ombudsman Act 1976* (Cth).[18] This section provides:

> Subject to section 35, neither the Ombudsman nor a person acting under his or her direction or authority is liable to an action, suit or proceeding for or in relation to an act done or omitted to be done in good faith in exercise or purported exercise of any power or authority conferred by this Act or Division 7 of Part V of the *Australian Federal Police Act 1979*.

12.16 This form of protection would not protect inquiry members from legal liability for acts committed blatantly in excess of their jurisdiction. This is narrower than the complete immunity from civil or criminal liability accorded to judges.

12.17 In *A New Inquiries Act*, the NZLC considered that it was inappropriate to confer on inquiry members an immunity equivalent to a judicial immunity. The NZLC observed that inquiries do not have the same ongoing need as courts to ensure individual or institutional independence, and the inquisitorial nature of inquiries, and the more relaxed application of the rules of evidence, meant there was greater likelihood of unfair harm to a person's interests. Further, it was not evident that a complete immunity from legal liability was necessary for inquiries to perform their functions.[19]

12.18 The NZLC recommended, instead, that inquiries should enjoy a qualified immunity. It recommended that inquiries and their members should have no liability for anything they may report, say, do or fail to do in the exercise or intended exercise of their functions unless the inquiry or inquiry member acted in bad faith. Similar provisions apply to most statutory bodies.[20] It rejected an additional requirement that the act or omission be 'reasonable', on the grounds that such a requirement would be likely to generate unnecessary litigation.[21]

12.19 The *Inquiries Act 2005* (UK) provides for a qualified immunity for inquiry members. It states that no action shall lie 'in respect of any act done or omission made in the execution of his duty as such, or any act done or omission made in good faith in the purported execution of duty as such' in the course of an inquiry.[22]

Scope of qualified immunities

12.20 The scope of similar qualified immunities has been considered by Australian courts. For example, courts have considered whether the phrasing of particular

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18 H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 359.

19 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [10.20]. A similar conclusion had been reached earlier in the report of (former) Public and Administrative Law Reform Committee (NZ), *Commissions of Inquiry,* Thirteenth Report (1980), 23.

20 New Zealand Law Commission, *A New Inquiries Act,* Report No 102 (2008), Rec 50.

21 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [10.24].

22 *Inquiries Act 2005* (UK) s 37.

immunities protects against claims of negligence.[23] As noted above, the courts have held that, in the context of a negligence action, inquiry members and those engaged or employed by inquiries do not generally owe a duty of care to inquiry participants. In the absence of a duty of care, an action in negligence cannot succeed.

12.21 Another issue is whether such immunities exclude judicial review.[24] The Victorian Court of Appeal concluded, in respect of an immunity similar to s 33 of the *Ombudsman Act*, that:

> the phrase 'action or proceeding ... against any person' means a proceeding in which the person is exposed to liability. The phrase is not apt to encompass a proceeding which challenges the validity of a decision made (or refused to be made) by that person. Such a proceeding, of which the present is an instance, is not as a matter of ordinary language an action 'against' the person. Rather, the action is in respect of the person's official act, that is, the decision or refusal.[25]

12.22 Importantly, such immunities do not generally extend to *any* act or omission performed in the official capacity of the person protected by the immunity.[26] For example, an immunity may not extend to internal matters of administration (such as the employment of staff),[27] or acts or omissions not directly referable to the statutory powers and functions of the person protected.[28]

Clarity of present immunity

12.23 Dr Leonard Hallett has suggested that a qualified immunity has the disadvantage of being less clear than the present immunity under s 7 of the *Royal Commissions Act*.[29] Although the language in s 7 of the *Royal Commissions Act* is used commonly in legislation, the scope of the immunity it confers is unclear. The section refers to the immunities enjoyed by judges, legal practitioners and witnesses in the High Court. An ordinary reader is unlikely to know which immunities and liabilities apply to witnesses, counsel and judges. The language also reinforces the misleading perception that inquiries are judicial in nature, rather than investigations established for the purposes of the executive arm of government.

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23 See, eg, *Masterwood Pty Ltd v Far North Queensland Electricity Board (No. 2)* [2000] 1 Qd R 253; *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105; *Board of Fire Commissioners (NSW) v Rowland* 60 SR (NSW) 322. See also *Niselle v Brouwer* (2007) 16 VR 296, [93].

24 Judicial review is discussed in Ch 14.

25 *Applicants A1 & A2 v Brouwer* (2007) 16 VR 612, [80]–[81]. A similar conclusion was reached in *Niselle v Brouwer* (2007) 16 VR 296, [97]. See also *Ex parte Waldron* [1986] QB 824. It has been held to exclude judicial review in one case, although this was referable to the particular language and legislative history of that immunity: *Ainsworth v Ombudsman* (1988) 17 NSWLR 276. Professor Enid Campbell was of the view that s 33 of the *Ombudsman Act 1973* (Cth) did exclude judicial review, subject to s 75 of the *Australian Constitution*: H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [11.4].

26 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575, [34]-[35].

27 *Ombudsman v Laughton* (2005) 64 NSWLR 114.

28 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575; *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105; *Hudson v Venderheld* (1968) 118 CLR 171; *Australian National Airlines Commission v Newman* (1987) 162 CLR 466.

29 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 315.

12.24 Further, the phrasing of similar protections in Australian state and territory legislation has caused some difficulties of interpretation. In *Carruthers v Connolly*, the Supreme Court of Queensland considered and rejected an argument that a similar immunity provision in the *Commissions of Inquiry Act 1950* (Qld) extended to all civil proceedings, including proceedings for judicial review.[30] Thomas J noted:

> because of the difference of function and place in the legal system, there is an immediate difficulty in giving a precise meaning and application to the words 'the same protection and immunity' as a judge.[31]

Legal practitioners

12.25 Section 7 of the *Royal Commissions Act* also protects legal practitioners assisting a Royal Commission, and legal practitioners appearing on behalf of a person at a hearing before the Commission. The role of legal practitioners assisting Royal Commissions and other inquiries is discussed in Chapter 6. As noted there, counsel assisting are typically involved in identifying and obtaining relevant evidence for the Commission, making opening and closing statements, calling witnesses, and examining or cross-examining witnesses. Solicitors assisting may be involved in interviewing potential witnesses, assisting in obtaining, analysing and preparing material for counsel assisting, and aiding counsel assisting to finalise submissions arising from hearings. Legal practitioners assisting inquiries, therefore, perform investigative functions similar to those performed by staff at an investigative standing body, such as the Commonwealth Ombudsman.

12.26 One issue, therefore, is whether legal practitioners assisting a Royal Commission or Official Inquiry should, for the same reasons as inquiry members, enjoy only a qualified immunity from civil or criminal action. Section 33 of the *Ombudsman Act*, set out above, provides such an immunity for those acting under the direction or authority of the Ombudsman, in the exercise or purported exercise of powers or authorities under the Act. Since the *Royal Commissions Act* does not specify many of the powers, functions or duties of legal practitioners assisting an inquiry, this kind of provision would need to be drafted carefully to ensure that it protected these powers, functions or duties.[32]

12.27 Legal practitioners appearing on behalf of a person at a hearing before an inquiry are in a different position from legal practitioners assisting an inquiry. They represent the interests of a person during a hearing in a way that is similar to the role of an advocate in a court. Under s 6FA of the *Royal Commissions Act*, a legal representative authorised to appear for the purpose of representing a person may examine and cross-examine a person in an inquiry, so far as the Commission thinks proper.

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30 *Carruthers v Connolly* [1998] 1 Qd R 339, 377–381.

31 Ibid, 378.

32 This may be the purpose of the broader protection in the *Inspector of Transport Security Act 2006* (Cth) ss 84, 85, which also protects acts 'as otherwise permitted, either expressly or by implication, under this Act'.

12.28 Section 7 of the *Royal Commissions Act* grants legal practitioners the same common law immunity as enjoyed by counsel in a courtroom. The common law immunity for counsel, as noted above, protects any work done in court, or 'work done out of court which leads to a decision affecting the conduct of the case in court', from civil or criminal actions.[33] As noted above, the purpose of this immunity is to ensure that matters are freely and fully adjudicated before the courts, and to provide finality in litigation.[34]

12.29 Should legal representatives appearing on behalf of a person enjoy only a qualified immunity in terms similar to s 33 of the *Ombudsman Act*? If so, what powers or functions should this immunity protect?

12.30 At present, the only express power or function a legal representative has under the *Royal Commissions Act* is the power to examine or cross-examine a witness. The first issue that arises is whether the immunity should be extended to protect other forms of representation before an inquiry. As discussed in Chapter 15, an inquiry need not be conducted by way of formal hearings and, therefore, a legal representative may represent a person before an inquiry by, for example, making written submissions, or accompanying a person at a private interview.

12.31 Whether the immunity should extend beyond the function of representing a person before an inquiry is a second issue. For example, legal representation may involve providing general legal advice to a client. This may have no effect on the conduct of an inquiry. In legal proceedings, the common law immunity for counsel would not apply to such functions.

Inquiry employees

12.32 Much of the work done by Royal Commissions is conducted by inquiry employees, such as support staff, and consultants or contractors (including experts)[35] engaged by an inquiry. The duties of such employees may include the collection and use of evidence, contact with potential witnesses and the public, and the provision of advice. Such activities may incur legal liability.

12.33 Section 7 of the *Royal Commissions Act* does not provide any protection for inquiry employees, other than legal practitioners assisting an inquiry. In contrast, protection from legal liability is accorded to the staff of standing investigatory bodies. As already noted, s 33 of the *Ombudsman Act* protects the Commonwealth Ombudsman (defined to include the Deputy Ombudsman and a delegate of the Commonwealth Ombudsman) and any person 'acting under his or her direction or authority'. Section 33 of the *Inspector-General of Intelligence and Security Act 1986* (Cth) protects the Inspector-General and a 'person acting on behalf' of the Inspector-

33 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [37]–[45], [86].
34 Ibid, [40]–[41].
35 In Ch 6, the ALRC recommends that Royal Commissions and Official Inquiries should be empowered to appoint expert advisors: Recommendation 6–9.

General. Similar protections could be conferred on those employed or engaged by an inquiry.

12.34 Both Campbell and Hallett have expressed the view that it would be desirable to protect the staff of an inquiry from legal liability, in line with the protection afforded to Royal Commissioners and legal practitioners.[36]

12.35 Among stakeholders who addressed this issue in consultations, there was general support for an extension of the protection from legal liability to others employed by inquiries. For example, the Community and Public Sector Union (CPSU), submitted that such protection

> should also extend as necessary to employees of the Royal Commission fulfilling their employment duties.[37]

Witnesses

12.36 The protection afforded to witnesses under s 7 of the *Royal Commissions Act* is expressed to apply to those 'summoned to attend or appearing before the Commission'. This suggests that those who choose to give evidence other than at hearings will not benefit from the protection. As discussed in Chapter 15, it may be appropriate in many inquiries to gather evidence outside of formal hearings and in a non-adversarial setting.

12.37 Much broader protection is afforded in respect of some investigatory bodies that employ more informal inquiry procedures.[38] For example, s 37 of the *Ombudsman Act* provides:

> Civil proceedings do not lie against a person in respect of loss, damage or injury of any kind suffered by another person by reason of any of the following acts done in good faith:
>
> (a) the making of a complaint to the Ombudsman under this Act;
>
> (b) the making of a statement to, or the furnishing of a document or information to, a person, being an officer within the meaning of section 35, for the purposes of this Act, whether or not the statement was made, or the document or information was furnished, in pursuance of a requirement under section 9 or an order under section 11A.

12.38 This section protects anyone giving information to an officer of the Commonwealth Ombudsman—including where such information was given voluntarily—if it was given in good faith. In consultations, both the Commonwealth

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36 See H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 359–360; L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 319–320. There is, however, statutory protection from defamation actions in relation to inquiry reports, as discussed later in this chapter.

37 Commonwealth Ombudsman, *Submission RC 32,* 13 October 2009; Liberty Victoria, *Submission RC 26,* 27 September 2009; Community and Public Sector Union, *Submission RC 10,* 22 May 2009. See also G Millar, *Submission RC 5,* 17 May 2009.

38 See, eg, *Inspector of Transport Security Act 2006* (Cth) s 48; *Inspector-General of Intelligence and Security Act 1986* (Cth) s 33(2).

Ombudsman and the Inspector of Transport Security indicated that these broader protections were useful in encouraging people to provide information.[39]

12.39 The protection afforded under s 37 of the *Ombudsman Act* is narrower in two respects than the common law immunity for witnesses that applies under s 7 of the *Royal Commissions Act*. First, the common law immunity does not require 'good faith' on the part of the witness, and extends to false or malicious acts.[40] Instead, false or malicious acts are penalised in the form of a criminal offence or contempt.[41] This helps to ensure the finality of litigation.[42]

12.40 An alternative to s 37 of the Ombudsman Act would be to provide a statutory immunity for witnesses that did not require good faith. An example of such an immunity is s 222(5) of the Law Enforcement Integrity Commissioner Act 2006 (Cth). The requirement of good faith was removed on the recommendation of a parliamentary inquiry, on the basis that informants may 'provid[e] true and significant information about the misconduct of others even though they may be doing so out of motives of revenge, self-enhancement or a desire to embarrass or damage the organisation'.[43]

12.41 Secondly, s 37 of the *Ombudsman Act* does not protect acts done in preparation for the making of statements or the furnishing of information to an inquiry. This is narrower than the common law immunity for witnesses, as the common law immunity extends to acts such as swearing affidavits, making statements not subsequently used in court, preliminary examinations of evidence outside of a hearing, and conducting examinations for the purpose of providing expert evidence.[44]

Inquiry reports

12.42 In the past, some commentators have noted that those reporting on, or involved in the preparation or publication of, inquiry reports were not afforded protection from defamation actions under the *Royal Commissions Act*.[45] Similarly, DIAC noted that some witnesses involved in a non-statutory inquiry had 'raised general concerns over whether their answers and transcripts would be made public and whether that could expose them to personal suit'.[46]

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39 Inspector of Transport Security, *Consultation*, 4 June 2009; Commonwealth Ombudsman, *Consultation*, Canberra, 14 May 2009.

40 *Cabassi v Vila* (1940) 64 CLR 130, 140–141; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [39]–[40] .

41 *Cabassi v Vila* (1940) 64 CLR 130, 140–141.

42 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [41].

43 Senate Legal and Constitutional Affairs Committee, *Provisions of: the Law Enforcement Integrity Commissioner Bill 2006, the Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006 and the Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006* (2006), [3.73], citing Dr AJ Brown, *Submission 8*, 7.

44 The extent of this immunity is discussed in *Commonwealth v Griffiths* (2007) 70 NSWLR 268.

45 L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 320–321.

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

12.43 This concern has been addressed by the uniform Defamation Acts introduced in all Australian jurisdictions in 2005–2006.[47] These Acts provide a defence of absolute privilege—that is, the defence applies regardless of the motive of the person making the statement—in relation to any matter published in the course of proceedings of an Australian tribunal.[48] An 'Australian tribunal' is defined as any tribunal with the power to take evidence on oath or affirmation, and expressly includes Royal Commissions or other special commissions of inquiry.[49] This defence expressly applies to: any document filed or lodged with, or otherwise submitted to, the tribunal; evidence given before the tribunal; and any judgment, order or other determination of the tribunal.[50]

12.44 The uniform Defamation Acts also provide for a defence in relation to the publication of matters in public documents, or a fair report or summary of public documents.[51] A public document is defined to include, relevantly, any document authorised by the law of any country to be published, or required to be submitted or tabled before Parliament.[52] In addition, documents tabled in Parliament attract parliamentary privilege. In Chapter 7, the ALRC recommends that the Australian Government should table in Parliament reports of Royal Commissions and Official Inquiries or, if part of a report is not to be tabled, a statement of reasons why the whole report is not being tabled.[53]

12.45 The uniform Defamation Acts also protect publication of fair reports of 'proceedings of public concern', which is defined as including any proceedings in public of an inquiry authorised under any law.[54] The defences of publication of public documents and fair reports of proceedings of public concern are defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.[55]

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47 See *Defamation Act 2005* (NSW); *Defamation Act 2005* (Vic); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (WA); *Defamation Act 2005* (Tas); *Civil Law (Wrongs) Act 2002* (ACT) as amended; and *Defamation Act 2006* (NT). The sections cited below in relation to the *Defamation Act 2005* (NSW) apply to the legislation of other states and territories, except as noted otherwise.

48 See, eg, *Defamation Act 2005* (NSW) s 27(2)(b); *Defamation Act 2005* (SA) s 25(2)(b); *Civil Law (Wrongs) Act 2002* (ACT) s 137(2)(b); *Defamation Act 2006* (NT) s 24(2)(b).

49 See, eg, *Defamation Act 2005* (NSW) s 4; *Defamation Act 2005* (Qld) Dictionary; *Civil Law (Wrongs) Act 2002* (ACT) s 116; *Defamation Act 2006* (NT) s 3.

50 See, eg, *Defamation Act 2005* (NSW) s 27(2)(b)(i)–(iii); *Defamation Act 2005* (SA) s 25(2)(b)(i)–(iii); *Civil Law (Wrongs) Act 2002* (ACT) s 137(2)(b)(i)–(iii); *Defamation Act 2006* (NT) s 24(2)(b)(i)–(iii).

51 See, eg, *Defamation Act 2005* (NSW) s 28(1); *Defamation Act 2005* (SA) s 26(1); *Civil Law (Wrongs) Act 2002* (ACT) s 138(1); *Defamation Act* (NT) s 25(1).

52 See, eg, *Defamation Act 2005* (NSW) s 28(4)(c); *Defamation Act 2005* (SA) s 26(4)(c); *Civil Law (Wrongs) Act 2002* (ACT) s 138(4)(c); *Defamation Act* (NT) s 25(4)(c). The issue of tabling reports is discussed in Ch 7.

53 Recommendation 7–2.

54 See *Defamation Act 2005* (NSW) s 29(4)(f); *Defamation Act 2005* (SA) s 27(4)(f); *Civil Law (Wrongs) Act 2002* (ACT) s 139(4)(f); *Defamation Act* (NT) s 26(4)(f).

55 See, eg, *Defamation Act 2005* (NSW) ss 28(3), 29(3); *Defamation Act 2005* (SA) ss 26(3), 27(3); *Civil Law (Wrongs) Act 2002* (ACT) ss 138(3), 139(3); *Defamation Act* (NT) ss 25(3), 26(3).

12.46 Finally, there is also a defence in relation to information published to a recipient with an interest in receiving that information.[56] This defence is defeated if it is proved that the publication was actuated by malice.[57]

12.47 These defences provide appropriate protection from defamation in relation to the publication of reports and the giving of evidence in inquiries, including Official Inquiries.

ALRC's view

Inquiry members

12.48 In the ALRC's view, a qualified immunity is appropriate for inquiry members. An inquiry does not have the same ongoing need for independence as a court. Further, because inquiry members play an active role in investigating matters and are able to obtain and examine a wide range of material, there is a greater potential for harm than in the case of judges examining evidence presented to a court by opposing parties.[58]

12.49 A form of protection similar to that in s 33 of the *Ombudsman Act*, therefore, should be conferred on inquiry members under the *Inquiries Act*. This would protect them from civil and criminal actions in respect of actions done, or omissions made, in good faith in the exercise or intended exercise of powers or functions under the *Inquiries Act*. In the ALRC's view, this form of protection is also easier for the ordinary reader and the courts to understand.[59]

Legal practitioners and inquiry employees

12.50 The ALRC recommends that the same protection should be conferred on legal practitioners assisting the inquiry. Legal practitioners assisting the inquiry perform similar functions and duties as those of the staff of investigatory bodies, and should receive similar protections. This protection should extend beyond work done in, or for, formal hearings, in order to reflect the different nature of the work done by legal practitioners assisting an inquiry.

12.51 Much of the work of an inquiry is likely to be done by employees other than legal practitioners. There is no reason for protecting only legal practitioners assisting an inquiry in the conduct of an inquiry. The ALRC recommends that the same protection should be extended to staff, contractors and consultants of Royal Commissions and Official Inquiries. As noted above, this would be consistent with protection conferred on the employees of standing investigatory bodies.

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56 See, eg, *Defamation Act 2005* (NSW) s 30; *Defamation Act 2005* (SA) s 28; *Civil Law (Wrongs) Act 2002* (ACT) s 139A; *Defamation Act* (NT) s 27.

57 See, eg, *Defamation Act 2005* (NSW) s 30(4); *Defamation Act 2005* (SA) s 28(4); *Civil Law (Wrongs) Act 2002* (ACT) s 139A(4); *Defamation Act* (NT) s 27(4).

58 As noted above, these accord with the reasons given by the NZLC in its report: New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [10.11].

59 The ALRC notes that this provision should not exclude judicial review. Judicial review is discussed in Ch 14. It may be desirable to clarify that this protection does not exclude judicial review, although this does not appear necessary because, as noted above, both the language and the purpose of the immunity should indicate that judicial review is not excluded.

12.52 Legal representatives of inquiry participants also should receive protection from legal liability. As discussed above, one of the purposes of this protection is to promote the fearless pursuit of the truth. This purpose justifies protection for legal representatives as well as legal practitioners assisting an inquiry, since legal representatives need to defend their clients' interests robustly.

12.53 Another purpose of such a protection is to ensure that any challenges to the inquiry are through the proper channels, such as judicial review or political means. This also justifies protection from legal liability for legal representatives. For example, if an inquiry participant could sue his or her legal representative on the basis that a different result would have been reached if the legal representative had cross-examined a witness differently, this would have the effect of reopening the issues in an inquiry.

12.54 For these reasons, legal representatives should be protected in respect of their representation of an inquiry participant. These forms of representation should extend beyond the conduct of examinations and cross-examinations in a formal hearing, to all forms of representation before an inquiry, such as making written submissions and representation at private interviews. As with inquiry members and legal practitioners assisting, this immunity need only extend to acts done, or omissions made, in good faith. There is no reason, however, to extend such protection to functions of a legal representative that are not related to the conduct of an inquiry, such as providing general legal advice.

Inquiry participants

12.55 It is also desirable to extend protection from legal liability to all those who supply information to inquiries, whether they are required to attend a hearing or otherwise. There is no reason to distinguish between the protection of witnesses summoned to a hearing, and others providing information in less formal ways. Both need to be able to provide information fully and frankly to an inquiry, without fear of legal action in relation to the information provided. Further, the extension of such protection will enable inquiries to proceed more informally, as discussed in Chapter 15. The ALRC recommends that a provision in similar terms to s 37 of the *Ombudsman Act* should be included in the *Inquiries Act*.

12.56 This provision, however, should not require that the acts or omissions be done in good faith. There is a distinction here between the acts and omissions of inquiry members or staff, and similar conduct by those supplying information to an inquiry. Information may be supplied with malicious motives, but may be nevertheless relevant to an inquiry. The protection from legal liability for those supplying information should therefore be wider than the protection for inquiry members or staff. Further, the protection should also extend to acts done in preparation for the making of statements or the furnishing of information or documents to an inquiry, in line with the immunity of a witness at common law.

Recommendation 12–1 The recommended *Inquiries Act* should provide that no civil or criminal proceedings shall lie in respect of acts done, or omissions made, in good faith, in the exercise, or intended exercise, of powers or functions under the Act. This protection should apply to members of Royal Commissions and Official Inquiries, legal practitioners assisting inquiries, legal representatives of inquiry participants, and those employed or engaged by an inquiry.

Recommendation 12–2 The recommended *Inquiries Act* should provide that civil proceedings shall not lie against a person for loss, damage or injury of any kind suffered by another person by reason of the provision of any information or the making of any statement to Royal Commissions or Official Inquiries, or acts done in preparation for such provision of information or making of statements.

Electronic publications

12.57 Recent Royal Commissions and some public inquiries have published their reports and much of the material available to them on websites. Some stakeholders raised concerns about the possibility of civil proceedings arising from the publication of evidence or reports on the internet.

12.58 In *Dow Jones v Gutnick*, the High Court of Australia determined that, in relation to material published electronically, the tort of defamation is committed in the place where the material is downloaded.[60] Potentially, therefore, a person downloading material from an Australian inquiry website outside of Australia may be able to sue for defamation in that foreign jurisdiction if the person suffers damage to his or her reputation in that jurisdiction. The protection from legal liability discussed in this chapter will not apply to claims made outside Australia.

12.59 A similar difficulty may arise when evidence is given from foreign jurisdictions, for example, by video link. A person could defame another person in the course of giving evidence on video link, and could be sued in a foreign jurisdiction as a result.

12.60 Inquiries need to give careful consideration, therefore, to the electronic publication of inquiry reports and material, as well as the use of technology such as video links to receive evidence from foreign jurisdictions. This consideration should not be limited only to the potential liability for defamation actions. In Chapter 16, the ALRC discusses circumstances in which it may be appropriate to restrict public access to matters before an inquiry, including where it may cause prejudice or hardship to an individual, or would disclose confidential or sensitive information. These matters are also relevant when an inquiry is considering what should be published electronically, or whether video link evidence should be heard in public.

60 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

12.61 In particular, inquiries need to consider the impact of electronic publication on the privacy of inquiry participants. In consultations, the ALRC heard of instances in which confidential material provided to an inquiry had been published on the internet.

12.62 In its 2008 report *For Your Information: Australian Privacy Law and Practice* (ALRC 108), the ALRC discussed the differences between generally available information, such as electoral rolls, and the publication of such information electronically.[61] The ALRC noted that the greater accessibility of electronic information, the novel ways in which it could be aggregated or used, and the greater difficulties in enforcing rules relating to the collection and publication of such information, meant that greater caution was required before making generally available information available in electronic form.[62]

12.63 The Office of the Privacy Commissioner has developed guidelines to promote best practice in ensuring an appropriate degree of privacy for federal and ACT government websites.[63] These guidelines provide a useful starting point for inquiries considering electronic publication of material.

12.64 In Chapter 6, the ALRC recommends that an *Inquiries Handbook* should be published to provide guidance to inquiries on a range of matters.[64] The ALRC considers that guidance on the liability for defamation and other court action in the case of electronic publications should be included in the *Inquiries Handbook*.

12.65 There was support for this proposal among the few stakeholders who addressed this issue in submissions and consultations. The CPSU submitted:

> We welcome [this proposal]. CPSU members who have given evidence in their capacity as public servants have been threatened with defamation proceedings. Accordingly, it is important that this issue and the provision of appropriate legal assistance in such circumstances are addressed in the handbook.[65]

Recommendation 12–3 The recommended *Inquiries Handbook* should address liability for defamation and other court action in the case of electronic publications.

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61 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), Ch 11.

62 Ibid, [11.27]–[11.28], [11.53].

63 Office of the Privacy Commissioner, *Guidelines for Federal and ACT Government Websites* (2003). See also the Office of the Victorian Privacy Commissioner, *Website Privacy—Guidelines for the Victorian Public Sector* (2004).

64 Recommendation 6–1.

65 Community and Public Sector Union, *Submission RC 25,* 22 September 2009. See also Liberty Victoria, *Submission RC 26,* 27 September 2009.

Compellability

12.66 Under s 16 of the *Evidence Act 1995* (Cth), a person who is or was a judge in an Australian or overseas proceeding cannot be compelled to give evidence about that proceeding unless the court gives leave.[66] This provision was recommended by the ALRC, on the basis that there was a risk of 'judges … being involved unnecessarily in proceedings'.[67] It also reflects the common law principle that judges of superior courts cannot be compelled to testify as to matters in which they have been judicially engaged.[68]

12.67 The NZLC stated that a provision similar to s 7 of the *Royal Commissions Act* may prevent an inquiry member from being compellable to give evidence in respect of their conduct of the inquiry.[69]

12.68 The legislation governing other investigatory bodies often includes a provision that investigators are not compellable in proceedings. For example, the Ombudsman and his or her delegates are not compellable in proceedings in relation to information acquired during the course of their investigation.[70]

12.69 In its 1987 report, *Contempt* (ALRC 35), the ALRC recommended that Royal Commissioners should be compellable only in respect of proceedings in which they had been involved, if leave is granted by the court trying the alleged offence.[71] In DP 75, the ALRC proposed that the *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries are not compellable to give evidence about those inquiries, unless the court gives leave.[72] The NZLC recommended a slightly different provision, namely, that members of an inquiry should not be compellable witnesses in relation to that inquiry, except if bad faith is alleged, in which case they are compellable if the court grants leave.[73]

ALRC's view

12.70 There is a public interest in ensuring that members of Royal Commissions or Official Inquiries are not brought to court unnecessarily as a result of their involvement in inquiries. This protection should extend to both Royal Commissions and Official Inquiries, since the public interest is the same in relation to both forms of inquiry.

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66 This provision is replicated in the uniform evidence legislation of other Australian jurisdictions, such as *Evidence Act 1995* (NSW) s 16. Section 192 of the *Evidence Act 1995* (Cth) requires courts to take into consideration, before granting leave, matters such as: the effect on the length of the hearing; any unfairness to a party or witness; the importance of the evidence; and the nature of the proceeding.

67 Australian Law Reform Commission, *Evidence (Interim)* ALRC 26 (1985), [527].

68 See, eg, *Hennessy v Broken Hill Pty Ltd* (1926) 38 CLR 342, 349; *Zanatta v McCleary* [1976] 1 NSWLR 230, 234–235.

69 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [10.26].

70 *Ombudsman Act 1976* (Cth) s 35(8). See also *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 211; *Inspector of Transport Security Act 2006* (Cth) s 87; *Transport Safety Investigation Act 2003* (Cth) s 66.

71 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Rec 123.

72 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 12–4.

73 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 51.

12.71 The ALRC recommends that the *Inquiries Act* should provide that those conducting inquiries should not be compellable to give evidence about those inquiries, unless the court gives leave. This approach is preferred to that recommended by the NZLC because it is consistent with s 16 of the *Evidence Act* (Cth). It is not expected, however, that the altered wording will have very different consequences, because a court usually will not give leave if the evidence required is evidence that can be supplied in another form, such as by a transcript of inquiry proceedings, or by the documents of an inquiry. An allegation of bad faith is the most likely case in which testimony by an inquiry member might be required, in which case both the recommendations by the ALRC and NZLC would require the court to grant leave before the inquiry member could be compelled to give evidence.

Recommendation 12–4 The recommended *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries are not compellable to give evidence about those inquiries, unless the court gives leave.

13. National Security

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Introduction

13.1 The Terms of Reference for this Inquiry ask the ALRC to consider whether there is any need to develop special arrangements and powers for inquiries involving matters of national security. At present, the *Royal Commissions Act 1902* (Cth) does not contain any provisions dealing specifically with the protection of information that

may prejudice national security during the conduct of an inquiry or after its completion.

13.2 The discovery of the truth has been described as a prime function of a Royal Commission.[1] Royal Commissions are established only where a particular area of public concern has been identified. Their purpose is to determine factual circumstances, report on the matters specified in the Letters Patent and make recommendations. Royal Commission proceedings, therefore, are generally conducted in public and full reporting by the media is allowed. A comprehensive final report detailing all the evidence heard is generally prepared by the Commission. However, there may be some national security-related information which, in the public interest, should not be disclosed publicly. Further, there are occasions on which the public interests in open justice and open government must be weighed against a proper need for secrecy.

13.3 This chapter provides an overview of previous Royal Commissions and inquiries that have considered matters involving national security or have required access to national security information in the course of their inquiries. From this discussion, it is possible to identify a number of existing mechanisms that inquiries have used to protect national security information. The chapter then examines some issues that arise for consideration in the context of Royal Commissions and Official Inquiries such as: existing government policies and protocols for the protection of national security information; the role of existing permanent bodies; the protection of national security information in court proceedings; and the use of security clearances as a method of protecting and limiting access to such information. The approach taken in comparable overseas jurisdictions to the protection of national security information is also considered.

13.4 The ALRC makes a number of recommendations for special arrangements and powers for Royal Commissions and Official Inquiries where matters of national security are under consideration. The recommendations take into account the need for a flexible system for inquiries that incorporates both legal and practical solutions, including by way of guidance in the recommended *Inquiries Handbook*. The role of the inquiry members in tailoring procedures that will apply in any particular case in line with the specific circumstances of the inquiry and the requirements of procedural fairness is also emphasised.

Royal Commissions and inquiries in cases of national security

13.5 This section examines a number of past Royal Commissions and inquiries that have dealt with issues of national security or have required access to national security information in conducting their inquiries.

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1 T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), vol 1, [7.66].

Royal Commission on Espionage

13.6 The Royal Commission on Espionage (1955) was established in May 1954 following the defection of two Soviet diplomats, Vladimir and Evdokia Petrov. The Letters Patent authorising the investigation and report were issued pursuant to s 3 of the *Royal Commissions Act 1954* (Cth).[2] Subsequently, in order to increase the powers conferred upon the Royal Commission and to remove certain doubts that had arisen, the *Royal Commission on Espionage Act 1954* (Cth) was enacted.[3]

13.7 As noted in the Report, the Royal Commission was 'concerned with matters which vitally affect the security and defence of the country' and involved the examination of evidence and material 'of a most confidential character'. According to Commissioner Owen, to investigate material of that nature in public was, in the national interest, undesirable.[4] Despite the subject matter, the Royal Commission, which sat for 126 days in Canberra, Sydney and Melbourne, held most of its hearings in public except in 'certain cases in which it seemed ... that the national interest demanded' that evidence be heard in private sessions. Those cases fell into four broad classes:

- where the evidence was known to be of such a nature that, for reasons of security, it should not be made public;
- where a witness was engaged in counter-intelligence work and it was not desirable to disclose their identity;
- where it was uncertain until a matter had been investigated whether the answers to the questions would involve security considerations; and
- where the relations of Australia with other countries made it desirable that evidence concerning their nationals either should not be published or should be made known to the governments of those countries before publication.[5]

13.8 Transcripts of most of these private proceedings were withheld from publication until after the Royal Commission had presented its report. Some of the transcripts,

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2 The *Royal Commissions Act 1954* (Cth) provided for the appointment of the Royal Commission. Section 3(2) provided that the Royal Commission had 'all the powers, rights and privileges' specified in the *Royal Commissions Act 1902* (Cth).

3 W Owen, R Philip and G Ligertwood, *Report of the Royal Commission on Espionage* (1955), 4. Section 6(1) of the *Royal Commission on Espionage Act 1954* (Cth) excluded the application of the *Royal Commissions Act 1902* (Cth) to the Royal Commission on Espionage although the provisions of both Acts were substantially the same.

4 W Owen, R Philip and G Ligertwood, *Report of the Royal Commission on Espionage* (1955), 8.

5 Ibid.

however, were never published, including evidence in closed session of former and serving 'senior servants of the Crown'.[6]

13.9 The *Report of the Royal Commission on Espionage* was presented to the Governor-General on 22 August 1955 and tabled in Parliament on 14 September 1955.[7] A separate 20 page *Annexure to the Report of the Royal Commission on Espionage* was also presented consisting of excerpts from the 'Moscow Papers' and evidence in closed session that the Commission members withheld from the report. This included the names of certain foreign diplomats in Australia, officers of the Department of External Affairs and slanderous material which the Commission members and government agencies felt should not be made public. The Annexure was intended for 'official eyes only' and had a very limited distribution.[8]

Royal Commission on Intelligence and Security

13.10 The Royal Commission on Intelligence and Security (1977) involved a comprehensive review of Australia's security services, including their history, administrative structure and functions. The Royal Commission, chaired by the Hon Justice Robert Hope (Commissioner Hope), was established by Letters Patent on 21 August 1974 and concluded its work in 1977.

13.11 The nature of the inquiry required 'a somewhat different procedure to be adopted to that commonly adopted in the case of Royal Commissions ... particularly because of the degree of secrecy attached to many of the matters subject of the inquiry'.[9] Consequently, while some of the sittings were held in public, most of them were held in closed session. This practice was adopted not only because of the nature of the subject matter of the evidence and submissions, but also to protect those participating in the inquiry or those to whom they referred.[10] Commissioner Hope made orders pursuant to s 6D(3) of the *Royal Commissions Act*, directing that evidence given before the Commission, or the contents of documents, books or writings produced at the inquiry, not be published.[11]

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6 For example, evidence in closed session of the Director-General of Security, Deputy Secretary of the Department of Defence, particular security officers and the former Secretary of the Department of External Affairs, Dr John Wear Burton: ibid, 8–9. See also National Archives of Australia, *Series Notes for Series A6223—Printed Copies of Royal Commission on Espionage Official Transcripts of In Camera Proceedings*, <www.naa.gov.au> at 18 June 2009.

7 National Archives of Australia, *Fact Sheet 130—The Royal Commission on Espionage, 1954–55* (2006) <www.naa.gov.au> at 18 June 2009. The final report was in one volume with four appendices including a printed copy of the *Interim Report of the Royal Commission on Espionage* dated 21 October 1954 (Appendix 2).

8 National Archives of Australia, *Series notes for series A6219—Annexure to the Report of the Royal Commission on Espionage*, <www.naa.gov.au> at 18 June 2009.

9 R Hope, *Royal Commission on Intelligence and Security—First Report* (1976), 1–2.

10 Ibid, 2.

11 Ibid.

13.12 The Royal Commission also adopted other mechanisms to protect sensitive material. For example, in inviting submissions, the Commission advised those wishing to refer to secret information in their submission that the secretary of the relevant department must be informed in advance.[12] Further, Commissioner Hope adopted a practice of making a recommendation as to whether each of the eight separate reports of the Royal Commission should be made public or regarded as classified.[13] While Commissioner Hope recognised that information about many of the matters under investigation could not be released publicly, where possible he worded his findings in a way that would enable them to be released immediately.[14] Accordingly, some of the reports were divided into publishable and non-publishable portions, and some were accompanied by abridged versions of the findings and recommendations suitable for publication.

13.13 The Royal Commission's operating procedures were also influenced by the subject matter of the inquiry, which drew upon some 2,000 supporting files from security and intelligence agencies. As described by the former Secretary of the Royal Commission, George Brownbill, the minimum classification of most of the files provided to the Royal Commission was 'secret' and many were 'top secret' or higher.[15] The office was located in secure premises in Canberra with a cipher-locked entrance, 24 hour police guard and two secure electronic perimeters. All staff had top secret security clearances as provided for in the *Protective Security Handbook*. Brownbill required all staff to observe strictly procedures for paper handling, communications security and personal discretion.[16]

13.14 Hope was concerned about the records of the Royal Commission and, in the Eighth Report released by the Commission, set out recommendations concerning the disposal and subsequent use of the records—which he envisaged would be preserved and eventually released for public access.[17] The sensitive records of the Commission were transferred to the National Archives of Australia for appropriate classification.[18]

Royal Commission on Australia's Security and Intelligence Agencies

13.15 The Royal Commission on Australia's Security and Intelligence Agencies (1984) was announced on 12 May 1983 following the expulsion from Australia of the Soviet diplomat, Mr Valeriy Ivanov, and exposure of his relationship with the Australian lobbyist, Mr David Combe. Justice Hope was again appointed Royal Commissioner.

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12 See 'Opening Statement'—Appendix 1–B: Ibid, 18–21.

13 Ibid, 1–2.

14 J Stokes, *A Brief History of the Royal Commission on Intelligence and Security* <www.naa.gov.au/collection/issues/stokes-rcis-history.aspx> at 4 August 2009.

15 G Brownbill, *The RCIS—An Insider's Perspective* (2008) National Archives of Australia <http://www.naa.gov.au/collection/issues/brownbill-rcis.aspx> at 4 August 2009.

16 Ibid.

17 R Hope, *Royal Commission on Intelligence and Security—Eighth Report* (1977).

18 J Stokes, *A Brief History of the Royal Commission on Intelligence and Security* <www.naa.gov.au/collection/issues/stokes-rcis-history.aspx> at 4 August 2009.

13.16 At the outset of hearings, Commissioner Hope indicated that the nature of the investigation would require that some evidence be heard in closed session. Difficulties arose, however, from the exclusion of Combe from part of the hearings notwithstanding that he was mentioned by name in the terms of reference and had a clear interest in any findings that were made.[19] Hope decided to characterise information as falling within four separate classes:

- matter so sensitive it should not be shown either to Combe or his counsel;
- matter that could be shown to Combe's counsel, but not to Combe or his instructing solicitor;
- matter that could be shown to Combe and his instructing solicitor; and
- matter that could be made public.[20]

13.17 Commissioner Hope made 'class orders' from time to time covering specific portions of the evidence and every exhibit was listed with a notation indicating to which of the four classes it was assigned.[21] There were only two pieces of evidence which fell within the most sensitive class. These were of only peripheral relevance and had no bearing upon Commissioner Hope's conclusions.[22] Evidence falling within the next most sensitive class was made available solely on the basis of the 'need-to-know' principle. Hence, only counsel and the witness giving evidence remained in the hearing room.[23]

13.18 Of a total of 68 hearing days there were closed hearings on 54 days. The full transcript of public hearings and edited transcripts of closed hearings were published. Material was deleted only for reasons concerning national security or privacy. The national security considerations taken into account in editing material included information on intelligence sources, methods of operation, resources, technical capacity, and knowledge about foreign intelligence services and methods of countering their activities.[24] Commissioner Hope adopted a procedure whereby Royal Commission staff undertook preliminary editing of the transcripts of closed proceedings. The draft transcript was then circulated to counsel for the Australian Government and counsel for Combe (and, where appropriate, counsel for particular witnesses) to enable them to express a view. Hope noted that, 'by this process a large measure of agreement was reached as to what should be published but when a difference remained it was resolved by me'.[25]

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19 R Hope, *Royal Commission on Australia's Security and Intelligence Agencies—Report on Term of Reference (c)* (1983), 5.
20 Ibid.
21 Ibid, 6.
22 Ibid.
23 Ibid.
24 Ibid, 6–8.
25 Ibid, 7.

13.19 Commissioner Hope observed that, throughout the hearings, he 'was faced with the difficult problem of balancing competing interests'—which included 'valid security considerations, valid considerations of the public interest and Mr Combe's interests'—and the need to make rulings with regard to the publication of evidence arose frequently.[26] He dealt with these issues on a case-by-case basis.

13.20 The report contained all the material which Commissioner Hope considered could be made public. Other material, which Commissioner Hope recommended not be published, was contained in a separate volume of appendices.[27]

Commission of Inquiry into the Australian Secret Intelligence Service

13.21 The Commission of Inquiry into the Australian Secret Intelligence Service (1995) was established as a result of media stories disclosing what purported to be details of certain Australian Secret Intelligence Service (ASIS) operations. These details were allegedly based on information supplied by two former ASIS officers (the complainants).[28] On 23 February 1994, the Australian Government announced the terms of reference of a 'judicial inquiry into the operations and management of ASIS'.[29] Subsequently, the Hon Gordon Samuels QC and a former senior public servant, Mr Michael Codd, were appointed to head the inquiry.[30] The inquiry held an initial public hearing on 2 May 1993 and thereafter sat for 64 days in closed session. The inquiry did not release any transcript of the evidence which it had taken or any of the exhibits it had admitted.[31]

13.22 On 31 March 1995, the inquiry delivered to the Prime Minister a three volume secret report together with a summary report. The summary report was released publicly on 24 April 1995. Subsequently, the Australian Government tabled the first volume of the report with deletions recommended by the inquiry to protect national security and privacy. The second volume of the report was not made public for reasons of national security and privacy, although the complainants and their legal representatives were allowed to see certain parts on conditions of strict confidentiality. A copy of the full classified report was provided to the Leader of the Opposition and the Shadow Foreign Minister, subject to assurances of confidentiality.[32]

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26 Ibid.
27 Ibid, 11.
28 G Samuels and M Codd, *Commission of Inquiry into the Australian Secret Intelligence Service—Public Report* (1995), [5].
29 Ibid, [7].
30 Commonwealth, *Parliamentary Debates*, Senate, 1 June 1995, 716 (G Evans—Minister for Foreign Affairs).
31 G Samuels and M Codd, *Commission of Inquiry into the Australian Secret Intelligence Service—Public Report* (1995), [9].
32 Commonwealth, *Parliamentary Debates*, Senate, 1 June 1995, 716 (G Evans—Minister for Foreign Affairs).

Inquiry into Australian Intelligence Agencies

13.23 The Inquiry into Australian Intelligence Agencies (2004) was a non-statutory inquiry conducted by Mr Philip Flood at the request of the Prime Minister. The inquiry focused on the involvement of Australian intelligence agencies in foreign intelligence collection and assessment. In preparing the report, Flood was given full access to all intelligence material that he required. He also conducted formal and informal interviews with members of the Australian Government, members and former members of Parliament and members and former members of the Australian Public Service and the Australian Defence Force. Only one person declined to be interviewed by the inquiry.[33] As required by his letter of appointment, Flood delivered a classified and unclassified version of his report.

AWB Inquiry

13.24 During the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006) (AWB Inquiry), the Australian Government, through the Australian Intelligence Community (AIC), produced certain classified documents to the inquiry in response to a notice. The AIC sought orders that some of the documents not be produced, together with statutory declarations in support of the application for non-publication. The application rested on two grounds: the public interest required that the documents remain secret because they were highly classified for national security reasons; and the accompanying statutory declarations, if disclosed, might reveal information that might defeat the protection of the documents.

13.25 The Commissioner, the Hon Terence Cole QC (Commissioner Cole), upheld these claims and ordered, pursuant to s 6D of the *Royal Commissions Act*, that the secret documents and statutory declarations not be published and only be viewed by nominated members of the inquiry legal team. It was also ordered that witnesses who might be expected to have seen the secret documents at the time they were officers of the Department of Foreign Affairs and Trade could be shown a copy and asked questions in a manner that did not disclose, in any way, the contents, the sources of the contents or the originating agency of the contents of the documents unless specifically authorised by Commissioner Cole.

13.26 Subsequently, various parties submitted that the Commission did not have powers to hear or decide questions of public interest immunity under the *Royal Commissions Act*. Commissioner Cole rejected those submissions.[34] No party sought judicial review of this decision.

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33 This was because neither the Inquiry nor the Australian Army was in a position to agree to the witness's condition that expenses of his senior and junior counsel be met: P Flood, *Report of the Inquiry into Australian Intelligence Agencies* (2004), 47.

34 Commissioner Cole issued written reasons, dated 30 March 2006, for his decision: T Cole, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006), Appendix 9, Figure 9.4.

13.27 Counsel assisting the Commission produced in draft form a 'summation of the material' contained in the secret documents. The document was provided initially to the Australian Government on a confidential basis to ensure that it did not disclose any material which ought not to be disclosed in the public interest. A substitute document, containing minor amendments to satisfy the government's concerns, became an exhibit and a public document.[35] Commissioner Cole was satisfied that the document was a sufficient and adequate summation of the secret documents.

Clarke Inquiry into the Case of Dr Mohamed Haneef

13.28 Issues concerning the protection of classified and security sensitive material also arose in the non-statutory Inquiry into the Case of Dr Mohamed Haneef (2008) (Clarke Inquiry). The head of the inquiry, the Hon John Clarke QC, had considerable difficulty negotiating access to sensitive material from the National Security Committee of Cabinet, as well as departments and agencies. In his report, Clarke noted that the physical arrangements made for the protection of relevant information were inconvenient and cumbersome, and that many documents were over-classified and should have had their security classification reviewed.[36] He also noted that gaining access to classified material from the United Kingdom (UK) was a 'huge obstacle for all involved in the Inquiry'.[37] Finally, there was some difficulty in establishing which aspects of the report could be freely published.[38] All of these difficulties delayed the progress of the inquiry and eventually led to an extension of the reporting date.

13.29 Clarke's report consisted of two volumes. The first volume sought to deal fully with the matters covered by the terms of reference and Clarke envisaged that it would be publicly released. In describing the events of the case, Clarke 'made every effort to avoid including any material that might be judged a threat to national security information or continuing operations or might jeopardise any current trials'.[39] The second volume contained supplementary material that provided greater detail and analysis of the events examined and included references to sensitive or classified material that could not be published immediately.

13.30 Clarke expressed the view that inquiries or independent reviews that involve national security and therefore deal with sensitive documentation and evidence should be covered by statutory provisions.[40] He recommended that the Australian Government consider incorporating in legislation the special arrangements and powers that would

35 Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme, *Exhibit 584—Distillation of Secret Exhibit 4*, (2006) <www.ag.gov.au/www/inquiry/offi.nsf/images/GOV.0002.0066.pdf> at 18 June 2009.
36 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 5.
37 Ibid, 6.
38 Ibid, 8.
39 Ibid, Letter of Transmittal.
40 Ibid, 16–17.

apply to inquiries and other independent reviews and investigations involving matters of national security.[41]

Overview of the use of national security information by inquiries

13.31 Royal Commissions are not formally bound by the same requirements of openness as courts or tribunals and may call any witness, conduct hearings in private, and direct that any evidence or documents provided shall not be published.[42] As can be seen from the above examples, previous Royal Commissions and inquiries have used a number of mechanisms to ensure the protection of national security information in the conduct of their inquiries, including:

- holding hearings and examinations in private;
- withholding material, such as transcripts and exhibits, from publication, or deferring publication of such material;
- making orders prohibiting the disclosure of particular documents or classes of documents;[43]
- making orders prohibiting the disclosure of the identity of participants in an inquiry;[44]
- making orders relating to how a person should be examined and what documents can be shown to the person;
- adapting inquiry procedures, for example, implementing arrangements with inquiry participants and the Australian Government to enable agreement to be reached on what portions of the transcript should, and should not, be published;
- requiring inquiry participants to provide notice prior to referring to national security information in the course of the inquiry, including in submissions;
- preparing confidential volumes or annexures of the report and placing limits on their distribution;
- making recommendations to the Australian Government regarding which parts of a report should, or should not, be made public;

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41 Ibid, Rec 1.
42 *Royal Commissions Act 1902* (Cth) s 6D.
43 The power to make such orders is currently found in *Royal Commissions Act 1902* (Cth) s 6D(3).
44 Ibid.

- preparing abridged versions of findings and recommendations suitable for publication;

- examining national security information and preparing summaries of such information for use in the conduct of the inquiry;

- entering into arrangements with Australian Government agencies for the protection of national security information provided to the inquiry, including handling and storage; and

- making arrangements for persons accessing national security information in the course of an inquiry to obtain security clearances.

13.32 The doctrine of public interest immunity—which protects certain government documents from being called for under a coercive power—has been used to prevent the disclosure of information that is likely to prejudice national security in the context of Royal Commissions.[45] Other Commonwealth inquiries, such as the Clarke Inquiry, have developed ad hoc procedures to deal with issues concerning the protection of classified and security sensitive material.

13.33 Royal Commissions and other inquiries must also comply with the requirements of s 15XT of the *Crimes Act 1914* (Cth). The purpose of this section is to ensure, to the greatest extent possible, that the real identity of a person who has an assumed identity—such as members of intelligence and law enforcement agencies—is protected from disclosure in the course of proceedings before a court, tribunal, Royal Commission or other commission of inquiry.[46]

Overseas jurisdictions

13.34 The following section examines the practices of some comparable overseas jurisdictions with regard to the protection of security sensitive information in the context of public inquiries.

United Kingdom

13.35 The *Inquiries Act 2005* (UK) does not state that evidence relating to national security is inadmissible in inquiry proceedings. Pursuant to s 22(2) of the Act, however, a claim of public interest immunity may be made in respect of such evidence.

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45 The use of public interest immunity claims to protect the disclosure of national security information is considered later in this chapter. The application of public interest immunity to Royal Commissions and inquiries more generally is considered in Ch 16.

46 Section 15XT is located in Part 1AC of the *Crimes Act 1914* (Cth). Part 1AC deals with assumed identities and was introduced in 2001: *Measures to Combat Serious and Organised Crime Act 2001* (Cth). This provision, and others that may require consequential amendment, are set out in Appendix 6 of this Report.

13.36 Assuming that a claim of public interest immunity fails, several provisions of the *Inquiries Act* attempt to ensure that sensitive evidence, if tendered in the proceedings, does not become publicly available. Section 19 of the Act, for example, allows a minister or inquiry chair to restrict access to inquiry proceedings or evidence on public interest grounds if, among other things, there is a sufficient risk of 'damage to national security or international relations'. Similarly, s 25 empowers the minister or inquiry chairperson to issue a non-publication order, which authorises the withholding of material in the inquiry's final report to the extent necessary to avert 'damage to national security or international relations'.

13.37 This approach has the benefit of granting inquiry chair full access to the evidence they require to make their findings (assuming any claim of public interest immunity is not upheld), while ensuring the confidentiality of sensitive information relating to national security. Nevertheless, the approach in the *Inquiries Act* may give rise to situations where the minister, but not the inquiry chair, determines that non-publication or restriction orders are in the public interest. In these situations, the public may perceive that a supposedly independent inquiry is being hampered by political interference.

Canada

13.38 At the federal level, s 4(b) of the *Inquiries Act 1985* (Canada) grants commissioners the power to require witnesses to 'produce such documents and things as [the commissioners] deem requisite to the full investigation of the matters into which they are appointed to examine'. Accordingly, if evidence relating to national security falls within the purview of the inquiry's terms of reference, it is prima facie admissible. Section 5, however, goes on to specify that 'commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases'.

13.39 Accordingly, when the disclosure of evidence relating to national security becomes an issue for a public inquiry, s 38 of the *Canada Evidence Act 1985* (Canada) is invoked. The section requires that persons who are about to disclose what they believe to be 'sensitive information', or participants in proceedings to which those persons are a party (and who also believe that information to be sensitive), must notify the Attorney-General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding. Public officials have the same duty of notification. Once notified, the Attorney-General may authorise or refuse disclosure within 10 days. Alternatively, the Attorney-General may refer the question of disclosure to the Federal Court. Pending the final decision as to disclosure, the evidence under review may not be given in connection with the proceedings.

13.40 The Canadian approach has the benefit of ensuring consistency between the treatment of sensitive evidence in public inquiries and civil proceedings. Nonetheless, the decision with respect to disclosure remains with the executive in the first instance. While the Attorney-General may choose to allow the Federal Court to make the

determination, he or she may circumvent the judicial process by summarily deciding against disclosure.

New Zealand

13.41 Section 4B(1) of the *Commissions of Inquiry Act 1908* (NZ) empowers commissions to 'receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law'. Clause 20(a) of the Inquiries Bill 2008 (NZ) is materially identical to this provision. Clause 28 of the Bill, however, incorporates the New Zealand Law Commission's suggestion that inquiries legislation embody the privileges and immunities contained in the *Evidence Act 2006* (NZ).[47] Public interest immunity, as enshrined in s 70 of the *Evidence Act*, therefore will be a valid basis for a refusal to disclose to inquiries evidence relating to national security.

13.42 Clause 21(c) of the Inquiries Bill provides that the inquiry may:

> examine any document or thing for which privilege or confidentiality is claimed, or refer the document or thing to an independent person or body, to determine whether—
>
> (i) the person claiming privilege or confidentiality has a justifiable reason in maintaining the privilege or confidentiality; or
>
> (ii) the document or thing should be disclosed.

13.43 Pursuant to cl 28 of the Inquiries Bill, if the inquiry decides to disclose or admit the evidence, it may do so subject to 'appropriate terms and conditions'.

13.44 Like the UK approach, the proposed New Zealand approach grants inquiries full access to the evidence they require to make their findings, provided that there is no successful claim of public interest immunity. Not only are inquiries granted access to the evidence for the purposes of determining its admissibility, but their power to attach conditions to its disclosure and use helps to ensure that the evidence in question is protected.

Special powers in cases of national security

Courts and tribunals

13.45 The ALRC reviewed the handling and protection of national security information in legal proceedings in its 2004 report *Keeping Secrets: Protection of Classified and Security Sensitive Information* (*Keeping Secrets*).[48] In that report, the ALRC recommended the introduction of legislation to govern the use of such information in all stages of proceedings in all courts and tribunals in Australia. The ALRC's recommended scheme was intended to provide courts and tribunals with a

47 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Ch 9.

48 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004).

range of options to tailor orders to suit the circumstances of the particular case, including:

- admitting the sensitive material after it has been edited or 'redacted' (that is, with the sensitive parts obscured);
- replacing the sensitive material with alternative, less sensitive, forms of evidence;
- using closed-circuit television, computer monitors, headphones and other technical means to hide the identity of witnesses or the content of sensitive evidence (in otherwise open proceedings);
- limiting the range of people given access to sensitive material (for example, limiting access only to those with an appropriate security clearance);
- closing all or part of the proceedings to the public; and
- hearing part of the proceedings in the absence of one of the parties and its legal representatives—although not in criminal prosecutions or civil proceedings (except some judicial review matters), and only in other exceptional cases, (subject to certain safeguards).[49]

13.46 It was the ALRC's view that the same principles that apply to court proceedings should generally apply to tribunal proceedings and Royal Commissions.[50]

13.47 In 2004 and 2005, the Australian Government introduced legislation establishing a scheme for the handling of national security information in criminal, and some civil, proceedings. The *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) largely incorporates the framework and terminology developed by the ALRC, as well as a number of principles and processes that are consistent with those expressed in *Keeping Secrets*. There are some points of departure in detail, however, between the NSI Act and the ALRC's recommended statutory scheme. Further, and critically important in the context of this Inquiry, the NSI Act only relates to federal criminal and civil proceedings, and not to Royal Commissions or other types of inquiries.

13.48 The NSI Act sets out a comprehensive procedure to determine the way in which information that may prejudice national security may be used in court proceedings.[51]

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49 Ibid, Recs 11–1 to 11–43.

50 Ibid, [11.193].

51 S Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 88.

Facilitating the prosecution of an offence without prejudicing national security or the right of a defendant to a fair trial is the objective of the Act.[52] The NSI Act is supplemented by the *National Security Information (Criminal Proceedings) Regulations 2005* (Cth) (NSI Regulations) and the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings* issued by the Australian Government Attorney-General's Department (AGD) (NSI Requirements). Together, these documents provide a comprehensive regulatory framework for the disclosure, storage and handling of national security information in federal criminal proceedings and civil proceedings, whether in documentary or oral form.[53] The AGD has also published a *Practitioner's Guide* to the NSI Act.[54]

13.49 The current practice in proceedings to which the NSI Act applies involves alternative 'tracks' for the management of national security information issues.[55] The first track, under Division 1 of Part 3, provides for pre-trial conferences to consider issues regarding the disclosure in the trial of information that relates to, or may affect, national security,[56] and for the parties to agree to consent arrangements about such disclosures.[57] The Court may make orders to give effect to consent arrangements.[58] The second track, under Division 2 of Part 3, establishes a notification scheme. The parties must notify the Attorney-General about any expected disclosure of national security information.[59] Following the notification, proceedings are adjourned until the Attorney-General has either provided a non-disclosure certificate or witness-exclusion certificate to the court,[60] or advised that no such certificates will be issued. If the Attorney-General is satisfied that the disclosure of information would be likely to prejudice national security and has issued a certificate, he or she may provide a copy of the document with the information deleted, with or without a summary of the information or a statement of the facts that such information would be likely to prove.[61]

13.50 The procedures for the disclosure of national security information in federal criminal proceedings and civil proceedings in the NSI Act have been in operation for over four years. As at July 2009, the procedures have been invoked in federal criminal cases involving 38 defendants and in civil proceedings relating to the making of a

52 Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) <www.national security.gov.au> at 3 June 2009.
53 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 6.
54 Ibid.
55 S Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 91 citing *R v Lodhi* (2006) 163 A Crim R 448, 464–465; *R v Benbrika* [2007] VSC 141.
56 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 21(1).
57 Ibid s 22.
58 Ibid s 22(1).
59 Ibid ss 24–25.
60 Ibid ss 26–28.
61 Ibid s 26.

control order under the *Criminal Code Act 1995* (Cth).[62] It has been observed that the first track, involving consent arrangements, has become common practice in most cases[63] and 'provides a way of dealing with the complications that can arise' from the second track.[64] As noted in the *Practitioner's Guide*, consent arrangements 'are useful because they can alleviate the need for the parties to fully adhere to detailed procedures set out in the NSI Regulations and NSI Requirements document'.[65] Consent arrangements are ordinarily negotiated as part of the pre-trial process between counsel for the Attorney-General and the defendant. The orders made are invariably detailed and may run to many pages.[66]

13.51 At the time of writing in October 2009, the Australian Government had released an Exposure Draft of the National Security Legislation Amendment Bill 2009 (Cth) (Exposure Draft Bill) and a Discussion Paper outlining proposals for legislative reform of Australia's counter-terrorism and national security legislation. Among other things, the Exposure Draft Bill includes substantial amendments to the NSI Act aimed at improving 'the protection of national security information in court proceedings to ensure such protection does not cause undue delay in proceedings'.[67]

Public interest immunity

13.52 Before the NSI Act was enacted, the common law doctrine of public interest immunity was the main mechanism by which the Australian Government could seek to protect national security information from disclosure during court proceedings.[68] As noted in Chapter 17, public interest immunity allows a court to exclude evidence which, if admitted, would be injurious to the public interest.[69]

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62 Australian Government, *National Security Legislation—Discussion Paper on Proposed Amendments* (2009), 172.

63 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 13.

64 S Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 91.

65 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 13.

66 The protective orders made by Bongiorno J in *R v Benbrika (Ruling 1)* [2007] VSC 141, for example, consisted of 45 paragraphs.

67 Australian Government, *National Security Legislation—Discussion Paper on Proposed Amendments* (2009), iv. Submissions as part of the public consultation on the Exposure Draft Bill closed on 25 September 2009. At the time of writing in October 2009, legislation was yet to be introduced into Parliament. The proposed amendments are not discussed in detail in the Discussion Paper. The amendments fall within the following broad categories: clarifying the application of the NSI Act to the defendant's legal representatives; inserting a definition of 'national security information'; clarifying the role of the Attorney-General in proceedings; reinforcing the court's ability to control the conduct of proceedings; clarifying the operation of 'consent arrangements' under s 22; and streamlining procedures and minimising unnecessary processes (eg, requirements for notifying the Attorney-General of potential disclosures of national security information and adjournments of proceedings that may involve disclosure of such information).

68 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 5.

69 Ibid, 5.

13.53 According to Dr Stephen Donaghue, 'traditional public interest immunity claims are, in the vast majority of cases, just as effective as the NSI Act in preventing any disclosure of information that is likely to prejudice national security'.[70] Donaghue also argues that traditional public interest immunity claims have practical advantages over the NSI Act procedure, namely:

- they do not require the personal involvement of the Attorney-General, but can be made by a senior public servant or head of the relevant agency;
- they can often be heard in public whereas claims made under the NSI Act must be held in private;[71] and
- they do not require the adjournment of the entire proceeding while the claim is prepared, but it is arguable that the NSI Act does require such an adjournment.[72]

13.54 According to Donaghue, the main type of case that calls for the application of the NSI Act arises where either the prosecution or the defence needs to rely, as a central part of their case, on information that, if disclosed, would damage national security.[73] If a public interest immunity claim was made and upheld in that type of case, crucial evidence may not be available resulting in the prosecution either failing or being stayed because information had been denied to the defence.[74] In contrast, the NSI Act creates a procedure for such information to be admitted into evidence, but in a form that ensures that it does not prejudice national security—for example, edited documents, summaries, or statements of facts of the kind contemplated by s 26 of the NSI Act.[75]

13.55 A number of additional difficulties associated with reliance upon public interest immunity to protect national security information have been identified.[76] National security issues may arise unexpectedly, even after an inappropriate disclosure has occurred, and therefore claims for public interest immunity will therefore often have to be determined at very short notice. Additionally, it does not protect information from disclosure before the making of a court order. Also, it does not allow for summaries or stipulations of fact to be substituted (in contrast to the procedure under s 26 of the NSI Act).

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70 S Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 90.

71 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 29.

72 In particular, ibid ss 24, 25; S Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (2007) 87, 90.

73 Ibid, 90–91.

74 Ibid, 91.

75 Ibid.

76 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 5–6.

Submissions and consultations

13.56 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether there is a need for public inquiries to have special powers in cases of national security. In particular, the ALRC asked whether:

- special administrative arrangements should be developed for Royal Commissions and other forms of public inquiries dealing with matters relating to national security, for example, standard arrangements for access to classified and security sensitive material;[77] and

- legislation establishing Royal Commissions or other public inquiries should incorporate the procedures applied in federal criminal and civil proceedings—that is, the NSI Act, NSI Regulations and NSI Requirements—in dealing with matters relating to national security.[78]

13.57 Liberty Victoria supported inquiries having access to classified information where relevant to the inquiry and where appropriate protections were in place to ensure security is maintained. It submitted that where issues of national security or other sensitive matters were dealt with in an inquiry's report, those parts could be redacted or an expedited version tabled in Parliament—but only to the degree absolutely necessary to protect Australia's interests or an individual's civil liberties.[79]

13.58 The Law Council of Australia (Law Council) expressed general support for the findings and recommendations made in the *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef*.[80] The report stated that:

> inquiries or independent reviews that involve national security and thus deal with sensitive documentation and evidence should be covered by statutory provisions. At a minimum, these provisions would confer coercive powers in respect of the following:
>
> - Production of documents—which might override claims of public interest immunity or legal professional privilege
> - Appearances before an inquiry
> - Maintenance of confidentiality
> - Protection of witnesses
>
> The expectation is that inquiries established under these conditions would normally be conducted in private, and proceedings would remain confidential, although this would not necessarily preclude conducting hearings in public where circumstances allowed.[81]

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77 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 7–6.
78 Ibid, Question 7–7.
79 Liberty Victoria, *Submission RC 1,* 6 May 2009.
80 Law Council of Australia, *Submission RC 9,* 19 May 2009.
81 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 17.

13.59 The Law Council submitted that government departments and agencies should not have the discretion to refuse to disclose relevant information to public inquiries. Moreover, once information was disclosed the inquiry should determine whether it was made public following submissions by relevant agencies concerning non-publication. Such applications should be determined according to established legal criteria and in an environment where an agency's application may be subject to challenge.

13.60 The Law Council also submitted that such a process would allow for national security considerations and the integrity of ongoing investigations and prosecutions both here and abroad to be given due weight. This decision would be made by the inquiry itself applying criteria defined in law, rather than being determined solely by the assertion, either by domestic or foreign agencies, that security or police operations may be prejudiced by disclosure.

13.61 The Law Council expressed the view that any general inquiries legislation should include criteria to determine whether certain information should be protected from public disclosure or publication. Such criteria could require inquiry heads to consider issues such as national security and the public interest in publication before determining whether to conduct hearings in private or restrict publication of certain material.[82]

13.62 The Department of Immigration and Citizenship (DIAC) supported the recommendations made by the Clarke Inquiry referred to above. It considered that any general inquiries legislation 'should also be able to support further coercive powers to accommodate inquiries into matters of national security or serious investigatory inquiries if required'.

13.63 In relation to the use of coercive powers by an inquiry relating to matters of national security, DIAC submitted that the treatment of witnesses, witness statements and transcripts and documents required stronger protections. For example, documents and transcripts that have national security implications should not be disclosed, or if disclosed, should be protected from subsequent publication, and accordingly should not be reflected in detail in an inquiry's report.

13.64 DIAC queried whether inquiries should have the power to request and examine confidential material from government agencies in their own right. DIAC also submitted that the protections available for handling sensitive information should also extend to related information such as transcripts of interviews of witnesses who discuss the content of sensitive information.[83]

13.65 There were differing views among stakeholders as to whether the NSI Act should be applied to Royal Commissions and public inquiries. The Law Council did

82 Law Council of Australia, *Submission RC 9,* 19 May 2009.
83 Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009.

not support the adoption of the procedures contained in the NSI Act in the context of Royal Commissions and public inquiries.[84]

13.66 The Australian Intelligence Community (AIC) submitted that while the NSI Act provided a useful framework for the facilitation of national security information in legal proceedings, the framework was procedurally intricate and may not be appropriate for Royal Commissions seeking to access information in an expeditious and flexible manner. The AIC considered that:

> current legislative arrangements do not inhibit appropriate information sharing to Royal Commissions and there is no clear need to incorporate procedures applied in federal and criminal and civil proceedings in dealing with matters relating to national security. The AIC considers that Royal Commissions have, to date, struck an appropriate balance between access to national security information and protections against inappropriate disclosure of sensitive material.[85]

13.67 In contrast, Liberty Victoria was of the view that the framework under the NSI Act should be available to inquiries.[86] It submitted that the procedures that apply to a particular inquiry should ultimately be determined by the inquiry members.[87]

13.68 The Australian Government Solicitor (AGS) observed that, while the *Royal Commissions Act* did not deal expressly with national security information, Royal Commissions did have some flexibility in dealing with such information. In the AGS' view, extending the regime which is available under the NSI Act to Royal Commissions would ensure that equivalent protections were available to protect national security information in the context of Royal Commission proceedings.[88]

13.69 If that course was adopted, the AGS submitted that consideration should be given to whether a Commissioner would be given the source information in respect of which a 'summary' had been provided by the Attorney-General.[89] The AGS noted that in the AWB Inquiry a summary of sensitive evidence was produced for affected persons, but the Commissioner and certain identified Commission lawyers were allowed to access the source material for the purposes of the inquiry.[90]

13.70 In DP 75, the ALRC expressed the view that the NSI Act in its current form could not be readily applied to Royal Commissions and Official Inquiries.[91] Instead, the ALRC proposed that the *Inquiries Act* should contain provisions dealing

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84 Law Council of Australia, *Submission RC 9,* 19 May 2009.
85 Australian Intelligence Community, *Submission RC 12,* 2 June 2009.
86 Liberty Victoria, *Submission RC 1,* 6 May 2009.
87 Liberty Victoria, *Submission RC 26,* 27 September 2009.
88 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
89 This procedure is set out in *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 26.
90 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
91 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [13.96]–13.98].

specifically with the use and protection of national security information in the conduct of Royal Commissions and Official Inquiries.[92] The ALRC was of the view that inquiry members should retain the ultimate discretion to determine the procedures that will apply in a particular inquiry, including those relating to national security information.[93] In addition, the ALRC proposed that inquiry members should be empowered to make a wide range of directions, on their own motion or at the request of inquiry participants, relating to the use and protection of such information.[94]

13.71 The AIC generally supported the introduction of special arrangements and powers for inclusion in the recommended *Inquiries Act* to provide a structure for any inquiry dealing with national security information. While noting that its agencies had cooperated fully with all previous Royal Commissions, the AIC submitted that there was value in national security information being treated as a specific category of information. This would facilitate the protection of such information during the course of any inquiry and after inquiry proceedings had concluded.[95]

13.72 The Law Council agreed with the ALRC's proposals in DP 75, and with its view that the NSI Act should not apply to the conduct of Royal Commissions and Official Inquiries. The Law Council submitted that legislative provisions relating to national security information in public inquiries should be included in the recommended *Inquiries Act*. The Law Council also submitted that directions as to what information relating to national security is provided to an inquiry and how it is used should be made by inquiry members.[96]

ALRC's view

13.73 Matters of national security may need to be considered by a Royal Commission or inquiry for a number of reasons, including that the inquiry:

- is reviewing or investigating the structure and operations of intelligence and security agencies;
- is investigating Australia's relations with foreign countries;
- requires access to national security information and documents to investigate and establish the facts; or
- calls evidence from a witness whose identity, if disclosed, could raise national security-related issues.

92 Ibid, Proposal 13–1.
93 Ibid, Proposal 13–2.
94 Ibid.
95 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.
96 Law Council of Australia, *Submission RC 30,* 2 October 2009.

Are special arrangements and powers required?

13.74 At present, the *Royal Commissions Act* does not contain any specific powers or procedures for the protection of national security information. As noted above, however, Royal Commissions have previously exercised general powers to make orders to prevent the disclosure of such information—for example, by taking evidence in private and making orders for non-disclosure of information and evidence.

13.75 Royal Commissions and other inquiries have also used other procedural mechanisms and developed ad hoc arrangements with Australian Government agencies providing national security information to the inquiry. Using existing mechanisms, inquiries have been able to prevent inadvertent disclosure of national security information in the conduct of their inquiries.

13.76 In view of this, the ALRC has considered whether it is necessary to incorporate special procedures and powers for the protection and use of national security information in the recommended *Inquiries Act*. An alternative would be to leave it to inquiry members to determine their own procedures in accordance with certain statements of principle, which could be set out in the *Inquiries Handbook*.

13.77 In the ALRC's view, special procedures and powers should be provided for in legislation. Although previous inquiries have been able to prevent inadvertent disclosure of national security information, some have encountered practical difficulties in accessing and using such material.[97] Others have experienced complications in the determination of public interest immunity claims.[98]

13.78 The recommended *Inquiries Act* should contain provisions dealing specifically with the protection of national security information in the conduct of Royal Commissions and Official Inquiries. It is the prevailing view of stakeholders that issues relating to the use and protection of national security information in the conduct of inquiries warrant a regime with statutory force. The ALRC agrees with this view. It is important that inquiry members have access to all relevant information, including national security information, and that there be appropriately balanced measures to protect such information.

Should the NSI Act apply to inquiries?

13.79 The regime under the NSI Act is designed for federal criminal proceedings and selected civil proceedings and entails a number of prescriptive, procedural steps that might not be suitable in the context of inquiries. For example, the regime requires the personal involvement of the Attorney-General for the purposes of issuing non-

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97 For example, the *Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008) <www.haneefcaseinquiry.gov.au/> at 4 August 2009.

98 For example, the *Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme* (2006) <www.oilforfoodinquiry.gov.au/> at 4 August 2009.

disclosure certificates.[99] It also directs the court to hold closed hearings for the purposes of determining whether to allow a witness to be called and whether, and in what form, information potentially prejudicial to national security may be disclosed.[100] Further, the regime provides for mandatory adjournments of proceedings if information will be disclosed that relates to or may affect national security.[101] Finally, the ALRC notes that parties in court proceedings to which the NSI Act applies often rely on consent orders in preference to the detailed procedures set out in the Act, NSI Regulations and the NSI Requirements.[102]

13.80 In the ALRC's view, the procedural framework under the NSI Act, which is specifically drafted to apply in the context of court proceedings, could not be readily applied to Royal Commissions and Official Inquiries in its present form. Amendments would be required to tailor procedures for inquiries. Any special arrangements and powers relating to the protection of national security information, therefore, should be located in the *Inquiries Act*.

A framework for the protection of national security information

13.81 As noted in Chapters 15 and 16, the ALRC recommends measures to encourage greater flexibility in inquiry procedures. Royal Commissions and Official Inquiries should retain the discretion to determine the procedures that will apply in a particular inquiry in relation to the protection of national security information.[103] The *Inquiries Act* should, however, incorporate sufficient powers to enable inquiry members to make directions, including on their own motion, or at the request of an inquiry participant, relating to the disclosure and use of national security information. These powers should be analogous to those recommended in *Keeping Secrets*, but tailored to the specific circumstances of Royal Commissions and Official Inquiries.

13.82 In making determinations about the relevance of any national security information, including any claims for public interest immunity made in respect of such information, inquiry members require access to the underlying documents or material. The procedures that should apply to determining claims of privilege and public interest immunity, including those relating to national security information, are discussed in Chapter 17. The framework is also intended to operate in conjunction with the ALRC's recommendations for offences for non-compliance with a notice issued by an inquiry to produce documents or provide information.

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99 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) pt 3 div 2, pt 3A div 2.

100 Ibid pt 3 div 3, pt 3A div 3.

101 Ibid ss 29, 38I.

102 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 13.

103 Under the NSI Act in its current form, there is no definition of the phrase 'national security information'. The ALRC notes that the Exposure Draft Bill would insert a new definition of that phrase in the NSI Act—namely, information that relates to national security, or the disclosure of which may affect national security: Exposure Draft—National Security Legislation Amendment Bill 2009 (Cth) cl 8. See also Australian Government, *National Security Legislation—Discussion Paper on Proposed Amendments* (2009), 183.

National Security Legislation Monitor

13.83 The National Security Legislation Monitor Bill 2009 (Cth)—which, at the time of writing in October 2009, was before Parliament—provides for the establishment of a National Security Legislation Monitor (the Monitor). According to the Explanatory Memorandum:

> The standing function of the Monitor will be to review the operation, effectiveness and implications of the counter-terrorism and national security legislation and report his or her comments, findings and recommendations to the Prime Minster, and in turn Parliament, on an annual basis. As well, the Monitor must consider whether Australia's counter-terrorism and national security legislation contains appropriate safeguards for protecting individuals' rights and remains necessary. The main purpose of the Bill is to ensure the laws operate in an effective and accountable manner, are consistent with international human rights law and help to maintain public confidence in those laws.[104]

13.84 The 'counter-terrorism and national security legislation' within the scope of the Monitor's consideration includes the NSI Act, among other provisions of Commonwealth law.[105] If the regime for the use and protection of national security information in the conduct of inquiries recommended in this Report is adopted, it may be appropriate to give the Monitor the function of reviewing the regime as part of his or her proposed functions.

Recommendation 13–1 The recommended *Inquiries Act* should contain provisions dealing specifically with the use and protection of national security information in the conduct of Royal Commissions and Official Inquiries.

Recommendation 13–2 Royal Commissions and Official Inquiries should retain the ultimate discretion to determine the procedures that will apply in a particular inquiry. The recommended *Inquiries Act* should empower inquiry members to make directions on their own motion, or at the request of a person or body affected by or involved in the conduct of the inquiry, in relation to the use and protection of national security information, including, but not limited to, the following:

(a) determinations of the relevance of any national security information, including any claims for public interest immunity, and the use to which that information may be put in the conduct of the inquiry;

104 Explanatory Memorandum, National Security Legislation Monitor Bill 2009 (Cth), 1.
105 National Security Legislation Monitor Bill 2009 (Cth) cl 4.

(b) the provision by persons involved with the inquiry of lists of all national security information that those persons reasonably anticipate will be used in the course of the inquiry. The chair of an inquiry may make such directions as he or she thinks fit in relation to the specificity with which national security information is to be described in these lists, the people to whom these lists are to be given, the use that may be made of the information and the degree of protection that must be given;

(c) the form in which any national security information may be produced or otherwise used in the conduct of the inquiry. Such directions may involve:

(i) the redaction, editing or obscuring of any part of a document containing or adverting to national security information;

(ii) replacing the national security information with summaries, extracts or transcriptions of the evidence sought to be used, or by a statement of facts, whether agreed by the parties or persons involved in the inquiry or not;

(iii) replacing the national security information with evidence to similar effect obtained though unclassified means or sources;

(iv) concealing the identity of any witness or person identified in, or whose identity might reasonably be inferred from, national security information or from its use in the conduct of the inquiry (including oral evidence), and concealing the identity of any person who comes into contact with national security information;

(v) the use of written questions and answers during evidence which would otherwise be given orally;

(vi) the use of technical means by which the identity of witnesses and contents of national security information may be protected, for example, through the use of closed-circuit television, computer monitors and headsets;

(vii) restrictions on the people to whom any national security information may be given or to whom access to that information may be given. Such restrictions may include limiting access to certain material to people holding security clearances to a specified level;

(viii) restrictions on the use that can be made by a person with access to any national security information; and

(ix) restrictions on the extent to which any person who has access to any national security information may reproduce or disclose that information.

Security clearances

13.85 The requirement of a security clearance is another method used to protect national security information.[106] In *Keeping Secrets*, the ALRC considered existing procedures relating to security assessments and clearances. It also considered issues concerning security clearances for various people (including lawyers) involved in court and tribunal proceedings.[107] Similar issues may arise in the context of Royal Commissions and Official Inquiries that require access to national security information for the purposes of conducting the inquiry. There are a number of examples—including the Royal Commission on Intelligence and Security and, more recently, the Clarke Inquiry—in which inquiry staff had to obtain security clearances in order to access national security information.

13.86 The ALRC recommended in *Keeping Secrets* that courts retain the discretion to impose restrictions on who may be given access to national security information, including limiting access to certain material to people holding security clearances to a specified level.[108] This could include ordering that specified material not be disclosed to a lawyer unless he or she holds a security clearance at a specified level.[109]

13.87 In contrast, the NSI Act empowers the Secretary of the AGD to give notice to a defendant's lawyer (or anyone assisting that lawyer) that the proceedings involve information that is likely to prejudice national security.[110] That person then may apply for a security clearance (if he or she does not already have one) at a level considered appropriate by the Secretary of the AGD.[111] Any adjournment necessary to seek that clearance must be given by the court.[112] If the person does not apply for clearance within 14 days, the court may then advise the defendant of the consequences and may recommend that he or she retain another lawyer who is cleared or is prepared to seek a clearance.[113]

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106 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [6.1]. Security clearances are given in accordance with the *Australian Government Protective Security Manual.*

107 Ibid, Ch 6, Recs 6–1, 6–2, 6–3.

108 Ibid, Recs 11–10(c)(vii), 11–25.

109 Rec 11–43(d).

110 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 39, 39A.

111 Ibid ss 39(2), 39A(2).

112 Ibid ss 39(3)–(4), 39A(3)–(4).

113 Ibid ss 39(5), 39A(5)–(7).

13.88 Those persons without a security clearance will not have access to some of the evidence in the case. The court cannot override this prohibition whether pursuant to a confidentiality undertaking or otherwise.[114] In proceedings subject to the NSI Act, it is the practice for defence counsel to be informed of the desirability of applying for a security clearance as early as possible.[115]

13.89 In *Keeping Secrets*, the ALRC also expressed the strong view that judges and magistrates should never require a security clearance to perform their duties.[116] This view was informed by concerns about the separation of powers and judicial independence. Under the NSI Act, judges are not required to obtain security clearances. The court retains the discretion to exclude other court personnel who are not security cleared such as associates, tip staff, court reporters, corrections officers and anyone else involved in the handling and storage of national security information.[117]

Submissions and consultations

13.90 In response to IP 35, Liberty Victoria argued that those with carriage of a public inquiry must have minimum qualifications and experience including, where applicable, security clearances to enable access to secret or highly confidential materials. This would ensure inquiries had adequate access to classified information where relevant to the inquiry (and prevent governments from withholding information on the basis of 'national security' or other interests).[118]

13.91 In DP 75, the ALRC proposed that inquiry members should not be required to obtain a security clearance in order to access national security information.[119] The Law Council agreed with the ALRC's view, noting that it was common for Royal Commissions to be chaired by legal practitioners or current or former judges.[120]

13.92 Liberty Victoria reiterated its view that inquiry members must have security clearances adequate to the level of the inquiry.[121] Similarly, Mr Kym Bills submitted that if inquiry members were not required to obtain a security clearance to access

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114 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [1.34].

115 Australian Government, *National Security Legislation—Discussion Paper on Proposed Amendments* (2009), 295.

116 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [6.119]–[6.120], Rec 6–2.

117 Australian Government Attorney-General's Department, *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)—Practitioners' Guide* (2008), 28.

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

119 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 13–3.

120 Law Council of Australia, *Submission RC 30,* 2 October 2009.

121 Liberty Victoria, *Submission RC 26,* 27 September 2009.

national security information, their background should suggest that access to such information is appropriate.[122]

13.93 The AIC noted that the security clearance process was an important element in mitigating possible harm to Australia's national interests and provided a non-discriminatory threshold for those who are given access to national security information. The AIC also highlighted the importance of the security clearance process to Australian's foreign relations; in particular, by providing reassurance to foreign partners that shared intelligence information will be afforded protection from disclosure.[123]

13.94 The AIC submitted that an inquiry member's position was not necessarily synonymous with that of a judge. As such, the AIC opposed any blanket exemption for inquiry members from the requirement to obtain a security clearance in order to access national security information. In the AIC's view, inquiry members, other than judicial members, should have to acquire an appropriate level of security clearance or authorisation before accessing national security material.

13.95 In DP 75, the ALRC also proposed that inquiry members be empowered to impose restrictions on the people to whom national security information may be given, or to whom access to that information may be given, in the conduct of an inquiry. Such restrictions could include limiting access to certain material to people holding security clearances to a specified level.[124]

13.96 In response, the AIC submitted that staff members, counsel assisting and other non-judicial personnel should have to obtain a security clearance to access such material. Alternatively, they should have to obtain a waiver from the relevant minister.[125]

ALRC's view

Inquiry members

13.97 No security clearance is currently required for members of a Royal Commission under the *Royal Commissions Act*, although some Commissioners have obtained such clearances in the past. As the ALRC noted in *Keeping Secrets*, the security clearance process can be discriminatory and intrusive.[126] As such, a requirement that an inquiry member undergo a security clearance in order to access certain information may be

122 K Bills, *Submission RC 19,* 17 September 2009.
123 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.
124 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 13–2(c)(vii).
125 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.
126 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [6.8].

inconsistent with the ALRC's recommendation that Royal Commissions and Official Inquiries be independent in the performance of their functions.[127]

13.98 Further, it is undesirable to require an inquiry member to undergo a security assessment once an inquiry has commenced. An inquiry member may, however, choose to obtain such a clearance. As discussed in Chapter 6, the Australian Government may consider, before establishing an inquiry, whether a person who does not hold a security clearance should be appointed as an inquiry member.[128]

13.99 The ALRC has considered the AIC's proposal that only inquiry members who are also judicial officers should be exempt from any security clearance requirement. The ALRC notes, however, that it is rare for serving (as opposed to retired) judicial offers to be appointed to inquiries.[129] Under the ALRC's recommended statutory framework, it is envisaged that the appointment of inquiry members who are also judicial officers may occur only occasionally. Therefore, distinguishing between the security clearance requirements of judicial and non-judicial inquiry members may not provide any additional protection of national security information in the conduct of inquiries under the *Inquiries Act.*

13.100 It is the ALRC's view, therefore, that the *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries do not require a security clearance to access national security information. This would facilitate access by inquiry members to national security information for the purpose of determining any claims for public interest immunity and the making of appropriate directions about the disclosure and use of such information in the conduct of the inquiry.

Recommendation 13–3 The recommended *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries do not require a security clearance to access national security information.

Others involved in an inquiry

13.101 The ALRC has considered a number of options relating to security clearance requirements for those involved in inquiries, other than inquiry members. As noted above, one option is to empower inquiry members, in appropriate circumstances, to make directions that impose restrictions on who may access national security

127 Recommendation 6–5.

128 In Chapter 6, the ALRC recommends that the *Inquiries Handbook* should provide guidance on the appointment of members of Royal Commissions and Official Inquiries, including whether it is necessary for potential inquiry members to hold or obtain a security clearance: Recommendation 6-6(c).

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

information in the conduct of an inquiry, including limiting access to people holding security clearances to a specified level.[130]

13.102 Another option, advocated by the AIC, is to require any person who requires access to national security information in the course of a Royal Commission or Official Inquiry, to hold an appropriate security clearance.[131] This requirement would apply to counsel and solicitors assisting, inquiry staff, inquiry participants and their legal representatives. In individual cases, waivers of this requirement could be granted by the relevant minister. In effect, this would mean that a minister, rather than the inquiry members, would have the power to determine when security clearances are required.

13.103 In the ALRC's view, such an arrangement is inconsistent with the requirement that Royal Commissions and Official Inquiries be independent in the performance of their functions.[132] It would fetter inquiry members' discretion to impose restrictions on the disclosure of material, including to those who do not hold a security clearance. The conferral of such a discretion on inquiry members is addressed earlier in this chapter.[133] In exercising this discretion, inquiry members may consider: the relevance of the material to a particular inquiry, the dictates of procedural fairness, and the public interest in protecting national security information.

13.104 In the course of an inquiry, Australian Government agencies could make representations to an inquiry member on issues relating to security clearances—for example, regarding the need to meet domestic concerns about the protection of national security information, as well as Australia's international obligations regarding shared intelligence.[134]

13.105 As recommended later in this chapter, inquiry members could seek expert advice and assistance from the Inspector-General of Intelligence Security (IGIS). This could include advice relating to matters such as security clearance requirements for inquiry participants.

13.106 For the above reasons, the ALRC recommends that the *Inquiries Act* empower inquiry members to make directions—on their own motion, or at the request of inquiry participants—that impose restrictions on the people to whom any national security information may be given or to whom access to that information may be given. Such restrictions may include limiting access to certain material to people holding security clearances to a specified level.[135]

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130 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 13–2(c)(vii).

131 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.

132 Recommendation 6–5.

133 See Recommendation 13–2(c)(vii).

134 See Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), [6.108].

135 See Recommendation 13–2(c)(vii).

Existing permanent bodies

13.107 There are a number of existing permanent bodies that may be tasked with conducting inquiries into matters involving a consideration of national security issues and information. In this section, the ALRC examines issues relating to the functions, powers and jurisdiction of these bodies. As discussed below, and in Chapter 5, in some circumstances, it may be more appropriate, in terms of expertise and resources, for the Australian Government to ask one of these bodies to conduct an inquiry, rather than establishing a Royal Commission or Official Inquiry.

Inspector-General of Intelligence and Security

13.108 At least in respect of the six AIC agencies,[136] there is already an independent statutory office within the Prime Minister's portfolio established to conduct inquiries into the legality and propriety of their activities—the IGIS.

13.109 The IGIS has the capacity to initiate its own inquiries and strong coercive powers and protections as set out in the *Inspector-General of Intelligence and Security Act 1986* (Cth). Given the nature of the material involved, inquiries under the *Inspector-General of Intelligence and Security Act* must be conducted in private.[137] The IGIS has significant experience in accessing, handling and dealing with the storage and further use of classified material. It also occupies highly secure premises and the AIC has grown comfortable over time with the level of security practised by the office over more than 20 years of maintaining and protecting confidentiality.[138] Given that the jurisdiction of the IGIS is presently limited, it would not be able to extend its inquiries to other agencies or non-public sector bodies even if a national security-related matter could be adequately examined only by looking beyond the AIC.[139]

Commonwealth Ombudsman

13.110 The office of the Commonwealth Ombudsman, another independent statutory office tasked with investigating the administrative actions of Commonwealth departments and prescribed authorities, is equipped with coercive information-gathering powers, employs staff with varying levels of security clearance and has existing information technology infrastructure to protect sensitive information. As in the case of the IGIS, however, there are limitations on the extent to which the

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136 The agencies that comprise the Australian Intelligence Community (AIC) are: the Australian Security Intelligence Organisation (ASIO); Australian Secret Intelligence Service (ASIS); Defence Signals Directorate (DSD); Defence Imagery and Geospatial Organisation (DIGO); Defence Intelligence Organisation (DIO); and Office of National Assessments (ONA).

137 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 17(1).

138 Australian Intelligence Community, *Submission RC 12,* 2 June 2009; Inspector-General of Intelligence and Security, *Submission RC 2,* 12 May 2009.

139 At the time of writing this Report in October 2009, the Australian Government was considering broadening the mandate of the IGIS to enable its inquiries to be extended, by a direction from the Prime Minister, to Commonwealth agencies that are not members of the AIC: Australian Government, *Australian Government response to Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), <www.ag.gov.au> at 2 October 2009.

Commonwealth Ombudsman can investigate matters—including those involving matters of national security—beyond the public sector.[140]

13.111 The powers of the Commonwealth Ombudsman to investigate national security-related matters also may be limited by s 9(3) of the *Ombudsman Act 1976* (Cth). This section provides that the Attorney-General may issue a certificate preventing the disclosure to the Commonwealth Ombudsman of certain information or documents which would be contrary to the public interest for a number of reasons—including that it would prejudice the security, defence or international relations of the Commonwealth.

Parliamentary Joint Committee

13.112 The Parliamentary Joint Committee on Intelligence and Security has limited inquiry powers relating to the review of the administration, expenditure and financial statements of intelligence agencies within the AIC and other matters.[141] The Committee can also review matters relating to the AIC referred to it by the responsible minister or the Parliament. The Committee is not authorised to initiate its own references, but may request the responsible minister to refer a particular matter to it for review. The Committee is specifically excluded from reviewing, among other things, the intelligence-gathering priorities of the agencies, their sources of information or other operational matters, and from conducting inquiries into individual complaints made against those agencies.[142]

ALRC's view

13.113 In some circumstances it is appropriate for the Australian Government to refer an inquiry to an existing body that already has the expertise and resources to conduct it, rather than establishing a Royal Commission or Official Inquiry. For example, the ALRC agrees with the view expressed by the AIC that 'the IGIS is the appropriate first option to undertake inquiries into matters of intelligence, or where significant or substantial amounts of national security information are relevant'.[143]

13.114 As noted in Chapter 6, in some circumstances legislation establishing existing bodies, such as the *Inspector-General of Intelligence and Security Act*, could be amended to address powers and processes for a particular inquiry. This should, however, be done by Parliament on a case-by-case basis.

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140 The Ombudsman is limited to investigating administrative action by a department or prescribed authority. See, *Ombudsman Act 1976* (Cth) ss 3(1), 5(1).

141 The Committee is established under s 28 of the *Intelligence Services Act 2001* (Cth). Predecessors of the Committee include the Parliamentary Joint Committee on ASIO, ASIS and DSD; Parliamentary Joint Committee on the Australian Security and Intelligence Organisation; and the Joint Select Committee on the Intelligence Services.

142 *Intelligence Services Act 2001* (Cth) s 29(3).

143 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.

13.115 There are several potential advantages and efficiencies in asking existing permanent bodies, such as the IGIS and the Commonwealth Ombudsman, to conduct an inquiry into matters involving a consideration of national security issues and information. Many of their staff already hold security clearances. It may take several months for an individual to obtain a security clearance and this may pose difficulties if a Royal Commission and Official Inquiry needs to engage staff on an urgent or ad hoc basis. In addition, these bodies also have existing knowledge of government processes, procedural fairness obligations and the proper exercise of coercive powers.

Expert role for the Inspector-General of Intelligence and Security

13.116 There is scope to give existing permanent bodies, such as the IGIS, a role in advising and assisting Royal Commissions and Official Inquiries in the use of national security information. An expert advisory role for the IGIS in freedom of information matters in the Administrative Appeals Tribunal (AAT) has recently been introduced in the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth).[144] Before making a determination in matters involving merits review of claims under a national security, defence, or international relations exemption, or a confidential foreign government communication exemption, the AAT will be required to request the IGIS to give evidence on:

- the damage that would, or could reasonably be expected to, result from disclosure to:
    - the security of the Commonwealth;
    - the defence of the Commonwealth; or
    - the international relations of the Commonwealth; or
- whether giving access to the document would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation to the Australian Government.[145]

13.117 The ALRC notes that there is currently a potential limit on the scope of the IGIS to provide assistance and information to Royal Commissions and other inquiries.

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144 The effect of the Act—which repeals the power to issue conclusive certificates in the *Freedom of Information Act 1982* (Cth) and the *Archives Act 1983* (Cth)—is that the AAT may undertake full merits review of all exemption claims.

145 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth), sch 1 item 25, sch 2 item 10. A more detailed discussion of the legislation is contained in DP 75: Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [13.45]–[13.47].

Section 34 of the *Inspector-General of Intelligence and Security Act* imposes secrecy obligations on the IGIS and IGIS staff. Such persons cannot communicate any information acquired by reason of their position, except in the performance of their statutory functions or the exercise of their statutory powers.[146] Section 34(5) exempts such persons from any obligation to produce documents or provide information to a court, tribunal, authority or person which has power to require production of documents or answering of questions except where it is necessary to do so for the purposes of the *Inspector-General of Intelligence and Security Act*.

13.118 Following the establishment of the Royal Commission into the Australian Secret Intelligence Service in 1994, the Australian Government considered that the secrecy provisions in s 34 might prevent the IGIS and IGIS staff from giving information or documents to assist the Commission.[147] Accordingly, s 34A was inserted into the *Inspector-General of Intelligence and Security Act* to ensure that the IGIS and IGIS staff were able to cooperate fully with the Royal Commission.[148]

13.119 The IGIS submitted that, while s 34(5) of the *Inspector-General of Intelligence and Security Act* is a protection from compulsion, it leaves a discretion for the IGIS to decide to release information, unless there is another constraint on doing so. The IGIS submitted that s 34A should be repealed so that the IGIS is not potentially constrained from providing assistance to a Royal Commission, should the IGIS consider it appropriate to do so.[149]

Submissions and consultations

13.120 In DP 75, the ALRC proposed that inquiry members be empowered to request advice or assistance from the IGIS in determining the use or disclosure of national security information in the conduct of an inquiry.[150] The ALRC also proposed the repeal of s 34A of the *Inspector-General of Intelligence and Security Act.*[151]

13.121 In its submission, the AIC expressed support for a legislative mechanism to enable a formal role for the IGIS, noting that the IGIS was potentially a very significant independent source of advice for Royal Commissions and Official Inquiries. It also noted, however, that the IGIS is not necessarily a subject matter expert in relation to all information that might damage or prejudice national security or in terms

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146 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 34(1). Another exception, in s 34(1A) of the Act, is where the IGIS believes on reasonable grounds that the disclosure is necessary for the purpose of preserving the well-being or safety of a person.

147 C Horan, *Bills Digest—Inspector-General of Intelligence and Security Amendment Bill 1994*, Department of the Parliamentary Library, Parliamentary Research Services; Commonwealth, *Parliamentary Debates*, House of Representatives, 24 March 1994, 2073 (F Walker—Special Minister of State).

148 Section 34A was inserted by the *Inspector-General of Intelligence and Security Amendment Act 1994* (Cth) s 3.

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

150 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 13–4.

151 Ibid, Proposal 13–5.

of the confidence of communications and damage to international relations which might arise from disclosure of matters relating to foreign governments.[152]

13.122 Bills submitted that inquiry members should not simply be 'empowered' to request advice or assistance from the IGIS. Rather, there should be an onus on inquiry members to seek such advice to ensure there are no unintended consequences—for example, for intelligence sharing with Australia's allies or compromising sources of intelligence.[153]

13.123 Liberty Victoria submitted that it was appropriate for inquiry members to request advice or assistance from the IGIS. The proposal to repeal s 34A of the *Inspector-General of Security and Intelligence Act* was also supported.[154]

ALRC's view

13.124 In determining the use or disclosure of information in the conduct of an inquiry—for example, claims for public interest immunity in respect of national security information or security clearance requirements for inquiry staff and participants—inquiry members may benefit from expert advice. Such advice should be provided by a body independent of the inquiry and of those providing the information, which in most cases would be government agencies.

13.125 The ALRC recommends, therefore, that the *Inquiries Act* should empower an inquiry member to request advice or assistance from the IGIS concerning:

- the damage or prejudice to national security that would, or could reasonably be expected to, result from the use or disclosure; and

- whether giving access to the information would divulge any matter communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation to the Australian Government.

13.126 The ALRC recommends that the IGIS be required to give advice and assistance if requested by an inquiry member and be entitled to have access to documents in order to be properly informed of the issues under consideration. Noting the views expressed by the AIC, the ALRC is of the view that the IGIS could decline to assist in limited circumstances, for example, if the IGIS was of the view that he or she was not qualified to give expert evidence.

13.127 Inquiry members should have the option of requesting advice from the IGIS before making a direction or determination, but would not be required to do so. Inquiry

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152 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.
153 K Bills, *Submission RC 19,* 17 September 2009.
154 Liberty Victoria, *Submission RC 26,* 27 September 2009.

members would also not be obliged to receive advice or assistance from the IGIS. This is consistent with the ALRC's recommendations that inquiry members are to be independent in the performance of their functions and retain the discretion to determine their own procedures.[155]

13.128 The IGIS could be called upon to assist at any stage of the inquiry and not only after the provider of the information had given evidence or submissions. Any advice provided by the IGIS could be given in any form agreed upon by the IGIS and inquiry members and need not be given by way of sworn evidence in oral or written form.

13.129 The ALRC notes that the adoption of these recommendations may necessitate consequential changes to the provisions of the *Inspector-General of Intelligence and Security Act* relating to the IGIS's statutory functions and secrecy obligations to cover information and documents that the IGIS or IGIS staff have acquired in the performance of the IGIS's role under the *Inquiries Act*.[156]

13.130 The ALRC also recommends, as suggested by the IGIS, that s 34A of the *Inspector-General of Intelligence and Security Act* be repealed. If national security-related matters are considered by Royal Commissions or Official Inquiries, the IGIS or his or her staff should not be precluded from assisting inquiries in appropriate circumstances, including by disclosing or communicating information or documents to the inquiry.

13.131 It is arguable that the repeal of s 34A would be sufficient to remove potential constraints on the IGIS providing assistance to an inquiry should he or she consider it appropriate to do so. To avoid doubt, however, the discretion of the IGIS to decide to provide such assistance, including by the release of relevant information to an inquiry, should be made explicit by way of consequential amendments to the statutory functions and secrecy obligations of the IGIS. While the IGIS should have a discretion in relation to such assistance, it is appropriate that the protection from compulsion in s 34(5) of the *Inspector-General of Intelligence and Security Act* be preserved.

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155 These matters are discussed in more detail in Chapters 6 and 15 respectively. See Recommendations 6–5 and 15–4.

156 Similar consequential amendments are contained in the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* (Cth) sch 4.

Recommendation 13–4 The recommended *Inquiries Act* should empower inquiry members, in determining the use or disclosure of information in the conduct of an inquiry, to request advice or assistance from the Inspector-General of Intelligence and Security concerning:

(a) the damage or prejudice to national security that would, or could reasonably be expected to, result from the use or disclosure; and

(b) whether giving access to the information would divulge any matter communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation to the Australian Government.

Recommendation 13–5 Section 34A of the *Inspector-General of Intelligence and Security Act 1986* (Cth), which relates to information and documents that may be given to the Commission of Inquiry into matters relating to the Australian Secret Intelligence Service (1995), should be repealed.

Government policies and protocols

13.132 The Australian Government has an existing security classification system and a protective security policy—the *Australian Government Protective Security Manual* (PSM). The PSM is produced and periodically revised by the Protective Security Coordination Centre in the AGD.

> The PSM is the principal means for communicating protective security policies, procedures and minimum security requirements related to the protection of the Government's official resources. It is designed to assist agencies with their protective security arrangements, and includes principles, standards and procedures for the protection of government personnel, infrastructure and information.[157]

13.133 In *Keeping Secrets*, the ALRC recommended that a revised PSM be placed in the public domain, with any sensitive protective security information removed.[158] The ALRC expressed the view that the information in the PSM:

> is not only of interest to government departments, agencies and contractors. Other parties, including the media, freedom of information applicants and the general public, have a legitimate interest in knowing how and why government information and other public assets are classified and protected, and where responsibility for protective security measures falls. It would also increase awareness of the PSM and its contents both within and outside government including, for example, among

157 Australian Government Attorney-General's Department, *Protective Security Manual (PSM),* <www.ag.gov.au> at 29 September 2009.

158 Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), Rec 4–1.

> officers and staff of courts and tribunals and, … among potential contractors to government. Increased understanding of the need to protect classified and security sensitive information is likely to assist in preventing the unnecessary disclosure of such information.[159]

13.134 At the time of writing in October 2009, access to the PSM remains restricted to government agencies. Agencies may also provide engaged contractors with the sections of the PSM required to meet contractual obligations.[160]

13.135 In the Clarke Inquiry, the AGD assisted the inquiry to develop and promulgate arrangements for the protection of national security and other classified information provided to the inquiry. According to the report, the arrangements 'were in accordance with the prescriptions of the [PSM] and the relevant legislation'.[161] As part of this process, the inquiry had systems and equipment installed to upgrade its premises and storage facilities to meet the standards required for classification as a 'secure area'. While all inquiry staff had security clearances at top secret or secret level, they were still required to view some documents at the premises of particular agencies with some documents being delivered to, and removed from, the inquiry offices daily. In his report, Clarke noted that the situation was extremely inconvenient both administratively and operationally. As noted above, he also formed the view that many documents were 'over-classified'.[162]

Technical assistance

13.136 The ALRC has considered whether other arrangements of an administrative nature should be implemented, in addition to the recommended statutory framework, to facilitate physical access by a Royal Commission or Official Inquiry to national security information while also ensuring adequate protection of such information. In DP 75, the ALRC proposed that the *Inquiries Handbook* should contain information on the handling and storage of national security information by inquiries.[163] Further, the ALRC proposed that inquiry members should be able to request that the Australian Government provide trained personnel to assist and advise the inquiry on matters relating to the handling and storage of such information.[164]

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159 Ibid, [4.23].

160 Australian Government Attorney-General's Department, *Protective Security Manual (PSM),* <www.ag.gov.au> at 29 September 2009.

161 M Clarke, *The Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (2008), 5.

162 Ibid. The ALRC examined the practice and procedure in the classification of sensitive material by government agencies and made a number of recommendations in Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), Chs 2, 4.

163 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 13–6.

164 Ibid, Proposal 13–7.

Submissions and consultations

13.137 In response to IP 35, some stakeholders supported the introduction of such arrangements, including by way of written guidance for inquiry members and staff. The Law Council, for example, suggested that consideration be given to establishing administrative guidelines or arrangements for inquiries dealing with national security—for example, guidelines for accessing classified and security sensitive documents.[165]

13.138 The AIC and Liberty Victoria supported the ALRC's proposals in DP 75 referred to above.[166] The AIC submitted, however, that the requirements set out in the PSM and other Australian Government policies should be adhered to by inquiries. Further, it submitted that the PSM should be followed by inquiry members when exercising their discretion to determine the appropriate procedures for the protection of national security information. Any guidance set out in the *Inquiries Handbook* should, in the AIC's view, incorporate the standards and procedures in the PSM.[167]

ALRC's view

13.139 One option is to leave individual Royal Commissions and Official Inquiries to develop their own arrangements, or enter into memorandums of understanding with relevant government departments and agencies, which are usually the custodians of national security information. In the ALRC's view, however, it is preferable for issues relating to the handling and storage of national security information by inquiries to be addressed in the recommended *Inquiries Handbook*. This would increase awareness among inquiry members, staff and contractors of the need to protect national security information and may assist in preventing unnecessary disclosure of such information. It would provide more consistency and certainty and avoid duplication of effort from inquiry to inquiry.

13.140 The ALRC notes that the PSM already provides a comprehensive protective security framework from which appropriate standards and procedures could be developed for inquiries. Such information could be developed in consultation with relevant government department or agencies—which in most cases will provide national security information to inquiries—and the Protective Security Policy Committee, who has responsibility for the management and dissemination of the PSM.

13.141 While the PSM provides a useful framework from which to develop standards and procedures, it is not a public document and the ALRC does not recommend that inquiries be required to adhere to it. It is preferable that any standards and procedures be included in the recommended *Inquiries Handbook*, which should be

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

166 Australian Intelligence Community, *Submission RC 28,* 28 September 2009; Liberty Victoria, *Submission RC 26,* 27 September 2009.

167 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.

publicly accessible. This will enable inquiry participants, as well as members of the media and the general public, to access information about how Royal Commissions and Official Inquiries will deal with national security information.

13.142 There are many technical and practical aspects relating to the physical protection of national security information, including its use and storage. The ALRC recommends that the Australian Government department responsible for the administration of inquiries—presently the AGD—should assign, upon request by an inquiry member, appropriately trained personnel to advise the inquiry on the handling and storage of national security information. Such officers could be assigned on a part-time or full-time basis to advise on technical aspects only and while performing any such function would be answerable to the inquiry members.

Recommendation 13–6 The recommended *Inquiries Handbook* should include information on the handling and storage of national security information by inquiries. The information should be developed in consultation with relevant government departments or agencies such as the Protective Security Policy Committee and the Australian Intelligence Community and may incorporate, as appropriate, the standards and procedures in the *Australian Government Protective Security Manual*.

Recommendation 13–7 If requested by members of Royal Commissions and Official Inquiries, the Australian Government should assign appropriately trained personnel to advise the inquiry on the handling and storage of national security information.

Part E

Conduct of Inquiries

14. Inquiries and Courts

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Introduction

14.1 In this chapter, the ALRC discusses the relationship between inquiries established under the *Inquiries Act* recommended in this Report and court proceedings. Court proceedings may affect inquiries in four ways. First, court proceedings may be used to supervise the legality of the establishment and conduct of an inquiry. Secondly, court proceedings may be used to determine legal disputes arising in an inquiry. Thirdly, inquiries may be restrained from inquiring into matters that are in dispute in related court proceedings that are being conducted at the same time. Fourthly, an inquiry may affect the conduct of subsequent legal proceedings.

14.2 This chapter examines the interactions between inquiries and courts, beginning with the supervision of inquiries through judicial review, and the determination of legal disputes through the referral of legal issues to a court. It then briefly discusses the interaction of inquiries with concurrent and subsequent legal proceedings.

Judicial review

Introduction

14.3 Judicial review can be described broadly as 'the function or capacity of courts to provide remedies to people adversely affected by unlawful government action'.[1] Importantly, the purpose of judicial review is to ensure the legality of government action, rather than its correctness.[2] As the High Court has stated, judicial review

> is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. … Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction.[3]

14.4 Judicial review of administrative action can be sought in the High Court in the exercise of its original jurisdiction under the *Australian Constitution*;[4] or in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).[5] The principles governing judicial review, however, remain to a large extent the product of common law.

14.5 A court may determine that administrative action is unlawful on a number of grounds—for example, that it was not based on any evidence or other material, or that it was made in breach of the principles of procedural fairness (as discussed in Chapter 15).[6] If a court determines the administrative action is unlawful, it may make a number of orders, such as quashing a government decision, or compelling a person to do, or prohibiting a person from doing, an act.

Judicial review of inquiries

14.6 While historically Royal Commissions were not subject to judicial review, it is clear now that they are subject to such review.[7] For example, a Royal Commission may be challenged on the basis that its conduct extends beyond its terms of reference,[8] because a Royal Commissioner is biased or appears to be biased,[9] or because there has

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1 Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2006), 1.
2 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–36.
3 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–514.
4 In particular, s 75(iii) and (v).
5 Royal Commissions are susceptible to judicial review under the *ADJR Act*: *Lloyd v Costigan* (1983) 48 ALR 241, 246-248, but jurisdiction under the *ADJR Act* may not be available in respect of decisions that are not given force and effect by the *Royal Commissions Act 1902* (Cth): *AWB Ltd v Cole* (2006) 152 FCR 382, [168]–[174].
6 See generally P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), Ch 13.
7 Ibid, 691.
8 Ibid, 704–705.
9 Ibid, 734–744.

been a breach of the principles of procedural fairness.[10] The same principles would apply to the Official Inquiries recommended in this Report,[11] as Official Inquiries will have very similar powers and functions.[12]

14.7 In Australia, courts generally have been reluctant to intervene in the conduct of Royal Commissions. For example, as discussed below, the courts take a liberal approach in determining whether evidence is relevant to a Royal Commission.[13]

14.8 As the New Zealand Court of Appeal has observed, there are competing considerations as to whether, and to what extent, judicial review ought to be available in the context of Royal Commissions.[14] On the one hand, a report is merely an expression of opinion and has no immediate legal effect. This points towards a fairly limited role for judicial review. On the other hand, most Royal Commissions are of major significance in 'practical, public and other senses'.[15] They are appointed relatively rarely, they generally receive major publicity and they may impact on significant interests of individuals.[16] These considerations suggest that judicial review is an important safeguard in the context of Royal Commissions.

14.9 Although the report of an inquiry will not directly determine legal rights or liabilities, an inquiry may make decisions which adversely affect the legal rights of individuals indirectly. For example, the right to refuse to answer a question on the basis that it would be self-incriminating may be abrogated.[17] The decisions that may affect these legal rights and liabilities would be open to judicial review.

14.10 Not all of the remedies of judicial review are available in the context of inquiries. For example, courts may not quash a finding in the report of an inquiry if the inquiry has no direct or indirect legal consequences,[18] although the court may declare that a finding reached in breach of the principles of procedural fairness is a nullity.[19]

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10 A finding of a Royal Commission may be challenged on this basis: see *Mahon v Air New Zealand Ltd* [1984] AC 808; and, in the analogous context of a coronial finding, *Annetts v McCann* (1990) 170 CLR 596.

11 Recommendation 5–1.

12 The application of the principles of judicial review may differ between statutory and non-statutory inquiries. For example, it is unclear whether non-statutory inquiries attract the rules of procedural fairness: *Stewart v Ronalds* [2009] NSWCA 277.

13 See, eg, *Ross v Costigan* (1982) 59 FLR 184. See generally P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 706–708.

14 *Peters v Davison* (1999) 2 NZLR 164, 181–182.

15 Ibid, 182.

16 Ibid.

17 This privilege is discussed in Ch 17.

18 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471.

19 *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125.

Delay caused by judicial review

14.11 Judicial review proceedings may delay the proceedings of an inquiry, and therefore increase its cost. For example, several actions were instituted in the Federal Court in respect of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme (2006), resulting in a delay of several months.[20]

14.12 In the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission), the Commissioner in charge of the inquiry, the Hon Terence Cole QC (Commissioner Cole), discussed the difficulties that arise as a result of judicial review:

> [A]s the law currently stands the effectiveness of Royal Commissions can be greatly hampered by the threat of court action. Court action will inevitably delay a Commission and involve very considerable time and expense. It can easily derail an investigation. This Commission naturally sought to avoid litigation. That meant, however, that it was sometimes possible for baseless objections to frustrate an investigation, particularly where the person or organisation concerned was prepared to fight a matter in the courts largely irrespective of its merits. The benefits of frustrating the Commission's investigations were, apparently, thought to outweigh the costs of court action even though that action was unlikely to be successful.[21]

14.13 There are three principal methods of addressing the issue of delay caused by judicial review proceedings. First, a legislative provision, commonly known as an ouster or a privative clause, may state that a Royal Commission is beyond the review of the courts.[22] In the federal context, however, a privative clause is not very effective because the *Australian Constitution* entrenches the judicial review jurisdiction of the High Court.[23] This means that such clauses in federal legislation are either held to be constitutionally invalid or are read very restrictively in order to be compatible with the *Australian Constitution*.[24]

14.14 A second method of addressing the issue is to impose time limits on the institution of judicial review proceedings.[25] Under the *ADJR Act*, a time limit of 28 days is imposed, although a court may exercise its discretion to allow an extension of this period.[26] Longer periods apply under the original jurisdiction of the High Court

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20 *AWB Ltd v Cole (No 6)* (2006) 235 ALR 307; *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30; *AWB Ltd v Cole (No 4)* [2006] FCA 1050 *AWB Ltd v Cole (No 3)* [2006] FCA 1031; *AWB Ltd v Cole (No 2)* (2006) 233 ALR 453; *AWB Ltd v Cole* (2006) 152 FCR 382.

21 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 81.

22 *Special Commissions of Inquiry Act 1983* (NSW) s 36(2); *Royal Commissions Act 1917* (SA) s 9; *Royal Commissions Act 1991* (ACT) s 48.

23 *Australian Constitution* s 75(iii), (v).

24 See generally M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), 840–860. See especially *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

25 For example, *Inquiries Act 2005* (UK) s 38 imposes a time limit of 14 days for bringing such a proceeding, although a court may extend this time.

26 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11(3).

and Federal Court.[27] A time limit, however, also may be constitutionally invalid if it has the effect of curtailing or limiting the right or ability of a person to seek judicial review under the *Australian Constitution*.[28]

14.15 A third method would be to provide, by legislation or otherwise, that the Federal Court or High Court must expedite matters involving Royal Commissions or Official Inquiries.

14.16 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether there were any concerns about judicial review of decisions made by Royal Commissions or other public inquiries, and if so, how legislation should attempt to address those concerns.[29] In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), however, the ALRC expressed the view that there should be no modification of the application of the principles of judicial review.[30]

Submissions and consultations

14.17 Submissions to the Inquiry generally supported the existence of judicial review, and argued against the introduction of specific expedited procedures. For example, the Law Council of Australia (Law Council) submitted that

> it is important that there is some level of oversight of Royal Commissions and public inquiries. The availability of judicial review means that Courts are able to intervene when they consider it appropriate, and ensure that Royal Commissions or other public inquiries do not go beyond their terms of reference or otherwise go off the rails.[31]

14.18 The Law Council noted that the removal of other safeguards—including the inability to sue Royal Commissions, discussed in Chapter 12, and the fact that the rules of evidence applicable in civil litigation do not apply to Royal Commissions—made judicial review even more important in this context. It observed that courts generally have been reluctant to interfere with Royal Commissions, and had mechanisms to prevent frivolous or vexatious claims.[32]

14.19 In relation to the possibility of a privative clause, the Law Council submitted:

> Judicial review cannot be excluded under the Commonwealth Constitution, and the usefulness of conventional privative clauses in limiting the scope for review of

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27 Under the *High Court Rules 2004* (Cth), a period of two months applies to an order requiring a judicial tribunal to do an act (r 25.07); and a period of six months applies to an order removing a judgment, order, conviction or other proceeding for the purpose of being quashed (r 25.06). There is no time limit governing orders prohibiting a person from doing something. These time limits, however, may be extended by a judge of the Court: r 4.02. There are no equivalent provisions in the *Federal Court Rules* (Cth). Time limits may be prescribed in specific Acts: see, eg, *Migration Act 1958* (Cth) s 477A.

28 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

29 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 3–1.

30 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [14.22]–[14.24].

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

32 Ibid.

> decisions under Commonwealth legislation now appears to be debatable at best. Therefore it is unclear what use a privative clause, such as that included in the *Royal Commission Act 1917* (SA), would serve, other than to further confuse matters and to encourage arid jurisdictional debate.[33]

14.20 The Law Council also rejected the idea of a time limit, arguing that there was insufficient justification to shorten the time limit of 28 days under the *ADJR Act*, especially as the delays caused by judicial review were usually determined by the speed with which the court could hear and determine the case, not by the time for instituting the case. The Law Council also observed that reducing the time limit further could cause constitutional difficulties, as noted above.[34]

14.21 Liberty Victoria also rejected an expedited process, saying:

> Liberty believes that the current mechanisms are adequate and should only be reformed if there is a clear and demonstrable need to do so.[35]

14.22 Civil Liberties Australia also expressed the view that judicial review should be available to an appropriate court.[36]

14.23 In consultations, the overwhelming majority of stakeholders who addressed this issue acknowledged that the process of judicial review caused delay but felt that this did not justify or warrant an attempt to modify the usual application of judicial review, especially in light of the constitutional difficulties involved.

14.24 Further, there was limited support for a statutory provision dealing with expedition. The majority of stakeholders addressing the issue observed that in the past, the Federal Court had shown a willingness to expedite such cases, and that the case management practices of the Federal Court were sufficiently flexible to enable cases to be heard rapidly.

14.25 Some stakeholders also observed that there were important practical difficulties in accessing judicial review, especially for less well-resourced participants. These included the prospect of court fees and costs, and a concern about offending inquiry members.

ALRC's view

14.26 The possibility of judicial review is an important check on the legality of government action. Judicial review is an especially important check in the context of Royal Commissions and Official Inquiries for two additional reasons. First, a number of procedural safeguards that apply in court proceedings do not apply to, or are relaxed

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33 Ibid.
34 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.
35 Liberty Victoria, *Submission RC 1A,* 12 May 2009.
36 Civil Liberties Australia, *Submission RC 17,* 19 May 2009.

in, Royal Commission proceedings. This will apply equally to the proceedings of Official Inquiries. Further, as temporary, independent bodies, Royal Commissions and Official Inquiries are not subject to the supervision of a government department or a body with oversight powers, such as the Commonwealth Ombudsman.[37] The absence of these other safeguards makes it more important that inquiries be subject to judicial review.

14.27 The ALRC acknowledges that the availability of judicial review may delay an inquiry. The mere threat of delay, however, does not outweigh the important role judicial review plays in ensuring the legality of the proceedings of Royal Commissions and Official Inquiries.

14.28 The ALRC does not recommend that the Australian Government should introduce an expedited process for the hearing of such cases. As stakeholders have noted, the Federal Court has shown a willingness to expedite appropriate cases, and the case management practices of the Federal Court are sufficiently flexible to enable the Court to hear cases rapidly.

Challenges to notices or summons

14.29 In the Building Royal Commission, Commissioner Cole recommended that the *Royal Commissions Act 1902* (Cth) be amended

> to provide that no challenge may be made to a notice or summons on the basis that the information sought does not fall within the Terms of Reference of a Royal Commission, except on the basis that the notice or summons is not a bona fide attempt to investigate matters into which the Commission is authorised to inquire.[38]

14.30 Commissioner Cole considered that this recommendation, if implemented, would codify the common law.[39] He considered that it was necessary to define the rules as precisely as possible to avoid the delays caused by legal challenges.[40]

14.31 Coercive powers, such as the power to compel evidence, may be exercised only for the purposes of a particular investigation. If a Royal Commission or Official Inquiry is acting outside of its terms of reference, it may be restrained from doing so. As noted above, however, the courts have tended to take an expansive view of the relevance of any information sought to be compelled and the subject of the inquiry.

14.32 For example, in *Ross v Costigan (No 2)*, the Full Court of the Federal Court stated that 'what the Commissioner can look to is what he bona fide believes will assist him in his Inquiry'.[41] In *Douglas v Pindling*, the Privy Council stated:

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37 Other oversight mechanisms for inquiries are discussed in detail in Ch 5.
38 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 80.
39 Ibid, vol 2, 81.
40 Ibid.
41 *Ross v Costigan (No 2)* (1982) 64 FLR 55, 69.

> If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, then it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result. …
>
> [T]he decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at.[42]

14.33 As Commissioner Cole indicated, therefore, the common law position is that a challenge to any decision made in good faith to issue a summons or notice to produce will not succeed, unless it is one that no reasonable Royal Commission could properly arrive at.

14.34 There is a subtle but important difference between an expansive interpretation of the power of Royal Commissioners to issue summonses or notices by the courts, and a legislative provision that prohibits courts from examining such cases. Although the ultimate effect may be the same, the exclusion of judicial review infringes an important constitutional principle—namely that it is the role of the courts to ensure the legality of administrative action. Further, such a provision also may be constitutionally invalid.[43] For the reasons discussed above in relation to judicial review generally, the ALRC does not recommend the inclusion of such a provision in the *Inquiries Act*.

Referral of questions of law

14.35 The referral of questions of law to a court may be a convenient way of ensuring that legal disputes before a Royal Commission or an Official Inquiry are resolved, rather than relying on those participating in a Royal Commission or Official Inquiry to bring judicial review proceedings.[44] As noted earlier, those participating in inquiries may be deterred from bringing judicial review proceedings because of the cost involved.

Questions of law

14.36 A power to refer a question of law is commonly conferred on federal tribunals and other federal bodies.[45] These provisions typically provide that a tribunal may refer

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42 *Douglas v Pindling* [1996] AC 890, 904.

43 The case of *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, which changed the law relating to privative clauses, was handed down in the same year as the Building Royal Commission reported.

44 The Australian Commission for Law Enforcement Integrity, for example, has submitted to a parliamentary inquiry that it should have powers to 'settle questions of law that may arise during an investigation or inquiry': Australian Commission for Law Enforcement Integrity, *Submission No 14 to the Joint Committee on the Australian Commission for Law Enforcement Integrity—Parliament of Australia, Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, July 2009.

45 See, eg, *Corporations Act 2001* (Cth) s 659A; *Administrative Appeals Tribunal Act 1975* (Cth) s 45.

a question of law to the Federal Court, either on its own motion or at the request of a party.[46]

14.37 Such a power could, for example, be used to resolve questions of law—such as whether there is a legal right to refuse to produce documents or things, on the basis of a claim of privilege or a conflicting statutory or other legal obligation.[47] An example of a situation in which it may be useful to refer a question of law is provided in the case of *Independent Commission Against Corruption v Cripps.*[48] In that case, the New South Wales Independent Commission Against Corruption, in order to resolve a dispute on that question, sought a declaration that the defendant had waived privilege in relation to the production of documents and the answering of questions.

14.38 Section 16 of the *Commissions of Inquiry Act 1995* (Tas) empowers a commission of inquiry, or parties to that inquiry, to refer a question of law to the Supreme Court of Tasmania.[49] This provision also states that, while the Commission awaits the decision of the court, it may either conclude its inquiry subject to the decision, or adjourn its inquiry until the decision is given.[50]

14.39 A similar provision is contained in s 10 of the *Commissions of Inquiry Act 1908* (NZ). In *A New Inquiries Act*, the New Zealand Law Commission (NZLC) reported that s 10 had been used at least five times since 1908.[51] It noted that while such a procedure can cause delay, so can subsequent judicial review of an inquiry member's decision. In the NZLC's view, where there is a genuine dispute about a proposed ruling in an inquiry, 'it may be preferable that the inquirer seeks directions from the court on that issue, rather than wait to see if judicial review will result'.[52] On the NZLC's recommendation, a similar section was included as cl 35 of the Inquiries Bill 2008 (NZ).[53]

14.40 In Australia, the power to refer a question of law to federal courts is subject to a constitutional limitation, namely that federal courts cannot give advisory opinions.[54] In *Mellifont v Attorney-General (Qld)*, however, the majority of the High Court held that

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46 Procedural matters, such as whether a special case should be drawn up, may be prescribed in the *Federal Court Rules* (Cth), as is done in relation to native title proceedings: *Federal Court Rules* (Cth) O 78, Div 3. Proceedings relating to a question referred to the Federal Court are exempt from court fees: *Federal Court of Australia Regulations 2004* (Cth) Sch 3, ss 2(e), 4(e).

47 Privileges and other legal exemptions from disclosure are discussed in Chs 17 and 18.

48 *Independent Commission Against Corruption v Cripps* [1996] NSWSC 372.

49 This provision further states that a question of law may be referred to the court in the form of a special case drawn up by the parties to the inquiry or, if there are no parties to the inquiry or the parties cannot agree, by the Commission, and provides that a court decision on a referral is binding on the Commission and any parties to the inquiry.

50 *Commissions of Inquiry Act 1995* (Tas) s 16(3).

51 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [11.39].

52 Ibid, [11.40].

53 Ibid, Rec 55. The NZLC noted a procedural issue. Stating a case to the High Court raises the potential for parties to seek reimbursement of their costs from the inquiry. The NZLC suggested that the power should be rarely exercised: New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [11.40].

54 *Re Judiciary and Navigation Acts (Advisory Opinions Case)* (1921) 29 CLR 257.

there were two critical concepts which identified an advisory opinion: an abstract question of law which did not involve the right or duty of any body or person; and the making of a declaration of law divorced from any attempt to administer that law.[55]

14.41 The High Court has observed in relation to referrals of questions of law:

> The function of this Court is not to give the Board general or abstract advice as to the manner in which it ought to exercise the authority confided to it by the Act … but to give a judgment deciding a concrete question of law which must be decided in order that the Board may perform its function in the particular case in accordance with law.[56]

14.42 This means that a referral of a question of law cannot be used to advise on how an inquiry should exercise statutory discretions, or to determine questions of fact.[57] While it has not always been easy for courts to determine whether a matter is a 'question of law',[58] there are some clear examples of such questions, such as questions of law concerning whether documents are privileged from disclosure.

14.43 The prohibition against advisory opinions does not apply to federal tribunals, such as the Administrative Appeals Tribunal (AAT). Under s 59 of the *Administrative Appeals Tribunal Act 1975* (Cth), the AAT may be empowered under another Act to give an advisory opinion on a matter or question referred to it. The *Ombudsman Act 1976* (Cth) empowers the Commonwealth Ombudsman to refer a 'specified question' to the AAT about the taking of an action, or the exercise of a power, by a Department or prescribed authority which the Commonwealth Ombudsman is investigating.[59] The Commonwealth Ombudsman may also recommend a principal officer to refer such a question to the AAT.[60]

14.44 This jurisdiction, however, appears only to have been used once.[61] In that case, Brennan J outlined the principles that applied to the use of that jurisdiction. These included that the Tribunal was 'furnished with the facts, equipped with the principles … and given access to the expertise needed to form a definitive opinion upon the question referred'; that the exercise of its jurisdiction 'is likely to produce a useful practical result'; that it should relate to a 'matter of importance … which is uncertain or in controversy'; and that it was not likely that there would be litigation on the same subject.[62]

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55 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 303.
56 *Mobil Oil Australia Pty Ltd v The Commissioner of Taxation* (1963) 113 CLR 475, 497.
57 See the discussion in *Attorney-General for the State of NSW v X* (2000) 49 NSWLR 653, 664–666.
58 Ibid; see also Timothy Endicott, 'Questions of Law' (1998) 114 *Law Quarterly Review* 292; H Wade and C Forsyth, *Administrative Law* (9th ed, 2004), 941–948.
59 *Ombudsman Act 1976* (Cth) s 10A.
60 Ibid s 11.
61 *In the matter of a reference under s.11 of the Ombudsman Act 1976 for an advisory opinion and Ex parte The Director-General of Social Services* [1979] AATA 34.
62 Ibid.

14.45 Referral of questions by an inquiry to the AAT could enable a broader range of matters to be referred. The disadvantage, however, is that the advisory opinion is not binding. It is possible, therefore, that an action would be brought to the courts on the same matter, reducing the benefit of the referral to the inquiry.

Submissions and consultations

14.46 In DP 75, the ALRC proposed that the power to refer a question of law, on their own motion or on the request of a party, should be conferred on Royal Commissions and Official Inquiries.[63] In submissions to the Inquiry, stakeholders generally supported a power to refer questions of law. For example, Liberty Victoria stated:

> It is foreseeable that at various times, inquiries may be faced with legal questions which are best determined by the courts rather than seeking tentative legal advice. A similar power to that of section 16 of the *Commissions of Inquiry Act 1995* (Tas) … has particular appeal. To ensure constitutional validity and in keeping with [*Mellifont v Attorney-General* (*Qld*)], it is suggested that any provision require that the question be drawn up as a dispute between the parties. Where there is only one party, it may be possible for the Attorney-General or the Solicitor-General to take the place of a second party. Liberty supports a general power for inquiries to refer questions of law to the Federal Court where those questions are formulated as a determinative dispute between one or more parties. Where a second party is required, it may be possible to implement a similar program to the Australian Tax Office's Test Case Litigation Program whereby the inquiry subsidises the second party's costs of the litigation; particularly where the second party is not a government agency.[64]

14.47 Similarly, Civil Liberties Australia submitted that:

> any relevant person should be able, with the agreement of the panel (ie, commissioner) to refer a fundamental question in dispute to an appropriate body for resolution, including to the appropriate court.[65]

ALRC's view

Referral of question of law

14.48 The ALRC recommends that a Royal Commission or Official Inquiry should have the power to refer a question of law to a court. Such a power would have several benefits. It would provide a convenient alternative to judicial review proceedings in ensuring the legality of the conduct of an inquiry. In particular, this is likely to benefit inquiry members who are not legally trained, and those participating in inquiries who wish to challenge a decision without incurring the costs of judicial review proceedings. As noted above, while such a power may cause delay, such delays would not be greater than those caused by applications for judicial review.

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63 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 14–1.

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

65 Civil Liberties Australia, *Submission RC 17,* 19 May 2009.

14.49 Such a procedure also may be a useful way of resolving disputes concerning privilege or other exemptions from disclosure. As noted in Chapter 19, the *Royal Commissions Act* presently includes no procedure for resolving such disputes, with the exception of claims of client legal privilege.[66] There may well be circumstances in which it would assist an inquiry to resolve such a dispute in the course of its investigations.

14.50 In the ALRC's view, an inquiry should seek to refer a question to a court only where it is necessary to obtain a definitive ruling on a question of law, given the expense and delay involved in such proceedings. As a definitive ruling can only be obtained in a court, it is therefore preferable for an inquiry to refer a question of law to a court, rather than request an advisory opinion from the AAT. If an inquiry requires general advice, it may appoint a legal expert to advise it,[67] or seek the advice of standing bodies with expertise in inquiries, such as the Australian Commissioner for Law Enforcement Integrity (ACLEI), the Australian Crime Commission (ACC), and the Commonwealth Ombudsman.

Recommendation 14–1 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may refer a question of law to the Federal Court, either on their own motion or pursuant to the request of a participant.

Related legal proceedings

Concurrent legal proceedings

14.51 If an inquiry into crime or misconduct is examining matters that are being prosecuted in criminal or penalty proceedings, this may raise the question of whether the inquiry is in contempt of court. An inquiry may be in contempt of court if there is a 'real risk' that its proceedings will interfere with the administration of justice in a particular case.[68]

14.52 There are two main ways in which this issue could arise. First, inquiries could generate publicity through public hearings or the government could make public reports that prejudice pending trials. Secondly, inquiries could compel an accused to reveal material which could tend to incriminate a person in relation to an offence that is

66 *Royal Commissions Act 1902* (Cth) s 6AA sets out a procedure in relation to client legal privilege, which enables a Royal Commission to accept or reject a claim of client legal privilege, or enables a person to refuse to produce a document if a court has found that it is subject to client legal privilege. In Chapter 19, a procedure enabling an inquiry member to consider claims of reasonable excuse is recommended: Recommendation 19–7.

67 Recommendation 6–9.

68 See S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), Ch 10; G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 31–32. In Ch 19, the ALRC discusses the concept of contempt in detail.

being prosecuted in the courts.[69] As discussed in Chapter 16, a person may be required to incriminate him or herself before a Royal Commission (but not an Official Inquiry), but is protected from disclosing such material in a court. In that case, there is a real risk that compelling a person to reveal such material may interfere with the criminal proceeding.

14.53 The issue of prejudicial publicity is normally dealt with by conducting inquiry hearings in private, and reporting in private as necessary.[70] The power to restrict public access to hearings and evidence is discussed in Chapter 16. In that chapter, the ALRC recommends that the *Inquiries Act* should provide that members of Royal Commissions or Official Inquiries may prohibit or restrict public access to hearings or publication of certain information before an inquiry because of, among other things, the potential for prejudice to legal proceedings.[71]

14.54 The second issue, concerning the use of incriminating evidence, is discussed in Chapter 17. As noted in that chapter, the *Royal Commissions Act* presently provides that the privilege against self-incrimination is abrogated, except if related criminal charges or penalty proceedings have begun, and have not been finally disposed of.[72]

14.55 The ALRC recommends that the *Inquiries Act* should include a provision with a similar effect, although in different terms. That is, the *Inquiries Act* should provide that a Royal Commission must not require a person to answer a question, or produce a document or other thing, about a matter if a person is subject to concurrent criminal or penalty proceedings in respect of that matter.[73] The ALRC notes, however, that a court may restrain an inquiry from examining a witness even where a person has not been charged with an offence, if in the particular circumstances of a case such examination would amount to contempt.[74]

Suspension of inquiries

14.56 Another method that has been used by Royal Commissions to resolve the potential for conflict between an inquiry and a concurrent legal proceeding is for a chair to adjourn an inquiry while court proceedings are underway, using the broad discretion conferred on inquiry members to conduct an inquiry in the way they think fit.[75] As noted by the High Court, however, this method may not be appropriate in all cases, since it could provide an incentive for inquiry participants to initiate court actions to delay or frustrate inquiries.[76]

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69 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [10.12].

70 Ibid, [10.13]–[10.14]. As noted there, the courts generally have placed great weight on the public interest in public reporting.

71 Recommendation 16–1.

72 *Royal Commissions Act 1902* (Cth) s 6A(3), (4).

73 Recommendation 17–1(b).

74 *Sorby v Commonwealth* (1983) 152 CLR 281, 307–308.

75 The ALRC discusses the broad discretion conferred on inquiry members to conduct an inquiry in detail in Ch 15.

76 *Lockwood v Commonwealth* (1954) 90 CLR 177, 186.

14.57 An alternative is to provide a statutory mechanism for resolving such conflicts. Section 13 of the *Inquiries Act 2005* (UK), for example, enables a minister, after consulting with the chair of an inquiry, to suspend an inquiry pending a related investigation or related court proceedings.[77] In DP 75, the ALRC asked whether a similar power should be conferred on the body establishing an inquiry under the *Inquiries Act* recommended in this Report.[78]

14.58 Section 4A of the *Commissions of Inquiry Act 1950* (Qld) provides an alternative mechanism. This section ousts jurisdiction from courts, tribunals, wardens, coroners, justices or other person (other than the Supreme Court or Industrial Court, or members thereof) where those bodies or persons are inquiring into matters that are the subject of inquiry by a Commission of Inquiry constituted or chaired by a judge of the Supreme Court.

Submissions and consultations

14.59 The few stakeholders who addressed this question were opposed to empowering a body establishing an inquiry to suspend an inquiry pending related proceedings, principally because of the delay that such a procedure could cause.

14.60 Mr Ian Mackintosh stated that:

> timeliness requires the inquiry to be completed as far as possible in a timely manner; I therefore submit it would be appropriate for the inquiry to continue in private for its completion of any part relating to a Court proceeding and finalized after any Court finding that is deemed relevant to the inquiry.[79]

14.61 Dr Ian Turnbull submitted that 'the answer to this question should be generally "no". It would seem an unnecessary and potentially costly delay.'[80]

14.62 Liberty Victoria noted in its submission:

> Inquiries should only be suspended to the extent necessary; inquiries should stay on foot for those aspects not directly involved in the court proceedings.[81]

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77 See also Tribunals of Inquiry Bill 2005 (Ireland) s 11, which was recommended by the Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), Ch 9. This clause enables the government (in consultation with a tribunal) to suspend an inquiry to allow for the completion of another inquiry or the determination of related civil or criminal proceedings. At the time of writing on 9 October 2009, this bill was still before the Oireachtas.

78 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 14–1.

79 I Mackintosh, *Submission RC 23,* 21 September 2009.

80 I Turnbull, *Submission RC 22,* 21 September 2009.

81 Liberty Victoria, *Submission RC 26,* 27 September 2009.

ALRC's view

14.63 Concurrent legal proceedings may affect inquiries in different ways, and the potential for conflict similarly may be resolved in a variety of ways. As noted earlier, an inquiry may be able to continue in private, defer consideration of a particular issue, or adjourn the inquiry. Adjourning an inquiry is the most drastic of these options, since it will delay the progress of the inquiry and may provide an incentive to initiate court actions. Adjournment, therefore, should be used as a last resort.

14.64 As an inquiry already has power to adjourn or suspend its work, there is no real value in conferring an additional power to suspend on the body establishing the inquiry.[82] The inquiry members are in the best position to determine whether an adjournment is necessary to deal with concurrent legal proceedings, or whether less drastic options are available. Further, there is a danger that conferring a power on the establishing body to suspend an inquiry may undermine the independence of an inquiry. Consequently, the ALRC does not recommend that a power to suspend inquiry proceedings should be conferred by statute on the body establishing an inquiry under the *Inquiries Act*.

Subsequent legal proceedings

14.65 Finally, it should be noted that a number of recommendations in this Report relate to inquiries and legal proceedings that are commenced after an inquiry has concluded.[83] For example, in Chapter 17, the ALRC examines the abrogation of the privilege against self-incrimination in respect of Royal Commissions, and the protection through a 'use immunity' against the use of evidence given to Royal Commissions in subsequent legal proceedings. The ALRC recommends that the present position should continue, in which direct use in subsequent legal proceedings of certain evidence before a Royal Commission is prohibited, but indirect use of that evidence is permitted.[84]

14.66 The ALRC further recommends that the scope of this use immunity should be clarified in a number of ways, including by making it clear that the use immunity applies to documents in the nature of a disclosure, but not to pre-existing documents.[85]

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82 In Ch 15, the ALRC recommends that the adjournment of an inquiry should be specified in legislation as an example of the procedural decisions an inquiry may make: Recommendation 15–4.

83 See Ch 5, which deals with the relevance of the prospect of subsequent legal proceedings in determining whether an inquiry should be established; Ch 8, which considers the transfer of custody and use of Royal Commission records; Ch 11, which deals with the power of a Royal Commission and Official Inquiry to communicate information relating to contraventions of a law to an agency responsible for administering that law; and Ch 12, which discusses the protection from subsequent legal liability of those involved in inquiries.

84 Recommendations 17–1, 17–2.

85 Recommendation 17–2.

15. Procedures: General Aspects

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Introduction

15.1 The types of procedures an inquiry member chooses to employ will be extremely important to the effectiveness and efficiency of an inquiry. When making this choice, an inquiry member will need to consider a range of matters, including: the purposes of an inquiry; the types of information needed to fulfil the terms of reference; the accessibility, quality and means of obtaining the information; and the impact of the methods of information-gathering on affected parties. In particular, when an inquiry is required to investigate allegations of misconduct or serious mismanagement, an inquiry member will have to balance the wider interest in exposing wrongdoing and ensuring transparency against the individual rights and interests that may be affected.

15.2 In this chapter, the ALRC examines a number of general issues relating to the procedures adopted by inquiries. First, it examines the types of procedures available to conduct an inquiry. Secondly, it examines the requirement that the procedures adopted comply with the principles of procedural fairness, and whether the obligations of procedural fairness should be extended to include the right to appear and be represented, and a right to cross-examine a witness. The next chapter addresses particular aspects of procedures which affect the interests of individuals participating in an inquiry.

Methods of inquiry

15.3 There are many possible methods of inquiring into a matter. The *Royal Commissions Act 1902* (Cth) itself does not prescribe any particular method of conducting an inquiry, and Royal Commissions have wide powers to regulate their own proceedings. The procedures adopted will necessarily vary from inquiry to inquiry, because of 'the infinite variety of circumstances that may give rise to the need for a major public inquiry'.[1] In determining the procedures, inquiry members need to balance the objectives of effectiveness, fairness, efficiency, and economy.[2]

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

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

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1 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [2.3].

2 Ibid, [2.3]–[2.9].

it obtained information from government agencies through memorandums of understanding, received telephone interception information from other agencies, obtained 'overview evidence' intended to inform the Commission about issues in the building industry, and conducted private hearings.[3]

15.6 Methods of inquiry often are categorised as adversarial or inquisitorial. Adversarial procedures are used in the courts of common law countries—that is, parties identify the issues and present the case as they think fit, and the judge acts as an umpire deciding between the cases put by the parties. In contrast, 'the essential role of an inquisitorial body is to gather evidence, question witnesses and determine the process and direction of the inquiry'.[4] Although this distinction has its uses, in practice inquiry procedures tend to include elements of both adversarial and inquisitorial methods. It is difficult, therefore, 'to draw an absolutely hard and fast distinction between the inquisitorial and adversarial modes'.[5]

Processes of Royal Commissions

15.7 The processes of Royal Commissions and other forms of inquiry were the subject of significant comment in consultations. As many stakeholders observed, the public expectation and the usual practice is that Royal Commissions are conducted in a manner similar to courts, with public hearings consisting of opening statements, examination and cross-examination of witnesses, and closing statements. The *Royal Commissions Act* uses terms such as witnesses, evidence, formal hearings, cross-examination, and appointment of counsel assisting, which may reinforce the use of a court-like procedure.[6]

15.8 Some stakeholders observed that such procedures may not be the most appropriate or efficient method of investigation. The use of court-like procedures may inhibit cooperation from witnesses, and tends to encourage an adversarial rather than an inquisitorial process, which may be inappropriate for an investigation such as a Royal Commission. Such procedures are also time consuming and costly. Further, such procedures may cause significant and irreparable harm to the reputations of witnesses who may endure a form of 'trial by media'.[7]

15.9 In the opinion of many stakeholders, the undue focus on public hearings and court-like procedures is the product of a number of factors. These include: public expectations as to the conduct of a Royal Commission; media pressure for public hearings; the time pressures experienced by Royal Commissions; and the legal training of most Royal Commissioners. The cumbersome and costly nature of the typical Royal

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

4 G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 39–40.

5 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.3].

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

7 The issue of public access to hearings is discussed in Ch 16.

Commission is, in the view of many stakeholders, a principal motivation behind the increased use of non-statutory inquiries. This is so even though nothing in the *Royal Commissions Act* itself requires adversarial processes.

15.10 Stakeholders observed that the conduct of non-statutory forms of public inquiries tended to be more inquisitorial. Such inquiries tend to rely on more flexible procedures such as meetings with stakeholders, investigations based on analysis of documentary records, and written submissions. This, it was suggested, resulted in more efficient inquiries which were able to report quickly, and cost less than Royal Commissions.[8] A number of stakeholders expressed concern that a statutory structure may limit this procedural flexibility.

Measures to encourage flexibility

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

15.12 The use of Official Inquiries is a key mechanism for increasing flexibility. It is expected that Official Inquiries will use more informal procedures than Royal Commissions, since the public expectations that apply to Royal Commissions are less likely to apply to Official Inquiries. Further, the Australian Government may be more likely to appoint non-judicial members to conduct an Official Inquiry, as is presently the case with non-statutory inquiries. In addition, in Chapter 6, the ALRC recommends that the *Inquiries Act* should provide for the appointment of an expert or experts in any field to assist inquiry members.[9] As expert advisors may be appointed to advise on legal matters, this may also encourage the appointment of members with other types of expertise to both Royal Commissions and Official Inquiries.

Statutory list of available procedures

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

15.14 In its report, *A New Inquiries Act*, the New Zealand Law Commission (NZLC) recommended the inclusion of such a provision to address similar concerns about the appropriateness of court-like procedures.[10] Clause 14(3) of the resulting Inquiries Bill 2008 (NZ) provides that inquiries 'may determine matters such as':

> (a) whether to conduct interviews, and if so, who to interview;

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8 This is discussed also in the context of public hearings in Ch 16.
9 Recommendation 6–9.
10 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 14.

(b) whether to call witnesses, and if so, who to call;

(c) whether to hold hearings in the course of its inquiry, and if so, when and where hearings are to be held;

(d) whether to receive evidence or submissions from or on behalf of any person participating in the inquiry;

(e) whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions; and

(f) whether to allow or restrict cross-examination of witnesses.

15.15 This clause is expressed so as not to limit the general power of an inquiry to 'conduct its inquiry as it considers appropriate', subject to the Act, or the inquiry's terms of reference.[11] The NZLC considered that such a provision would help inquiry participants, inquiry members and the public to understand the scope of the inquiry's powers.[12]

15.16 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed a provision along the lines of the New Zealand model.[13] The Law Council of Australia (Law Council) supported such a provision,[14] as did Liberty Victoria.[15]

Guidance on the selection of procedures

15.17 The use of a handbook on how to conduct an inquiry is another way to encourage flexibility. As noted in Chapter 6, the ALRC recommends the publication of an *Inquiries Handbook*, which provides information on the establishment, conduct and administration of inquiries.[16] A similar handbook is published in New Zealand, which includes a section on the selection of appropriate procedures.[17] This section includes guidance on: the issues inquiry members may need to consider in selecting procedures; deciding who has an interest in an inquiry; the treatment of witnesses and evidence; the holding of hearings; a standard format for hearings; and the requirements of procedural fairness.

15.18 In consultations, a number of stakeholders supported the use of the *Inquiries Handbook* to provide guidance on matters of procedure. In DP 75, the ALRC proposed that the *Inquiries Handbook* should address the suitability and use of different kinds of procedures, including the manner in which hearings are conducted and, as discussed

11 Inquiries Bill 2008 (NZ) cl 14(1).
12 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [4.11].
13 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–1.
14 Law Council of Australia, *Submission RC 30,* 2 October 2009; Civil Liberties Australia, *Submission RC 17,* 19 May 2009.
15 Liberty Victoria, *Submission RC 26,* 27 September 2009.
16 Recommendation 6–1.
17 New Zealand Government Department of Internal Affairs, *Setting Up and Running Commissions of Inquiry* (2001), Ch 20.

later in this chapter, the ways in which procedural fairness may be accorded. The Law Council supported this proposal, as did a number of stakeholders in consultations.[18]

ALRC's view

15.19 In the ALRC's view, a provision similar to cl 14(3) of the Inquiries Bill (NZ) should be included in the *Inquiries Act*. This would reinforce the fact that Royal Commissions may adopt a wide variety of procedures when conducting an inquiry. Since procedural flexibility is desirable with respect to both Royal Commissions and Official Inquiries, such a provision should apply to both types of inquiry.

15.20 Another power, which is not included in cl 14(3) of the New Zealand Bill, is the power of an inquiry to adjourn or suspend its work. As discussed in Chapter 14, this power is especially important when an inquiry is being conducted at the same time as related court proceedings. In light of the importance of this power, the ALRC recommends that it also be included in the *Inquiries Act*.

15.21 In addition, it would be useful for the *Inquiries Handbook* to address the selection and use of different procedures. The procedures adopted in an inquiry may be critical to its success. Since some inquiry members may not have conducted an inquiry before, or may be unfamiliar with the variety of procedures that may be adopted, information on these matters may be useful. This also may encourage greater use of more inquisitorial methods of inquiry. The New Zealand handbook would be a useful model in this regard.

Procedural fairness

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

15.23 If an inquiry may operate to 'destroy, defeat or prejudice a person's rights, interests or legitimate expectations',[19] it is required to observe the principles of procedural fairness. That is, it is under a duty to observe fair procedures when making decisions affecting those rights, interests or legitimate expectations.[20] Reputation, both personal and commercial, is an interest that attracts the protection of the principles of procedural fairness.[21] Therefore, any inquiry that may affect the reputation of

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18 Law Council of Australia, *Submission RC 9,* 19 May 2009; Law Council of Australia, *Submission RC 30,* 2 October 2009.

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

20 This conclusion has been reached in other countries: see, eg, *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)* [1997] 3 SCR 440, [55]; *R v Lord Saville; ex parte A* [1999] 4 All ER 860, 872–873, affirmed in *Lord Saville of Newdigate v Widgery Soldiers* [2001] EWCA Civ 2048, [7].

21 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 578; *New South Wales v Canellis* (1994) 181 CLR 309, 330.

individuals and corporations, which would include all inquiries investigating misconduct, is obliged to observe the principles of procedural fairness.

Aspects of procedural fairness

15.24 There are two main aspects of procedural fairness: the requirement that a person who is liable to be affected by a decision must be given notice of all relevant matters, and given an opportunity to put his or her case (the 'hearing rule'); and the requirement that a decision maker is not biased, or seen to be biased (the 'bias rule'). What these principles require in a particular case will depend on the circumstances, however, they do not impose many limitations on the procedures that may be adopted by inquiries.[22]

15.25 The test for the bias rule is whether the conduct in the circumstances would give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the inquiry member will not discharge his or her task impartially.[23] The rule has a limited operation in the context of inquiries, however, because those conducting inquiries necessarily begin with suspicions before they commence their investigations,[24] and inquiry members inevitably play an active role in investigating the issues.[25]

Adverse findings

15.26 The main requirement of procedural fairness in the context of an inquiry is that the inquiry 'cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding'.[26] Typically, such a finding would arise where a person is identified as having been responsible for misconduct, although findings of guilt or innocence, or of professional misconduct, should not be made.[27] An 'adverse finding' in this context does not extend to 'any finding of disputed fact, or any criticism of a party, or the exposure of evidence or material which might reflect badly on a person'.[28]

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

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

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

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

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

27 In *Brinsmead v Commissioner Tweed Shire Council Public Inquiry* [2007] NSWSC 246, it was held that an inquiry which applied provisions of the *Royal Commissions Act 1923* (NSW) could not validly make such findings. In general, Royal Commissioners have taken the view that they should not express conclusions of guilt or recommend prosecution: T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), [57]. See also *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440.

28 *Royal Commission into Productivity in the Building Industry in NSW* (1992) vol 7, 129.

15.27 The general duty is to provide 'an opportunity to be heard on the matters which pose a potential risk of adverse findings',[29] so that a person is not 'left in the dark' as to the risk of adverse findings.[30] This requirement does not mean that an inquiry has to give notice of any possible adverse matter at the time it is disclosed.[31] Rather, the duty arises when an inquiry 'has reached the stage of contemplating the making of an unfavourable finding against [a] person'.[32] Further, the person does not have the right to be heard on the general subject of an inquiry, only on the subject matter of the potential adverse findings.[33]

15.28 This duty can be met in a number of ways. Typically, in a Royal Commission, this may include counsel assisting giving notice of adverse matters through the identification of issues and possible adverse findings in an opening and closing statement. Further, notice of adverse matters may be provided through the publication of evidence, the use of public hearings and the provision of transcripts of evidence to the person affected.[34]

15.29 Providing draft adverse findings is another way of ensuring notice is given of such findings. For example, in the Building Royal Commission, Commissioner Cole directed counsel assisting to set out, in submissions available to any person who might be adversely affected, the findings of fact which counsel assisting contended should be made, along with references to the supporting and contrary evidence, and the conclusions to be drawn from those findings of fact.[35] There is, however, no duty at common law requiring an investigation to disclose its findings or recommendations and invite comments upon them.[36] A procedure of circulating draft findings has been criticised as 'difficult and time-consuming',[37] although others have considered it 'impeccably fair' where there is no legal representation or cross-examination.[38]

15.30 The detail of the notice of adverse matters that is required will depend on the nature of the inquiry itself. For example, an inquiry may not 'lend itself to the making of precise allegations as to conduct'.[39] The key is that the person should 'be kept in the

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29 M Harris, 'Fairness and the Adversarial Paradigm: An Australian Perspective' [1996] *Public Law* 508, 516.
30 *Mahon v Air New Zealand Ltd* [1984] AC 808, 821.
31 N Owen, *Report of the HIH Royal Commission* (2003), [1.4.2].
32 *Annetts v McCann* (1990) 170 CLR 596, 610.
33 Ibid, 601.
34 N Owen, *Report of the HIH Royal Commission* (2003).
35 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, [40].
36 M Harris, 'Fairness and the Adversarial Paradigm: An Australian Perspective' [1996] *Public Law* 508, 517.
37 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.11].
38 M Harris, 'Fairness and the Adversarial Paradigm: An Australian Perspective' [1996] *Public Law* 508, 523.
39 Ibid, 523.

picture as to the nature of the inquiry … the direction in which it is proceeding and the issues upon which it is focusing'.[40]

15.31 A person may be given a reasonable opportunity to respond to these matters if an adverse matter is put to them in examination, or a person is re-examined or given the opportunity to cross-examine. Further, the opportunity to provide written statements and submissions in response to evidence, closing statements and draft findings may constitute a reasonable opportunity to respond.[41] The person has no right at common law, however, to call further evidence in response.[42]

Guidance on procedural fairness

15.32 The *Royal Commissions Act* does not refer to the principles of procedural fairness. Inquiry members usually are given no guidance on the matter, although members with legal training are likely to be aware of the requirements of procedural fairness. One issue for this Inquiry is whether it would be useful to provide some guidance on the application of those principles. One way to provide such guidance is through the use of the *Inquiries Handbook*, as discussed above. Such guidance also could be provided for by statute.[43] For example, the NZLC was of the view that the rules regarding adverse comment should be set out in statute to 'give clear direction to those conducting and participating in inquiries'.[44] It recommended that legislation should provide that, where a person or body will be the subject of adverse comment or findings by an inquiry, the inquiry must:

- give prior notice of allegations, proposed adverse findings or the risk or likelihood of adverse findings;
- disclose the relevant material relied upon, and state the reasons on which the finding or allegation is based;
- give the person or body reasonable time and reasonable opportunity to refute or respond to the proposed findings or allegations; and
- give proper consideration to those representations.[45]

15.33 The NZLC observed that, where there are no hearings, the requirement of prior notice could be fulfilled by the circulation of extracts of the draft report,[46] and that the

40 Ibid, 517.
41 N Owen, *Report of the HIH Royal Commission* (2003).
42 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), [50]–[53].
43 See, eg, *Commissions of Inquiry Act 1995* (Tas) s 18; *Inquiries Act 1985* RSC c I-11 (Canada) s 13.
44 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 15, 71.
45 Ibid, Rec 15, 71.
46 Ibid, [4.38].

opportunity to respond need not be in the form of an oral hearing.[47] While the common law does not require the inquiry member to state reasons, the NZLC considered that it was 'axiomatic' that the inquiry member should give reasons since the purpose of an inquiry was to 'find out what happened, not to adjudicate'.[48]

15.34 Clause 17 of the Inquiries Bill (NZ), resulting from the NZLC's inquiry, does not follow exactly the NZLC's recommendation.[49] It provides that an inquiry must not make any finding adverse to a person in a report unless the inquiry has taken all reasonable steps to:

(i) give that person reasonable notice of the intention to make the finding; and

(ii) disclose to that person the contents of the proposed finding, the relevant material relied on for that finding, and the reasons on which it is based; and

(iii) give that person a reasonable opportunity to respond to the proposed finding.

15.35 Clause 17(b) also requires that the inquiry give proper consideration to any response given. While the resulting clause is similar, it does not include notice of 'the risk or likelihood of adverse findings'. It does require circulation of the contents of the proposed finding, and an indication of an intention to make the finding. This would appear to preclude adequate notice of the potential for an adverse finding being given through the use of public hearings and evidence.

15.36 Section 35A of the *Royal Commissions Act 1991* (ACT) goes further than the Inquiries Bill 2008 (NZ) by requiring that an inquiry provide a copy of the proposed comment, together with a written notice allowing for the party to respond within a specified period of at least 14 days.[50]

Submissions and consultations

15.37 In IP 35, the ALRC asked what rights of witnesses, in addition to those in the *Royal Commission Act*, should be protected in the proceedings of inquiries.[51] In DP 75, the ALRC proposed that a provision similar to cl 17 of the Inquiries Bill (NZ) should be included in the *Inquiries Act*,[52] and that the *Inquiries Handbook* should address matters of procedural fairness.[53]

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47 Ibid, [4.43].

48 Ibid, [4.40].

49 At the time of writing in October 2009, this Bill was before the New Zealand Parliament.

50 See also the more prescriptive procedure in the Tribunals of Inquiry Bill 2005 (Ireland) cll 37–43, which requires circulation of extracts of draft reports to any person identified or identifiable in a report, and enables them to apply to amend the report and empowers an inquiry to apply to the High Court for directions in this regard.

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

52 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–3.

53 Ibid, Proposal 15–2.

15.38 The Law Council supported both proposals.[54] It submitted that:

> it is the compulsory nature of attendance before an executive body which gives considerable force to this call for statutory protection of witnesses. The common law rules of procedural fairness, and particularly their content in any given situation, are too discretionary and uncertain to afford sufficient protection to witnesses compelled to attend, give evidence, and be cross examined by the executive and its representatives, and then be subject of possibly adverse comment or findings.[55]

15.39 On the other hand, the Law Council recognised the dangers of putting the obligations of procedural fairness into statutory form, and noted that

> enacting general law principles into statutory form can risk shifting the debate from the application of a principle to the construction of an opaque phrase (such as 'reasonable opportunity' to respond to an adverse finding or assertion). There is also potential for statutory provisions to interrupt proceedings for non-compliance with a mandatory requirement even if no unfairness results, and conversely, the potential for unfair procedures to slip through on the basis that formal compliance with a mandatory requirement occurred.[56]

15.40 On balance, however, the Law Council endorsed a provision similar to cl 17 of the Inquiries Bill (NZ).[57]

15.41 The Construction, Forestry, Mining and Energy Union (CFMEU) also supported a statutory provision,[58] citing in support the views of Dr Janet Ransley, who has stated:

> [C]ontrols over commissions and their use of powers could be improved by clearly imposing upon them, through legislation, general duties of procedural fairness, together with an obligation to base their findings on probative evidence. This could be supplemented by statutory guidelines as to appropriate procedures to achieve such fairness. … These measures would spell out the legal position of commissions, make them clearly amenable to review by the courts, and still subject them to the dynamic development of the common law doctrines of procedural fairness …[59]

15.42 The Community and Public Sector Union (CPSU) specifically supported the inclusion of a provision similar to s 35A of the *Royal Commissions Act* (ACT).[60] In its submission in response to DP 75, it stated that:

> the provision of natural justice to participants is particularly important. Where there may be adverse findings found against a person, that person should be afforded rights in the process, be given the opportunity to respond to those potential findings and where the findings are made, their response, at least in summary form, should be

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54 Law Council of Australia, *Submission RC 30,* 2 October 2009.
55 Law Council of Australia, *Submission RC 9*, 19 May 2009.
56 Ibid.
57 Law Council of Australia, *Submission RC 30,* 2 October 2009.
58 Construction, Forestry, Mining and Energy Union, *Taking Liberties—The Cole Royal Commission into the Building and Construction Industry* (2004).
59 J Ransley, 'The Powers of Royal Commissions and Controls Over Them' in P Weller (ed) *Royal Commissions and the Making of Public Policy* (1994) 22, 31.
60 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.

> included in the final report. Given that the final report of a Royal Commission or Official Inquiry will be a public document the provision of these rights is integral in affording inquiry participants natural justice.[61]

15.43 Liberty Victoria also expressed support for a provision stipulating that all reasonable steps should be taken to give that person a right of reply before the publication of a report making an adverse finding against them.[62]

15.44 Mr Graham Millar, however, expressed reservations:

> I agree that all reasonable steps should be taken to give a person notice of the possibility of adverse findings, the details and basis of those findings and an opportunity to respond. … In my view, however, the members of inquiries should have the prerogative to reserve their final position on any adverse findings for their reports. Adoption of [the ALRC's proposal for a statutory procedural fairness provision] has the potential to add substantial process to an inquiry, involving additional time and cost, particularly in cases where there may be a number of possible adverse findings.[63]

ALRC's view

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

15.46 It is difficult to generalise about the requirements of procedural fairness in the conduct of inquiries, because of the wide variety of circumstances in which procedural fairness issues might arise. Further, the concept continues to evolve. One clear obligation, however, is the right to be given an opportunity to respond before an adverse finding is made.

15.47 This obligation can usefully be set out in legislation in similar terms to cl 17 of the Inquiries Bill (NZ). This provision is preferable to the equivalent section in the *Royal Commissions Act* (ACT), because the New Zealand provision sets out a more flexible procedure for discharging the obligation. The ALRC recommends, however, that 'risk or likelihood' of a proposed adverse finding also should be included, to clarify that notice need not be given of the contents of the proposed finding, or an intention to make that finding. For example, if an inquiry participant is legally represented, the hearings are in public, and all the evidence is published, normally there would be adequate notice of the nature of the proposed adverse finding and the material on which it is likely to be based, without an additional requirement that the inquiry circulate the contents of findings.

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61 Community and Public Sector Union, *Submission RC 25,* 22 September 2009.
62 Liberty Victoria, *Submission RC 26,* 27 September 2009.
63 G Millar, *Submission RC 21,* 21 September 2009.

15.48 Later in this chapter, the ALRC recommends that the application of other matters relating to procedural fairness should be dealt with in the *Inquiries Handbook*.[64] Matters that could be addressed include: the circumstances in which issues of procedural fairness may arise; when and how prior notice should be given; what needs to be disclosed in order to allow a fair opportunity to respond; the methods by which people can respond to allegations; and the manner in which such responses should be considered. Some of the specific issues discussed later in this and the next chapter are also relevant to these matters. The New Zealand handbook provides a useful model in this respect.

Recommendation 15–1 The recommended *Inquiries Act* should provide that reports of Royal Commissions and Official Inquiries should not make any finding that is adverse to a person, unless the inquiry has taken all reasonable steps to give notice of proposed adverse findings or the risk or likelihood of adverse findings, and disclosed the relevant material relied upon and the reasons on which such a finding might be based. Further, the inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and the inquiry should properly consider any response given.

The Salmon Principles

15.49 The common law requirement of procedural fairness protects, to some degree, the rights and interests of affected parties in inquiries. As noted above, what is required by procedural fairness will vary from inquiry to inquiry. Should any additional procedural measures be required (whether by legislation or otherwise) to ensure fairness in an inquiry?

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

15.51 The Salmon Principles were not intended to operate as statutory rules, but rather as guidelines for the proceedings of inquiries, and in particular for inquiries established under the *Tribunals of Inquiry (Evidence) Act 1921* (UK).[65] Nevertheless, they have been given statutory form in the *Commissions of Inquiry Act 1995* (Tas).[66]

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64 Recommendation 15–5.

65 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [3.4]; G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 63.

66 *Commissions of Inquiry Act 1995* (Tas) ss 17, 18, 36. Israel has also enacted the Salmon Principles in statutory form: G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 65.

15.52 The Salmon Principles have been criticised as 'problematic and not altogether helpful'.[67] The concern is that the Principles do not satisfy a number of other objectives of public inquiries, such as the desirability of more informal proceedings, the need for proceedings to be conducted as efficiently as possible, and the need for the costs of inquiries to be kept within reasonable bounds.[68]

Principle 1—Involving a person in an inquiry

15.53 The first Salmon Principle states that before persons become involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect those persons and which the Tribunal proposes to investigate. This is designed to 'prevent the potentially hurtful consequences of involvement in an Inquiry being visited on individuals with no real connection with the Inquiry's terms of reference'.[69] Sir Richard Scott has noted, however, that this 'should not be applied so as to prevent the Inquiry from questioning persons for the purpose of ascertaining whether they have any relevant information to give'.[70] After all, 'it is impossible to make the exercise of the inquisitorial powers conditional upon the existence of evidence probative of the very facts that a tribunal is required to investigate'.[71] In his view, this principle should be qualified by saying that an Inquiry should not *publicly* involve anyone until the Inquiry is satisfied there are circumstances which affect them.[72]

Principle 2—Putting witnesses on notice

15.54 The second Salmon Principle requires that, before persons who are involved in an inquiry are called as witnesses, they should be informed of any allegations which are made against them and the substance of the evidence in support of the allegations. This principle is informed by the policy underlying the law requiring notice of potential adverse findings, although it is concerned with notice being given before the giving of evidence, rather than before the making of adverse finding.

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67 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [103], citing Lord Laming. For a fuller discussion of the controversies, see G Lindell, *Tribunals of Inquiry and Royal Commissions* (2002), 40–65.

68 In particular, the Salmon Principles have been criticised by Sir Richard Scott in one high-profile inquiry: R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996), Part 4, Section K; R Scott, 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596. Subsequently, the (then) Council on Tribunals was requested to provide guidance on these recommendations: Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996). The Council on Tribunals has been replaced by the Administrative Justice and Tribunals Council. More recently, the UK government responded to the observations of a parliamentary committee by agreeing that the Salmon Principles needed to be 're-interpreted' by focusing on 'how to preserve the underlying aim of ensuring fairness, without introducing costly, adversarial elements': UK Government, *Government Response to the Public Administration Select Committee's First Report of the 2004-2005 Session: 'Government by Inquiry'* Cm 6481 (2005).

69 R Scott, 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596, 601.

70 R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996), K1.4.

71 G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 44.

72 R Scott, 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596, 602.

15.55 There is a difficulty with implementing this principle in practice as there will be no 'allegations' at the outset in an inquiry, and notice of a 'case' against a person is inappropriate in the context of an inquiry.[73] In the view of both Scott and the Council on Tribunals in the UK, in practice the principle requires the following steps:

- before a witness gives evidence, the witness should be 'made aware of the inquiry's areas of concern and the respects in which, in the light of the information so far available, he may be vulnerable to criticism';[74]
- a witness against whom damaging evidence has already been given should, unless there is some special reason to the contrary, be referred to the damaging evidence and to relevant background documents;[75] and
- if damaging evidence or allegations emerge after a person has already given evidence, the witness should be given an opportunity to respond, and usually the person also should be told the source of the allegations.[76]

Principle 3—Legal assistance and representation

15.56 The third Salmon Principle provides that those involved in an inquiry should be given an adequate opportunity to prepare their case and be assisted by their legal advisers. Further, their legal expenses should normally be met out of public funds.[77] This clearly extends beyond the present common law requirement of procedural fairness.[78] The funding of legal assistance and representation is discussed in Chapter 9, and authorisation to appear and be legally represented is discussed further below.

Principles 4 and 6—Examination and cross-examination

15.57 The fourth Salmon Principle provides that witnesses should be examined by their own solicitor or counsel and have the opportunity to state their case in public—for example, in a public hearing. This principle was, however, strongly criticised by a later inquiry member:

> [T]his … seems to me to represent a quite unnecessary importation into inquisitorial proceedings of procedures designed for those of an adversarial character. Every witness … is the Inquiry's witness. … For the purposes of an inquisitorial hearing

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73 Ibid, 602–603; Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.9]. See also G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 45–46.

74 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.9].

75 R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996), K1.4.

76 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.10].

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

78 *New South Wales v Canellis* (1994) 181 CLR 309. On the other hand, *R (Wagstaff) v Secretary of Health* [2001] 1 WLR 292 indicated that a decision not to accord publicly funded representation in particular circumstances may not be rational.

> conducted before an Inquiry … the distinction between examination-in-chief, cross-examination and re-examination is meaningless. … If, however, in order to provide some particular context in which his answers to the Inquiry's questions should, in his view, be considered, the witness wants to provide additional evidence, going beyond the Inquiry's questions, or to make some particular comments, he must, of course, be given the opportunity of doing so. … But it is not necessary that preliminary or supplementary statements by witnesses should be elicited in question and answer mode by lawyers.[79]

15.58 The sixth Salmon Principle requires that persons should have the opportunity of testing any evidence which may affect them by cross-examination conducted by their own solicitor or counsel. The issue of cross-examination is addressed further below.

Principle 5—Calling of witnesses

15.59 The fifth Salmon Principle provides that, if persons involved in an inquiry wish a material witness to be called, that witness should, if reasonably practicable, be heard. Both Scott and the Council on Tribunals considered that this principle was sound, subject to the qualification that written evidence could suffice.[80]

Submissions and consultations

15.60 In IP 35, the ALRC discussed the Salmon Principles and asked whether these or other rights of witnesses should be protected in the proceedings of inquiries.[81] In DP 75, the ALRC expressed the view that there should not be any statutory extension of procedural rights along the lines of the Salmon Principles.[82]

15.61 The Law Council, which was the only stakeholder to address this issue in submissions, observed that the Salmon Principles took 'the concepts of procedural fairness beyond the point that the common law has reached', referring specifically to the requirements to put 'any allegations' to a potential witness before they are called, the payment of legal expenses out of public funds, and the opportunity to call witnesses.[83]

15.62 The Law Council noted that it was most likely that these procedures would be required by procedural fairness only in 'exceptional cases', and submitted that there was 'therefore some force in the criticisms of the Salmon Principles as being inconsistent with other objectives of public inquiries'.[84] Such principles, however,

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79 R Scott, 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596, 605.

80 Ibid, 607; Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.16].

81 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), [8.89], Question 8–12.

82 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [15.50].

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

84 Ibid.

> might appropriately guide a Royal Commissioner when seeking to adequately protect the interests of a particular witness, subject to considerations including the nature of the particular commission and its terms of reference, the nature of the evidence given, and the access of the witness to proper legal representation.[85]

15.63 The Law Council suggested that there was scope to include in legislation a 'guided discretion'. This may provide that, at any stage of an inquiry, if a witness is able to make a case that his or her reputation might be adversely affected, certain balanced protective steps might be taken, such as protecting information from publication until a certain date. The Law Council noted that while such a power already exists, 'it is the linking of it to the protection of reputation of witnesses that needs further consideration'.[86]

ALRC's view

15.64 The Salmon Principles provide useful guidance on the kinds of procedural measures that may improve the fairness of inquiry procedures. As the discussion above illustrates, however, the application of these principles may not be appropriate or practicable in every inquiry.

15.65 In the ALRC's view, any codification of the Salmon Principles would be too prescriptive. It would fail to recognise competing interests, such as the desirability of flexibility and efficiency in the conduct of inquiries, and would promote an overly judicial approach to inquiries.

15.66 It would be of more practical benefit to include a discussion of the Salmon Principles, including the useful advice of the Council on Tribunals, in the *Inquiries Handbook*. This would enable a more detailed and nuanced discussion of the types of procedural measures addressed by the Salmon Principles. This approach is reflected in Recommendation 15–5, set out at the end of this chapter.

Leave to appear and be represented

15.67 Two procedural measures encompassed by the Salmon Principles are the ability of a person to 'state their case' at an inquiry, and the ability to access legal assistance and representation. Presently, under s 6FA of the *Royal Commissions Act*, interested parties and their legal representatives may only participate with the authorisation of the Royal Commission. This section provides that any person authorised to appear before a Commission, or any legal practitioner authorised to appear before a Commission for the purpose of representing a person, may, 'so far as the Commission thinks proper', examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry.

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85 Ibid.
86 Ibid.

Criteria for authorisation

15.68 Section 6FA does not identify, however, the factors that are relevant to the decision of a Royal Commission to allow a person to appear before it.[87] In contrast, in some jurisdictions legislation addresses the issue of determining which individuals or groups should have the right to appear. In the UK, the chair of an inquiry may designate a person as a 'core participant' in the inquiry, having particular regard to whether:

> (a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;
>
> (b) the person has a significant interest in an important aspect of the matters to which the inquiry relates; or
>
> (c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.[88]

15.69 Core participants are entitled to have their legal representatives designated as a 'recognised legal representative'. These representatives are entitled to apply to the chair for leave to ask questions of a witness giving oral evidence, and make opening and closing statements.[89]

15.70 The NZLC recommended adopting a similar provision which would entitle a core participant to give evidence and make submissions, subject to any directions of the inquiry relating to such matters.[90]

15.71 The provisions in the *Inquiries Act 2005* (UK) and the Inquiries Bill 2008 (NZ) list factors which guide the exercise of the inquiry's discretion in determining who should have the right to appear. In the Building Royal Commission, Commissioner Cole suggested a similar list of relevant factors for granting an application for authority to appear before the applicant.[91] Additionally, Commissioner Cole noted that an application may be granted if a person would be in a better position to assist the Royal Commission in carrying out its inquiry if he or she were authorised to appear. All general grants of authority to appear were made subject to a number of conditions.[92]

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

88 *Inquiries Rules 2006* (UK) r 5.

89 Inquiries Rules 2006 (UK) rr 6, 10(4), 11.

90 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 16. This was incorporated in cl 18 of the Inquiries Bill 2008 (NZ).

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

92 Ibid, vol 2, 32.

Legal representation

15.72 At common law, inquiries 'may hear Counsel or not, as they please'.[93] This is, however, subject to the common law requirements of procedural fairness. In particular inquiries, such as where a person is the subject of serious allegations of misconduct which, if proven, would constitute serious criminal offences, it may be that procedural fairness requires legal representation.[94] For example, it has been said that:

> where the sole object of the inquiry is to investigate the conduct of an individual … [i]n such an inquiry, or in one where questions of law are involved, Commissioners would no doubt welcome the appearance of counsel, and one might imagine inquiries of such a nature that it could not fairly be said that a party cited or a person interested has been 'heard' in any proper sense of the word unless he has had the assistance of counsel.[95]

15.73 In most jurisdictions, the statutes governing inquiries provide that legal representation is at the discretion of the inquiry member.[96] In some jurisdictions, however, the statutes provide a right to legal representation if a person is granted standing by an inquiry, or if the person is the subject of allegations.[97] In practice, it is usual for legal representation to be allowed for those authorised to appear before Royal Commissions, although representation by a particular legal practitioner could be refused where an investigation could be prejudiced for reasons such as a conflict of interest.[98]

15.74 Whether there should be a right to legal representation in inquiries is controversial.[99] On the one hand, it may be argued that the effect on reputation, the exercise of coercive powers, the complexity of an inquiry, and the use by an inquiry of its own lawyers may justify an entitlement to legal representation.[100] On the other hand, legal representation may be considered undesirable because it may increase the formality of proceedings, undermine the inquisitorial nature of an inquiry, and add to its length and cost. For example, Sir Louis Blom-Cooper, an experienced inquiry member, has said that:

> all that lawyers do is bring all their expertise of the legal system into the inquiry room, and that simply increases the costs. … The trouble is that lawyers who are

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93 *Jellicoe v Haselden* (1903) 22 NZLR 343, 359.

94 See, eg, *Re Public Inquiries Act and Shulman* [1967] OR 375.

95 *Re Royal Commission on the State Services* [1962] NZLR 96, 117. A decision to refuse to permit legal representation could also be reviewed by a court as being irrational: *R (Wagstaff) v Secretary of Health* [2001] 1 WLR 292.

96 H Grant, 'Commissions of Inquiry—Is There a Right to be Legally Represented?' [2001] *Public Law* 377, 380–381.

97 Ibid, 380–382.

98 *National Crime Authority v A, B, and D* (1988) 18 FCR 439; *R v Whiting* [1994] 1 Qd R 561; *Australian Securities Commission v Bell* (1991) 32 FCR 517; *Bonan v Hadgkiss* (2006) 160 FCR 10.

99 See generally H Grant, 'Commissions of Inquiry—Is There a Right to be Legally Represented?' [2001] *Public Law* 377.

100 H Grant, 'Commissions of Inquiry—Is There a Right to be Legally Represented?' [2001] *Public Law* 377, 388.

> representing parties will behave as they behave in the court room and they will be adversarial, and that is fatal.[101]

15.75 As noted above, the issue of legal representation was addressed by the Salmon Principles. The Council on Tribunals noted that it was generally agreed that legal assistance should be available to those involved, both at the stage of giving evidence and at the stage of responding to criticisms.[102] There was, however, 'a consensus among those commenting on the Scott inquiry procedures that legal representation in this sense should not be regarded as an absolute entitlement' and that written evidence could be an adequate substitute for oral evidence in an inquiry.[103]

15.76 The Council observed that it 'may be counterproductive to start from the position that legal representatives will only be heard exceptionally', since it should not be assumed that hearing legal representatives would add significantly or at all to the length and associated costs of an inquiry.[104] Nevertheless:

> strict adherence to the Salmon principles regarding legal representation [in some inquiries] … has led to the inquiry being excessively prolonged. It is clearly undesirable that there should be mass legal representation throughout the course of an inquiry. The inquiry chairman should have power to authorise persons to be represented, either at public expense or privately, for part only of the inquiry, having regard to the extent to which their interests are involved in what the inquiry is currently investigating. Joint representation of witnesses with a similar interest is to be strongly encouraged.[105]

Submissions and consultations

15.77 In DP 75, the ALRC proposed that inquiries continue to have the discretion to allow a person, or a person's legal representative, to participate in an inquiry, to the extent that inquiry members consider appropriate. It also proposed that, in making that decision, inquiry members may consider a number of factors, based on the factors recognised in previous inquiries and in overseas legislation.[106]

15.78 Few stakeholders addressed the issue of authorisation of leave to appear in either submissions or consultations to the Inquiry. Liberty Victoria stated that all levels of inquiries 'should have a broad discretion … in how and what they obtain as evidence', including the ability to authorise persons or organisations to appear before

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101 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [102].

102 R Scott, 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596, 604; Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.13].

103 Ibid, [7.13]–[7.14].

104 Ibid, [7.14].

105 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.15].

106 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–5.

it.[107] The Australian Government Solicitor (AGS) noted that the power in s 6FA of the *Royal Commissions Act* to authorise leave to appear was generally effective.[108]

15.79 The Law Council, the only stakeholder to address this proposal, expressed support for it, noting that the proposed criteria 'appear to be appropriate for the exercise of that discretion'.[109]

ALRC's view

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

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

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

15.83 Legal representation may be an important measure for ensuring fairness to inquiry participants, and it may be required in particular circumstances to achieve procedural fairness. Nevertheless, in the ALRC's view a statutory entitlement to legal representation would be unduly inflexible. Circumstances in which it would ordinarily be appropriate to authorise legal representation may be addressed in the *Inquiries Handbook*. This is reflected in Recommendation 15–5, set out at the end of this Chapter.

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107 Liberty Victoria, *Submission RC 1,* 6 May 2009.
108 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
109 Law Council of Australia, *Submission RC 30,* 2 October 2009.

Recommendation 15–2 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may allow any person or a person's legal representative to participate in an inquiry to the extent that inquiry members consider appropriate. In making that decision, inquiry members may have regard to factors including:

(a) any direct or special interest a person may have in the matters relevant to an inquiry;

(b) the probability that an inquiry may make a finding adverse to that person's interests; and

(c) the ability of a person to assist an inquiry.

Examination and cross-examination

15.84 It is usual in Royal Commissions for witnesses to be examined or cross-examined in the course of a hearing. Section 6FA of the *Royal Commissions Act* provides that counsel assisting, or legal representatives appearing before a Commission, may 'so far as the Commission thinks proper' examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry.[110]

15.85 The procedures adopted for the examination or cross-examination of witnesses can vary significantly according to the nature of the Royal Commission and the type of evidence being presented.[111] In each Commission, procedures for cross-examination may be determined by directions or guidelines developed by the Commission, or rulings of the Commissioner on applications to cross-examine.[112]

15.86 For example, the Building Royal Commission early in its inquiry released a practice note outlining principles for examination and cross-examination. The note advised that any witness who was legally represented would be first examined by counsel assisting the Commission, and then allowed to be examined by his or her own legal representative. That witness could then be cross-examined by or on behalf of any person considered by the Commission to have sufficient interest in so doing. Re-examination by the person's representative or counsel assisting the Commission would then be allowed.[113]

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110 The *Inquiry Rules 2006* (UK) r 10 similarly grants inquiries the discretion of allowing examination or cross-examination, in slightly greater detail.

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

112 Ibid.

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

15.87 A slightly different process was employed in the HIH Royal Commission (2003). In that inquiry, if a witness was represented or was connected with a party who was represented, counsel for the witness or party was given leave to lead the evidence from the witness. The usual practice was for the witness's written statement to be adopted where one had been provided. Counsel assisting the inquiry was then able to ask questions of the witness, with other parties then able to cross-examine if given leave. Re-examination was then allowed.[114]

Cross-examination

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

15.89 In a second practice note, Commissioner Cole indicated that leave to cross-examine would be given only in limited circumstances. In particular, persons other than counsel assisting would not be permitted to cross-examine a witness unless they provided counsel assisting with a signed statement of evidence advancing material contrary to the evidence of that witness.[115] In practice, this meant cross-examination could not occur except where there was direct evidence challenging the witness.

15.90 The other guiding principles used by Commissioner Cole to decide when leave to cross-examine would be given were as follows. Cross-examination was allowed if there was a disputed issue of fact relevant to a matter regarded as material to any issue that had to be determined and, overriding all other considerations, if there were grave allegations against a person which may have been diminished or eliminated by an attack on the credit of the witness giving evidence. Cross-examination was not allowed in relation to adverse evidence where that evidence was not denied; if the evidence contesting earlier evidence did not raise a factual conflict but rather commented upon the earlier evidence; or if the person wishing to contest the fact stated that he or she had no recollection of a fact about which a person had given evidence, and there were no surrounding circumstances casting doubt upon the truth of that evidence.[116]

15.91 The conditions on cross-examination were challenged by the CFMEU on the basis that the rules of procedural fairness include the right to cross-examine a witness who is giving evidence adverse to an affected person's interests. In *Kingham v Cole*, Heerey J rejected this argument, holding that the direction on cross-examination 'on its face seems rationally and reasonably related to the efficient performance of the obligations of the Commissioner'.[117] He held that the *Royal Commissions Act*

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

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

116 Ibid.

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

contemplated the imposition of limitations on cross-examination, and this was not inconsistent with the rules of procedural fairness. While it did not bestow on a Commissioner unfettered discretion to impose any conditions he or she wished, conditions which had a reasonable connection with the function of a Commissioner under the Act or the Letters Patent were valid. In particular, Heerey J noted that the principles of procedural fairness did not confer a general right to cross-examination in inquiries.[118] There may, however, be a requirement to permit cross-examination in some circumstances, such as when the reputation of a third person or organisation is in issue.[119]

15.92 Other inquiry members have similarly sought to confine the use of cross-examination. For example, in the HIH Royal Commission, Commissioner Owen indicated that cross-examination would be allowed only where 'it would help … ascertain the facts on which' the final report would be based.[120] Scott observed that, while there would be circumstances in which fairness required an opportunity to cross-examine, he 'unhesitatingly reject[ed] the proposition' that all persons affected by the evidence of a witness should be able to cross-examine that witness.[121] In his view, that 'would be likely in many Inquiries to be inimical to, perhaps destructive of, the efficient conduct of the Inquiry'.[122] Rather, alternatives should be sought, such as copying transcripts of adverse evidence and inviting written responses or recalling witnesses.

Submissions and consultations

15.93 In IP 35, the ALRC asked whether any changes were required to the powers of a Royal Commissioner to examine or cross-examine witnesses, and also whether there should be a statutory right to cross-examine witnesses.[123] In DP 75, the ALRC expressed the view that there should be no statutory right to cross-examine witnesses, but that it may be useful to address the issue of examination and cross-examination in the *Inquiries Handbook*.[124]

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118 Ibid, 295. See also *Bakewell v MacPherson* (Unreported, Full Court of the Supreme Court of South Australia, King CJ, Olsson and Mullighan JJ, 25 September 1992), 26; *Edwardes v Kyle* (1995) 15 WAR 302, 317.

119 *Badger v Whangarei Commn of Inquiry* [1985] 2 NZLR 688, Barker J at 705. See also *Edwardes v Kyle* (1995) 15 WAR 302, 317.

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

121 R Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (1996), K.14.

122 Ibid, K.14.

123 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Questions 8–1, 8–2.

124 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [15.82]–[15.83].

15.94 In submissions to the Inquiry, there was some support for a legislative entitlement to cross-examination. For example, the CFMEU stated:

> First, legislative provision should be made that before any evidence can be used to found an adverse finding, it may be the subject of cross-examination by a legal representative in the same way as in the courts. Cross examination in the courts can be curtailed if it is repetitive, unnecessary or oppressive. Such limitations are sufficient in the interests of fairness in a royal commission or inquiry.[125]

15.95 The CPSU also supported a right to cross-examine if adverse evidence was given. It observed that cross-examination 'should allow parties represented in the proceedings to refute allegations made against them in a timely way, but similarly not impede the timely and efficient conduct of proceedings'.[126] It noted the concern of some of its members that they had been subject to unnecessarily lengthy and repetitive cross-examination in Royal Commission proceedings. In the CPSU's view:

> where the party's interests are affected by evidence, there should be a right to cross-examine. Where a party's interests are not affected by the evidence, the Commissioner should refrain from allowing cross-examination by that party's representatives. …
>
> For the reasons set out above, and in the interests of natural justice, a party whose interests are adversely affected by a witness' evidence should have the opportunity to cross-examine that witness. To ensure that proceedings are not unduly delayed, the Commissioner should have to make a finding that the party's interests were adversely affected and the cross-examination can only go to that evidence deemed to be detrimental to the party.
>
> In the interests of fairness, this should occur as promptly as possible so the injured party has an opportunity to correct the public record. If the party is not afforded this right and afforded it in a timely manner, their interests will be harmed by the public reporting of allegations made against them without any fair opportunity to respond.[127]

15.96 Other stakeholders, however, rejected the idea of a legislative entitlement to cross-examination. Dr Ian Turnbull submitted that leave to cross-examine should not be allowed, because such inquiries were inquisitorial and not adversarial. Rather, there should be an opportunity to provide written questions to counsel assisting to put to the witness, at his or her discretion, even where there was a signed statement of contradictory evidence.[128]

15.97 In its submission, the AGS doubted whether 'a Commissioner's powers to determine how a witness may be examined and cross-examined should be further

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125 Construction, Forestry, Mining and Energy Union, *Taking Liberties—The Cole Royal Commission into the Building and Construction Industry* (2004).
126 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.
127 Ibid.
128 I Turnbull, *Submission RC 6,* 16 May 2009.

prescribed'.[129] In its experience, the existing discretion had proven to be effective in practice.

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

ALRC's view

15.99 The process of examination and cross-examination is only one way of conducting an inquiry. An inquiry is not a court, and its inquisitorial character means that the adversarial procedures used in courts will not always be appropriate, or will require modification. Inquiries should have considerable flexibility in adopting appropriate procedures, and should weigh carefully the advantages and disadvantages of adopting court-like procedures. Further, inquiries require considerable procedural discretion in order to achieve the objectives of fairness, speed and economy.

15.100 The ALRC, therefore, does not recommend any change to the present statutory position. An inquiry member should have discretion to allow examination or cross-examination, subject to the requirements of procedural fairness. This is reflected in Recommendation 15–4, set out at the end of this chapter.

15.101 The issue of examination or cross-examination, however, may be addressed usefully in the *Inquiries Handbook*. For example, guidance in the *Inquiries Handbook* might address the importance of cross-examination as a method of achieving procedural fairness. It should be noted that, if the inquiry is conducted by way of hearings, there generally should be an opportunity to cross-examine a person giving evidence adverse to the interests of another.

Publication of responses to adverse findings

15.102 As discussed earlier in this chapter, procedural fairness may require that a person should be given an opportunity to respond to a potential adverse finding, or a risk or likelihood of such a finding being made. One issue for this Inquiry is whether a person's response to such an adverse finding should be published.

15.103 For example, s 35A(4) of the *Royal Commissions Act* (ACT) provides:

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

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

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

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

15.105 Similar provisions can be found in other legislation relating to the publication of reports. The nature of these legislative requirements differs. For example, under the *Coroners Act 1997* (ACT), coroners may report on inquests and inquiries into the deaths of people, and may hold hearings, and compel evidence. Under that Act, if the coroner is to make a finding adverse to an identifiable person, the coroner must give a copy of the finding and invite submissions or written statements on it. In addition, the coroner must publish any written statement provided in response, or a fair summary of it, if the person so requests.[130]

15.106 Both the Inspector-General of Intelligence and Security (IGIS), and the federal Auditor-General, are empowered by legislation to report on certain matters relating to the conduct of Australian Government agencies, and are required to provide draft reports to those agencies for comment.[131] The Auditor-General also may provide draft reports to anyone it considers to have a 'special interest' in the report.[132] The IGIS is required to include 'relevant' comments made in response to its draft reports, while the Auditor-General is required to include 'all written comments' received from those persons who are given a draft report.[133]

15.107 The publication of responses to possible adverse findings would enable a person affected by such findings to have his or her comments in response put on the public record, and enable members of the public to make up their own minds about the reasoning process employed by an inquiry. In a court, a person's response to allegations would form part of the evidence before the court and, in many cases, also would be recorded in the judge's written reasons.

15.108 A similar effect would be achieved in a Royal Commission conducted predominantly in public. The person usually would be given an opportunity to respond to evidence in support of adverse findings and that response would form part of the evidence before the inquiry. Further, in at least some Royal Commissions, those at risk of an adverse finding have been given an opportunity to provide written responses to

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130 *Coroners Act 1997* (ACT) s 55(3). See also *Transport Safety Investigation Act 2003* (Cth) s 25(3); *Private Health Insurance Act 2007* (Cth) s 241.60(5); *Occupational Health and Safety Act 1991* (Cth) s 53(3).

131 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 21; *Auditor-General Act 1997* (Cth) s 19.

132 *Auditor-General Act 1997* (Cth) s 19(3).

133 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 21(2); *Auditor-General Act 1997* (Cth) s 19(5). This latter provision was recently added to the Act by the *Auditor-General Amendment Act 2009* (Cth) Sch 1, cl 20, in response to a recommendation made by the Commonwealth Parliament's Joint Committee of Public Accounts and Audit, *Review of the Auditor–General Act 1997* (2001), Rec 3.

submissions of counsel assisting the Commission, and these written responses have been published as exhibits on inquiry websites.[134]

Submissions and consultations

15.109 In DP 75, the ALRC asked whether a provision similar to s 35A(4) of the *Royal Commissions Act* (ACT)—requiring that a response or a summary of a response to a draft adverse finding be included in a report—should be included in the *Inquiries Act* recommended in this Report.[135]

15.110 The CPSU supported the inclusion of responses in a report, at least in summary form.[136] Liberty Victoria also supported such a provision.[137] Turnbull also supported a provision of this nature, subject to the consent of the person and the wording of any summary.[138]

15.111 Millar opposed the inclusion of such a provision, stating:

> I do not see a need for a requirement for such responses to be included in the report. Where an inquiry is open to the public, it is currently common practice for the transcript of evidence and much of the tendered evidence to be published on the inquiry website. That material is not usually included in the report but is retained on the website after the report is released.[139]

ALRC's view

15.112 Generally, a person's response to a potential adverse finding should be on the public record. As noted above and in the next chapter, the publicity that often accompanies an inquiry means that an adverse finding can cause significant damage to a person's reputation. This is even more important in an age where such findings are readily accessible and stored for a long time on the internet. It is only fair that a person potentially subject to such a finding has the right to have their side of the story published, even if it is not ultimately accepted by an inquiry.

15.113 Since the primary purpose of an inquiry is to find out what happened, not to adjudicate on issues in dispute,[140] it is essential that the reasons for the findings of an inquiry are open to public scrutiny. This is an important aspect of ensuring the

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134 See, eg, Exhibit 2074, 2077 published on the Building Royal Commission's website: *Royal Commission into the Building and Construction Industry* (2003) <www.pandora.nla.gov.au/pan/24143/20040427-0000/www.royalcombci.gov.au/index.html> at 4 August 2009; Witness Statement WITS.0305.001published on the website of the HIH Royal Commission: *The HIH Royal Commission* (2003) <www.pandora.nla.gov.au/pan/23212/20030418-0000/www.hihroyalcom.gov.au/index.html> at 4 August 2009.

135 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 15–1.

136 Community and Public Sector Union, *Submission RC 25,* 22 September 2009.

137 Liberty Victoria, *Submission RC 26,* 27 September 2009.

138 I Turnbull, *Submission RC 22,* 21 September 2009.

139 G Millar, *Submission RC 21,* 21 September 2009.

140 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [4.40].

accountability and transparency of inquiries. This can be enhanced by making publicly available the responses of those potentially subject to adverse findings. Even if the inquiry decides not to make an adverse finding, the response will form part of the inquiry record and, therefore, also should be available for public scrutiny.

15.114 In general, therefore, a response to a potential adverse finding should be published. In the view of the ALRC, however, the requirements in the *Royal Commissions Act* (ACT) are too prescriptive, and may impose an undue administrative burden on an inquiry. The objectives of ensuring fairness to an affected person and facilitating public scrutiny may be met in a number of different ways. In the context of a Royal Commission conducted largely in public by way of formal hearings, a person may respond by giving further evidence, in which case the obligation to publish would be discharged by publishing such evidence in the form of transcripts or exhibits on the internet, as has been common practice in recent times.

15.115 In the event an inquiry decides not to hold public hearings, but instead invites oral or written responses to proposed adverse findings, it is desirable that those responses should also form part of the public record. This may be achieved, for example, by appending a response to a report, or by publishing such responses on the inquiry website. The latter would be a relatively small administrative burden.

15.116 There may be circumstances, however, in which it is inappropriate to publish an entire response or parts of a response. For example, there may be concerns over the privacy of third parties, potential damage to the reputation of third parties, or confidential or sensitive information. Similar concerns are discussed in Chapter 16 in the context of prohibitions or restrictions on public access to hearings or material before an inquiry. Further, it may be that a person providing such a response wishes it to remain confidential. The ALRC recommends, therefore, that the inquiry should have a broad discretion to summarise responses, and that the obligation to publish should only arise if a person requests the publication. The ways in which this information may be provided by an inquiry are discussed in the next chapter.

Recommendation 15–3 The recommended *Inquiries Act* should include a provision that, when an inquiry gives an opportunity to a person to respond to potential adverse findings made against him or her in a report, that response, or where appropriate a summary of it, should be published, at the request of that person.

Recommendation 15–4 The recommended *Inquiries Act* should provide that Royal Commissions and Official Inquiries may conduct inquiries and gather information as members consider appropriate, subject to any other provisions in the Act and the requirements of procedural fairness. For example, an inquiry may:

(i) conduct interviews;

(ii) hold hearings;

(iii) call witnesses;

(iv) obtain and receive information in any manner it sees fit;

(v) allow or restrict the questioning of witnesses; and

(vi) adjourn an inquiry.

Recommendation 15–5 The recommended *Inquiries Handbook* should address the suitability and use of different kinds of procedures that may be employed by inquiries. For example, the *Inquiries Handbook* may address the manner in which hearings are conducted, the ways in which people may participate in an inquiry, the provision of information to inquiry participants about procedures, and how to accord procedural fairness in the context of different types of inquiry.

16. Procedures: Specific Aspects

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Introduction

16.1 This chapter addresses particular procedural issues that afford protection to the interests of individuals participating in an inquiry, as well as the protection afforded to confidential or sensitive information.[1] These safeguards include: the provision of information and assistance concerning the procedures adopted by an inquiry; restrictions on public access to hearings, evidence and reports; ensuring that procedures are culturally appropriate, in the context of inquiries affecting Indigenous witnesses; and mechanisms to correct the public record in relation to subsequent investigations.

Information about procedures

16.2 Providing guidance for participants in judicial and non-judicial proceedings has become increasingly common in Australia. For example, the New South Wales Independent Commission Against Corruption (ICAC) provides a brochure for witnesses and others which covers: the nature of ICAC; the nature and legal effect of a summons; their entitlements to legal representation and expenses; the conduct and

1 See Chs 13, 17 and 18 for a discussion of different types of confidential or sensitive information. Ch 15 addressed general issues relating to the procedures adopted by inquiries.

procedure of examinations and hearings; the recording of examinations and hearings; processes after an examination or hearing; and the protection of witnesses.[2]

16.3 Royal Commissions customarily provide directions and rulings for the conduct of its proceedings at the beginning of, and sometimes during, an inquiry.[3] These typically cover the grant of leave to appear (discussed in Chapter 15) as well as procedures for the conduct of its proceedings.

16.4 As the Council on Tribunals in the United Kingdom (UK) has observed:

> It is very desirable that there should be a preliminary public hearing at which the inquiry's intended procedural ground rules can be announced, explained, discussed with the major interested parties or their representatives and determined, and the need for flexibility emphasised. Consideration should be given to inviting to such a preliminary hearing all those who are expected to be called as principal witnesses, or their representatives.[4]

16.5 The Royal Commission on Tribunals of Inquiry (1966) in the UK similarly emphasised the importance of a tribunal explaining, at the outset of an inquiry, how it proposed to interpret the terms of reference of the inquiry and the procedures it proposed to adopt.[5] A failure to provide sufficient information could be subject to judicial review, as a breach of procedural fairness.[6] In *Haughey v Moriarty*, the Irish Supreme Court declared that a tribunal of inquiry was obliged to explain to the plaintiffs in that case its interpretation of the terms of reference, in so far as it related to the plaintiffs.[7]

16.6 In a submission to this Inquiry, the Community and Public Sector Union (CPSU) raised the issue of the availability of procedural information about an inquiry, stating:

> There is often uncertainty about what the proceedings involve and how an individual's interests may be affected by those proceedings. This has impeded individual's abilities to make informed decisions about their best representation.
>
> For example, members who have been involved in previous inquiries have advised us whilst they were offered their own representation they did not elect to take up that option because they did not understand what would be involved in the proceedings and if they were offered the choice again they would probably make a different decision. Royal Commissions, and other forms of public inquiries, involve formal, legal proceedings, with which most APS employees would have had no previous involvement.

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2 Independent Commission Against Corruption, *Information for Witnesses*.
3 Practice notes have also been issued in non-statutory inquiries, such as the Clarke Inquiry into the Case of Dr Mohamed Haneef (2008).
4 Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.2].
5 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), 31, 36, Rec 34.
6 Procedural fairness is discussed in Ch 15.
7 *Haughey v Moriarty* [1998] IESC 17.

> Employees involved in these proceedings should be provided with very clear information about what is likely to be involved in these proceedings, including the scope of the proceedings, and any potential consequences for them as individual employees, if the report makes adverse findings against them as individuals. Such information could be provided centrally and should assist employees in making appropriate decisions.[8]

16.7 The CPSU noted that in the Quarantine and Biosecurity Review (2008),[9] the transcript of the hearings was not made available to the CPSU or CPSU members. Also, there was no publicly available information about who had appeared, and was scheduled to appear, before the inquiry and what evidence they had put forward. The CPSU submitted that 'this resulted in uncertainty about the focus of the inquiry, and concern about the weight being given to the evidence of the six CPSU members who appeared'.[10]

16.8 In contrast, the CPSU reported that, prior to the Inquiry into the Circumstances of the Vivian Alvarez Matter (2005),[11] which was undertaken by Neil Comrie under the authority of the Commonwealth Ombudsman (the Comrie Inquiry), the CPSU had met with the Commonwealth Ombudsman to discuss the procedures of that inquiry and the protections available to its members. This allowed the CPSU to advise its members about their rights and what they should expect during the inquiry.

16.9 The matters addressed at the meeting between the Commonwealth Ombudsman and CPSU officials related in part to: the nature of the inquiry, such as the Commonwealth Ombudsman's use of its coercive powers; the formality of proceedings; and the Commonwealth Ombudsman's focus on systemic issues. The meeting also addressed the rights of those participating in the inquiry to administrative support and advice, interview transcripts, and assistance in the form of a support person. Those participating could also contact the Commonwealth Ombudsman's office after an interview to clarify matters, and were given the opportunity to respond to comments directly or indirectly critical to them.[12]

ALRC's view

16.10 Providing sufficient information on the nature and conduct of an inquiry has a number of important benefits. For participants, it enables them to understand the purpose of the inquiry and to prepare for it appropriately. It also may serve to reduce

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

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

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

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

12 Community and Public Sector Union, *DIMA Bulletin* (April 2006). The issue of responses to such comments is discussed in Chapter 15.

their anxieties. This is likely to facilitate the efficient and effective conduct of inquiries. Further, the provision of information by an inquiry encourages inquiries to consider the impact of their work on interested parties, and encourages the early development of procedural strategies.

16.11 This information may be provided in a number of ways. For example, inquiry members may meet directly with representative organisations to discuss issues. Further, information may be provided through: directions and rulings; the production of brochures or the creation of a telephone hotline; and oral communication with interested parties.

16.12 In the ALRC's view, it is desirable that timely and sufficient information about the nature and conduct of an inquiry is available to participants. Generally, it would be appropriate for an inquiry seeking public input to issue practice notes or explain its procedures at a preliminary public meeting.

16.13 The diversity of inquiries and the variety of approaches by which such information may be supplied, however, make it undesirable to prescribe either when or how such information should be provided. For example, there is likely to be a gap between the establishment of an inquiry and the determination of procedural matters, and an inquiry may need to change its procedures during the course of its investigation.

16.14 A number of recommendations in this Report address the right of inquiry participants to information about the nature and conduct of an inquiry. For example, the ALRC recommends that the *Inquiries Act* should set out the powers available to Royal Commissions and Official Inquiries, and the exemptions from disclosure that will apply to those powers.[13] The ALRC also recommends that the protections available to inquiry participants should be set out in the statute.[14] This should assist inquiry participants in ascertaining their rights.

16.15 Other recommendations may help inquiry participants to understand when certain powers may be exercised by an inquiry. For example, the ALRC recommends that the *Inquiries Act* should list factors relevant to the decision to authorise a person to appear and, as discussed below, grounds for the exercise of the power to prohibit or restrict public access to hearings, or the publication of information relating to the inquiry.[15]

16.16 The ALRC also recommends (see below) that an *Inquiries Handbook* should be published to provide guidance on a number of issues including what kinds of procedures are available to inquiries, and when and how different procedures should be

13 Recommendation 5–2, Chs 11, 17, 18.
14 Recommendation 12–2.
15 Recommendations 15–2, 16–1.

used.[16] This should provide inquiry participants with information about the types of procedures an inquiry might employ.

16.17 The ALRC also recommends in this Report that certain rights should be conferred on inquiry participants, such as an entitlement to expenses and a right to request publication of responses to potential adverse findings.[17] There are also recommendations for the *Inquiries Act* to confer certain discretions—such as the power of the Attorney-General to grant funding for legal representation—to protect the interests of inquiry participants.[18] It is desirable that information about these rights and discretions should be provided to inquiry participants, and the manner in which such information may be provided also should be addressed in the *Inquiries Handbook*.

Public access to inquiries

16.18 An issue of major importance in the protection of individual interests is the degree of public (and media) access to the inquiry, including access to hearings and evidence. This issue is also raised where the information sought by a Royal Commission or Official Inquiry may be confidential or sensitive in nature, such as where it may prejudice national security.[19]

Public interest in public access

16.19 Royal Commissions are largely conducted in public, in that: the hearings usually are held in public; most if not all of the evidence is published; and most if not all of the report is made publicly available.[20]

16.20 There are strong reasons for conducting Royal Commissions (and, if established, Official Inquiries) in public wherever possible. Royal Commissions are often established to investigate a matter of substantial public interest or concern. Ascertaining the 'truth' of a matter and making these findings public is the fundamental reason for establishing a Royal Commission. Public exposure of wrongdoing, or publicly dispelling allegations, may be the most important outcome of a Royal Commission.[21] Where the allegations concern the propriety of government conduct, the case for full public access may be particularly compelling.

16 Recommendation 15–5.
17 Recommendations 9–2, 9–3, 15–3.
18 Recommendations 9–1.
19 National security information is discussed in Ch 13. Chs 17 and 18 discuss other types of confidential or sensitive information which may enable a person to resist disclosure.
20 Not all Royal Commissions are conducted primarily in public. For example, the Royal Commission on Intelligence and Security (1977) conducted most of its hearings in private.
21 F Costigan, *Final Report of the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* (1984), vol 2, [14.044]; R Scott, 'Procedures at Inquiries—the Duty to be Fair' (1995) 111 *Law Quarterly Review* 596, 615.

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

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

> It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive …
>
> The denial of public proceedings immediately brings in its train other detriments. Potential witnesses and others having relevant documents and information in their possession, lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.[22]

16.23 On the other hand, there may be good reasons for restricting public access to inquiries in some circumstances. While opinions differ widely about the merits of holding public or private hearings,[23] there are readily identifiable factors that weigh in favour of private hearings.

Interests of witnesses

16.24 Inquiries, particularly Royal Commissions, can have an intrusive impact on the lives of witnesses. The reputation of a witness can be damaged even if he or she is subsequently cleared in the inquiry's final report. The mere fact of being called as a witness to a Royal Commission may damage that person's reputation, even where that person is not the principal subject of an inquiry.[24]

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

> Unless a witness is known to have relevant evidence to give, there can be no reason for exposing the witness to a public hearing … it is worth asking on what basis an

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22 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 97. See also the similar comments in the C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), 20.

23 See the recent debate in the United Kingdom: House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [89]–[98]; *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [23]–[29], [71]–[76]; *Howard v Secretary of State for Health* [2002] EWHC 396 (Admin), [71]–[74], [78]–[82].

24 See Peter Doody, 'Commissions of Inquiry, Fairness, and Reasonable Apprehension of Bias: Protecting Unnecessary and Inappropriate Damage to Reputation' (2009) *Canadian Journal of Administrative Law & Practice* 19.

> investigative hearing ought to be a public hearing. The police are not expected to conduct their investigations in public.[25]

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

16.27 Other kinds of harm to the individual interests of witnesses may result. Most seriously, the physical safety of a witness may be compromised.[26] For example, a person may be required to disclose personal or sensitive information that may infringe a person's privacy.

16.28 As was pointed out in *Independent Commission Against Corruption v Chaffey*, however, an inquiry is not obliged to avoid or minimise publicity in order to protect a person's reputation.[27] Rather, an inquiry must balance the public interests served by an inquiry against the interests of affected individuals.

Sensitive information

16.29 Chapters 13, 17 and 18 discuss the types of information that may be exempted from disclosure because of their sensitive or confidential nature, such as information obtained for the purposes of legal advice or information that may prejudice national security.

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

16.31 Chapters 13, 17 and 18 also discuss different types of confidential or sensitive information. For the reasons discussed in detail in those chapters, some of these types of information do not justify an exemption from disclosure, but a restriction on public access may be warranted.[28] For example, it may be appropriate for an inquiry to receive in closed session information that would otherwise be subject to secrecy provisions or claims of privilege.[29]

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

26 This may engage the state's duty to protect a person's right to life, as set out in art 2 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, which reflects art 6 of the *International Covenant on Civil and Political Rights*: *Officer L, Re Application for Judicial Review* [2006] NIQB 75; *R (A) v Lord Saville of Newdigate* (2001) EWCA Civ 2048.

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

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

29 See, eg, *Churche v Australian Prudential Regulation Authority (No 3)* [2006] FCA 1168, [12].

Prejudice to legal proceedings

16.32 The disclosure of information may also prejudice legal proceedings that are being conducted at the same time as an inquiry, or are contemplated. As discussed in Chapter 18, at common law, an inquiry is unable to require a person to answer questions that are directly relevant to matters that are the subject of a criminal proceeding or a proceeding for the imposition of a penalty that is being conducted at the same time. The ALRC recommends that a provision setting out this limitation should be included in the proposed *Inquiries Act*.[30]

16.33 An inquiry, however, may be able to look into matters that are otherwise relevant to legal proceedings. For example, an inquiry examining alleged malpractice in a particular industry may continue to conduct its inquiry even though the matter 'touched and concerned a pending criminal charge'.[31] In such a case, it may need to restrict public access to the hearings, evidence or report to ensure that it does not prejudice the related legal proceeding.[32]

16.34 An inquiry also may need to restrict public access to ensure it does not prejudice any subsequent legal proceedings that may be contemplated.[33] For example, if it is contemplated that a person may be prosecuted for matters that are the subject of the inquiry, it may be necessary to hear that evidence in private to avoid the publicity influencing potential jurors. Whether it is in fact necessary will depend on the circumstances of the case—and in particular the extent of attention the inquiry hearings are attracting from the media.

Efficient and effective conduct

16.35 Another important reason for restricting public access is to facilitate a more informal and inquisitorial process. This may have several benefits. Informal and confidential meetings may be more productive in terms of ascertaining the truth, because witnesses are more likely to be frank. For example, one inquiry member gave evidence that 'in the absence of friends, colleagues, parents, press and other embarrassments, witnesses gradually began to speak with a frankness which was at times startling'.[34]

16.36 Public hearings often involve lawyers, which adds to the formality and cost of proceedings and tends to encourage an adversarial approach. In the view of Sir Liam Donaldson,

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30 Recommendation 17–1(b).
31 *Hammond v Commonwealth* (1982) 152 CLR 188, 199.
32 Ibid.
33 See Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [326].
34 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05 (2005), [89] citing Sir Cecil Clothier. See also *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin), [15].

> the bottom line is that a public inquiry will cost you £20 million and a private inquiry will cost you £3 million, and then six months as compared to two and a half to three years.[35]

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

Methods of restricting public access

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

16.39 It is clear that Royal Commissions have the power to take evidence in private. Under s 6D(2) of the *Royal Commissions Act*, witnesses may request that their evidence be given in private if they are giving evidence about the profits or financial position of any person, and the taking of that evidence in public would be unfairly prejudicial to that person. Section 6D(5) states that this provision operates in 'aid of and not as in derogation of the Commission's general powers to order that any evidence may be taken in private'. The Act otherwise gives no guidance on whether hearings should be held in public or private. The decision to hold an inquiry in private, however, could be judicially reviewed.[36]

16.40 Secondly, the publication of certain evidence can be prohibited or restricted. Under s 6D(3) of the *Royal Commissions Act*, the Commission may prohibit or restrict the publication of any evidence before it, the contents of any document, a description of anything produced to a Commission, or any information that might enable a person who has given evidence before the Commission to be identified.[37]

16.41 Thirdly, an inquiry can exercise its discretion as to what evidence or findings are made public, in a report or otherwise. For example, in the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission),

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35 House of Commons Public Administration Select Committee (UK), *Government by Inquiry*, First Report of Session 2004–05, [95]. Sir Liam Donaldson was speaking as Chief Medical Officer. He was giving evidence because his department was responsible for a large number of inquiries.

36 In the UK, the decision to hold an inquiry in private has been successfully challenged as irrational: *R (Wagstaff) v Secretary of State for Health* [2000] EWHC 634 (Admin), although this has been questioned and distinguished in subsequent cases: *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin); *Howard v Secretary of State for Health* [2002] EWHC 396 (Admin). According to the jurisprudence of the European Court of Human Rights, inquiries concerning the death of people also must meet procedural obligations that flow from the right to life under art 2 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, which reflects art 6 of the *International Covenant on Civil and Political Rights*: see M Requa, 'Truth, Transition and the Inquiries Act 2005' (2007) 4 *European Human Rights Law Review* 404.

37 Failure to comply with such a direction is a criminal offence: see Ch 19.

Commissioner Cole submitted a confidential volume of his report to the government,[38] which concerned his 'views in relation to matters that might have constituted breaches of the criminal law'.[39]

16.42 This discretion extends to the decision of the inquiry to publish material on the internet. In recent times, the practice has been to establish inquiry websites on which evidence, submissions and reports may be published. The Victorian Bushfires Royal Commission—which was still proceeding at the time of writing in October 2009—streamed its public hearings over the internet. This has the advantage of increasing the accessibility, transparency and accountability of inquiries. As discussed in Chapter 12, care needs to be taken with electronic publications because of the degree of accessibility and the difficulty of enforcing rules governing information (such as rules relating to privacy) in the electronic environment. The ALRC recommends, in Chapter 12, that the *Inquiries Handbook* should include guidance on the appropriateness of electronic publication.[40]

Presumption of public access to hearings

16.43 The relevant legislation in some jurisdictions requires that the hearings of an inquiry should be public, subject to exceptions.[41] One is s 18(1) of the *Inquiries Act 2005* (UK), which states that, subject to any restrictions imposed by the chair of an inquiry, or the responsible minister, reasonable steps must be taken to allow members of the public to attend inquiry hearings and view evidence.[42]

16.44 The New Zealand Law Commission (NZLC), after considering this issue in its report, *A New Inquiries Act* (2008), concluded that such a provision could encourage the inappropriate use of formal hearings. The NZLC stated:

> While inquiries should be as open as possible, there will be cases where their purposes are better served without formal hearings and where witnesses can speak freely without fear of public exposure.[43]

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

39 Ibid, vol 2, [59]. As noted there, other Royal Commissions have taken similar approaches to findings in relation to criminal conduct.

40 Recommendation 12–3.

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

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

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

16.45 The NZLC recommended instead that legislation should confer a specific power to hold an inquiry or any part of it in private, or otherwise restrict public access to an inquiry or any part of it.[44] It also recommended that, before making any such order, the inquiry should consider the following criteria:

> (a) the risk to public confidence in the proceedings of the inquiry;
>
> (b) the need for the inquiry to properly ascertain the facts;
>
> (c) the extent to which public proceedings may prejudice the security or defence or economic interests of New Zealand;
>
> (d) the privacy interests of any individual; and
>
> (e) whether such an order would interfere with the administration of justice, including the right to a fair trial.[45]

16.46 It is useful to consider also the experience of ICAC in this respect. The *Independent Commission Against Corruption Act 1988* (NSW) originally provided that ICAC hearings generally should be held in public.[46] Concerns were expressed, however, that the publicity of the process caused 'great and irreparable harm to entirely innocent people'.[47] In 1991, the section was amended to allow ICAC to decide whether it would hold hearings in public or private.[48] Subsequent practice has been for ICAC to make greater use of private hearings and other information-gathering powers.[49]

16.47 In 2002, the Parliamentary Joint Committee which supervises ICAC recommended that all initial investigations, including hearings, should be conducted in private, followed by a public hearing if there is sufficient evidence to justify making an adverse finding.[50] This

> reform model … limits the risk of unnecessary damage to reputation, preserves the Commission's role in publicly exposing corrupt conduct and emphasises the need for the strategic use of other investigative strategies and methodologies in the confidential investigation stage.[51]

16.48 This is similar to the model used in the Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984), where matters were usually

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

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

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

47 Peter McClellan QC, 'ICAC: A barrister's perspective' (1991) 2(3) *Current Issues in Criminal Justice* 17.

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

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

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

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

explored in private sittings to ensure that 'before matters were put in a public sitting there was a high degree of confidence that they would be material to [the Royal Commissioner's] enquiries and the expected answers would be likely to be correct'.[52]

Power to restrict publication

16.49 Section 6D(3) of the *Royal Commissions Act* enables a Royal Commission to make a direction prohibiting or restricting publication of evidence, the contents of any document or description of a thing produced or delivered to it, or any information that might enable a person who has given evidence before the Commission to be identified. The section does not set out any limitations on this power, or indicate the grounds on which such a power may be exercised.[53] Similar provisions can be found in the inquiries legislation of other jurisdictions.[54]

16.50 In the HIH Royal Commission, Commissioner Owen indicated that the exercise of the discretion to make an order should be guided by the principles used by courts.[55] The powers of courts to restrict publication in a similar manner, through what are commonly known as suppression orders, have been reviewed recently by the New South Wales Law Reform Commission (NSWLRC).[56] The NZLC is also examining suppression orders.[57] The ALRC considered suppression orders in its 1987 report, *Contempt* (ALRC 35).[58]

16.51 Suppression orders in courts are underpinned by a number of important considerations, including the principle that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'[59] (the principle of open justice), and freedom of expression.[60] The principle of open justice, however, may be in tension with the greater purpose of ensuring that justice is done.[61] For example, it may be necessary to make a suppression order to ensure that juries are not unduly influenced.

16.52 The powers of courts to make suppression orders derive from the common law and a variety of statutory provisions.[62] At common law, the principle of open justice

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

53 A contravention of such a direction is a criminal offence: *Royal Commissions Act 1902* (Cth) s 6D(4). This is discussed in Ch 19.

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

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

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

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

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

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

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

61 Ibid, [1.5].

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

cannot be departed from unless it is necessary in the administration of justice.[63] There are established categories in which suppression orders may be made at common law, including to protect trade secrets and other confidential information.[64]

16.53 Some of the statutory provisions governing the making of suppression orders by courts set out the grounds for making those orders.[65] The grounds typically relate to: the interests of justice, including prejudice to a fair trial; the interests of victims or witnesses, including the safety of persons and the adverse impact on victims of sexual offences; national security or defence; and public morality or decency.[66]

Submissions and consultations

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

16.55 In response to the ALRC's Issues Paper, *Review of the Royal Commissions Act* (IP 35), most stakeholders who made submissions supported the principle that, in general, public inquiries should be open, and that the power to take evidence in private, while necessary, was an exception to that general rule. For example, Liberty Victoria submitted that:

> In general, Liberty believes all public inquiries should be open, but recognises that this must be weighed against the protection of individual liberties.[67]

16.56 The CPSU submitted that 'public accountability and transparency must be paramount in all forms of public inquiries', and expressed concern that the credibility of inquiries conducted mostly in private 'is often compromised, fairly or unfairly, by the way in which it was conducted'.[68] The CPSU noted that, in some circumstances, it would be appropriate for evidence to be taken in private, such as where evidence might otherwise fall within the scope of secrecy provisions. The opportunity for evidence to

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

64 See, eg, *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294. See generally A Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *Adelaide Law Review* 279, 284–286.

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

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

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

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

be taken in private may influence the level of information willingly provided by the witness.[69] The CPSU concluded:

> It should therefore be open to a Commissioner to accept evidence in private, however in deciding whether to accept evidence in private the Commissioner should be required by the statute to balance the interests of claims to privacy with the interests of the public in having an open, public inquiry.
>
> The CPSU believes that it is important that Royal Commissions and public inquiries should have public hearings and their reports clearly identify the evidence on which findings are made. Any evidence taken in private should only be by necessity and should be the exception to the rule. The only exemptions should be where a party has a legitimate interest in maintaining privacy and, on balance, that legitimate individual interest overrides the public interest in such matters being dealt with openly. Wherever possible, the Commissioner should merely de-identify such evidence in its report.[70]

16.57 Civil Liberties Australia similarly commented that:

> For the people to have confidence in the system, the process must be public, the findings must be publicised and the recommendations acted on (or good reasons for not doing so explained in full).[71]

16.58 Civil Liberties Australia also acknowledged that 'there may be situations, such as compelling disclosure by journalists, clerics (and other groups in exceptional circumstances)' where private hearings and non-publication orders would be appropriate. In its view, however, it was appropriate to restrict media coverage in certain ways, such as restrictions on filming and photographing people arriving and departing from inquiries, limiting the reporting of such inquiries; revocation of permission to continue coverage of an inquiry; and requirements to pay fines for acting in breach of inquiries.[72]

16.59 Mr Don McKenzie also argued strongly for public hearings in the context of corruption, noting a number of benefits, the most important being

> that the community will know that if the integrity of government is called into question, this will be resolved in public, in a manner that it can observe, and which precludes manipulation by powerful or well connected people.[73]

16.60 In McKenzie's view, concerns about the trauma that can be experienced by people called before a public inquiry 'is a reason to manage the process in a more effective manner, to better guard against unfair treatment, rather than to discard the approach altogether'.[74]

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69 Ibid.
70 Ibid.
71 Civil Liberties Australia, *Submission RC 17,* 19 May 2009.
72 Ibid.
73 D McKenzie, *Submission RC 27,* 28 September 2009.
74 Ibid.

16.61 The Department of Immigration and Citizenship (DIAC) submitted that a legislative presumption that an inquiry should hold a hearing in public would be useful. Such a provision, however, should allow an inquiry to exclude the public from a hearing (or from part of it) where an inquiry decides that the public interest in holding the hearing in public is outweighed by other considerations. These other considerations could include the consequences of possible disclosure of national security information, the right to privacy, and the right of any person to a subsequent fair trial. DIAC also noted that sensitive documents, such as documents that could prejudice national security, should not be set out in detail in an inquiry's report.[75]

16.62 DIAC considered that it may be useful to allow certain witnesses to give evidence in private to avoid media scrutiny or public attention—in particular witnesses of 'a junior level [who] have only had limited involvement in, or responsibility for, the issue being investigated by the inquiry'.[76]

16.63 The Law Council of Australia (Law Council) submitted that any new legislation should include, among other things, criteria to determine whether certain information should be prevented from public disclosure or publication. Such criteria could require inquiry members to consider issues such as personal privacy, national security and the public interest in publication before determining whether to conduct hearings in private or restrict publication of certain material.[77]

16.64 The Inspector-General of Intelligence and Security (IGIS) submitted:

> I would observe that the degree of openness with which an inquiry can be conducted will be determined by the subject matter and consideration of sensitivities such as privacy and security. In the case of the IGIS Act, inquiries must be conducted in private … This is hardly surprising given the nature of the material which will be involved. The experience of other inquiries and Royal Commissions which have dealt with intelligence and security issues has been that most of the proceedings must be conducted in private.[78]

16.65 The Commonwealth Ombudsman noted that his investigations were conducted in private, and that reports of the investigations usually did not include identifying details. The Ombudsman suggested this approach could be adopted where there was an inquiry into events relating to identifiable individuals, especially if they related to sensitive personal information, or where an inquiry dealt with an inherently sensitive matter. The Ombudsman noted that, 'while the default position might lean towards openness, inquiries need to be given some legislative guidance about the circumstances that may warrant such a departure'.[79]

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75 Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009.
76 Ibid.
77 Law Council of Australia, *Submission RC 9,* 19 May 2009.
78 Inspector-General of Intelligence and Security, *Submission RC 2,* 12 May 2009.
79 Commonwealth Ombudsman, *Submission RC 13,* 4 June 2009.

16.66 The Australian Government Solicitor (AGS) noted that it was rare for a Royal Commission to take evidence in private, but that 'the power to take evidence in private remains an important option and we see no reason why that power should not be maintained'.[80] The AGS submitted that it was 'not aware of compelling arguments in favour of a legislative *requirement* that Royal Commissions and other public inquiries should hold hearings in public'.[81] Private hearings might be necessary to protect, for example, national security information, the identity of certain witnesses or to prevent the disclosure of matters which could interfere with the administration of justice. The AGS considered that inquiries should maintain a broad discretion to conduct their proceedings as they consider appropriate, and noted that administrative mechanisms such as publishing edited or redacted forms of evidence, or summaries of evidence, might be adopted if evidence was given in private.

16.67 Dr Ian Turnbull submitted:

> A public inquiry does not require public hearings. Transcripts can be made available on the internet, for example. The key to its public nature is that the final report be complete and thorough and contain or refer to all relevant evidence (with identified exemptions).[82]

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

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

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

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80 Australian Government Solicitor, *Submission RC 15,* 18 June 2009.
81 Ibid.
82 I Turnbull, *Submission RC 6,* 16 May 2009.

16.71 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that Royal Commissions and Official Inquiries should continue to have a general power to prohibit or restrict public access to hearings, publication of information identifying a person giving information to an inquiry, or information provided to an inquiry. The ALRC also proposed that this power could be exercised on a number of specified grounds, including 'any other matter that an inquiry considers appropriate'.[83]

16.72 The Law Council was the only stakeholder to address this proposal in its submission. It supported the proposal, although noting that the proposed grounds were broader than those suggested by it in its earlier submission. The Law Council reiterated its view that, while inquiries 'should be as open and accessible to the public as possible and make their reports public to the greatest extent possible', there would be 'circumstances … in which members of an inquiry may see the need to restrict access to an inquiry and parts of a report'.[84] It emphasised that members of inquiries, not government agencies, should make such determinations.

ALRC's view

16.73 The power to conduct an inquiry in private or restrict publication of material protects a range of interests, such as the reputations of those participating in inquiries and the sensitivity of information. This power is especially significant given that certain material that is protected from disclosure to a court may have to be disclosed to a Royal Commission or Official Inquiry.[85]

16.74 The ALRC recommends that Royal Commissions and Official Inquiries be empowered to make directions prohibiting or restricting:

- public access to a hearing;
- prohibiting or restricting publication of any information that might enable a person to identify a person giving information to an inquiry; or
- publication of any information provided to an inquiry.

16.75 This power should be formulated to ensure that it extends beyond witnesses giving evidence at a hearing to include less formal types of information-gathering processes.

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83 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–4.

84 Law Council of Australia, *Submission RC 30,* 2 October 2009.

85 See Chs 17, 18. For example, a Royal Commission may compel the production of information that would, in a court, be protected from disclosure by the privilege against self-incrimination, or which would be inadmissible in a court because it was hearsay or opinion evidence.

16.76 In the ALRC's view, the discretion to exercise the power should not be constrained by a legislative requirement that, in general, inquiries should hold hearings in public. The pressure to hold inquiries in public is already great, and a legislative presumption might tilt the balance too heavily in favour of public access.

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

16.78 Secondly, the wider range of information that is typically accessed by an inquiry, the wider scope of its inquiry, and the fewer evidential and procedural safeguards that apply to disclosure may mean that greater restrictions on disclosure may be appropriate. For example, where Royal Commissions and Official Inquiries obtain information that could not be obtained in a court—such as by compelling the production of incriminating evidence—it may be appropriate to restrict publication of such evidence.[86] Further, as noted earlier, it may be appropriate to restrict publication of findings bearing on breaches of the criminal law.

16.79 Thirdly, inquiries differ from courts in that inquiries are investigatory. Publication of material during the progress of an investigation may prejudice the success of the investigation. For example, publishing the evidence of a witness may alert other potential witnesses to the direction the inquiry is taking. Publication of material during an investigation also may lead to unfair damage, because suspicions raised during the course of an inquiry may, in the light of all of the evidence, turn out to be unfounded. Some inquiries may be more efficiently and effectively conducted in private, or partly in private. Many non-statutory inquiries are now currently conducted largely or entirely in private, as are statutory investigations such as those by the Commonwealth Ombudsman. A requirement that hearings should be held in public is likely to encourage greater formality in these types of inquiries, which involves additional time and cost.

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

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86 See Ch 17.

16.81 There are a number of factors which are readily identifiable as reasons why a restriction on access might be desirable, whether in the form of restricting public access to a hearing or restricting publication. These include the prejudice or hardship caused to an individual; the nature and subject-matter of the information that may be involved; the potential for prejudice to legal proceedings; and the efficient and effective conduct of an inquiry. This list should not be exhaustive, however, as it is difficult to foresee all the circumstances that might justify restrictions on public access.[87]

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

16.83 In Chapter 15, the ALRC recommends that the *Inquiries Handbook* should address matters of procedure.[88] It may be useful for one of these matters to be the circumstances in which it might be appropriate to prohibit or restrict access or publication, and the competing interests in using public or private hearings.[89]

Recommendation 16–1 The recommended *Inquiries Act* should provide that members of Royal Commissions and Official Inquiries may:

(a) make directions prohibiting or restricting:

  (i) public access to a hearing;

  (ii) publication of any information that might enable a person to identify a person giving information to the inquiry; and

  (iii) publication of any information provided to the inquiry; and

(b) exercise the power to prohibit or restrict public access or publication on the following grounds:

  (i) prejudice or hardship to an individual;

  (ii) the nature and subject matter of the information that may be involved;

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

88 Recommendation 15–5.

89 Similar advice is given, for example, by the Council on Tribunals: Council on Tribunals (UK), *Procedural Issues Arising in the Conduct of Public Inquiries set up by Ministers* (1996), [7.4]–[7.7].

(iii) the potential for prejudice to legal proceedings;

(iv) the efficient and effective conduct of an inquiry; and

(v) any other matter that an inquiry considers appropriate.

Inquiries affecting Indigenous peoples

16.84 There have been a number of public inquiries that have affected Indigenous peoples, although the last federal Royal Commission focusing primarily on Indigenous issues was the Royal Commission into Aboriginal Deaths in Custody (1991).[90] The treatment of Indigenous witnesses in public inquiries was raised as an issue in consultations. Some of these concerns also may be applicable to other minority groups.

16.85 The issues that Indigenous witnesses may encounter in giving evidence in court have been addressed in a number of reports by the ALRC and other law reform bodies.[91] These issues include language and physical communication barriers; cultural factors that influence communication; the formality of court proceedings; and the effect of customary laws on the giving of evidence.[92] There are many Indigenous groups in Australia and the ALRC notes that the observations below are general in nature and may not apply equally to all Indigenous peoples.

Language and physical communication barriers

16.86 Many Indigenous peoples speak a number of languages other than Standard Australian English,[93] including traditional languages, pidgins or creoles, and Aboriginal English.[94] In the 2006 census, 12% of Indigenous people spoke an

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

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

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

93 Standard Australian English is a linguistic term which refers to 'the form of Australian English which conforms to the perceived notion of appropriate usages for serious writing': *Macquarie Dictionary* (3rd revised ed, 2001).

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

Indigenous language at home, and 19% indicated they did not speak English well or at all.[95] Aboriginal English is a dialect of Australian English and is the first language for many Indigenous people in Queensland. It differs from Standard Australian English in pronunciation, grammar, vocabulary and style.[96]

16.87 As a result, some Indigenous witnesses, while speaking some English, may not be fluent in Standard Australian English and may encounter difficulties in legal proceedings. They may not fully understand the questions put to them, and their responses may be misinterpreted because of the different meanings of common English words in Aboriginal English or in one of the creoles.[97] A range of Indigenous interpreting services have been established to address these difficulties, most notably the Northern Territory Aboriginal Interpreters Service.

16.88 The need for skilled interpreters for Indigenous peoples in Australia has been noted many times before in previous reports, including by the ALRC.[98] Access to interpreters is also included in art 13 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which provides:

> 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
>
> 2. States shall take effective measures to ensure this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.[99]

16.89 A statutory right to an interpreter has been recommended in a number of reports. For example, the Queensland Criminal Justice Commission (QCJC) recommended that the *Evidence Act 1977* (Qld) should include a provision that a 'witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to

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

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

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

98 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [600]; Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), Ch 3. See also E Johnston, *Royal Commission into Aboriginal Deaths in Custody* (1991), Recs 99, 100, 249; Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007), Rec 34; National Human Rights Consultation, *Report* (2009), Ch 9.

99 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/47/1 (2007), art 13. The Australian Government has issued a formal statement in support of this declaration: see Jenny Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Statement in Support of the UN Declaration on the Rights of Indigenous Peoples' (Speech, 3 April 2009).

make an adequate reply to, questions that may be put about the fact'.[100] The QCJC further recommended that, if a court had any reason to doubt the capacity of a witness both to understand and speak Standard Australian English, proceedings should not continue until an interpreter is provided.[101]

16.90 The uniform evidence laws in place in several Australian jurisdictions permit a witness to give evidence 'about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact'.[102] This applies to court proceedings and other proceedings that apply the rules of evidence.[103] This provision was based on a recommendation made by the ALRC in its 1985 Interim Report on *Evidence* (ALRC 26).[104]

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

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

16.92 This statutory obligation does not require that the interpreter be accredited, although the interpreter must be competent.[105] The lack of accredited or professionally trained interpreters is another issue that was raised in consultations. This is a longstanding difficulty which persists, despite the establishment of some Indigenous interpretation services—as was recently recognised in the report of the National Human Rights Consultation (2009).[106]

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

101 Ibid, Rec 5.2.

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

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

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

105 *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6, [31].

106 National Human Rights Consultation, *Report* (2009), Ch 9.

16.93 As the ALRC has noted previously, the quality of an interpreter is critical, especially in legal proceedings, and therefore professional interpreters are generally desirable.[107] On the other hand,

> limiting the use of interpreters to professional interpreters limits access to interpreters. Unlike friends or relatives, professional interpreters have to be paid. There may not be a professional accredited interpreter available for the witness' language, especially for new or very small migrant groups. If so, any reasonably able interpreter would be better than no interpreter at all. A professional interpreter may not be necessary in all cases. Some people may feel more comfortable using a friend or relative rather than a professional interpreter who is not known to them.[108]

Communication styles

16.94 A number of cultural factors may affect the way Indigenous peoples communicate in formal proceedings. For example, interviews conducted through questions and answers are said to be 'culturally alien to many Aboriginal people, who are accustomed to a less direct form of information gathering'.[109] Indigenous groups may build up complex information over a period of time, and through a series of interactions. The appropriate response, if one does not understand, may be to wait for clarification through continued interaction, as to 'state that one does not understand what has been said can be humiliating'.[110] If an Indigenous person volunteers information about a matter, it can be intensely embarrassing for him or her to have that knowledge questioned.[111]

16.95 Indigenous peoples may seek to avoid open disagreement or criticism. Avoiding loss of personal dignity is central in dealing with conflict, and a key strategy to achieve this is to feign disinterest.[112] Indigenous witnesses are also susceptible to agreeing to a question rather than disagreeing, particularly if the questioning takes place in an oppressive environment and over a long period of time.[113]

16.96 Another feature of Indigenous communication styles is that silence may indicate a number of different things. For many Indigenous groups, silence is a common and positively valued part of conversation that allows time for thinking. In a courtroom, however, it may imply that the person is not in control of, or not comfortable with, the dialogue. It may also indicate a lack of authority to speak about a matter, or criticism or disapproval if there is conflict within an Indigenous group. Further, silence may indicate a failure of the person questioning to understand matters important to the Indigenous person.[114]

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107 Australian Law Reform Commission, *Multiculturalism and the Law* ALRC 57 (1992), [3.21].
108 Ibid.
109 Criminal Justice Commission (Qld), *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), 19.
110 Ibid.
111 Ibid, 19–20.
112 Ibid, 20.
113 Ibid, 21–22.
114 Ibid, 23–24.

Formality of proceedings

16.97 The QCJC reported that many of the people it had consulted for its report on *Aboriginal Witnesses in Queensland's Criminal Courts* indicated that

> feelings of intimidation, isolation, fear and disorientation are common among Aboriginal people who gave evidence in our courts. Those feelings are not restricted to Aboriginal people, nor are they experienced by all Aboriginal people. However, the [QCJC] is satisfied that feelings of alienation are sufficiently widespread among Aboriginal people to justify measures to make courts more familiar and less intimidating.[115]

Effect of customary laws

16.98 The customary laws of Indigenous groups also may affect the ways in which Indigenous participants in an inquiry provide information.[116] An Indigenous person may not have the authority to speak on certain matters—for example, issues related to specific areas of land—or may have the authority to speak only in conjunction with others who collectively have such authority. Some information may be secret, and an Indigenous person may be subject to severe penalties for breaching that secret. In addition, it needs to be considered whether an Indigenous person should be required to disclose information that may violate customary law, particularly if such disclosure might expose them to some retaliation.[117]

Similar measures

16.99 A number of measures have been developed to address these issues in relation to courts, and in particular in relation to native title proceedings as well as inquiries such as the Royal Commission into British Nuclear Tests in Australia (1985). For example, the *Evidence Act 1995* (Cth) allows a court to direct that evidence can be given in narrative form.[118] The QCJC recommended that a similar provision be included in the *Evidence Act 1977* (Qld).[119]

16.100 The Supreme Court of the Northern Territory has developed guidelines to apply to the interrogation of Indigenous peoples by police, known as the Anunga Rules.[120] These address matters such as the need for interpreters and legal assistance, the desirability of a 'prisoner's friend' or support person being present, the need to ensure that the person understands the meaning of the right to silence, and the need to frame questions carefully and avoid cross-examination. If the Rules have been seriously breached, any confession is likely to be rejected at a trial. These guidelines

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115 Ibid, 77.

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

117 This may raise similar concerns to those which justify the privilege against self-incrimination. See Ch 17.

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

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

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

have been incorporated into standing police orders and are applied in other jurisdictions, although care clearly needs to be taken to ensure their appropriateness in the particular circumstances.[121]

Submissions and consultations

Duty to consult

16.101 In DP 75, the ALRC proposed that, if the inquiry concerned matters that may have a significant effect on Indigenous peoples, there should be a legislative duty to consult with Indigenous groups, individuals or organisations to inform the development of appropriate procedures for the conduct of a Royal Commission or Official Inquiry.[122]

16.102 This proposal was partly based on stakeholder concerns that guidelines and protocols were not always applied in practice.[123] Other stakeholders felt it would be difficult to frame a specific provision given the diversity of Indigenous groups and the diversity of circumstances in which inquiries might arise.

16.103 Stakeholders had also indicated support for a range of more detailed procedural matters, such as the right to bring a support person to an inquiry; the desirability of allowing narrative evidence and group evidence; the desirability of restricting unnecessary cross-examination; and the need to ensure that hearings are located near communities and in relatively informal settings. Finally, some stakeholders thought guidance was desirable in relation to types of culturally sensitive evidence that might require protection, including whether such evidence ought to be heard in private.

16.104 The few stakeholders who addressed this issue after the release of DP 75 generally expressed support for this proposal.[124] The Law Council supported the proposal, noting however that greater guidance should be given about when an inquiry will have a 'significant effect' on Indigenous peoples.[125] The Australian Collaboration also considered that these procedures should be addressed in some detail in the

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

122 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–6.

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

124 Australian Collaboration, *Submission RC 24,* 22 September 2009; Community and Public Sector Union, *Submission RC 25,* 22 September 2009.

125 Law Council of Australia, *Submission RC 30,* 2 October 2009.

Inquiries Handbook.[126] Turnbull, while not disagreeing with the proposal, considered a better approach would be to frame the proposal more broadly to require inquiries to consider other ethnic, religious and other sensitivities or customary laws in appropriate circumstances, and specifically identifying Indigenous groups among those.[127]

Interpreters

16.105 In DP 75, the ALRC also proposed that an interpreter should be appointed if a person is asked to provide information to a Royal Commission or Official Inquiry and the person is not sufficiently proficient in English.[128] Stakeholders in consultations emphasised the importance of interpreters, and there was support for a statutory right to an interpreter, particularly since such a right could have implications in terms of funding. As noted above, they observed that one of the difficulties was the lack of access to accredited interpreters, or interpreters of good quality.

16.106 All of the stakeholders who addressed this issue in submissions supported this proposal.[129] The Law Council was concerned, however, that the proposal as framed did not clearly require an inquiry to appoint an interpreter upon the request of a person asked to provide information to an inquiry.[130]

ALRC's view

Consultation

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

16.108 This duty to consult would arise only where the inquiry was likely to have a significant effect on Indigenous peoples. For example, it would arise if an inquiry focused upon Indigenous rights or interests, such as native title, or focused upon the effect of particular social issues upon Indigenous groups—the Royal Commission into Aboriginal Deaths in Custody being an example. The duty would not arise, however, merely because an Indigenous person was called to give evidence in an inquiry which otherwise had no special bearing on Indigenous interests.

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126 Australian Collaboration, *Submission RC 24,* 22 September 2009.
127 I Turnbull, *Submission RC 22,* 21 September 2009.
128 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 15–7.
129 Liberty Victoria, *Submission RC 26,* 27 September 2009; Australian Collaboration, *Submission RC 24,* 22 September 2009; I Turnbull, *Submission RC 22,* 21 September 2009.
130 Law Council of Australia, *Submission RC 30,* 2 October 2009.

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

16.110 The legislative duty to consult, it should be noted, is not a duty to ensure a particular outcome. It is a duty to consult a particular group that is significantly affected to inform the development of procedures. It does not specify the level or type of consultation that is required—as noted above, this will depend on the particular inquiry and the Indigenous peoples that are likely to be affected. Nor does it require specific procedures to be adopted.

16.111 It is important for the legitimacy and fairness of any inquiry that the specific needs of any particular group should be considered in the development of the procedures of an inquiry, so it will be appropriate for inquiries to consider the need for consultation in relation to other specific groups, such as religious or ethnic communities, if those specific groups are specially affected by an inquiry.

16.112 The ALRC does not, however, recommend that the legislative duty to consult should be imposed in relation to other groups. As the ALRC has noted previously, Indigenous peoples are not in the same position as other cultural groups in Australian society. The historical and political relationship between Indigenous groups and the rest of the Australian community is unique:

> This is their country of origin. In relation to the general community, they exist not merely as individuals but as a prior community (or series of communities) inhabiting territory to which the general community itself migrated (without their agreement and without their having any control over that process).[131]

16.113 It is the uniqueness of this relationship—which gives special significance to the need for consultation between Indigenous peoples and the rest of the Australian community—that justifies a legislative duty to consult Indigenous peoples in order to inform the development of procedures in an inquiry.

Interpreters

16.114 The ALRC also recommends that there should be a statutory right to an interpreter in inquiries for those who are not sufficiently proficient in English. This

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131 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC 31 (1986), [164]. See also the preamble to the *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/47/1 (2007).

obligation should be drafted in similar terms to the right to an interpreter before the Migration Review Tribunal—that is, a person may request an interpreter, and must be given one if the inquirer considers he or she is not sufficiently proficient in English. An inquiry must appoint an interpreter, even if the person has not requested one, if an inquiry considers that the person is not sufficiently proficient in English. The language of this provision is preferable to that in the *Evidence Act*, as the latter relates to questioning about specific facts and does not empower a person to request an interpreter. For the sake of clarity, the language of the ALRC's recommendation has been changed from its original proposal in DP 75 to reflect the language used in the *Migration Act*.[132]

16.115 As noted above, this recommendation does not require that an *accredited* interpreter should be provided, although it does require a competent interpreter. The lack of adequate access to accredited or professional interpreters makes it impractical to recommend that only professional or accredited interpreters be provided. Further, there may be considerations which weigh against the use of accredited interpreters, such as an Indigenous witness' preference for an interpreter that he or she knows or that the inquiry trusts, or the desirability of adopting less formal procedures.

16.116 The reason for this recommendation—the obvious desirability that those providing information should understand and be able to communicate effectively—is equally applicable to other groups that may require interpretation services, and the recommendation is therefore not restricted to Indigenous witnesses. It is also framed so that the right to an interpreter exists in more informal types of procedures such as interviews or meetings, as long as the person has been asked to provide information to an inquiry.

Recommendation 16–2 The recommended *Inquiries Act* should provide that, if a Royal Commission or Official Inquiry is inquiring into matters that may have a significant effect on Indigenous peoples, the inquiry should consult with Indigenous groups, individuals or organisations to inform the development of appropriate procedures for the conduct of the inquiry.

Recommendation 16–3 The recommended *Inquiries Act* should provide that, if a person is asked to provide information to a Royal Commission or Official Inquiry, the inquiry must:

(a) comply with a request for an interpreter unless it considers that the person is sufficiently proficient in English; or

132 *Migration Act 1958* (Cth) s 366C.

(b) appoint an interpreter if the inquiry considers that the person is not sufficiently proficient in English, even though the person has not requested an interpreter.

Correction of the public record

16.117 Adverse findings can be made in inquiry reports that are not sustained by further investigation. In such a case, the damage done by the adverse finding is generally not countered by a sufficiently prominent correction of the public record.

16.118 The Senate Standing Committee on Education, Employment and Workplace Relations, for example, noted in its report on the Building Royal Commission that 'allegations, and adverse mentions, and even inferences made about individuals, remain posted on the royal commission website' although no charges had been brought at this stage.[133] The Committee cited with approval a submission that:

> to have those allegations remaining unchallenged, unquestioned, untested indefinitely seems to us to be entirely wrong in principle and there should be … a removal from the public record … we would share your concern that the person in respect of whom such a finding has been made, remains under that cloud with no opportunity to clear his or her name.[134]

16.119 The Committee recommended that the Senate refer to its Legal and Constitutional Affairs Committee the question of whether amendments should be made to ensure that procedures of royal commissions give due protection to the reputations of people whose prosecutions are recommended but against whom no charges are laid.[135]

16.120 The issue may also arise if an adverse finding is found to be without merit in a subsequent proceeding. This is particularly concerning in relation to administrative and disciplinary proceedings. It may be of less concern in relation to court proceedings, because such proceedings are held in public and tend to be reported by the media if they are related to a public inquiry of significant importance.

16.121 For example, after the Equine Influenza Inquiry reported in April 2008, public statements had been made on behalf of the Department of Agriculture, Fisheries and Forestry, and widely reported, that individual officers named in the report would be investigated for breaches of the Australian Public Service Code of Conduct (APS

133 Senate Employment, Workplace Relations and Education Committee, *Beyond Cole: The Future of the Construction Industry* (2004), [2.28].

134 Ibid, citing the submission of the then Victorian Council for Civil Liberties, now known as Liberty Victoria.

135 Ibid, Rec 3. This recommendation does not appear to have been implemented.

Code of Conduct).[136] Breaches of the APS Code of Conduct are handled by the employing agency under agency guidelines.[137] The subsequent investigation found, however, that none of the officers had breached the APS Code of Conduct.[138] The CPSU observed that 'the reputations of those individual officers were, however, unfairly harmed by the earlier public comments'.[139]

16.122 The Australian Public Service Commissioner (APSC) provides detailed guidance to agencies about the handling of investigations into breaches of the APS Code of Conduct. This includes advice on when the identity of a person subject to such an investigation should be disclosed.[140] In general, the identity of such an employee is not released unless it is 'necessary, appropriate and reasonable' to do so.[141] The APSC advises that, before disclosure is made, certain steps should be taken, including notifying the affected person of the usual disclosures that are made,[142] and seeking consent for disclosure of information to third parties, if such information is not normally disclosed to such parties.[143]

16.123 The APSC also publishes advice on the best practice to be adopted by agencies in handling investigations into breaches of the APS Code of Conduct.[144] Its advice is that

> it may be appropriate for the agency to take some action, where the employee has suffered any loss of reputation because it became known they were suspected of misconduct if it is clear that no such misconduct occurred (e.g. with the consent of the employee a notice be sent to all relevant employees informing them of the outcome).[145]

Submissions and consultations

16.124 In DP 75, the ALRC asked what mechanism, if any, should be included to address the harm caused to a person who, having been named or otherwise being identifiable in a public statement as the subject of an investigation flowing from an inquiry, is cleared in that subsequent investigation, without any further public

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

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

138 At the time of publication of DP 75, this had not been reported. It was subsequently reported in the media in September 2009: Mark Davis, 'No penalty for officers over equine flu bungle', *The Age* (Melbourne), 1 September 2009, 3.

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

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

141 Ibid, [35].

142 Ibid, [16].

143 Ibid, [19]–[21].

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

145 Ibid.

statement to that effect.[146] In DP 75, the ALRC discussed two options for addressing this issue:

- Guidelines or best practice advice could state that the identity of an employee who is subject to an investigation for breach of the APS Code of Conduct should not be disclosed, unless the employee consents. This appears in line with the best practice advice given by the APSC.

- Legislation could require that the results of subsequent investigations relevant to an adverse finding must be published.[147]

16.125 Some stakeholders supported the idea of publication of the results of subsequent investigations. For example, Turnbull submitted:

> I think that serious damage can flow from such naming and a statement in agreed wording should be published in the media and elsewhere, in a similar way to that which occurs with some defamation claims, indicating that the person was cleared.[148]

16.126 The CPSU, elaborating on its earlier submission in response to IP 35, submitted that:

> it is generally inappropriate for officials to make public comments announcing that individuals are being investigated for a breach of the Code of Conduct. This view … is consistent with the advice of the [APSC]. Even if the individuals are not specifically named, it would often be possible to identify them. It is therefore more appropriate that no comment about Code of Conduct or other disciplinary matters be made prior to their completion. Public comments prior to the investigatory process suggest that the matter has been prejudged and deny the employee(s) involved procedural fairness.
>
> Secondly, if such comments are made and the individual is subsequently cleared of any wrongdoing, they should be entitled to have their comments corrected. In the first instance, this could be achieved through the reporting mechanism [recommended in relation to the update of implementations]. It also may be appropriate, if the employee wishes, for a communication to be sent within his/her agency advising other employees of the outcome of the investigation. We note, however, that such corrections are unlikely to achieve the same coverage as comments made in a final report or at the time of release. It is therefore preferable that such comments are not made.[149]

16.127 Mr Graham Millar submitted, however, that there was no need to require publication of the results of subsequent investigations, because in an open inquiry most of the tendered evidence is publicly available during the course of an inquiry and subsequently on its website. In his view:

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146 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Question 15–2.

147 Ibid, [15.61]–[15.62].

148 I Turnbull, *Submission RC 22,* 21 September 2009.

149 Community and Public Sector Union, *Submission RC 25,* 22 September 2009.

> there is arguably a greater opportunity for a person involved in an inquiry to have the evidence presented in support of their case made readily available to the public than might be the case in other legal processes.[150]

ALRC's view

16.128 A real issue of fairness arises when adverse findings are made in an inquiry and those adverse findings are not sustained in subsequent proceedings. Such findings may cause irreparable damage to a person's reputation. If a person is subsequently cleared, or if no further investigations are initiated against a person named in a report, fairness to the individual affected requires that these facts should be published.

16.129 This unfairness arises if a person is identified or identifiable as the subject of an adverse finding, even if the person is not identified as the subject of a subsequent investigation. This is because it is the adverse finding itself, rather than the subsequent proceedings taken against a person, which causes damage to a person's reputation. As the APSC advises, however, it is generally inappropriate for the identity of an employee subject to an investigation for breach of the APS Code of Conduct to be released, and steps should be taken to notify the employee and seek their consent for disclosure of information to third parties.

16.130 The ALRC recommends that, in order to remedy this unfairness, the results of proceedings that arise out of an inquiry should be published. Such proceedings may be initiated as a consequence of recommendations made by an inquiry, or on the basis of adverse findings made by an inquiry. Further, if a decision is made not to initiate, or to discontinue, such proceedings, this also should be made public.

16.131 It should be noted that this recommendation requires only the factual reporting of the results of subsequent proceedings. It does not require, and should not be interpreted as requiring, a statement by the government that an inquiry's finding was incorrect. The investigation of an inquiry is different in nature from any subsequent disciplinary, civil or criminal proceedings, and the evidence and results, therefore, may well differ.

Recommendation 16–4 The recommended *Inquiries Act* should provide that the Australian Government make public:

(a) the results of any disciplinary, civil or criminal proceedings, initiated as a consequence of recommendations or findings of a Royal Commission or Official Inquiry; or

(b) any decision not to initiate, or to discontinue, such proceedings.

150 G Millar, *Submission RC 21,* 21 September 2009.

17. Privileges and Public Interest Immunity

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Introduction

17.1 A fundamental purpose of many inquiries is to establish the facts of an incident or issue, without the limitations on evidence and procedure that apply to courts. In Chapter 11, the ALRC discusses the powers of a Royal Commission to compel a person to attend or appear to give evidence, and produce documents or other things. In

that chapter, the ALRC recommends that similar powers should be conferred on a new form of statutory inquiry called Official Inquiries.[1]

17.2 These powers to require information, however, may be subject to a number of exemptions from disclosure. That is, a person required to provide the information may have a lawful claim for refusing to comply with the requirement. Exemptions from disclosure exist both to protect fundamental human rights or important individual interests, as well as to serve broader public interests such as national security. Such exemptions from disclosure, however, may impede the investigative function of inquiries by suppressing relevant evidence, hampering the effectiveness of investigations, and delaying or frustrating investigations.[2]

17.3 In this chapter, the ALRC discusses the common law privileges of: client legal privilege;[3] the privilege against self-incrimination; spousal incrimination;[4] and parliamentary privilege. The chapter also considers public interest immunity, which is technically distinct from a privilege but also enables a person to resist disclosure. Finally, the chapter considers whether other statutory privileges available under the *Evidence Act 1995* (Cth) should apply. The procedures for claiming such privileges are discussed in Chapters 14 and 19.

Privileges under the *Royal Commissions Act*

17.4 Until relatively recently, the *Royal Commissions Act 1902* (Cth) did not refer to privileges or public interest immunity at all.[5] Nevertheless, with the exception of the privilege against self-incrimination,[6] commentators generally have been of the view that common law privileges and public interest immunity did apply to Royal Commissions.[7]

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1 Recommendation 11–1.

2 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [6.9]–[6.39].

3 This is also known as legal professional privilege. The term 'client legal privilege' is preferred here because it is used in the *Evidence Act 1995* (Cth) pt 3.10, div 1, and it reflects the nature of the privilege as one belonging to the client, rather than the lawyer: ibid, [1.16]–[1.17].

4 As discussed below, at common law the privilege against spousal incrimination protects only those in a legally recognised marriage, and does not extend to those in a de facto relationship: *S v Boulton* (2006) 151 FCR 364, [50], [119], [171].

5 As noted below, ss 2(5) and 6AA of the *Royal Commissions Act 1902* (Cth), dealing with client legal privilege, were introduced in 2006, and s 6A, dealing with the privilege against self-incrimination, was introduced in 1982.

6 This was on the basis of s 6DD which, as discussed below, provides a use immunity. It is clear from the parliamentary debates, however, that this section was not introduced to abrogate the privilege, as the then Attorney-General expressly affirmed that the privilege applied: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, 1187 (W Hughes—Attorney-General).

7 See, eg, S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [6.10]; H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [8.2]–[8.10], [9.4]–[9.5].

17.5 There are three possible bases for this conclusion. First, there is the 'well settled [rule] that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect'.[8]

17.6 Secondly, the Act provides for a defence of 'reasonable excuse' for failing to attend before a Royal Commission, or for failing to produce documents or other things under s 3 of the Act. Section 1B of the Act defines reasonable excuses in terms of justifications that would excuse an equivalent person in a court of law, and this may therefore include privileges and public interest immunity.[9] The defence of 'reasonable excuse' is discussed in Chapter 19, with the ALRC recommending that the applicability of the privileges and public interest immunity be clarified in the defence of 'reasonable excuse'.

17.7 Thirdly, s 7 of the Act provides witnesses with the 'same protection' as a witness in a case tried before the High Court.[10] In 1912, the then Attorney-General offered the opinion that this section enabled witnesses to claim privileges and public interest immunity.[11] This view has been expressed more recently in a number of cases.[12]

Client legal privilege

17.8 Client legal privilege is a doctrine of both common law and statute which

> provides that, in civil and criminal cases, confidential communications passing between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation.[13]

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8 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553.

9 This was the view of Professor Enid Campbell: H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [8.2]. The Second Reading debates when this section was inserted, however, indicate that the intention was to confine 'reasonable excuse' solely to physical and practical excuses: Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, 1185 (W Hughes—Attorney-General).

10 Section 7 is discussed in more detail in Ch 12.

11 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 July 1912, 1388 (W Hughes—Attorney-General).

12 See *Royal Commission Re A Brisbane Hotel (No 2)* [1964] QWN 29; *Sorby v Commonwealth* (1983) 152 CLR 281, 300; *Re Clyne; Ex parte Deputy Commissioner of Taxation* (1986) 15 FCR 128, 136–137. See also the opinion of the Secretary to the Attorney-General's Department, cited in H Coombs and others, *Royal Commission on Australian Government Administration* (1976), [9.4]–[9.5], which expressed the view that s 7 of the *Royal Commissions Act* preserved public interest immunity.

13 S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 48.

17.9 As the ALRC stated in its 2007 report, *Privilege in Perspective* (ALRC 107):

> the doctrine of client legal privilege is a fundamental principle of the common law providing an essential protection to clients—both individual and corporate, enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide legal advice. The protection of the confidentiality of such communications facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.[14]

17.10 As noted above, until recently it was unclear whether client legal privilege constituted a 'reasonable excuse' for refusing to answer questions or produce documents,[15] although a number of commentators considered that client legal privilege did apply to Royal Commissions.[16]

17.11 In 2006, the position was clarified when the Act was amended to include provisions relating to client legal privilege.[17] These provide that a Royal Commission may require the production of documents even if they are subject to client legal privilege.[18] Further, a claim of client legal privilege is not a reasonable excuse to fail to produce a document to a Royal Commission, unless:

- a court has found the document to be privileged; or
- a claim is made to the member of the Commission who required production of the document within the time required for its production.[19]

17.12 Where a claim of client legal privilege is made to a Royal Commission, the Commission may require the document to be produced for inspection in order to determine the claim of privilege.[20] If the claim is accepted, the document is disregarded for the purposes of any report or decision of the Royal Commission.[21]

17.13 In ALRC 107, the ALRC made a number of recommendations concerning the application of client legal privilege to Royal Commission proceedings. As these are presently under consideration by the Australian Government, the Terms of Reference for this Inquiry exclude re-consideration of the application of client legal privilege to

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14 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [2.118].

15 N Owen, *Report of the HIH Royal Commission* (2003), vol 1, [2.9].

16 See, eg, E Campbell, *Contempt of Royal Commissions* (1984), 27; S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [5.21].

17 The amendment was sought by the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme (2006), as a result of the decision in *AWB Ltd v Cole* (2006) 152 FCR 382. See Explanatory Memorandum, Royal Commissions Amendment Bill 2006 (Cth), l.

18 *Royal Commissions Act 1902* (Cth) s 2(5). However, this section contains a note that under s 6AA client legal privilege might still be a reasonable excuse for refusing to produce the document.

19 Ibid s 6AA(1).

20 Ibid s 6AA(2), (3).

21 Ibid s 6AA(4).

Royal Commissions. One issue for this Inquiry, however, is the application of client legal privilege to Official Inquiries. It is useful, therefore, to describe briefly the recommendations made in ALRC 107.

17.14 In ALRC 107, it was stated that:

> The ALRC supports the doctrine of client legal privilege as a fundamental principle of common law that facilitates compliance with the law. The ALRC agrees … that, in the course of ordinary enforcement and investigatory activities, the importance of the privilege in encouraging compliance overrides the benefits of abrogation to the regulator.[22]

17.15 The ALRC recommended that client legal privilege should apply to the coercive information-gathering powers of federal bodies, in the absence of any clear, express statutory statement to the contrary.[23] Further, if Parliament was to legislate to abrogate the privilege, it should consider the following factors:

- the subject of the Royal Commission of inquiry, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community;
- whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and *especially*
- the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the Royal Commission and, in particular, whether the legal advice itself is central to the issues being considered by the Commission.[24]

17.16 The ALRC was of the view, however, that a strong case could be made for abrogating client legal privilege in the context of Royal Commissions, observing that

> the discovery of the truth has been described as a prime function of a Royal Commission. Royal Commissions are established only where a particular area of public concern has been identified for which the usual investigations and proceedings would not suffice, and their purpose is to determine factual circumstances, report on the matters specified in the Letters Patent and make recommendations.[25]

17.17 Rather than simply abrogating the privilege, however, the ALRC recommended that the Act should enable the Governor-General, by Letters Patent, to determine that client legal privilege should not apply, in relation to either the whole inquiry or particular aspects of the inquiry. This determination should be guided by the same three factors generally considered to be relevant to the determination that client legal

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22 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [6.133].
23 Ibid, Rec 6–1.
24 Ibid.
25 Ibid, [6.155].

privilege should be abrogated—namely, the importance and impact of the subject of inquiry; the availability of alternative means of obtaining the information; and the degree to which lack of access would hamper or frustrate the inquiry.

Application to Official Inquiries

17.18 The ALRC recommends in this Report the creation of another form of statutory inquiry, called Official Inquiries.[26] As discussed in Chapter 5, there should be a number of distinctions between Royal Commissions and Official Inquiries to ensure that each has the necessary tools to carry out its investigation without inappropriately infringing on the rights of persons involved with, or affected by, its processes.

17.19 Importantly, Royal Commissions should have a wider range of coercive powers than Official Inquiries. The model recommended by the ALRC, therefore, envisages that Royal Commissions should be reserved for more serious matters that require the full range of coercive powers. The issue is whether, in line with the recommendation in ALRC 107 in relation to Royal Commissions, there should be a power to abrogate client legal privilege in relation to some or all Official Inquiries. The ALRC notes that there was significant opposition to the abrogation of client legal privilege in the Royal Commissions context by many stakeholders in submissions to the previous inquiry.[27]

ALRC's view

17.20 In the ALRC's view, Official Inquiries should not have the power to abrogate client legal privilege. The model recommended by the ALRC is designed to ensure that an inquiry has the necessary tools to carry out its investigation without inappropriately infringing on the rights of those involved.

17.21 As discussed in Chapters 5 and 11, extraordinary coercive powers should be reserved for Royal Commissions. Similarly, the abrogation of client legal privilege should be reserved for Royal Commissions, given the importance of the privilege to the protection of rights and the administration of justice.

17.22 Client legal privilege provides an essential protection to clients and facilitates compliance with the law. In the course of ordinary investigatory activities, the importance of the privilege outweighs the benefits of abrogation to the investigator.[28] This conclusion also applies to the investigatory activities of Official Inquiries. Finally, the ALRC has recommended in this Report that, in the appropriate circumstances, an Official Inquiry may be converted into a Royal Commission.[29] If it becomes necessary to abrogate client legal privilege in an Official Inquiry, the appropriate course would be to convert the Official Inquiry into a Royal Commission.

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26 Recommendation 5–1.
27 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [6.108]–[6.111].
28 Ibid, [2.118], [6.133].
29 Recommendation 5–3.

Privilege against self-incrimination

Background

17.23 The common law privilege against self-incrimination entitles a person to refuse to answer any question, or to produce any document, if the answer or the document would tend to incriminate that person.[30] Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).[31]

17.24 The privilege has been described by the High Court as a human right 'which protects personal freedom, privacy and dignity'.[32] It is also a human right protected by the *International Covenant on Civil and Political Rights*.[33] Other rationales for the privilege include: preventing the abuse of power and convictions based on false confessions; protecting the quality of evidence and the requirement that the prosecution prove the offence; and avoiding putting a person in a position where the person will be exposed to punishment whether they tell the truth, lie, or refuse to provide the information.[34]

17.25 The privilege applies in non-judicial proceedings, such as inquiries, unless it is abrogated expressly or by the necessary implication of the wording of the governing statute.[35] In Australia, the privilege applies only to natural persons and does not apply to corporations.[36] Further, it protects only against self-incrimination and cannot be invoked to shield others from incrimination.[37]

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30 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 382.

31 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

32 Ibid, 498 quoting Murphy J in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134, 150. See also *Sorby v Commonwealth* (1983) 152 CLR 281; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96, 135; *Thomson Newspapers v Canada* [1990] 1 SCR 627, [61].

33 Article 14(3)(g) of the *International Covenant on Civil and Political Rights* provides that in the 'determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality … not to be compelled to testify against himself or to confess guilt'. It is said also to be an inherent right in art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*: *Murray v UK* (1996) 22 EHRR 29, [50]–[51].

34 Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination* (2004), Ch 3.

35 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 382, 340–341, 344; *Sorby v Commonwealth* (1983) 152 CLR 281, 309.

36 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Bridal Fashions Pty Ltd v Comptroller-General of Customs* (1996) 140 ALR 681, following *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96.

37 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385.

17.26 The privilege protects individuals from answering questions or producing documents. It does not cover physical evidence that may be obtained from a person, such as fingerprints,[38] or evidence that may be obtained by means other than by requiring a person to produce it (for example, by a search warrant or by intercepting telecommunications).[39]

17.27 It is an increasingly common trend for the privilege against self-incrimination to be abrogated by statute in order to assist regulators and administrators with investigation and enforcement. Commonly, the statute provides that, while individuals are not entitled to refuse to answer or produce documents because of the privilege, those answers or documents cannot be used in subsequent proceedings (typically referred to as a 'use immunity'). Use immunities tend to take one of three forms:

- a 'use' or 'direct use' immunity—the incriminating evidence itself is inadmissible in subsequent proceedings;
- a 'derivative use' immunity—the incriminating evidence and any evidence obtained as a result of that evidence is inadmissible in subsequent proceedings; or
- a 'transactional' or 'personal' immunity—a person who is compelled to testify about an offence may never be prosecuted for that offence, no matter how much independent evidence is obtained.[40]

The privilege and use immunity under the *Royal Commissions Act*

17.28 Section 6A of the *Royal Commissions Act* provides that it is not a reasonable excuse for a person to refuse or fail to produce a document or thing, or to answer a question, on the ground that doing so might incriminate the person or make the person liable to a penalty. As discussed below, the section does not apply if the production or answer might tend to incriminate the person in relation to continuing criminal or penalty proceedings.[41]

17.29 Section 6A was introduced to ensure that the privilege against self-incrimination was abrogated in Royal Commission proceedings.[42] Although the *Royal Commissions*

38 *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

39 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385. The powers of Royal Commissions to search and seize evidence, and to receive intercepted information, is discussed in Ch 11.

40 See discussion in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 19.

41 *Royal Commissions Act 1902* (Cth) s 6A(3), (4).

42 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security), 2337. This amendment was part of a number of amendments to Royal Commission powers sought during the Royal Commission into the Activities of the Federated Ships Painters and Dockers Union (1984). The amendment was upheld as constitutionally valid in *Sorby v Commonwealth* (1983) 152 CLR 281.

Act had long been interpreted as abrogating the privilege, the High Court had cast doubt upon this interpretation in *Hammond v Commonwealth*.[43]

17.30 Section 6DD provides that statements or disclosures made by a person in the course of giving evidence to a Royal Commission, or the production of a document or thing in response to a summons or notice to produce, are not admissible in evidence in 'any civil or criminal proceedings' in any Australian court, unless the proceedings are for an offence against the *Royal Commissions Act*. A similar provision applies to evidence that is taken outside Australia pursuant to s 7B of the Act.[44] Section 6DD, therefore, provides a direct use immunity.

17.31 The effect of ss 6A and 6DD is that evidence otherwise subject to the privilege against self-incrimination may be used in subsequent proceedings in certain circumstances. In particular, the evidence may be used as a basis for further investigations; in proceedings brought against another person; in proceedings against a corporation;[45] and in administrative or disciplinary proceedings.[46] In the HIH Royal Commission (2003), Commissioner Owen expressed the view that the immunity did not extend to the documents themselves, but only to the fact of the production of those documents.[47]

17.32 Under the *Director of Public Prosecutions Act 1983* (Cth), the Commonwealth Director of Public Prosecutions (CDPP) is empowered to provide an undertaking of derivative use immunity to a person in specified proceedings (including an inquiry conducted under the laws of the Commonwealth), in respect of any civil or criminal proceedings in an Australian court.[48] If such an undertaking is made, it may remove the risk of self-incrimination so that the person cannot rely upon the privilege against self-incrimination.[49]

The privilege and use immunity in other jurisdictions

17.33 The privilege against self-incrimination is likewise abrogated in the legislation governing inquiries in all but two Australian jurisdictions,[50] and in legislation governing standing crime commissions.[51] These laws provide for a direct use immunity

43 *Hammond v Commonwealth* (1982) 152 CLR 188, 202–203.
44 *Royal Commissions Act 1902* (Cth) s 7C.
45 See N Owen, *Report of the HIH Royal Commission* (2003), [1.3.4].
46 *Bercove v Hermes [No 3]* (1983) 74 FLR 315. See also *Attorney-General (Vic) v Riach* [1978] VR 301, 305.
47 N Owen, *Report of the HIH Royal Commission* (2003), [1.3.4]. As discussed further below, however, it is arguable that some documents could be characterised as a 'disclosure' protected by the use immunity.
48 *Director of Public Prosecutions Act 1983* (Cth) s 9(6), (6A).
49 *Registrar, Court of Appeal v Craven* (1994) 77 A Crim R 410.
50 *Special Commissions of Inquiry Act 1983* (NSW) s 23; *Royal Commissions Act 1923* (NSW) s 17; *Evidence Act 1958* (Vic) s 19C; *Commissions of Inquiry Act 1950* (Qld) s 14A(1); *Royal Commissions Act 1968* (WA) s 20; *Royal Commissions Act 1991* (ACT) s 24; *Inquiries Act 1991* (ACT) s 19. The privilege is not abrogated in South Australian or Northern Territory legislation: see *Royal Commissions Act 1917* (SA) s 16B(2); *Inquiries Act 1945* (NT) s 15.
51 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(1).

only,[52] except in Tasmania and the ACT.[53] In New South Wales (NSW), the privilege is capable of being abrogated only in relation to Royal Commissions chaired or constituted by a judge or a legal practitioner of at least seven years standing.[54]

17.34 The application of the privilege in relation to inquiries in overseas jurisdictions varies. Following a review by the Law Reform Commission of Ireland, Ireland has introduced a bill that abrogates the privilege and provides for a direct use immunity.[55] This bill is currently being considered by the legislature. In contrast, the United Kingdom[56] and New Zealand[57] have not abrogated the privilege against self-incrimination in legislation governing inquiries.

Options for reform

17.35 Several issues arise in this Inquiry in relation to the privilege against self-incrimination. First, should the privilege against self-incrimination be abrogated in all, or some, Royal Commissions and Official Inquiries? Secondly, if so, what kind of use immunity should apply? Thirdly, what should be the scope of the use immunity?

Abrogation of the privilege

17.36 The Queensland Law Reform Commission (QLRC) examined the circumstances which could justify the abrogation of the privilege against self-incrimination in 2004.[58] In its view, abrogation could be justified if, among other things, the information to be compelled as a result of the abrogation concerns an issue of 'major public importance that has a significant impact on the community in general or on a section of the community'.[59] The QLRC cited, as examples, inquiries or investigations into 'allegations of major criminal activity, organised crime or official corruption or other

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52 See, eg, *Royal Commissions Act 1923* (NSW) s 17; *Evidence Act 1958* (Vic) s 19C; *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* (SA) s 14; *Commissions of Inquiry Act 1995* (Tas) ss 21, 26; *Royal Commissions Act 1991* (ACT) s 24; *Inquiries Act 1991* (ACT) s 19.

53 Tasmania provides for a transactional immunity, and the ACT for a derivative use immunity: *Commissions of Inquiry Act 1995* (Tas) s 23; *Royal Commissions Act 1991* (ACT) s 24(3), *Inquiries Act 1991* (ACT) s 19(3).

54 *Royal Commissions Act 1923* (NSW) ss 15, 17. See also *Special Commissions of Inquiry Act 1983* (NSW) ss 21, 23. Special Commissions of Inquiry must be constituted by a judge of a specified court in New South Wales, or by a member of the Workers Compensation Commission, or by a legal practitioner of at least seven years standing: *Special Commissions of Inquiry Act 1983* (NSW) ss 3, 4(2).

55 Tribunals of Inquiry Bill 2005 (Ireland) s 16. This section is similar in terms to s 6DD of the *Royal Commissions Act 1902* (Cth), but the intention of abolishing the privilege was stated in Parliament upon its introduction: see Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), 258–259.

56 *Inquiries Act 2005* (UK) s 22. However, the Attorney-General may give an undertaking granting derivative use immunity, which would make it difficult for an individual to refuse to answer: Parliament of United Kingdom, *Explanatory Notes to Inquiries Act* (2005), [56]. See also United Kingdom Department of Constitutional Affairs, *Consultation Paper—Effective Inquiries* (2004), [77], [79].

57 *Commissions of Inquiry Act 1908* (NZ) ss 4C(4), 6.

58 Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination* (2004), Ch 6.

59 Ibid, [6.50].

serious misconduct by a public official'.[60] An additional consideration was the extent to which the information is likely to benefit the public interest.[61]

17.37 The QLRC also identified factors that, while not justifying abrogation as such, were relevant to the decision to abrogate the privilege. These included whether there were alternative means of obtaining the information; whether a use immunity was provided; and whether there were procedural safeguards. It was also relevant if the information was contained in a document that was already in existence, and if the extent of the abrogation was no more than necessary to achieve the intended purpose of the abrogation.[62]

Direct use or derivative use immunity

17.38 As noted above, the *Royal Commissions Act* provides for a direct use immunity rather than a derivative or transactional use immunity.[63] That is, evidence given by a witness in a Royal Commission cannot be used as evidence in subsequent legal proceedings, but may be used to obtain further evidence. A derivative use immunity would not allow the evidence to be used to obtain further evidence. This would make it much more difficult to prosecute a person for offences that are disclosed during an inquiry. The primary argument against a derivative use immunity, therefore, is that it would shield witnesses from the proper consequences of their wrongdoing. Given that Royal Commissions are usually established because of the seriousness and public importance of the allegations involved, it may seem particularly inappropriate to shield witnesses of a Royal Commission from the consequences of their misconduct.

17.39 A derivative use immunity may also limit the effectiveness of Royal Commissions. For example, there have been many Royal Commissions and other inquiries in which criminal prosecutions or regulatory action have been considered an important aspect of their effectiveness. As one submission to the ALRC's inquiry into client legal privilege put it:

> It would make the work of commissions of public importance appear somewhat futile if their findings could not be successfully acted upon because material available to them was not then admissible in subsequent court proceedings.[64]

17.40 The primary argument for a derivative use immunity is that it may be more useful in discovering the truth than a direct use immunity, because a person's fear of the consequences of disclosure would be diminished.[65] A derivative use immunity also

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60 Ibid, [6.51].
61 Ibid, [6.52].
62 Ibid, [6.59].
63 *Royal Commissions Act 1902* (Cth) s 6DD.
64 I Temby, *Submission LPP 72,* 19 July 2007.
65 The view of the Independent Commission Against Corruption, however, is that this argument 'is a myth rather than reality': Report of proceedings before Committee on the Independent Commission against Corruption, *Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 4 May 2009, Sydney, 5 (Jerrold Cripps QC, Commissioner).

can be justified by a number of the rationales for the privilege against self-incrimination discussed above—such as the interests in personal freedom, privacy and dignity, and the prevention of the abuse of power.

Submissions and consultations

17.41 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether the abrogation of the privilege against self-incrimination was appropriate in all circumstances, and if so, what protections should apply.[66]

17.42 The few submissions that addressed this issue argued either that the privilege should not be abrogated, or submitted that, if abrogated, there should be a derivative use immunity.[67] The Construction, Forestry, Mining and Energy Union (CFMEU) was the strongest advocate of retaining the privilege, citing in support the observations of Castan QC:

> This section runs contrary to the most fundamental principles of natural justice, by compelling persons to incriminate themselves on oath, and the protection given by Section 6DD [limited use immunity], is of no real significance, for the reasons the High Court itself has pointed out. The reasons for the abolition of Section 6A of the *Royal Commissions Act* are as compelling today as were the reasons in 1641 for the abolition of the Star Chamber.[68]

17.43 The Department of Immigration and Citizenship (DIAC) suggested that the privilege against self-incrimination should apply, as it would 'assist in ensuring the full co-operation of witnesses', and 'thus assist in ensuring the effectiveness of the inquiry'.[69]

17.44 The Law Council of Australia (Law Council) submitted:

> The Law Council believes that witnesses appearing before a Royal Commission for questioning should be able to refuse to answer a question or provide information to a Commissioner on the grounds that such information may incriminate the person. If the privilege of self-incrimination is not available under the [*Royal Commissions Act*], the Law Council believes that the witnesses should at least be entitled to both direct use and derivative use immunity in respect to any evidence or information he or she provides.[70]

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66 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 8–7.

67 Department of Immigration and Citizenship, *Submission RC 11,* 20 May 2009; Law Council of Australia, *Submission RC 9,* 19 May 2009; Construction, Forestry, Mining and Energy Union, *Submission RC 8,* 17 May 2009; Liberty Victoria, *Submission RC 1,* 6 May 2009.

68 Construction, Forestry, Mining and Energy Union, *Submission RC 8,* 17 May 2009, citing Castan QC, 'Natural Justice in Commissions and Inquiries' (Paper presented at the Australian Society of Labour Lawyers Seventh National Conference, Melbourne, August 1985).

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

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

17.45 Liberty Victoria similarly considered that a derivative use immunity should apply.[71] While the Community and Public Sector Union (CPSU) acknowledged that it was probable the abrogation would remain, it stated that derivative use immunity should be considered.[72]

17.46 The Inspector-General of Intelligence and Security (IGIS) suggested another option might be to require a graduated or proportionate use of coercive powers.[73]

17.47 Nevertheless, in consultations with stakeholders, there was broad support for the existing position in relation to Royal Commissions, especially for investigatory or inquisitorial Royal Commissions. There was less support for the extension to derivative use immunity.

17.48 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that, in respect of Royal Commissions only, the privilege should be abrogated, subject to a direct use immunity.[74] The response of the few stakeholders who addressed this proposal was mixed.

17.49 The Law Council reiterated its view that the privilege should not be abrogated. If, however, the privilege was to be abrogated, it supported the proposal to the extent that the privilege would not be abrogated in the proceedings of Official Inquiries.[75] It continued, however, to be of the view that derivative use immunity should apply.[76]

17.50 In contrast, the Australian Government Solicitor (AGS) endorsed the proposal that the present position should not be altered.[77]

17.51 Kym Bills expressed concerns about this proposal:

> In my view Official Inquiries should be able to require production of relevant documents from persons/companies regardless of potential incrimination and liability which should be dealt with through derivative use protections. I am also concerned that if a person/company is charged with a relatively minor offence or subject to a small regulatory penalty this should not be a basis to prevent production of relevant documents. In my opinion, an Official Inquiry or Royal Commission should not be constrained by, for example, action taken by a state or territory regulator to impose an appropriate fine under its legislation.[78]

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71 Liberty Victoria, *Submission RC 26,* 27 September 2009; Liberty Victoria, *Submission RC 1,* 6 May 2009.

72 Community and Public Sector Union, *Submission RC 25,* 22 September 2009; Community and Public Sector Union, *Submission RC 10,* 22 May 2009.

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

74 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 16–1.

75 Law Council of Australia, *Submission RC 30,* 2 October 2009.

76 Ibid.

77 Australian Government Solicitor, *Submission RC 31,* 6 October 2009.

78 K Bills, *Submission RC 19,* 17 September 2009.

17.52 Dr Ian Turnbull disagreed with a use immunity on principle:

> Any suggestion that a person will be more honest if protected by such a provision seems to me fanciful. It looks like wilful blindness and deliberately excluding valuable evidence from the court. An application can always be made to the court to exclude such evidence and it should be a matter for the trial judge, applying the rules of evidence, and not the inquiries legislation, in my view. A better proposal might be to state that the probative value of such evidence must be considered by the court in closed session or on a voir dire and must be substantial before being admitted.[79]

ALRC's view

17.53 The present abrogation of the privilege, coupled with a use immunity, strikes the right balance in relation to Royal Commissions. The function of Royal Commissions is to discover the truth, without the evidential or procedural limitations that apply to courts. The purpose of Royal Commissions is not to determine legal rights, but rather to find facts and make recommendations to the executive arm of government. As noted above, Royal Commissions are established only where a particular area of significant public concern has been identified for which the usual investigations and proceedings would not suffice.

17.54 The importance of the public interest involved in a Royal Commission outweighs the individual interests protected by the privilege—that is, 'extraordinary circumstances justifies, and indeed requires, the establishment of a commission with extraordinary powers'.[80] In these circumstances, the public interest in compulsion generally outweighs the individual interest that justifies the privilege.

17.55 Further, a derivative use immunity would render enforcement impracticable and negate the purpose of the abrogation of the privilege.[81] Royal Commissions should not be used as an obstacle to proper enforcement action, particularly given the serious subject-matter of most Royal Commissions.

17.56 Many Royal Commissions are likely to involve evidence that may incriminate a person. Although this is most probable in the case of investigatory Royal Commissions, there is no bright line between policy and investigatory types of Royal Commission. Investigations into what has happened often flow into policy recommendations, such as in the HIH Royal Commission. In light of this, it is the ALRC's view that the existing position should continue—namely, that all Royal Commissions should have the power to require a person to disclose incriminating information. It is important to note, however, that the power should be exercised only where necessary, given the subject-matter of the particular inquiry. It need not be exercised by all Royal Commissions.

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79 I Turnbull, *Submission RC 22,* 21 September 2009.

80 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 597.

81 A similar conclusion was reached with respect to client legal privilege in Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [7.143]–[7.145].

17.57 Further, the abrogation of the privilege against self-incrimination should not apply to Official Inquiries. The abrogation of the privilege should be reserved, in the two-tier model recommended in this Report, to cases of substantial public importance in which the full range of coercive powers is considered necessary.[82] Many inquiries presently operate effectively without the abrogation of the privilege, and the abrogation of the privilege should not be extended unnecessarily. As noted earlier, if the application of the privilege hampers or frustrates an Official Inquiry, the Australian Government has the option of converting an Official Inquiry into a Royal Commission. Alternatively, an undertaking to grant a use or derivative use immunity could be sought from the CDPP.

Pending charges or penalty proceedings

17.58 Section 6A(3) of the *Royal Commissions Act* provides that the abrogation of the privilege against self-incrimination does not apply if the answer, document or thing required relates to an offence, where a person has been charged with an offence, and the proceedings have not been finally disposed of. Section 6A(4) makes similar provision in relation to proceedings in respect of a penalty.

17.59 These subsections are unusual. Section 22(2) of the *Commissions of Inquiry Act 1995* (Tas) is the only similar provision in state and territory inquiry legislation. This provides that:

> A Commission must not require a person to give evidence about a matter if that person has been charged with an offence in respect of that matter.

17.60 In DP 75, the ALRC proposed that a provision similar to that in s 22(2) of the *Commissions of Inquiry Act 1995* (Tas) should be included in the *Inquiries Act*. The ALRC received no feedback on this proposal.

17.61 Subsections 6A(3) and (4) of the *Royal Commissions Act* were inserted 'to make clear that the [introduction of s 6A abrogating the privilege against self-incrimination] will not affect the actual ground of the High Court's decision'[83] in *Hammond v Commonwealth*.[84] In *Hammond*, the High Court held that, in the circumstances of that case, an examination by a Royal Commission of a person charged with an offence, relating to the circumstances surrounding the alleged offence, would amount to a real risk of interference with the administration of justice. This would constitute contempt of court, which meant that the Royal Commission could not lawfully inquire into those matters.[85]

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82 In Ch 5, the ALRC discusses in detail the recommended new statutory framework for conducting public inquiries.

83 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1982, 2337 (F Chaney—Minister for Social Security), 2337.

84 *Hammond v Commonwealth* (1982) 152 CLR 188.

85 The relationship between Royal Commissions and other public inquiries, and contempt of court in this context, is discussed in Ch 14.

17.62 In *Hammond*, Gibbs CJ stated:

> Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence. In the *Builders Labourers' Case* I expressed the opinion that, if during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, generally speaking, amount to a contempt of court, and that the proper course would be to adjourn the inquiry until the disposal of the criminal proceedings.[86]

17.63 In the same case, Brennan J expressed the view 'that it is a principle deep-rooted in our law and history that the Crown may not subject an accused person to compulsory process to obtain his answers upon the issue of his guilt of an offence with which he has been charged'.[87]

17.64 It would appear, however, that *Hammond* has been more narrowly interpreted in subsequent court decisions. In *Hammond*, the examination was to be attended by police officers investigating the criminal charges. This posed a risk that the police officers would use the evidence given in the examination to obtain other evidence for the purpose of the investigations in the criminal proceedings. In *ABC v Sage*, the Federal Court considered that it was this fact which posed a risk of interference with the administration of justice in *Hammond*.[88] In *ABC v Sage*, the Australian Crime Commission had taken steps to ensure that the investigation or prosecution of related criminal proceedings would not be similarly affected, by holding the examination in private and issuing non-publication orders. The Court held that these steps removed the risk of interference with the administration of justice.

ALRC's view

17.65 Sections 6A(3) and (4) of the *Royal Commissions Act* were intended to codify in statute the effect of *Hammond v Commonwealth*. Setting out this important limitation on the powers of Royal Commissions in the Act has the benefit of clarity.

17.66 The case of *ABC v Sage*, however, indicates that these sections may extend beyond the decision in *Hammond*, as inquiries may be able to take sufficient steps to ensure that there is no real risk such evidence would interfere with those criminal proceedings.

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86 *Hammond v Commonwealth* (1982) 152 CLR 188, 198.
87 Ibid, 203–204.
88 *ABC v Sage* (2009) 175 FCR 319. See also *OK v Australian Crime Commission* [2009] FCA 1038.

17.67 As a matter of policy, however, the ALRC endorses the principle that a person should not be required to answer questions that directly relate to a matter for which that person has been charged. In the ALRC's view, it is not fair to require a person to provide evidence in an inquiry on the same matters for which that person has been charged, even though that evidence may not be used directly against the person in those proceedings.

17.68 The ALRC recommends, therefore, that a provision reflecting this position should be included in the *Inquiries Act*. In the ALRC's view, the language of s 22(2) of the *Commissions of Inquiry Act 1995* (Tas) is preferable to the language in s 6A(3) and (4) of the *Royal Commissions Act*, because the language of the Tasmanian provision is both clearer and more accurately captures the underlying principle of *Hammond*. For the reasons set out below in relation to the scope of the use immunity, this provision should extend to a person who is subject to penalty proceedings that have commenced and not been finally disposed of, as is presently provided in s 6D(4) of the *Royal Commissions Act*.

Recommendation 17–1 (a) The recommended *Inquiries Act* should empower Royal Commissions, but not Official Inquiries, to require a person to answer a question, or produce a document or thing, notwithstanding such answer or production might incriminate that person or expose the person to a penalty.

(b) The recommended *Inquiries Act* should provide that a Royal Commission must not require a person to answer a question, or produce a document or other thing, about a matter if that person has been charged with an offence, or is subject to proceedings for the imposition or recovery of a penalty in respect of that matter.

Scope of use immunity

17.69 A number of issues arise in relation to the scope of the direct use immunity recommended by the ALRC. First, in what kinds of proceedings should the use immunity be available? Secondly, what kind of material should be protected by the use immunity? Thirdly, what exceptions should apply to the use immunity?

Type of proceedings

17.70 Presently, the use immunity in the *Royal Commissions Act* applies to 'any civil or criminal proceedings' in any Australian court. This immunity does not extend to disciplinary proceedings.[89] There are a large number of use immunities in federal

89 *Bercove v Hermes [No 3]* (1983) 74 FLR 315.

legislation, which vary in their application.[90] Some, such as the *Australian Crime Commission Act 2002* (Cth) and the *Law Enforcement Integrity Commissioner Act 2006* (Cth), limit the immunity to criminal proceedings and proceedings for the imposition or recovery of a penalty.[91] Others are restricted to criminal proceedings only.[92] In some Australian states and territories, the use immunity relating to Royal Commissions and similar inquiries expressly extends to administrative and disciplinary proceedings,[93] including proceedings for breaches of the Australian Public Service Code of Conduct.[94] Such disciplinary proceedings are also proceedings for the imposition of a penalty.[95]

17.71 As noted above, the purpose of the privilege is to protect a person from self-incrimination in criminal matters, and from self-exposure to a penalty. In the 2002 report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95), the ALRC found that some civil and administrative penalties carry consequences that are just as serious as traditional criminal punishments.[96] In that report, the ALRC recommended that, in the absence of any clear, express statutory statement to the contrary, the same protections for individuals afforded by the privilege against self-incrimination in criminal matters should apply in relation to the imposition of a civil or administrative penalty.[97]

17.72 The question of the type of proceedings to which a use immunity should apply has been given extended consideration in an inquiry in the NSW Parliament underway at the time of writing this Report.[98] This inquiry is considering a proposal to remove civil or disciplinary proceedings from the scope of the use immunity that applies to Independent Commission against Corruption (ICAC) investigations.[99] In ICAC's view:

> People think what is the point of exposing corruption if the people who are going to be corrupt—which, fortunately, are not the majority of public servants—know that nothing is going to happen to them.[100]

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90 See generally Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008), Appendix 1.

91 *Australian Crime Commission Act 2002* (Cth) s 31(5).

92 See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 30–31, 32A, 33, 41, 43; *Trade Practices Act 1974* (Cth) s 155(1).

93 *Royal Commissions Act 1923* (NSW) s 17(2); *Evidence Act 1958* (Vic) s 19C(2); *Commissions of Inquiry Act 1995* (Tas) s 21.

94 Powers and procedures to sanction breaches of the Australian Public Service Code of Conduct are set out in s 15 of the *Public Service Act 1999* (Cth).

95 *Police Service Board v Morris* (1985) 156 CLR 397. See also *Rich v Australian Securities Investment Commission* (2004) 220 CLR 129.

96 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), 652.

97 Ibid, Rec 19–1.

98 The question of the kinds of proceeding to which the use immunity should apply was not addressed by any stakeholders.

99 See Committee on the Independent Commission against Corruption (NSW), *Proposed Amendments to the Independent Commission Against Corruption Act 1988*, Issues Paper, 5 May 2009.

100 Report of proceedings before Committee on the Independent Commission against Corruption, *Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 4 May 2009,

17.73 The proposal to exclude disciplinary proceedings from the scope of the use immunity has been broadly supported by other standing anti-corruption commissions, although there was more concern about the exclusion of civil proceedings.[101] Other stakeholders, including the Law Society of NSW and the NSW Bar Association, opposed this proposal, on the basis that it would discourage witnesses from coming forward and diminish the rights of witnesses.[102]

ALRC's view

17.74 The recommended use immunity should apply to criminal proceedings and proceedings for the imposition or recovery of a penalty. This is consistent with the rationale of the privilege against self-incrimination and the privilege against self-exposure to penalties, as well as being in line with the views expressed in ALRC 95. It is also consistent with similar federal legislation.

17.75 The recommended use immunity is narrower than the present use immunity because it does not apply to all civil proceedings. It is broader than the present use immunity, however, because it would extend to disciplinary proceedings to the extent that these impose a penalty. In the ALRC's view, this is appropriate because the consequences of disciplinary proceedings, such as loss of employment, may be in practice as serious as the consequences of a criminal conviction. This does not mean, however, that a person can escape dismissal if an inquiry uncovers serious misconduct, since a direct use immunity only prevents the use of the person's evidence to an inquiry in such proceedings. Misconduct may be proven in the same way as it would if no inquiry had been undertaken. This applies equally in respect of other civil or criminal proceedings that may follow an inquiry.

Scope of material

17.76 Presently, the use immunity applies to a statement or disclosure made by a person in the course of giving evidence before a Royal Commission; and the production of a document or other thing by the person pursuant to a summons, requirement or notice.

Sydney, 9 (Jerrold Cripps, Commissioner). Other standing anti-corruption commissions supported this proposal in submissions.

101 Crime and Misconduct Commission (Qld), *Submission No 3 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 16 March 2009; Police Integrity Commission (NSW), *Submission No 4 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 27 March 2009; Corruption and Crime Commission (WA), *Submission No 7 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 2 April 2009; Australian Commission for Law Enforcement Integrity, *Submission No 13 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 20 April 2009.

102 NSW Bar Association, *Submission No 16 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 17 April 2009; Law Society of NSW, *Submission No 8 to NSW Parliament—ICAC Committee Inquiry into Proposed Amendments to the Independent Commission Against Corruption Act 1988*, 9 April 2009.

17.77 The ALRC has identified two issues relating to the scope of the material covered by the use immunity. First, should the use immunity be extended to oral or written statements provided to an officer of the Commission in connection with, or in preparation for, giving evidence to a Royal Commission? This was recommended by Commissioner Cole in the report of the Royal Commission into the Building and Construction Industry (2003).[103]

17.78 Secondly, should s 6DD apply to the documents produced by summons or notice, or only to the fact of the production of a document. In Australia, the privilege against self-incrimination extends to documents as well as to oral testimony.[104] This is a matter of significant practical importance, as a great deal of documentary evidence is commonly gathered in Royal Commissions.

17.79 Section 6DD applies to 'a statement or disclosure made by a person in the course of giving evidence before a Royal Commission', and 'the *production* of a document or other thing by the person' (emphasis added). In contrast, the use immunity in some state and territory inquiries legislation expressly extends to all documents (and sometimes all 'information').[105] In Queensland, the use immunity explicitly excludes documents.[106]

17.80 Arguably, the distinction drawn in the *Royal Commissions Act* between a statement or disclosure and the *production* of a document indicates that the documents so produced do not benefit from the use immunity. On the other hand, the phrase 'statements or disclosures' may be intended to reflect the common law notion of a 'testimonial disclosure'.[107] This distinguishes 'statements or communications made by the witness on the one hand, and real or physical evidence [such as fingerprints] provided by the witness on the other'.[108] Wigmore's *Evidence in Trials at Common Law*, states that while documents are not oral and are not 'created by virtue of a testimonial act or utterance—still there is a testimonial disclosure implicit in their production'.[109] For example, the production of a document may communicate the facts that the document exists and is possessed by a person.[110]

17.81 Testimonial disclosures also may be distinguished from documents that exist before a Royal Commission is established. In *Environment Protection Authority v Caltex Refining Co Pty Ltd*, Mason CJ and Toohey J explained the distinction as follows:

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103 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Rec 1(d).

104 *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385, 393–394.

105 *Royal Commissions Act 1923* (NSW) s 17(2); *Evidence Act 1958* (Vic) s 19C; *Royal Commissions Act 1991* (ACT) s 24(3).

106 *Commissions of Inquiry Act 1950* (Qld) s 14A(2).

107 Thomson Reuters, *Laws of Australia*, vol 2 Administrative Law, 2.8, [43] (as at 15 July 2009).

108 *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

109 J Wigmore, *Evidence in Trials at Common Law* (3rd ed, 1961), vol 8, 380–381.

110 *Doe v United States* 487 US 201, 209 (1988).

> It is one thing to protect a person from testifying as to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt … [documents] are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigative power or in the course of legal proceedings.[111]

17.82 In the 2005 report, *Uniform Evidence Law*, the ALRC, NSW Law Reform Commission and Victorian Law Reform Commission considered the issue of the application of the privilege against self-incrimination to pre-existing documents. The issue was raised in relation to orders for compulsory information about assets or other information, or orders to permit premises to be searched. The three Commissions recommended, in that context, a use immunity which did not extend to pre-existing documents.[112] This recommendation is now reflected in s 128A(9)(b) of the *Evidence Act 1995* (Cth).

17.83 In DP 75, the ALRC proposed that the scope of the use immunity should be clarified. It proposed that the use immunity should apply to: statements or disclosures to a Royal Commission, whether in written or oral form; the fact of the production of a document or other thing to a Royal Commission; information provided to an officer or member of a Royal Commission in connection with, or in preparation for, giving evidence to a Royal Commission; and exclude pre-existing documents or things that were not created in order to comply with a notice of the Royal Commission.

17.84 The only stakeholder to address this proposal in submissions, the AGS, 'strongly endorsed' this proposal, referring in particular to the exclusion of pre-existing documents or things.[113]

ALRC's view

17.85 The ALRC supports the extension of the use immunity to preparatory witness statements, as recommended by Commissioner Cole. In Chapter 15, the ALRC discusses information-gathering procedures used by Royal Commissions and other inquiries. It may be appropriate to gather information other than through formal hearings in a variety of circumstances. Similar protections should apply whether information is gathered informally or in formal hearings. This would facilitate the information-gathering process by minimising the need for formal hearings.

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111 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 493.

112 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Rec 15–10. Similarly, the New Zealand Law Commission also recommended that the privilege against self-incrimination should not apply to pre-existing documents in its review of evidence law: New Zealand Law Commission, *Evidence*, Report No 55 (1999), vol 1, [279]–[281]. This recommendation is implemented by the *Evidence Act 2006* (NZ), ss 51(3), 60.

113 Australian Government Solicitor, *Submission RC 31,* 6 October 2009.

17.86 The scope of the use immunity in relation to documents also should be clarified. The scope of the use immunity should not extend further than the purpose of the privilege against self-incrimination warrants—that is, it should extend only to protect a person from being compelled to testify against him or herself. An extension of the use immunity to all documents or information is likely to hamper the effectiveness of any subsequent legal proceedings, without protecting the interests served by the privilege. Rather, only documents that may be considered a testimonial disclosure—for example, a written statement, or a statutory declaration, prepared in response to a question—should be protected. It follows that the use immunity should not extend to pre-existing documents.

The exceptions

17.87 The use immunity in s 6DD does not apply to 'proceedings for an offence against this Act'. For example, the use immunity would not apply to proceedings under the *Royal Commissions Act* for giving false or misleading evidence to an inquiry,[114] or bribing a witness.[115] The exception, however, does not extend to similar kinds of offences in either Australian state or territory legislation or other Commonwealth criminal legislation, such as the *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth). This is so even though the use immunity applies to all Australian courts.

17.88 This inconsistency had a significant impact in one case where a Royal Commission was jointly constituted by the Commonwealth and Victoria.[116] A witness was charged with perjury under the Victorian legislation. Since the exception to the use immunity was not available, the evidence of the witness's perjury was not admissible and he had to be acquitted. The High Court noted in that case that it seemed 'likely that the draftsman failed to advert to the possible operation of s 6DD in its application to evidence given before a commissioner acting in a dual capacity'.[117]

17.89 The most relevant offences in the *Crimes Act* and *Criminal Code* are discussed further in Chapter 19. These include offences against the administration of justice that are similar to the offences provided for in the *Royal Commissions Act*, such as bribery of witnesses. These offences already apply to Royal Commissions. In Chapter 19, the ALRC recommends that the existing offences in the *Royal Commissions Act* should be removed, and reliance placed instead on the general offences under the *Crimes Act* and *Criminal Code*.[118] As well, in Chapter 20 the ALRC recommends that there should be a power to apply to the Federal Court for enforcement of its directions.[119]

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114 *Royal Commissions Act 1902* (Cth) s 6H.
115 Ibid s 6I.
116 *Giannarelli v The Queen* (1983) 154 CLR 212, 227. See Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (1984).
117 Ibid, 220.
118 Recommendation 19–8.
119 Recommendation 20–1.

17.90 In DP 75, the ALRC recommended broadening the exceptions to apply to court proceedings in a federal, state or territory court relating to the falsity or the misleading nature of the evidence, and for offences relating to the obstruction of Royal Commission proceedings.[120] In its response to DP 75, Liberty Victoria expressed support for this proposal.[121]

ALRC's view

17.91 The present exception for offences 'under the Act' in the *Royal Commissions Act*, s 6DD, is framed too narrowly. The policy underlying that provision is that evidence may be used to prove offences prohibiting the obstruction of Royal Commission proceedings, such as giving false evidence. That policy is equally applicable to similar offences under an Australian state or territory law, and to proceedings for enforcement of directions, as recommended in Chapter 20. Further, since the ALRC is proposing the removal of most of the offences in the *Royal Commissions Act*, and recommends instead to rely upon similar offences prohibiting interference with evidence or witnesses in *Crimes Act* or *Criminal Code*, it is necessary to ensure that the evidence may be used to prosecute offences brought under the *Crimes Act* or *Criminal Code*.

17.92 The ALRC recommends that there should not be a use immunity that applies to any proceeding in an Australian court in respect of: offences or proceedings for enforcement of directions under the *Inquiries Act*; the falsity or the misleading nature of the evidence; or offences prohibiting interference with evidence or witnesses in Royal Commission proceedings, such as the bribery of witnesses.

Recommendation 17–2 The recommended *Inquiries Act* should provide that statements or disclosures made by a person to a Royal Commission are not admissible in evidence against that person in criminal proceedings, or proceedings for the imposition or recovery of a penalty, in any court of the Commonwealth, of a state or of a territory ('use immunity'). This use immunity should:

(a) apply to statements or disclosures to a Royal Commission, whether in oral or written form;

(b) apply to the fact of the production of a document or other thing to a Royal Commission;

120 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 16–3.

121 Liberty Victoria, *Submission RC 26,* 27 September 2009.

(c) apply to information provided to an officer or member of a Royal Commission in connection with, or in preparation for, giving evidence to a Royal Commission; and

(d) exclude pre-existing documents or things that were not created in order to comply with a notice of the Royal Commission.

Recommendation 17–3 The use immunity referred to in Recommendation 17–2 should not apply to a proceeding in a federal, state or territory court:

(a) in respect of offences under the recommended *Inquiries Act*, or proceedings for enforcement under the *Inquiries Act*;

(b) in respect of the falsity or the misleading nature of the evidence; or

(c) for offences prohibiting interference with evidence or witnesses in relation to Royal Commission proceedings.

Privilege against spousal incrimination

17.93 The courts have recognised the existence of a long-standing common law privilege against spousal incrimination.[122] That is, the common law recognises that a husband or wife cannot be bound to give evidence against his or her spouse.[123] This privilege does not, however, apply to de facto spouses.[124]

17.94 This privilege is distinct from, although it overlaps with, the protection of a person against being compelled to give evidence against his or her spouse or other family members.[125] Under s 18 of the *Evidence Act 1995* (Cth), a person may object to being compelled to give evidence in criminal proceedings against a person's spouse, de facto partner, parent or child. The court must balance the harm likely to be caused to that person or the relationship against the desirability of the evidence being taken. Section 18 of the *Evidence Act*, therefore, recognises a broader range of relationships as justifying protection than the common law privilege against spousal incrimination.

122 *Callanan v B* (2004) 151 A Crim R 287; *Stoten v Sage* (2005) 144 FCR 487; *S v Boulton* (2006) 151 FCR 364.

123 See generally D Lusty, 'Is There a Common Law Privilege Against Spouse-Incrimination?' (2004) 27 *University of New South Wales Law Journal* 1.

124 *S v Boulton* (2006) 151 FCR 364.

125 This was discussed by the ALRC in Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), [4.90]–[4.116].

17.95 There are two modern rationales for this common law privilege: first, that it furthers society's interest in preserving marital harmony; and secondly, that it advances the same policies as the privilege against self-incrimination.[126]

17.96 This common law privilege, like the privilege of self-incrimination, applies in non-judicial contexts, unless abrogated by statute. In *S v Boulton*, a majority of the Full Court of the Federal Court held that the *Australian Crime Commission Act 2002* (Cth) abrogated the privilege against spousal incrimination, because it abrogated the privilege against self-incrimination and this privilege 'was an extension of the privilege against self-incrimination'.[127]

17.97 As the ALRC is recommending that the privilege against self-incrimination should continue to be abrogated in respect of Royal Commissions, the consequence is that the privilege against spousal incrimination is likely to be abrogated in respect of Royal Commissions as well. The interpretation of the Federal Court in *Boulton* makes unnecessary a recommendation that the privilege against spousal incrimination should not apply to Royal Commission proceedings.

17.98 Given that the policy considerations underlying the privilege against spousal incrimination are similar to those underlying the privilege against self-incrimination, it is the ALRC's view, for the reasons noted above, that the privilege against spousal incrimination also should be abrogated in Royal Commissions. The privilege should remain, however, for Official Inquiries. This is consistent with the reasons given above for the application of the privilege against self-incrimination in Official Inquiries.

Parliamentary privilege

17.99 Parliamentary privilege refers to

> the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.[128]

17.100 The single most important parliamentary privilege is the privilege of freedom of speech in Parliament.[129] This privilege provides legal immunity to Members of Parliament, and other participants in parliamentary proceedings, for anything they may say or do in the course of parliamentary proceedings, or anything that is incidental to

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126 David Lusty, 'Is There a Common Law Privilege Against Spouse-Incrimination?' (2004) 27 *UNSW Law Journal* 1, 39.

127 *S v Boulton* (2006) 151 FCR 364, 387 (Black CJ dissenting). See also *Stoten v Sage* (2005) 144 FCR 487. In *Callanan v B* (2004) 151 A Crim R 287, the privilege was held to apply, but only because 'privilege' had been legislatively defined in the Act: *Callanan v B* (2004) 151 A Crim R 287, 291–292.

128 E May, *Parliamentary Practice* (22nd ed, 1997), 65.

129 Parliament of United Kingdom—Joint Committee of the House of Lords and House of Commons, *Parliamentary Privilege—First Report* (1999), 26.

those proceedings.[130] The source of the privilege is art 9 of the Bill of Rights 1688,[131] which is incorporated into Australian law by s 49 of the *Australian Constitution* and the *Parliamentary Privileges Act 1987* (Cth).

17.101 The power in the Royal Commissions Act to compel a person to give or produce evidence is subject to parliamentary privilege.[132] Section 16(3) of the Parliamentary Privileges Act provides that, in a court or tribunal, it is:

> not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of,
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

17.102 A 'tribunal' is defined in s 3 of that Act as including a Royal Commission or other commission of inquiry of the Commonwealth or of a state or territory having that power.

17.103 Since the privilege is that of the Parliament, it may not be waived by individual members of the Parliament.[133] It may be waived by Parliament as a whole, although Professor Enid Campbell has suggested that legislation is necessary to waive the privilege, and that it is not sufficient to waive privilege by a motion of Parliament.[134]

17.104 The privilege of freedom of speech may prevent Royal Commissions or the recommended Official Inquiries from investigating allegations of misconduct made in Parliament. In practice, however, a number of inquiries have investigated such claims or conducted investigations touching on the proceedings of Parliament.[135] Although courts have differed on the issue, it appears that Royal Commissions or Official Inquiries will infringe parliamentary privilege if they inquire into the motives, intentions or truthfulness of a speaker in Parliament, or allow witnesses to be cross-examined in relation to words spoken or documents tabled in Parliament.[136]

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130 Ibid.
131 *Bill of Rights 1688* 1 Wm & M (England) s 2 c 2 (Eng).
132 *Hammond v Commonwealth* (1982) 152 CLR 188, 200.
133 *Sankey v Whitlam* (1978) 142 CLR 1, 36–37.
134 E Campbell, 'Investigating the Truth of Statements Made in Parliament: The Australian Experience' [1998] *Public Law* 125, 126.
135 For a list, see S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [6.12].
136 Ibid, [6.16].

17.105 Claims of parliamentary privilege have impeded some Royal Commissions, such as the Western Australian Royal Commission into Commercial Activities of Government and Other Matters (1992). This Royal Commission wished to use the testimony of persons called as witnesses by related parliamentary committees, but the Western Australian Parliament refused to waive the privilege. The Royal Commission, constituted by three members with judicial experience, criticised this refusal, and recommended that the law be examined with a view to permitting proceedings in Parliament to be questioned in a court or like place while preserving the principle of free speech in Parliament.[137]

17.106 In 1997, the issue of parliamentary privilege arose in the context of a Special Commission of Inquiry in NSW. In Parliament, a Member of Parliament alleged misconduct by other members of Parliament. The NSW Parliament amended the *Special Commissions of Inquiry Act 1983* (NSW) to enable a Special Commission of Inquiry into these allegations.[138] The amending Act expired six months after its commencement.[139]

17.107 The validity of this amending legislation was challenged on a number of grounds, but was upheld by the NSW Court of Appeal and the High Court refused special leave to appeal.[140]

ALRC's view

17.108 The appropriateness of any modification of the application of parliamentary privilege in a Royal Commission or Official Inquiry should be a decision taken by Parliament itself in the context of the particular inquiry, as was done in NSW. It would be undesirable to empower an inquiry established by the executive to override a privilege afforded to the whole Parliament.

17.109 Consequently, the ALRC does not make any recommendations modifying the application of parliamentary privilege in relation to Royal Commissions and the recommended Official Inquiries. The ALRC notes, however, that where the application of the privilege is clearly foreseeable, it may be desirable to clarify the operation of the privilege in that context. The precedent set by the *Special Commissions of Inquiry Amendment Act 1997* (NSW) is likely to be a useful one.

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137 R Davis, 'Parliamentary Privilege—Parliament and the Western Australian Royal Commission' (1993) 67 *Australian Law Journal* 671. See also *Easton v Griffiths* (1995) 69 ALJR 66; *Halden v Marks* (1995) 17 WAR 447.

138 *Special Commissions of Inquiry Amendment Act 1997* (NSW), inserting pt 4A. The circumstances are discussed in E Campbell, 'Investigating the Truth of Statements Made in Parliament: The Australian Experience' [1998] *Public Law* 125, 126.

139 *Special Commissions of Inquiry Act 1983* (NSW) s 33E.

140 *Arena v Nader* (1997) 42 NSWLR 427; *Arena v Nader* (1997) 71 ALJR 1604. The grounds of appeal included that the legislation impaired the institutional integrity of Parliament; the legislation breached the right to freedom of expression, as protected by implication in the *Australian Constitution*; and that it amounted to a retrospective change to the state's Constitution which was prohibited by the *Australian Constitution*.

17.110 In Chapter 19, the ALRC recommends that the kinds of 'reasonable excuses' that might justify refusing to give or produce evidence should be stated clearly in legislation.[141] The protection of parliamentary privilege is included as a reasonable excuse in that recommendation.

Public interest immunity

17.111 Public interest immunity is a rule of substantive law that enables documents or information to be withheld in the public interest from a party to criminal or civil proceedings. Pursuant to the rule, a court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it.[142] The 'public interest' in this context refers to 'the conduct of governmental functions'[143] or 'the proper functioning of government'.[144] It is clear, however, that public interest immunity is not confined to judicial or quasi-judicial proceedings.[145]

17.112 In essence, public interest immunity operates as a balancing test. Courts limit the disclosure of information or documents on the basis that the public interest against disclosure outweighs the need for disclosure to ensure justice in a particular case. Public interest immunity differs from a legal privilege in that: the immunity can be claimed by the state, a non-governmental party, or by the court on its own motion; the immunity cannot be waived;[146] and evidence related to the relevant information, including secondary evidence held by third parties, is excluded.[147]

17.113 Claims for public interest immunity are made most commonly by the government in relation to: Cabinet deliberations; high-level advice to governments; communications or negotiations between governments; police investigation methods; and the activities of Australian Security Intelligence Organisation officers, police informers and other types of informers or covert operatives.[148]

17.114 Public interest immunity is also commonly claimed in relation to national security information. This is discussed separately in Chapter 13.[149] As noted in that chapter, past inquiries have had difficulties in obtaining access to national security information. A claim of public interest immunity in relation to other types of information in a Royal Commission, however, appears quite rare.

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141 Recommendation 19–5.
142 *Sankey v Whitlam* (1978) 142 CLR 1, 38.
143 *R v Young* (1999) 46 NSWLR 681, [54].
144 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85, [34].
145 *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52.
146 *Rogers v Home Secretary* [1973] AC 388, 406–407.
147 *National Tertiary Education Union v Commonwealth* (2001) 111 FCR 585, 595.
148 J Hunter, C Cameron and T Henning, *Litigation I: Civil Procedure* (7th ed, 2005), [8.102].
149 See also Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004).

17.115 The *Royal Commissions Act* does not refer expressly to public interest immunity. Most commentators agree, however, that it is likely to be a 'reasonable excuse' for refusing to produce documents under s 3 of the Act.[150] The considerations of public interest underlying a claim for public interest immunity apply equally to Royal Commissions.[151] The same considerations apply to Official Inquiries.

17.116 Most Australian and overseas legislation governing Royal Commissions, and legislation governing standing crime and corruption commissions, are similarly silent on the application of public interest immunity. However, some Acts do address the application of public interest immunity expressly. For example, in the United Kingdom the *Inquiries Act 2005* (UK) provides that the law of public interest immunity applies to inquiries as it would in civil proceedings.[152] The *Crime and Misconduct Act 2001* (Qld) expressly provides that public interest immunity is a 'reasonable excuse' for non-compliance with certain requirements.[153]

17.117 In contrast, most other Australian legislation governing Royal Commissions and standing crime and corruption commissions which address public interest immunity appear to abrogate public interest immunity.[154]

17.118 For example, the *Law Enforcement Integrity Commissioner Act 2006* (Cth) provides that a person is not excused from answering a question or producing a document or thing on the ground (among others) that it 'would be otherwise contrary to the public interest'.[155] There is a similar provision in the *Building and Construction Industry Improvement Act 2005* (Cth).[156]

17.119 The *Royal Commissions Act 1923* (NSW) also appears to override the public interest immunity. A power can be vested in Royal Commissions, when constituted or chaired by a judge or legal practitioner of seven years standing, which prevents excuses on the basis of the privilege against self-incrimination, 'or on the ground of privilege or on any other ground'.[157] The legislation relating to NSW standing crime and corruption commissions provides that it is not an excuse to refuse to disclose information at a

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150 P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry—Powers and Procedures* (2004), 619; S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), [6.10]. It was assumed to apply in relation to a Western Australian Royal Commission in *Halden v Marks* (1996) 17 WAR 447, 464–465. It was accepted as a valid ground for a 'reasonable excuse' in relation to a similar provision in the *New South Wales Crime Commission Act 1985* (NSW): *Z v NSWCC (No 2)* [2005] NSWC 1388.

151 S McNicol, *Law of Privilege* (1992), 381; H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, [9.4]–[9.5].

152 *Inquiries Act 2005* (UK) s 22(2).

153 *Crime and Misconduct Act 2001* (Qld) s 196(5).

154 Although public interest immunity differs from a privilege in that it is not a right of an individual, it appears that it may be abrogated by statute. See, in the UK, *A Metropolitan Borough Council v S (A Child by His Guardian)* [2003] EWHC 976.

155 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5)(e).

156 *Building and Construction Industry Improvement Act 2005* (Cth) s 53(1).

157 *Royal Commissions Act 1923* (NSW) s 17(1).

hearing on the ground of the privilege against self-incrimination, 'or on the ground of a duty of secrecy or other restriction on disclosure'.[158]

17.120 The *Independent Commission Against Corruption Act 1988* (NSW) specifically provides that before a hearing, a person must comply with requirements despite an objection that disclosure of the information 'would otherwise be contrary to the public interest'.[159] The *Police Integrity Commission Act 1996* (NSW) goes further by requiring that a person must comply with a requirement of the Commission despite:

> (a) any rule that in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
>
> (b) any privilege of a public authority or public official in that capacity that the authority or official could have claimed in a court of law …[160]

Submissions and consultations

17.121 Only two stakeholders addressed this issue in submissions. In its submission to IP 35, DIAC stated that documents that may be protected by public interest immunity should either not be disclosed, or if disclosed, protected from subsequent publication.[161]

17.122 In response to DP 75, the Australian Intelligence Community strongly supported the ALRC's position that there should be no modification of public interest immunity.[162]

ALRC's view

17.123 In principle, there appears to be no reason to modify the application of public interest immunity in relation to Royal Commissions or the recommended Official Inquiries. The rationale of the immunity—to protect the public interest—applies equally to both kinds of inquiries. As outlined above, the immunity is not a blanket protection, but requires a balancing test to be undertaken. Accordingly, the public interest in full and frank disclosure to an inquiry will be given due weight.

17.124 In this respect, public interest immunity is quite different from the privileges discussed elsewhere in this chapter. The other privileges do not include a balancing test, and so in determining whether they should apply, it is necessary to balance the interests those privileges protect against the public interest in disclosure to a public inquiry. This balancing test is, however, performed in the application of the test for public interest immunity itself.

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158 *Police Integrity Commission Act 1996* (NSW) s 40(2); *Independent Commission Against Corruption Act 1988* (NSW); *New South Wales Crime Commission Act 1985* (NSW) s 18B(1). A similar blanket provision applies in the *Corruption and Crime Commission Act 2003* (WA) s 157(b).

159 *Independent Commission Against Corruption Act 1988* (NSW) ss 24(3), 25(3).

160 *Police Integrity Commission Act 1996* (NSW) s 27(3). The Commission interprets these provisions as abrogating public interest immunity: Police Integrity Commission (NSW), *Guidelines* (October 2007).

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

162 Australian Intelligence Community, *Submission RC 12,* 2 June 2009.

17.125 The ALRC notes the practical difficulties that have arisen regarding public interest immunity in the context of national security information. In Chapter 13, the ALRC makes several recommendations relating to national security information.[163] There is no evidence, however, that public interest immunity causes practical difficulty in any other context. The ALRC, therefore, does not propose any modification to the application of such immunity.

17.126 It is desirable, however, to clarify that public interest immunity does apply to Royal Commissions and Official Inquiries. In Chapter 19, therefore, the ALRC includes public interest immunity as a 'reasonable excuse' for refusing to comply with a notice to produce, or refusing to answer a question.[164]

Statutory privileges

17.127 The *Evidence Act 1995* (Cth) contains a number of privileges beyond those available under the common law. These include:

- confidential professional relationships privilege—which protects a communication made by a person in confidence to a journalist. The privilege is not absolute, and will protect the communication only where the court is satisfied that the harm that would or might be caused to the confider if the evidence was given outweighs the desirability of the evidence being given;[165]

- religious confessions privilege—which allows a member of the clergy (of any religion and religious denomination) to refuse to divulge that a religious confession was made, or the contents of the confession;[166] and

- exclusion of evidence of settlement—which protects communications made in connection with an attempt to negotiate a settlement of a dispute.[167]

17.128 These privileges do not apply to Royal Commissions at present. The New Zealand Law Commission, in its recent report on *A New Inquiries Act*, recommended that statutory privileges of a similar kind should apply to inquiries.[168]

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163 Recommendations 13–1 to 13–7.

164 Recommendation 19–5.

165 *Evidence Act 1995* (Cth) div 1A. On 19 March 2009, the Australian Government introduced the Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth). The Bill amends div 1A to require the courts to consider whether the information was passed contrary to a law (for example, was passed on by a whistleblower) and if there will be potential harm to the source or the journalist if the information is given in evidence. At the time of writing in October 2009, the bill was before the Senate.

166 Ibid s 127.

167 Ibid s 131. The rationale for such privileges was canvassed in detail in the ALRC reports concerning evidence law: Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), Ch 16; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Ch 15.

168 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Ch 9.

17.129 In practice, the privilege protecting journalists' sources is most likely to be relevant to inquiries. For example, a journalist was required to disclose a source in *Independent Commission Against Corruption v Cornwall*, notwithstanding claims of a 'reasonable excuse' based on a code of ethics.[169] In the view of the Royal Commission on Tribunals of Inquiry (1966) in the United Kingdom, such tribunals should insist upon such sources only if it was of vital importance.[170]

Submissions and consultations

17.130 Stakeholders expressed a variety of views concerning the question of whether statutory privileges, such as religious confessions privilege and professional confidential relationships privilege (including journalists' privilege) should apply to Royal Commissions and other public inquiries.[171] Liberty Victoria argued for a consistent approach:

> Consequently statutory and common law privileges should be protected, but subject to waiver where there is an overriding public interest in obtaining the information required. In each case, the public inquiry must be satisfied that there is no other reasonable way in which to obtain the information and that the public interest in waiving the privilege outweighs the public interest in protecting that privilege.[172]

17.131 Civil Liberties Australia similarly argued for the recognition of the statutory privileges. In its view, these

> provide a check and balance on the coercive powers of commissions and other inquiries. By protecting individual's liberties, these investigatory bodies enhance their credibility and mitigate the 'star chamber' argument.[173]

17.132 In consultations, some stakeholders agreed that consistency was preferable, and considered that, given the limited circumstances in which such claims would arise, the application of the privileges to Royal Commissions and Official Inquiries posed no real difficulty. Other stakeholders, however, expressed concern that these privileges would encourage proceedings for judicial review, could stymie inquiries, or would be inconsistent with the abrogation of other privileges in relation to Royal Commissions.

17.133 In DP 75, the ALRC expressed the view that these statutory privileges should not apply to inquiries. The only stakeholder who addressed this issue subsequently, Liberty Victoria, reiterated their support for the application of statutory privileges to inquiries.[174]

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169 *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207. The Court also rejected claims of public interest immunity or privilege, and rejected an argument of incompatibility with the implied constitutional right to freedom of communication.

170 C Salmon, *Report of the Royal Commission on Tribunals of Inquiry* (1966), 41, Rec 46.

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

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

173 Civil Liberties Australia, *Submission RC 17,* 19 May 2009.

174 Liberty Victoria, *Submission RC 26*, 27 September 2009.

ALRC's view

17.134 The interests protected by the statutory privileges are important, and an inquiry should only compel such information if it is absolutely necessary for the purposes of the inquiry. Nevertheless, the purpose of establishing Royal Commissions and Official Inquiries is to ascertain the truth without the restrictions on evidence imposed by courts. They are investigatory bodies, rather than judicial bodies, and the restrictions on evidence that apply to inquiries should not necessarily be consistent with those that apply in the courts.[175] Further, the addition of privileges is likely to reduce flexibility, increase formality, and increase the likelihood of legal challenge of inquiry decisions. The ALRC therefore does not recommend that these privileges should apply to Royal Commissions or Official Inquiries.

17.135 As a number of stakeholders noted, however, inquiries can be expected to recognise the importance of the interests protected by the statutory privileges, and exercise their discretion appropriately by, for example, not requiring the information or taking the evidence in private. These are more flexible procedural methods of ensuring that such interests are appropriately recognised and protected. In Chapter 15, the ALRC recommends that the suitability and use of different procedures should be addressed in an *Inquiries Handbook*.[176] It also may be appropriate to discuss the interests protected by statutory privileges in the relevant section on the *Inquiries Handbook.*

175 It also should be noted that these privileges are treated differently in different jurisdictions: see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (2005), Ch 15.

176 Recommendation 15–5.

18. Statutory Exemptions from Disclosure

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Introduction

18.1 Royal Commissions have the power to compel a person to produce documents or other things, and to give answers to questions.[1] This general power to compel disclosure is limited, to some extent, by legislative provisions that exempt a person from the requirement to disclose, as well as common law privileges and public interest immunity.[2]

18.2 In this chapter, the ALRC examines the limitations on the power to compel disclosure that arise out of legislation. First, the exemption from disclosing secret processes of manufacture, which is provided by s 6D(1) of the *Royal Commissions Act 1902* (Cth), is discussed. Secondly, the application of legislative provisions in other Acts—known as secrecy provisions—that generally prohibit or restrict public servants and others from disclosing government information is examined.

Secret processes of manufacture

18.3 Section 6D(1) of the *Royal Commissions Act* provides that nothing in the Act makes it compulsory for a witness to disclose to a Royal Commission any secret process of manufacture. This is the only provision in the Act that specifically exempts a person from disclosure before a Royal Commission.[3] There are similar provisions in

1 *Royal Commissions Act 1902* (Cth) ss 2, 3, 6. These powers are discussed in Ch 11.
2 Common law privileges and public interest immunity are discussed in Ch 17.
3 Under s 6D(2), a witness may request that his or her evidence be given in private if the evidence relates to the profits or financial position of any person, if the taking of the evidence in public would be unfairly prejudicial to the interests of that person. This provision is discussed further in Ch 16.

a number of Australian state and territory Acts governing Royal Commissions.[4] There is no direct equivalent in more recent legislation establishing public inquiries, such as the *Commissions of Inquiry Act 1995* (Tas) or the *Royal Commissions Act 1991* (ACT).

18.4 This exemption was inserted in 1912 on the premise that it would not be fair to require business people to make disclosures that may 'injure them in competing with rivals'.[5] Ordinarily, the confidentiality of manufacturing processes could be protected by various legal mechanisms, such as by an action for breach of confidence in relation to trade secrets.[6]

18.5 In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that s 6D(1) of the *Royal Commissions Act* should be repealed.[7] The two stakeholders who addressed this issue supported the repeal of s 6D(1).[8]

ALRC's view

18.6 Section 6D(1) of the *Royal Commissions Act* should be repealed. The ALRC does not recommend in this Report that any other category of information, including national security information, should be completely exempt from disclosure. There is no reason to elevate confidential commercial information above other categories of confidential information. Further, while s 6D(1) may have served a function when it was introduced, it now appears outdated.[9]

18.7 Finally, the confidentiality of commercial information may be protected through mechanisms less drastic than an absolute prohibition on disclosure. In Chapter 16, the ALRC recommends that the *Inquiries Act* should provide a general power to prohibit or restrict public access to hearings and publication of evidence because of, among other things, the nature and subject matter of information that may be involved.[10] If confidential commercial information is likely to be disclosed to a Royal Commission or Official Inquiry, it is appropriate for that inquiry to consider whether to prohibit or restrict public access to hearings or publication of material to protect the confidentiality of that information.

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4 *Special Commissions of Inquiry Act 1983* (NSW) s 17(2)(b); *Royal Commissions Act 1923* (NSW) s 11(2)(b); *Commissions of Inquiry Act 1950* (Qld) s 14(1)(a); *Royal Commissions Act 1968* (WA) s 19; *Royal Commissions Act 1917* (SA) s 14.

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 July 1912, 1486 (J Quick). Section 6D(1) was inserted by s 7 of the *Royal Commissions Act 1912* (Cth). In this period, there were a number of Royal Commissions inquiring into the competition in specific industries.

6 A court may restrain a person from disclosing information as a consequence of an action for breach of confidence. See G Clarke SC, 'Confidential Information and Trade Secrets: When is a Trade Secret in the Public Domain?' (2009) 83 *Australian Law Journal* 242.

7 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 17–1.

8 I Turnbull, *Submission RC 22,* 21 September 2009; Liberty Victoria, *Submission RC 26,* 27 September 2009.

9 The section has not been judicially considered, other than by way of passing reference in *Sorby v Commonwealth* (1983) 152 CLR 281, 288, 315, nor has it been the subject of academic consideration.

10 Recommendation 16–1.

Recommendation 18–1 Section 6D(1) of the *Royal Commissions Act 1902* (Cth), which provides that a person may refuse to disclose a secret process of manufacture, should be repealed.

Secrecy provisions

18.8 Legislation often includes provisions which impose secrecy or confidential obligations on public servants and others which restrict the disclosure of certain categories of information.[11] The majority of the provisions impose criminal penalties for disclosures which breach these obligations. Secrecy provisions often regulate disclosures by 'officers' or 'Commonwealth officers'. Section 70 of the *Crimes Act 1914* (Cth) is the principal secrecy offence of general application to Commonwealth officers.

18.9 Section 3 of the *Crimes Act* defines 'Commonwealth officer' for the purposes of s 70 as including those appointed or engaged under the *Public Service Act 1999* (Cth), employees of the Public Service of a territory or Defence Force or the Service of a Commonwealth public authority; Australian Federal Police employees, Commissioners and special members; those performing services for or on behalf of the Commonwealth, a territory or Commonwealth public authority; and employees or service providers and employees of service providers for the Australian Postal Corporation. These and other types of people may be specified as 'officers' for the purposes of other secrecy provisions.[12]

18.10 Concurrent with this Inquiry, the ALRC is conducting an inquiry into Commonwealth secrecy provisions.[13] The ALRC is to report on its secrecy inquiry in December 2009. As the ALRC outlines in its Discussion Paper, *Review of Secrecy Laws* (DP 74), a number of important public interests are protected by secrecy provisions. For example, secrecy provisions may be designed to protect national security and defence, the enforcement of the criminal law, the safety of an individual or the public, or personal privacy.[14]

Secrecy provisions and inquiries

18.11 If a statutory obligation of secrecy applies, it may limit the power of a Royal Commission to compel the production of information. Two issues arise in relation to this limitation. First, should the obligation of secrecy outweigh the public interest in

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11 The ALRC has so far identified 507 secrecy provisions in Commonwealth primary and subordinate legislation: Australian Law Reform Commission, *Review of Secrecy Laws*, DP 74 (2009), [5.33].

12 Ibid, [8.2]–[8.59].

13 That Inquiry focuses upon the protection of government information balanced against the need to maintain an open and accountable government through providing appropriate access to information. It does not consider the distinct issue of disclosure to courts and tribunals: ibid [1.49]–[1.51].

14 Ibid, Ch 7.

disclosure to an inquiry? There is evidence that the work of some inquiries have been impeded by the application of secrecy provisions. For example, in an interim report of the Royal Commission into the Activities of the Federated Ship Painters and Dockers (1984), Commissioner Costigan recommended that s 16 of the *Income Tax Assessment Act 1936* should be amended to enable limited disclosure to Royal Commissions.[15]

18.12 In its submission to this Inquiry, the Department of Immigration and Citizenship (DIAC) noted that, in the Inquiry into the Case of Dr Mohamed Haneef (2008), it had been unable to submit information obtained on a confidential basis from another agency because of a secrecy provision in the *Migration Act 1958* (Cth). It was, however, able to answer questions pursuant to an authorisation by the minister under that provision.[16]

18.13 Secondly, it may be unclear whether a particular secrecy provision applies to prevent disclosure to Royal Commissions and to the Official Inquiries recommended in this Report.[17] In some cases, the applicability of the provision to an inquiry may be clear, because the secrecy provision refers expressly to disclosure to Royal Commissions or similar inquiries, or refers expressly to 'courts' or 'tribunals' defined in a way that would include Royal Commissions and Official Inquiries. In other cases, however, the wording of a secrecy provision is ambiguous.

Express reference

18.14 Some secrecy provisions expressly regulate the disclosure of information to Royal Commissions.[18] For example, s 3E(1) of the *Taxation Administration Act 1953* (Cth) provides that:

> Notwithstanding any taxation secrecy provision, the Commissioner may disclose information acquired by the Commissioner under the provisions of a tax law to an authorised law enforcement agency officer, or to an authorised Royal Commission officer, if the Commissioner is satisfied that the information is relevant to:
>
> (a) establishing whether a serious offence has been, or is being, committed; or
>
> (b) the making, or proposed or possible making, of a proceeds of crime order.

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15 F Costigan, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union* Interim Report No 4 (1982), [4.06]–[4.07].

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

17 Recommendation 5–1. The ALRC has identified a number of secrecy provisions which apply expressly to disclosure of information to Royal Commissions, and which may need to be amended to apply expressly to Official Inquiries. Appendix 6 contains these provisions in a table of possible consequential amendments to legislation that may be required if Recommendation 5–1 is accepted.

18 See, eg, *Australian Communication and Media Authority Act 2005* (Cth) s 59C; *Australian Securities and Investments Commission Act 2001* (Cth) s 127(2B); *Child Support (Assessment) Act 1989* (Cth) s 150(4D), (4E); *Child Support (Registration and Collection) Act 1988* (Cth) s 16(4D), (4E); *Inspector-General of Intelligence and Security Act 1986* (Cth) s 34A; *Health Insurance Act 1973* (Cth) s 124Z; *Income Tax Assessment Act 1936* (Cth) s 16(4)(k), (4A); *Taxation Administration Act 1953* (Cth) ss 3E(1), (6A), 17C.

18.15 Section 127(2B) of the *Australian Securities and Investment Commission Act 2001* (Cth) provides:

> Disclosing information to a Royal Commission (within the meaning of the *Royal Commissions Act 1902*) is authorised use and disclosure of the information.

Courts or tribunals

18.16 Secrecy provisions often specify the powers of courts or tribunals to compel information subject to the secrecy provision.[19] In many cases, the word 'court' or 'tribunal' is defined in the legislation to include 'any tribunal, authority or person having power to require the production of documents or the answering of questions', which would include Royal Commissions and Official Inquiries.[20] Some provisions, however, leave 'court' or 'tribunal' undefined,[21] so the position of inquiries is left unclear.

18.17 In some cases, the secrecy provision permits disclosures to a court or tribunal, either unconditionally,[22] or with conditions such as the court preventing further disclosure.[23] Usually, however, the secrecy provision provides that a person 'shall not be required to produce' certain information in a court.[24] This phrase has been interpreted by the High Court to mean that an officer cannot be compelled to produce that information in a court, but if the officer chooses to give that information regardless, the evidence is admissible in court.[25] Typically, there are some exceptions to this protection, such as where disclosure is 'necessary for the purposes of this Act'.[26] Less commonly, secrecy provisions may be expressed as prohibiting a person from disclosing information to a court.[27]

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19 In the absence of such a provision, courts are generally reluctant to hold that a secrecy provision prevents courts from ordering disclosure: see *Townsley v Allan* [1985] Tas R 123.

20 See, eg, *Age Discrimination Act 2004* (Cth) s 60(2).

21 See, eg, *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 128(10), 131; *Australian Federal Police Act 1979* (Cth) s 40ZA.

22 See, eg, *Aviation Transport Security Act 2004* (Cth) s 74.

23 See, eg, *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 162(2); *Australian Hearing Services Act 1991* (Cth) s 67(8).

24 See, eg, *Australian Crime Commission Act 2002* (Cth) s 51; *Australian Security Intelligence Organisation Act 1979* (Cth) s 81.

25 *Canadian Tobacco Co v Stapleton* (1952) 86 CLR 1, 7, 10–11; *Hilton v Wells* (1985) 157 CLR 57, 87; *Sydney Water Corporation v The Persons Listed in the Schedules trading as PricewaterhouseCoopers* [2008] NSWSC 361, [14]-[17]. A court may also require inspection of those documents: *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447, and may require production on the application of a person to whom disclosure is authorised by the provision: *Bouhafs v Nurapai Torres Strait Islanders Corporation* [2001] QSC 148.

26 See, eg, *Age Discrimination Act 2004* (Cth) s 60(2); *Australian Security Intelligence Organisation Act 1979* (Cth) s 81.

27 See, eg, *Superannuation (Resolution of Complaints) Act 1993* (Cth) s 63(2)(b).

Unclear provisions

18.18 Whether a secrecy provision overrides a requirement in inquiries legislation to provide information is often unclear. In some cases, judicial interpretation may clarify the position. For example, some provisions, such as s 70 of the *Crimes Act 1914* (Cth), prohibit unauthorised disclosure to 'any person'. Section 70 has been held not to override a witness's duty to provide information to a court, as the word 'person' does not include a court.[28] A similar argument could be made in relation to the duties of a witness before a Royal Commission or Official Inquiry.[29]

18.19 Another form of secrecy provision might indicate that disclosure is prohibited in respect of Royal Commissions or Official Inquiries, because the secrecy provision appears to list exhaustively the list of authorised disclosures.[30] As noted above, there are secrecy provisions that regulate the powers of courts or tribunals, without defining those terms. In such cases, it could be argued that inquiries should be treated analogously to courts or tribunals.

18.20 In other cases, the secrecy provision may give little guidance as to whether it is intended to protect a person from being compelled to disclose to a public inquiry. For example, s 65 of the *Building and Construction Industry Improvement Act 2006* (Cth) prohibits the disclosure of 'protected information'. It does not specify its relationship with the powers of courts, and does not indicate whether the disclosures are to a 'person'. It is unclear if this exception would apply to the work of an inquiry. It is difficult for a person, reading that section, to determine whether a disclosure to a Royal Commission or (if established) an Official Inquiry would be permitted.

Exceptions

18.21 The exceptions to a secrecy provision can also impact on whether disclosure is permitted to a Royal Commission or other inquiry. Many secrecy provisions provide an exception for disclosures that are authorised by the head of an agency or minister.[31] Arguably, disclosure to a Royal Commission or Official Inquiry also may be permitted as a disclosure 'in the performance of', or 'in the course of', a person's functions or duties, which is another common exception.[32] In the context of a secrecy provision in public service regulations, a judge of the High Court has expressed the view that:

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28 *Canadian Tobacco Co v Stapleton* (1952) 86 CLR 1, 6. See also L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 125.

29 See, eg, H Coombs and others, *Royal Commission on Australian Government Administration* (1976), Appendix 4K, 356.

30 See, eg, the *Income Tax Assessment Act 1936* (Cth) s 16; *Australian Security Intelligence Organisation Act 1979* (Cth) ss 18, 34ZS.

31 In Australian Law Reform Commission, *Review of Secrecy Laws*, DP 74 (2009), the ALRC proposes that one exception to the new general secrecy offence it proposes should be where the disclosure is authorised by the relevant agency head or minister, and the agency head or minister certifies that the disclosure is in the public interest: Proposal 9–1(b).

32 See the discussion in ibid, [9.13]–[9.27].

> if an officer is required, by a body having legal authority to obtain information compulsorily, to give information or disclose the contents of documents which he has in his official capacity, it is in the course of his official duty to obey the requirement.[33]

18.22 Another common exception is if disclosure is 'necessary … for the purpose of carrying into effect the provisions of this Act'. As discussed in *Re Confitt Constructions Pty Ltd (in liq)*, this exception in s 16(3) of the *Income Tax Assessment Act 1936* (Cth) has been interpreted liberally.[34] The court held that, if a court orders that it is necessary to divulge information during proceedings related to the validity of a taxation assessment or payment, then there is no breach of the secrecy provision.[35]

18.23 This reasoning may extend to the work of inquiries. For example, in an analogous decision in New Zealand, a court held that an inquiry into alleged maladministration in the taxation department also could be treated as a 'carrying into effect' of the relevant taxation legislation, which was an exception to the relevant secrecy provision.[36] Disclosure to an inquiry into maladministration in a field related to the governing Act, therefore, may be permitted 'in the performance of' a person's functions or duties.

Legislative overriding of secrecy provisions

18.24 Another method of regulating disclosure to public inquiries is to override secrecy provisions expressly in the legislation governing the inquiry itself. While the *Royal Commissions Act* is silent on its relationship to secrecy provisions, some more recent legislation addresses the issue of secrecy provisions directly.

18.25 Three recent federal Acts governing standing commissions—the *Australian Crime Commission Act 2002* (Cth), the *Law Enforcement Integrity Commissioner Act 2006* (Cth), and the *Building and Construction Industry Improvement Act 2005* (Cth)—provide that the power to compel evidence generally overrides secrecy provisions.[37] Certain types of secrecy provisions may, however, continue to operate. For example, the provision in the *Australian Crime Commission Act* only overrides secrecy provisions other than taxation secrecy provisions or provisions prescribed in regulations.[38]

18.26 Some state inquiries legislation also deals expressly with secrecy provisions. The *Commissions of Inquiry Act 1950* (Qld) enables a regulation to declare that a written requirement to provide information overrides any oaths, affirmations and

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33 *Mobil Oil Australia Pty Ltd v The Commissioner of Taxation* (1963) 113 CLR 475, 505 (Kitto J). This view, however, was expressed in the context of disclosure to a taxation Board of Review, which had authority to require a taxation officer to communicate certain information to it.

34 *Re Confitt Constructions Pty Ltd (in liq)* [1999] 2 Qd R 490, [14] and cases discussed therein.

35 Ibid.

36 *Peters v Davison* [1999] 2 NZLR 164.

37 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5)(d); *Building and Construction Industry Improvement Act 2005* (Cth) s 52(7); *Australian Crime Commission Act 2002* (Cth) ss 19A(5), 20(4), (5).

38 *Australian Crime Commission Act 2002* (Cth) s 20A(1), (3).

provisions of an Act which otherwise might afford a reasonable excuse for non-compliance with that requirement.[39]

18.27 In New South Wales, the legislation governing some standing commissions expressly provides that a person is not excused from answering a question or producing a document or other thing on, among other grounds, the ground of 'a duty of secrecy'.[40] This has been interpreted as excluding all legal and moral obligations of confidence.[41]

Submissions and consultations

18.28 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether inquiries legislation should override secrecy provisions in federal legislation and, if so, whether this should be stipulated in inquiries legislation or in the legislation containing the specific secrecy provision.[42] Most of the stakeholders who addressed the issue of secrecy provisions expressed the view that there was a need to review the relationship between secrecy provisions and the powers of inquiries to compel information. Liberty Victoria submitted:

> While a general prohibition is appropriate to ensure public servants do not disclose confidential or private information inappropriately, disclosures made to courts and formal inquiries (including public inquiries) should be specifically excluded. Unfortunately there are many examples of disclosure prohibitions being used by governments to stymie inquiries. Liberty believes that public inquiries' powers to obtain information should override secrecy and other prohibition provisions to the extent required to obtain information reasonable and necessary to the inquiry and where adequate provision is made for the protection of that information.[43]

18.29 It was suggested by DIAC that the ALRC consider whether the present regime is the most efficient way of dealing with similar documents. It recommended, for example, that an inquiry body be empowered to request and examine confidential material in its own right, while respecting the condition of confidentiality imposed by a relevant agency.[44]

18.30 The CPSU submitted:

> In our view it is not currently clear whether the secrecy provisions that exist in federal legislation or the requirement to give evidence under the *Royal Commissions Act*

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39 *Commissions of Inquiry Act 1950* (Qld) s 5(2A). Such a regulation would have the effect of deeming a person not to have committed an offence, or be subject to disciplinary action, as a result of the provision.

40 *Police Integrity Commission Act 1996* (NSW) ss 27(3)(c), 40(2); *Independent Commission Against Corruption Act 1988* (NSW) s 37(2); *New South Wales Crime Commission Act 1985* (NSW) s 18B(1). See also *Public and Finance Audit Act 1983* (NSW) s 38.

41 *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207, 247.

42 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 8–6.

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

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

> takes precedence. Whichever takes precedence, the situation must be clarified in the legislation.
>
> In the absence of a clear legislative intent to override the secrecy provisions, a witness should have the right not to disclose confidential information. To force a witness to disclose confidential information, without clear legislation that allows for it, would open the public servant up to disciplinary proceedings and potentially criminal prosecution.[45]

18.31 In consultations, the majority of stakeholders that addressed the issue were in favour of introducing into inquiries legislation some provision to enable the overriding of secrecy provisions.[46]

18.32 In DP 75, the ALRC proposed that a legislative provision should enable Royal Commissions or Official Inquiries to require a person to answer or produce documents or other things, notwithstanding any secrecy provision, if the inquiry specifies that the requirement is made notwithstanding that secrecy provision. The ALRC proposed, however, two exceptions to this: first, in relation to secrecy provisions that specifically govern the disclosure of information to Royal Commissions or Official Inquiries; and secondly, in relation to secrecy provisions prescribed in regulations under the *Inquiries Act*.[47] The ALRC also proposed that a person compelled to answer notwithstanding a secrecy provision should be immune from any criminal, civil, administrative or disciplinary proceedings as a result of providing that information.[48]

18.33 These proposals received support from the few stakeholders who addressed the issue. The CPSU welcomed the proposals, reiterating that public servants should be able to ascertain from the legislative provision which of the competing obligations was to be preferred.[49] Liberty Victoria also expressed support, stating that this 'would result in more evidence being adduced, thus enabling the inquiry to fulfil its function'.[50]

18.34 The Australian Intelligence Community (AIC) reiterated its previous view that 'the secrecy laws contained in legislation relating to AIC agencies are essential to the effective operation of Australia's intelligence agencies'.[51] In its view, there should be no power to override the secrecy provisions in the *Intelligence Services Act 2001* (Cth), *Australian Security and Intelligence Organisation Act 1979* (Cth), or other relevant national security protections in Commonwealth legislation. It indicated that it would seek to have these provisions either prescribed under the *Inquiries Act*, or reviewed to provide specifically for disclosure to Royal Commissions and Official Inquiries. It did

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45 Community and Public Sector Union, *Submission RC 10,* 22 May 2009.
46 See Appendix 2 for a List of Agencies, Organisations and Individuals Consulted.
47 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 17–2.
48 Ibid, Proposal 17–3.
49 Community and Public Sector Union, *Submission RC 25,* 22 September 2009.
50 Liberty Victoria, *Submission RC 26,* 27 September 2009.
51 Australian Intelligence Community, *Submission RC 12,* 2 June 2009.

not, however, 'object to greater clarification on how disclosure to a Royal Commission or an Official Inquiry interacts with secrecy provisions applicable to the AIC'.[52]

ALRC's view

18.35 It is unsatisfactory that, in many cases, it is unclear whether a secrecy provision prohibits a person from disclosing information to an inquiry—especially as a person could be subject to criminal sanctions for either breaching the secrecy provision, or refusing to answer or produce a document as required an inquiry. It is therefore desirable to clarify the relationship between secrecy provisions and the power of Royal Commissions or Official Inquiries to compel evidence, where this relationship is not made clear by the secrecy provision itself.

18.36 Clarity could be achieved either by amending unclear secrecy provisions, or by regulating the relationship between secrecy provisions and the power of inquiries to compel information through a general provision in the *Inquiries Act* recommended in this Report. Given the large number of secrecy provisions in Commonwealth legislation, the second option is the more practical method.

18.37 The appropriate relationship between secrecy provisions and the powers of inquiries to compel information depends on balancing competing interests. On the one hand, there is a strong public interest in full disclosure to a public inquiry. The purpose of an inquiry—particularly an investigatory inquiry—is usually to ascertain all the facts. Exemptions from disclosure impede this function. The public interest in disclosure may be even stronger where the purpose of the inquiry is to examine government management and conduct.

18.38 On the other hand, consideration must be given to the interests that are protected by a particular secrecy provision. Secrecy provisions are designed to protect a wide variety of interests, some of which may justify an exemption from disclosure (such as national security) and others of which may not (such as ensuring confidence in the handling of government information). The balance between these competing interests should be struck differently, therefore, depending upon the nature of the interest sought to be protected by the secrecy provision.

18.39 The strong public interest in disclosure should, in the majority of situations, weigh in favour of enabling inquiries to compel information that is the subject of a secrecy provision. In the case of many secrecy provisions, the interests sought to be protected by the secrecy provision may be protected through measures restricting public access to the information, as discussed in Chapter 16. These include: the receipt of material in private hearings; a prohibition on the publication of material; the removal of identifying details from any material; and the receipt of material on a confidential basis.

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52 Ibid.

18.40 In some cases, however, the interests protected by a particular secrecy provision may outweigh the public interest in disclosure. An obvious example is the need to protect national security information, as discussed in Chapter 13. While the public interest in disclosure to an inquiry should ordinarily prevail against the interest protected by a secrecy provision, there should be a mechanism to ensure that the balance may be struck differently in relation to particular secrecy provisions.

18.41 The *Inquiries Act* recommended in this Report should, therefore, include a general power to override a secrecy provision. To ensure that the inquiry has considered whether such information should be compelled notwithstanding the secrecy provision, the inquiry should be required to state clearly that it compels the information notwithstanding that secrecy provision.

18.42 This general power should be subject to two exceptions. First, there should be an exception if the disclosure of information to an inquiry is already governed by a particular secrecy provision, either by express reference to a Royal Commission or similar inquiry that would include an Official Inquiry, or by inclusion of Royal Commissions and similar inquiries in the definition of courts or tribunals. The balance between the particular interests protected by that secrecy provision and disclosure to a Royal Commission or Official Inquiry has, in that case, already been struck by Parliament.

18.43 Secondly, there should be an exception if a secrecy provision is prescribed by regulation under the *Inquiries Act*. Where the Australian Government considers that the interests protected by a particular secrecy provision justify an exemption from disclosure to a Royal Commission or Official Inquiry, it should be able to protect those interests by prescribing the relevant provision.[53] This would have the advantage of flexibility, while still providing certainty to the person subject to the obligation.

18.44 This approach would require the Australian Government to balance the public interest in disclosure with the specific public interests that are protected by secrecy provisions. It is foreseeable that the person charged with balancing the competing interests may be part of a government whose conduct is being investigated by the Royal Commission or Official Inquiry. On the other hand, it is not desirable to place this responsibility on an inquiry member, since he or she may not be in a position to assess the potential harm caused by disclosure of the information protected by the secrecy provision. Further, until the inquiry member receives the information, he or she will not usually be in a position to assess the sensitivity of the information involved.

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53 The concerns of the AIC relating to national security information are discussed in Ch 13. In that chapter, the ALRC recommends that the *Inquiries Act* include specific provisions dealing with national security information, including powers enabling an inquiry to make directions aimed at protecting national security information: Recommendations 13–1, 13–2.

18.45 Finally, the *Inquiries Act* should clearly provide that where an inquiry overrides a secrecy provision, a person compelled to answer a question or produce a document is not subject to any criminal, civil, administrative or disciplinary proceedings as a result of providing that information.[54] It clearly would be unfair to require a person to disclose information subject to a secrecy provision, and then penalise that person for doing so. The extension to administrative or disciplinary proceedings is necessary in this context as some obligations of secrecy arise under administrative or disciplinary schemes.[55]

18.46 The ALRC also has considered whether any distinction should be made between Royal Commissions and Official Inquiries with regard to the application of secrecy provisions. As discussed in Chapters 3, 5, 11 and 17, the ALRC recommends that Royal Commissions should have a wider range of coercive powers than Official Inquiries. In particular, the ALRC recommends that Royal Commissions have the power to compel information that is potentially incriminating (that is, the power to abrogate the privilege against self-incrimination) or, if specified in the Letters Patent, the power to compel information that is subject to client legal privilege.[56]

18.47 The nature of the interests which secrecy provisions are designed to protect, however, differ from those protected by these two privileges. Further, as many Official Inquiries may review the management and operations of a particular agency or department, the application of secrecy provisions is likely to impede substantially the work of an Official Inquiry. In the ALRC's view, therefore, there should be no distinction between Royal Commissions and Official Inquiries in relation to the application of secrecy provisions.

Recommendation 18–2 The recommended *Inquiries Act* should provide that Royal Commissions or Official Inquiries may require a person to answer questions or produce documents or other things, notwithstanding any secrecy provision if the inquiry specifies that the requirement is made notwithstanding that secrecy provision. This power should not apply in the case of:

(a) secrecy provisions that specifically govern the disclosure of information to Royal Commissions or Official Inquiries; and

(b) secrecy provisions as prescribed in regulations under the recommended *Inquiries Act*.

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54 See, eg, the immunity provided in the *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(7). However, this does not extend to administrative or disciplinary proceedings.

55 Australian Law Reform Commission, *Review of Secrecy Laws*, DP 74 (2009), Ch 13.

56 Recommendations 11–3, 11–7, 11–8, 17–1 and Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), Rec 6–2.

Recommendation 18–3 The recommended *Inquiries Act* should provide that if a person is required to answer questions or produce documents or other things to a Royal Commission or Official Inquiry notwithstanding a secrecy provision, that person is not subject to any criminal, civil, administrative or disciplinary proceedings as a result of providing that information.

Part F

Offences and Penalties

19. Offences

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Introduction

19.1 In this chapter, the ALRC examines whether the offences in the *Royal Commissions Act 1902* (Cth) should be retained and, if so, whether similar offences

should apply to Official Inquiries.[1] The penalties for these offences are discussed in Chapter 21.

19.2 There are four types of offence in the *Royal Commissions Act*: offences that punish failures to comply with requirements of a Royal Commission (offences of non-compliance);[2] an offence of contravening a direction of a Royal Commission not to publish specified material;[3] offences that prohibit interference with evidence or witnesses;[4] and an offence which prohibits conduct that interferes with the work or authority of a Royal Commission.[5]

19.3 This chapter commences with an examination of the possibility of using other methods of punishing conduct by law, such as through the use of civil or administrative penalties, instead of, or in addition to, offences of non-compliance. Secondly, the scope of non-compliance offences is examined. Thirdly, the offences of interference with evidence or witnesses are discussed. Finally, the chapter addresses the application of other offences under the *Crimes Act 1914* (Cth), which relate to inquiries.

Civil or administrative sanctions

19.4 Under the *Royal Commissions Act*, it is a criminal offence to fail to comply with a summons or notice of a Royal Commission, or to refuse to swear, affirm or answer questions when required by a Royal Commission or by those authorised to appear before a Royal Commission.[6] One issue for the ALRC is whether there is a role for civil or administrative penalties, or infringement notices, instead of, or in addition to, criminal offences in punishing this kind of behaviour.

Types of penalties

19.5 The ALRC discussed the distinctions between criminal, civil and administrative penalties in detail in its report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95) (*Principled Regulation*).[7] Criminal offences—the most familiar form of sanction—are usually prosecuted by the relevant office of the Director of Public Prosecutions (DPP), who must prove the elements of the offence beyond reasonable doubt.[8] Offences may be punishable by imprisonment, and the consequences of criminal convictions extend beyond the immediate penalty, as

1 In Ch 5, the ALRC recommends that the *Royal Commissions Act* should be amended to enable the establishment of Royal Commissions and Official Inquiries and renamed the *Inquiries Act*: Recommendation 5–1.
2 *Royal Commissions Act 1902* (Cth) ss 3, 6, 6AB.
3 Ibid s 6D(4).
4 Ibid ss 6H–6N.
5 Ibid s 6O. Section 6O is dealt with separately in Ch 20.
6 Ibid ss 3, 6, 6FA.
7 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002).
8 *Evidence Act 1995* (Cth) s 141.

criminal convictions may affect a person's eligibility for offices (such as company directorships) or may need to be disclosed for the purposes of employment or travel.[9]

19.6 Traditionally, criminal penalties have been justified by 'the repugnance attached to the [prohibited] act, which invokes social censure and shame'.[10] This is not true of many crimes created by statute, such as motor vehicle offences or offences of failing to meet certain licensing standards.[11]

19.7 In modern regulatory systems, civil penalties have been used as another form of punishment. Civil penalties are used extensively, for example, in relation to contraventions of pt IV of the *Trade Practices Act 1974* (Cth), dealing with restrictive trade practices; and in relation to contraventions of a significant number of provisions in the *Corporations Act 2001* (Cth).[12] Civil penalties differ from criminal offences in that: they usually are pursued by a regulator;[13] the procedures and rules of evidence in civil cases, including a lower standard of proof, apply to their enforcement;[14] and most penalties are in the nature of fines.[15]

19.8 The Australian Government Attorney-General's Department guidelines contained in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (*Guide to Framing Commonwealth Offences*) states that:

> It is particularly important that civil penalties be used in appropriate and justifiable contexts. They are otherwise open to criticism for being too soft (in not carrying a criminal penalty) or for being too harsh (in not carrying the safeguards of criminal procedure such as a requirement for proof beyond reasonable doubt).[16]

19.9 Taking into account the ALRC recommendations made in *Principled Regulation*, the *Guide to Framing Commonwealth Offences* nominates the following

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9 See Australian Law Reform Commission, *Review of Secrecy Laws*, DP 74 (2009), [6.41]–[6.44].

10 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [2.10].

11 Ibid, [2.8].

12 *Corporations Act 2001* (Cth) pt 9.4B.

13 See Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 62.

14 The standard of proof in civil cases is on the 'balance of probabilities', but the standard of proof applied in a particular case will depend on the type of order sought and the gravity of the consequences: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

15 The maximum financial penalty under a civil penalty provision can be higher than the maximum fine for a parallel criminal offence. This is justified on the basis that the adverse effects of a criminal conviction should be taken into account when considering the relative severity of criminal and civil financial penalties. See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 26–3; Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 66.

16 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 63.

criteria as relevant to whether a civil penalty provision is likely to be appropriate and effective:

- where criminal punishment is not warranted—contraventions of the law involving serious moral culpability should be pursued only by criminal prosecution;

- where the maximum civil penalty is sufficient to justify the expense and time of court proceedings—the maximum penalty should be at least $5,000 and typically more; and

- where the conduct involves corporate wrongdoing—given that imprisonment is not available as a penalty, the financial disincentives that civil penalties offer may be effective.[17]

19.10 Administrative penalties, broadly speaking, arise automatically by operation of legislation, or can be imposed directly by an agency or regulator.[18] This distinguishes them from criminal and civil penalties, which may be imposed only by courts.[19] For example, tax legislation imposes specified additional charges for failing to pay tax on time.[20]

19.11 In the case of an administrative penalty, the legislation determines when a breach has occurred and whether a penalty is imposed, as well as the nature and the amount (or method of calculation) of the penalty to be imposed. The regulator has no power before the penalty is imposed to determine the level of penalty other than in accordance with the legislation, nor to determine whether there are extenuating circumstances that might warrant a variation in its imposition.[21]

19.12 Another form of penalty is an infringement notice, typically used for traffic or parking offences.[22] This is a notice authorised by statute setting out the particulars of an alleged offence. It gives the person to whom the notice is issued the option of either paying the penalty set out in the notice or electing to have the matter dealt with by a court. Infringement notice schemes typically set penalties at 20% or less of the

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17 Ibid, 63–64.

18 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [2.70].

19 Under the *Australian Constitution*, and the doctrine of the separation of powers, only judicial officers may exercise the judicial power of the Commonwealth, including the imposition of fines: *R v White; Ex Parte Byrnes* (1963) 109 CLR 665, 669–670, or other punishment for an offence: *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175.

20 *Taxation Administration Act 1953* (Cth) s 8AAC.

21 The regulator may have a limited discretion whether to impose the penalty for the breach or to withdraw the penalty if the facts on which the breach is based are incorrect, and can in many cases remit some or all of the penalties after they have been imposed.

22 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 12.

maximum fine that could be imposed by a court. The major advantage of such schemes is that they can prevent minor cases from coming to court and save time and money for the offender and the criminal justice system.

19.13 Infringement notices are not administrative penalties. Rather, they are an administrative device designed to dispose of a matter involving a breach that would otherwise have to be dealt with by a court—either by way of a criminal prosecution or in civil penalty proceedings. The ALRC has recommended previously that an infringement notice scheme should apply only to minor offences of strict or absolute liability.[23]

19.14 The *Guide to Framing Commonwealth Offences* states that an infringement notice scheme 'may be employed for relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective'.[24]

Choice of penalties

19.15 The *Guide to Framing Commonwealth Offences* advises that the choice between criminal sanctions or civil penalties is influenced by four considerations:

- the nature of the conduct that is sought to be sanctioned, including the type of harm caused by the conduct;
- the appropriateness of the criminal process for investigating and dealing with the conduct;
- the role of the provision in the legislative scheme, and consistency within that legislative scheme and with other Commonwealth legislation; and
- the effectiveness of the provision in deterring the prohibited conduct.[25]

19.16 The *Guide to Framing Commonwealth Offences* states that 'perhaps the most important factor' in deciding whether a sanction should be criminal or non-criminal is the effect of a criminal conviction.[26]

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23 Ibid, Recs 12–1, 12–2, 12–8. See also Recs 12–3 to 12–7. The *Guide to Framing Commonwealth Offences* also expresses the view that an infringement notice scheme should apply only to offences which do not require proof of fault and contain physical elements readily capable of assessment by an enforcement officer: Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 51

24 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 50.

25 Ibid, 10–11. See also Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Chs 3, 4.

26 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007); Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 3.

19.17 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether there was a role for the use of civil or administrative penalties as sanctions for breaches of legislation establishing Royal Commissions or other public inquiries.[27] In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC expressed the view that civil and administrative penalties were not appropriate in an inquiries context.[28]

Submissions and consultations

19.18 Stakeholders in this Inquiry were divided on whether there should be a role for civil or administrative penalties. Liberty Victoria supported the use of both criminal and civil penalties, which could be applied depending on the circumstances of the offence.[29] The Law Council of Australia (Law Council) suggested the use of civil penalties.[30] In consultations, a number of stakeholders also expressed support for civil penalties. Some stakeholders noted that civil proceedings could be instituted more rapidly than criminal proceedings, because there was often a delay while the Commonwealth DPP decided whether to institute criminal proceedings.[31] Other stakeholders noted that civil penalties may be more effective in sanctioning corporations, since the maximum civil penalty could be higher than the penalty for an equivalent criminal offence.

19.19 Some expressed the view that the penalties should remain exclusively criminal. For example, the Australian Government Solicitor stated that the use of civil or administrative penalties would 'downgrade' the offences, and 'would run the risk of lessening the authority and effectiveness of such bodies'.[32]

ALRC's view

19.20 Inquiries are temporary bodies established by the executive principally for the purpose of inquiring into an issue and recommending action to government. The primary argument for using civil or administrative penalties in this context is that a failure to comply with a requirement of such a body may not be sufficiently blameworthy to merit a criminal penalty, including imprisonment. Civil penalties also may be seen as equally effective in coercing compliance—especially if corporations are involved—and could be used as a lesser penalty where circumstances do not warrant a criminal conviction.

19.21 In the ALRC's view, however, if a person fails to attend or give evidence when required by a Royal Commission or Official Inquiry, a criminal sanction should be

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27 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 9–2.

28 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), [18.21]–[18.29].

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

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

31 The institution of criminal proceedings is discussed in Ch 21.

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

available. Inquiries are established to inquire into matters of public importance.[33] The coercive powers of Royal Commissions are critical to its method of investigation, and a failure to comply with the requirement of a Royal Commission has the potential to frustrate the purpose of a Royal Commission. This would apply equally to Official Inquiries, if established. Further, a person may have a strong incentive to withhold information, since an inquiry might expose wrongdoing or a subsequent legal proceeding may be contemplated. In some circumstances, failing to attend an interview or hearing of an inquiry, or withholding information from an inquiry may be sufficiently serious to warrant a criminal conviction.

19.22 Of course, the degree of culpability will vary greatly depending upon the circumstances. These are, however, matters that are more appropriately taken into account in the exercise of the discretion to prosecute, in the setting of the penalties, and in sentencing.[34]

19.23 Further, in Chapter 20, the ALRC recommends that Royal Commissions and Official Inquiries should have the power to apply to the Federal Court for enforcement of compliance with its notices and directions, as an alternative to prosecution of such conduct.[35] This may provide a more timely and effective mechanism for ensuring compliance than prosecution for an offence.

19.24 The ALRC has considered whether other forms of penalties should be available, but for a number of reasons is not presently persuaded that these would be helpful. First, failures to comply with the requirements of Royal Commissions or Official Inquiries should not be considered minor or low-level types of offences of a kind similar to traffic or parking fines, and are therefore not suitable for an infringement notice scheme or administrative penalties imposed by legislation.

19.25 Secondly, as discussed in *Principled Regulation*, these types of penalties remove a number of important safeguards in the criminal process. For example, both infringement notices and administrative penalties impose fixed penalties that do not take into account the individual circumstances of the case, such as any reasons for failing to comply or the nature of the inquiry or the information.

19.26 Another procedural safeguard in the criminal process is the exercise of the discretion to prosecute by the DPP in the relevant jurisdiction. Other types of penalties are usually pursued by the regulator concerned. The issue of infringement notices or the pursuit of a civil penalty by an inquiry is likely to undermine the perception of the independence of the inquiry.

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33 This is discussed in Ch 6.
34 These issues are discussed in Chapter 21.
35 Recommendation 20–2.

19.27 Thirdly, the procedural advantages of using these forms of penalty do not justify their use in Royal Commissions or Official Inquiries. Since the conduct of failing to attend or failing to comply with a notice is not difficult to prove beyond reasonable doubt, there is no real advantage to using the lower standard of proof in civil penalties. Such conduct does not require a complex regulatory scheme, in which civil penalties typically arise. In Chapter 21, the ALRC recommends that the maximum monetary penalty for these offences should be $3,300, which is too low to justify the expense and time of instituting a civil action.[36]

19.28 Finally, the primary advantage of infringement notices or administrative penalties is to manage a high volume of minor offences. Since Royal Commissions and Official Inquiries are not established frequently, the volume of offences of non-compliance with these inquiries is most unlikely to justify an infringement notice or administrative penalty scheme.

Offences of non-compliance

Current offences of non-compliance

19.29 The *Royal Commissions Act* creates several offences punishing non-compliance with the requirements of a Royal Commission. First, s 3 makes it an offence for a person to fail to attend a hearing or produce a document in response to a summons or written notice, without reasonable excuse. It is a defence to a prosecution that a document required to be produced was not relevant to the inquiry. This is in addition to the general defences that are available under Chapter 2 of the *Criminal Code* (Cth).[37]

19.30 Secondly, s 6 makes it an offence for witnesses to refuse to be sworn or to make an affirmation, or to answer any question relevant to the inquiry put to the witness by a Commissioner, or by a person authorised to examine or cross-examine witnesses.[38] Section 6 does not include any defences in addition to the general defences under the *Criminal Code*.

19.31 Thirdly, s 6AB makes it an offence to refuse or fail to produce a document which is required by a Royal Commissioner in order to determine a claim of client legal privilege, without reasonable excuse.[39] The section also makes it an offence to refuse or fail to produce a document required by a Royal Commissioner after a

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36 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 63–64.

37 These include the defence of mistake of fact and the defence of an intervening conduct or event: *Criminal Code* (Cth) ss 6.1, 10.1.

38 Pursuant to *Royal Commissions Act 1902* (Cth) s 6FA, which makes a witness examined or cross-examined by an legal practitioner authorised under that section subject to the same liabilities as if he or she had been examined by a Commissioner.

39 The Act uses the term 'legal professional privilege'. The term 'client legal privilege' is preferred here because it is used in the *Evidence Act 1995* (Cth) pt 3.10, div 1, and it reflects the nature of the privilege as one belonging to the client, rather than the lawyer: Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007), [1.16]–[1.17].

Commissioner has rejected a claim of client legal privilege, without reasonable excuse. It is not a reasonable excuse to claim that the document is subject to client legal privilege, unless a court has found the document to be subject to the privilege.[40]

19.32 Section 6C provides that where a person has on any day done or omitted to do something which amounts to an offence against ss 3 or 6, and does or omits to do the same thing at any meeting of the Commission held on some other day, each such act or omission shall be a separate offence.

Need for offences in the recommended *Inquiries Act*

19.33 The powers of a Royal Commission to require attendance, production of documents and the giving of evidence are discussed in Chapter 11. The same powers are recommended for Official Inquiries.[41] Indeed, the need for similar coercive powers for inquiries other than Royal Commissions is a key reason for proposing Official Inquiries.[42]

19.34 The power to compel evidence is critical to the functioning of an inquiry. Typically, this is the primary way in which an inquiry conducts its investigation. If a person is able to refuse to comply without any legal sanction, the purpose of establishing Royal Commissions and Official Inquiries may be frustrated. While non-compliance may not be an issue in every inquiry, sanctions do play an essential part in ensuring compliance.[43] Most stakeholders who addressed the issue in this Inquiry supported the need for sanctions, with particularly strong support for sanctions for non-compliance.

19.35 The threat of some legal sanction, therefore, is required to ensure compliance with the critical information-gathering powers of an inquiry. This need applies equally to Royal Commissions and Official Inquiries, since both have the same basic powers to compel the production or the giving of information. As discussed above, in the ALRC's view, this sanction should take the form of a criminal offence. The scope of the offences of non-compliance that should apply to Royal Commissions and Official Inquiries is discussed in the next section.

Strict liability

19.36 The offences of non-compliance, with one exception, are strict liability offences[44]—that is, they are offences in which the prosecution is not required to prove

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40 Client legal privilege is discussed in Ch 17.

41 Recommendations 11–1, 11–2.

42 See the discussion in Ch 5.

43 For example, the Australian Crime Commission reported 15 prosecutions relating to non-compliance in 2007–2008: Australian Crime Commission, *Annual Report 2007–2008*, Appendix A.

44 The exception is the offence of refusing or failing to produce a document or other thing when required by written notice (as opposed to a summons): *Royal Commissions Act 1902* (Cth) s 3(5). The offence was introduced in the *Royal Commissions and Other Legislation Amendment Act 2001* (Cth) sch cl 4C. It is not clear why this offence is not a strict liability offence. The issue is not addressed in the relevant Explanatory Memoranda, or in the second reading speech or debates.

that the defendant had any particular mental state when committing the act which constitutes the offence.[45] The defence of mistake of fact, and the defence of intervening conduct or event, are available in relation to strict liability offences.[46]

19.37 The non-compliance offences were stated to be strict liability offences when they were amended, in 2001, to be consistent with the principles of the *Criminal Code*.[47] The Explanatory Memorandum to the amending legislation noted that these offences were 'likely to create strict liability offences given the nature of the offences, the presence of a defence of reasonable excuse and the relatively small penalties involved'.[48]

19.38 Offences of strict liability depart from the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from the assumption of an unjustified risk (that is, recklessness).[49] This principle is reflected in s 5.6 of the *Criminal Code*, which provides that where no fault element is prescribed in relation to conduct, the relevant fault element is intention.

19.39 In 2002, the Senate Standing Committee for the Scrutiny of Bills (Senate Committee) reviewed strict liability offences in federal legislation.[50] The Senate Committee recommended that strict liability should apply only where the penalty does not include imprisonment, and where the monetary penalty does not exceed $6,600 for an individual and $33,000 for a body corporate.[51] The Senate Committee also considered that strict liability may be appropriate in the following circumstances: to ensure the integrity of a regulatory regime; to protect the general revenue; to overcome difficulties in prosecuting fault provisions; and to overcome arguments about the defendant's knowledge of a legislative provision which has been incorporated into the offence.[52]

19.40 The *Guide to Framing Commonwealth Offences* advises that a strict liability offence is appropriate only if each of the following considerations applies:

- the offence is not punishable by imprisonment and the monetary penalty does not exceed the amount specified by the Senate Committee;

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45 Under the *Criminal Code* (Cth), the mental state required to commit an offence is known as a 'fault element': ch 2, pt 2.2, div 5.

46 *Criminal Code* (Cth), ss 6.1, 10.1.

47 *Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) sch 1, cll 20, 22, 26.

48 Explanatory Memorandum, Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Bill 2001 (Cth).

49 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 24.

50 Parliament of Australia—Senate Standing Committee for the Scrutiny of Bills, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, Report 6/2002 (2002).

51 Ibid, 284.

52 Ibid, 284–285.

- the punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime; and

- there are legitimate grounds for penalising persons lacking 'fault'; for example, because they will be placed on notice to guard against any possible contravention.[53]

19.41 Federal legislation governing other bodies with coercive powers generally does not provide for strict liability in relation to similar offences.[54] In its 1987 report, *Contempt* (ALRC 35), the ALRC recommended that there should be an intention not to comply, or no reasonable attempt to comply, before these offences are committed. Further, the ALRC suggested that, in addition, punitive sanctions should only be imposed where a person was at least reckless as to whether the act or omission constituted a breach of the summons or written notice.[55]

19.42 In its recent review of inquiries legislation in New Zealand, the New Zealand Law Commission (NZLC) recommended that, for a sanction to apply, the acts of non-compliance should have to be committed 'intentionally'.[56] This recommendation has been incorporated in the Inquiries Bill 2008 (NZ), which at the time of writing in October 2009 was before the New Zealand Parliament.[57]

19.43 In response to IP 35, only one stakeholder, the Law Council, expressly addressed the issue of whether offences of non-compliance should remain strict liability. It noted in its submission that 'the mental element required for the offences in the [*Royal Commissions Act*] varies from strict liability to intention, without a clear rationale for this variance'.[58] In its view, 'greater consistency could be achieved by requiring a mental element of intention for all offences contained within the [Act]'.[59]

19.44 In DP 75, the ALRC proposed that the offences of non-compliance should require a mental element of intention. While intention was not specified in the language of the proposal, the ALRC noted that intention would be required as a result of s 5.6 of the *Criminal Code*. In its submission in response, the Law Council supported the proposal, but indicated that the mental element should be clearly specified.[60]

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53 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 25.

54 See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 93; *Australian Crime Commission Act 2002* (Cth) s 30.

55 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [522]–[526], [785]. Recklessness is a lower level of fault than intention or knowledge, so intention or knowledge that it would constitute a breach of the summons or written notice would also satisfy this requirement.

56 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), Rec 40.

57 Inquiries Bill 2008 (NZ) cl 30(b).

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

59 Ibid.

60 Law Council of Australia, *Submission RC 30,* 2 October 2009. The Law Council was the only stakeholder to address this proposal.

ALRC's view

19.45 There appears to be no reason to depart from the general rule that the fault element of intention should apply to the offences of non-compliance. It should normally be relatively easy to prove that a person intended not to attend an inquiry, or intended not to produce documents or give evidence. Further, the justifications for a strict liability offence—such as improving the administration of a regulatory scheme—do not apply to these offences. Finally, these offences are punishable by imprisonment. Applying strict liability runs counter to the advice of the Senate Committee, and the advice given in the *Guide to Framing Commonwealth Offences*.

19.46 The ALRC recommends that the *Inquiries Act* should require that the relevant acts or omissions in the offences of non-compliance must be committed intentionally. For the sake of clarity, this is specified in Recommendation 19–1. This recommendation also will allow a defendant to raise other defences under the *Criminal Code*, such as that the person acted under duress in committing the offence.[61]

19.47 As noted above, in *Contempt*, the ALRC recommended that the offence should additionally include a requirement that a person was reckless as to whether his or her conduct constituted a breach of a notice or direction of the inquiry.[62] That is, in addition to the intention to commit the act or omission, a person also must be reckless as to the *result* of the act or omission in order to be liable. The principle underlying this recommendation is that a person should understand the consequences of the act or omission, before being subject to criminal punishment. This principle remains sound.

19.48 In the ALRC's view, however, there is a better way of securing that end—namely by requiring an inquiry to give notice of the consequences of non-compliance before the offence is committed. This ensures that it is the responsibility of the inquiry to ensure a person is aware of the consequences of non-compliance. It is preferable that a person is made aware of these consequences at the stage of being required to comply, rather than addressing the issue of knowledge of the consequences at the time an offence is prosecuted.

Scope of conduct

19.49 Section 3 of the *Royal Commissions Act* currently requires a person to attend a hearing when required to do so by a summons. The offence in s 6 penalises 'any person appearing as a witness before the Commission' for refusing to swear or affirm, or answer a relevant question. As discussed in Chapter 15, it may be appropriate to conduct some inquiries informally, such as through the use of meetings and interviews rather than hearings. As a result, it is appropriate to extend the offences of non-compliance so that they apply to these informal types of procedures. Recommendation

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61 *Criminal Code* (Cth) pt 2.3.

62 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [522]–[526], [785].

19–1 below, therefore, modifies the terminology used in the current offences for this purpose.

19.50 The offence of failing to produce documents currently does not require that the person so required has the capacity to comply—for example, because they do not have possession of, or access to, those documents. Although this lack of capacity probably would be a 'reasonable excuse' for not complying, it is preferable to provide that a person does not commit an offence unless that person has 'custody or control' of the documents or other things required. This formulation is used in other Australian jurisdictions,[63] and is reflected in Recommendation 19–1.

Notice requirements

19.51 Under s 2(3A) of the *Royal Commissions Act*, a written notice to produce documents must specify the document or thing required, and the time and place for production. There are no other statutory requirements as to what a summons or notice to produce should include. It appears, however, that a person who is 'required' to answer a relevant question must have some notice of the consequences of a failure to comply.[64]

19.52 For a person to be aware of his or her legal obligations, and to be able to comply with them, a notice or summons needs to include certain details. For example, whether a person may be accompanied by a lawyer or other third party should be included in notices for attendance. Notices for the production of documents or things should identify how the information is to be provided. The period for compliance with a notice for the production of documents, or attendance at a hearing, should be at least 14 days.[65]

19.53 These recommended inclusions are similar to those proposed by the Administrative Review Council (ARC), which recently reviewed the issue of notices in the context of the information-gathering powers of administrative agencies.[66] In addition, the ARC recommended that all notices to produce information or attend hearings should identify the legislative authority under which they are issued, contact details for further inquiries, and the recipient's rights in relation to privilege.[67]

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63 See, eg, *Royal Commissions Act 1923* (NSW) s 20; *Commissions of Inquiry Act 1950* (Qld) ss 5, 9.

64 *Hammond v Aboudi* (2005) 31 WAR 533, [45].

65 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 97–98. It should be noted that, if only a short time is allowed for production, this may be challenged on the basis that the power to compel information was not used in good faith for the purpose for which it was conferred and with regard to the effect of the exercise of the power upon those affected: *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 57 FLR 368, 377–378; *AB v ACC* (2009) 175 FCR 296.

66 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008), 33–38.

67 Ibid, Principle 14, 37–38.

19.54 The ARC also recommended that a notice should set out the consequences for non-compliance. In some jurisdictions, this is required by statute. The *Inquiries Act 2005* (UK) provides that a notice to produce evidence must 'explain the possible consequences of not complying with the notice'.[68] The *Commissions of Investigation Act 2004* (Ireland) requires a member of a commission to provide a witness with a written statement specifying the powers of the commission and its intention to exercise those powers if the witness does not cooperate.[69] Further, if a witness is not legally represented, 'the commission shall advise the witness of his or her legal rights and obligations while giving evidence on oath or affirmation'.[70]

19.55 This is similar to the requirement under s 137.1 of the *Criminal Code*, which prohibits the giving of false or misleading information. This provides:

> (5) Subsection (1) does not apply as a result of subparagraph (1)(c)(ii) if, before the information was given by a person (the ***first person***) to the person mentioned in that subparagraph (the ***second person***), the second person did not take reasonable steps to inform the first person of the existence of the offence against subsection (1). …
>
> (6) For the purposes of subsections (4) and (5), it is sufficient if the following form of words is used:
>
> 'Giving false or misleading information is a serious offence'.

19.56 A requirement to provide certain details in a notice may be readily fulfilled through the use of a standard form. For example, schedule 1 to the *Royal Commissions Regulations 2001* (Cth) provides a form for a summons to appear before a Royal Commission. This form includes the legislative authority to compel production, the name of the Commissioner, and the time and date for compliance. In the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission), Commissioner Cole appended to the report of the inquiry an example of a notice to produce information. In addition to the matters considered above, the notice identified the terms of reference of the inquiry and the consequences of non-compliance.[71]

19.57 In IP 35, the ALRC asked whether a defendant should be given notice of the consequences of non-compliance.[72] No submission to this Inquiry addressed the issue.

ALRC's view

19.58 Before individuals are subject to criminal sanctions, it is essential that they be made aware of their obligation to comply, their rights in relation to that obligation and

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68 *Inquiries Act 2005* (UK) s 21(3).
69 *Commissions of Investigation Act 2004* (Ireland) s 13(1).
70 Ibid s 13(2).
71 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, Appendix 9.
72 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 9–3(c).

how they can comply. This is an important procedural safeguard. The recommended *Inquiries Act*, therefore, should include certain notice requirements.

19.59 In particular, a notice should specify: the consequences of non-compliance; the reasons which could justify non-compliance (as discussed below); the time and date for compliance; and, in relation to the production of documents or things, the manner of compliance. These are the most important matters of which the recipient of a notice should be aware.

19.60 This could be ensured—and in a convenient way—by way of a prescribed form of notice in regulations under the *Inquiries Act*, in terms similar to that used in the Building Royal Commission.

19.61 In the ALRC's view, there also should be notice of the consequences of non-compliance when a person is asked a question in an inquiry which he or she is required to answer. The same justifications for requiring notice apply equally whether the evidence is to be given in documentary form or orally. These requirements are reflected in Recommendation 19–2 below.

Reasonable excuse

19.62 The *Royal Commissions Act* provides that it is not an offence to fail to attend a hearing, or to fail to produce documents or other things as required by a Royal Commission, if the person has a 'reasonable excuse'.[73] Similarly, the offences in s 6AB relating to client legal privilege are not committed if a person has a reasonable excuse.[74] The offence of refusing to swear or affirm, or answer a question, however, does not allow for any 'reasonable excuse'.[75] The procedure for determining 'reasonable excuse' is discussed in Chapter 14.

19.63 Section 1B of the *Royal Commissions Act* defines 'reasonable excuse' as 'an excuse which would excuse an act or omission of a similar nature' by a witness before a court of law or, in the case of a person served a written notice to produce, a person served with a subpoena in connection with a proceeding before a court of law.[76] Contrary to the general practice in the courts, the Act also provides that it is not a reasonable excuse to fail to produce a document on the ground of the privilege against

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73 *Royal Commissions Act 1902* (Cth) ss 3(1B), 3(2B), 3(5).

74 Ibid s 6AB(4).

75 A defence of 'reasonable excuse' is provided in respect of similar offences in the ACT and Tasmania: *Criminal Code* (ACT) s 721; *Commissions of Inquiry Act 1995* (Tas) s 28, while a defence of 'lawful excuse' applies to similar offences in other jurisdictions: *Evidence (Commissions) Act 1982* (Vic) ss 16(b), 19(b); *Inquiries Act 2007* (Singapore) sch 1 cl 7(d).

76 *Royal Commissions Act 1902* (Cth) s 1B. This definition was extended after the decision that the definition in s 1B did not extend to persons required to produce a document by written notice: *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30, [46].

self-incrimination,[77] or because of a claim of client legal privilege, unless a court or the Royal Commissioner determines that the claim is valid.[78]

19.64 Apart from these provisions, however, the *Royal Commissions Act* is silent on what other circumstances might constitute a reasonable excuse. In the report of the Building Royal Commission, Commissioner Cole recommended that the Act should provide further that it is 'not a reasonable excuse that the person needs, wants, or asserts that it requires copies of the documents and that the Commission has refused to meet the cost of those copies; or that it has not yet been reimbursed for the cost of compliance'.[79]

19.65 The High Court has made it clear that there is no exhaustive list of what may constitute a reasonable excuse.

> When legislatures enact defences such as 'reasonable excuse' they effectively give, and intend to give, the courts power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes a decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence.[80]

19.66 For example, it may be a 'reasonable excuse' if a person is physically unable to attend a hearing, for reasons such as illness, injury or inability to travel. A witness also may be able to claim reasonable excuse on the basis of practicality, for example: if it is impracticable to produce the volume of information requested in the time available; the witness is unable to locate documents after making a reasonable effort to find them; or the witness has not been paid travel expenses where he or she is entitled to them.[81]

19.67 The question of whether 'reasonable excuse' encompasses privileges or public interest immunity, or statutory obligations not to disclose information, has been more controversial.[82] In 1912, when legislation was passed defining 'reasonable excuse',[83] the then Attorney-General expressed the view that the term should be restricted to 'such an excuse as physically prevents a person from attending'.[84]

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77 *Royal Commissions Act 1902* (Cth) s 6A. The privilege against self-incrimination is discussed in Ch 17.

78 Ibid ss 6AA, 6AB(5). This is discussed in Ch 17.

79 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 80.

80 *Taikato v The Queen* (1996) 186 CLR 454, 466.

81 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 48.

82 Privileges and public interest immunity are discussed in Ch 17, and secrecy provisions are discussed in Ch 18.

83 *Royal Commissions Act 1912* (Cth) s 3.

84 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, 1185, (W Hughes—Attorney-General). As noted in Ch 12, however, the Attorney-General considered that privileges and secrecy obligations would continue to apply as a result of s 7 of the Act: Commonwealth, *Parliamentary Debates*, House of Representatives, 30 July 1912, 1388, 1390 (W Hughes—Attorney-General).

19.68 While the High Court has expressed different views on whether 'reasonable excuse' includes such privileges, immunities and statutory obligations,[85] the present position appears to be that these would be ordinarily included in the phrase 'reasonable excuse'.[86]

19.69 In *AWB Ltd v Cole*, the Federal Court considered the phrase 'reasonable excuse' in the *Royal Commissions Act.* The Court held that the 'ordinary meaning' of 'reasonable excuse' was broad, and encompassed matters such as privilege:

> [The phrase 'reasonable excuse'] is wide enough to cover any matter, including absence of intention, which the law acknowledges by way of answer, defence, justification or excuse for refusing or failing to produce the specified documents …[87]

19.70 This 'ordinary meaning' was held to apply to the offence of refusing or failing to produce documents or other things in response to a written notice, on the basis that the definition in s 1B did not apply to this offence.[88] However, the Court noted that the definition in s 1B of the *Royal Commissions Act* may be narrower than this 'ordinary meaning', since it defined the term to include only such excuses as would excuse similar acts or omissions in a court of law.[89] Thus, the scope of the term 'reasonable excuse' in the *Royal Commissions Act* remains unclear.

Clarification of 'reasonable excuse'

19.71 The *Guide to Framing Commonwealth Offences* states that the phrase 'section X does not apply if the person has a reasonable excuse' should not be used in drafting Commonwealth offences, because the phrase is 'too open ended and places uncertainty in the way of any prosecution as to what defence might be raised'.[90] Instead, the *Guide* encourages reliance on general defences such as duress, mistake and ignorance of fact provided in the *Criminal Code*,[91] or for additional specific defences to be set out in legislation.[92]

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85 In the past, the view was expressed that the phrase was directed to physical or practical excuses: *Controlled Consultants v Corporate Affairs Commission* (1985) 156 CLR 385, 392; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 336. Cf, however, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [20], [58].

86 See, eg, *Smith v Lawrence* (2002) 171 FLR 68, [99], holding that a conflicting statutory secrecy provision was inherently a 'reasonable excuse'; *Ganin v NSW Crime Commission* (1993) 32 NSWLR 423, 436–437.

87 *AWB Ltd v Cole* (2006) 152 FCR 382, [46].

88 This was because the definition in s 1B of 'reasonable excuse' was not then expressed in terms to apply to the offence under s 3(5) of the Act, relating to a refusal or failure to produce documents or things in response to a written notice. The definition has since been amended to apply to that offence: *Royal Commissions Amendment Act 2006* (Cth), sch 1, cl 2.

89 *AWB Ltd v Cole* (2006) 152 FCR 382, [45]–[46].

90 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 28.

91 *Criminal Code* (Cth) pt 2.3.

92 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 28.

19.72 The NZLC considered this issue in relation to the similar phrase 'without sufficient cause' in the *Commissions of Inquiry Act 1908* (NZ). It noted that the phrase allowed a Commissioner to 'take into account a broad range of matters which might include the impact on a witness's professional or personal reputation, or commercial interests, but equally the interests of other individuals and the public at large in seeing the inquiry fulfil its role'.[93]

19.73 The NZLC considered that the phrase was too broad, and recommended the adoption of a list of circumstances of lawful excuse from s 121 of the *Coroners Act 2006* (NZ), which is now incorporated in cl 30(2) of the Inquiries Bill 2008 (NZ). This provides that a person can refuse to comply with a notice requiring the supply of documentation or information if:

> (a) compliance would be prevented by a privilege or immunity that the person would have as a witness or counsel, were that person giving evidence or acting as counsel in civil proceedings before a court; or
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> (b) compliance is prevented by an enactment, rule of law, or order or direction of a court prohibiting or restricting disclosure, or the manner of disclosure, of any document, information, or thing; or
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> (c) compliance would be likely to prejudice the maintenance of the law, including the prevention, detection, investigation, prosecution, or punishment of offences, including the right to a fair trial.

Procedure for determining claims

19.74 There is presently no procedure in the *Royal Commissions Act* that allows a claim of reasonable excuse or privilege to be examined by the Royal Commission, except in the case of client legal privilege. This may cause practical difficulties. If a person refuses to comply because he or she believes the information is protected by a privilege or there is a reasonable excuse, there are only two ways of resolving the dispute. First, the person may be prosecuted for failing to comply and then offers a 'reasonable excuse' for this failure. Secondly, the person may seek judicial review of the decision in a court.

19.75 The *Royal Commissions Act* sets out a procedure for examination of claims of client legal privilege. Under s 6AA of the *Royal Commissions Act*, a claim that a document is protected by client legal privilege may be determined by the member of the Royal Commission who required production of the document. The Royal Commissioner may ask for further documents for the purpose of determining the claim, and may decide whether to accept or reject the claim. The section also allows a court to determine the claim of client legal privilege.

19.76 Should there be a statutory procedure empowering an inquiry to examine the validity of reasonable excuses, similar to that in s 6AA of the *Royal Commissions Act*?

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93 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [8.34].

For example, the *Inquiries Act* (UK) provides that a person may, upon receipt of a notice to produce, claim that he or she is unable to comply with that notice, or it is not reasonable in all the circumstances to require him or her to comply. This claim is to be determined by the chair of the inquiry, who may revoke or vary the notice on that ground.[94]

19.77 In these statutory procedures, however, the decision of the inquiry on the validity of a reasonable excuse is not final. As noted above, s 6AA of the *Royal Commissions Act* enables a court to determine the claim of client legal privilege. In relation to other claims of reasonable excuse, a court would determine whether there was a 'reasonable excuse' in the course of a prosecution, or could determine the issue on an application for judicial review of a decision. The *Guide to Framing Commonwealth Offences* states that 'only a court can resolve any dispute about privilege', because it is 'neither appropriate for a person's claim of privilege to be treated as definitive, nor for the Commonwealth to be able to make a binding determination'.[95]

19.78 In Chapter 14, the ALRC recommends that an inquiry should have the power to refer a question of law to a court.[96] As discussed in that chapter, this power could be used, for example, to determine whether a person has a valid claim for privilege.

19.79 While most legislation in Australian jurisdictions enabling the establishment of an inquiry does not include procedures for claiming reasonable excuses, the legislation of some standing commissions provides for review of decisions on claims of privilege or 'reasonable excuses' for non-compliance.[97] For example, s 19 of the *NSW Crime Commission Act 1985* (NSW) provides that the Crime Commission shall decide claims that a person is entitled to refuse to furnish information or answer questions, but if the person is dissatisfied with the decision they may apply to the Supreme Court for 'an order of review' of the decision. The section requires the person to produce the document subject to the claim to the Court for custody, and prevents prosecutions for refusing to produce a document or answer a question while such an application may be made or is being considered.[98]

19.80 This procedure is similar to that set out in ss 194 and 195 of the *Crime and Misconduct Act 2001* (Qld), although those sections provide for a right of appeal, by leave, to the Supreme Court, and only if there are 'significant prospects of success' or

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94 *Inquiries Act 2005* (UK) s 21(4).

95 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 105.

96 Recommendation 14–1.

97 Privileges are discussed in Ch 17.

98 This section was considered in *Ganin v NSW Crime Commission* (1993) 32 NSWLR 423, 439-440, where Kirby P (as he then was) emphasised that as the section conferred a power of review, a degree of deference should be accorded to the Commission as the primary decision-maker and a specialised body with a greater degree of expertise than the Court.

an important question of law is involved. Sections 195B and 196 further provide for an application to the Supreme Court to decide claims of privilege.

Submissions and consultations

Clarification of 'reasonable excuse'

19.81 In submissions in response to IP 35, the few stakeholders who addressed the issue unanimously supported some clarification of the reasonable excuse provision. The Community and Public Sector Union (CPSU) stated:

> The current formulation of 'reasonable excuse' is confusing. The Issues Paper itself identifies a number of privileges in respect of which it is unclear whether they constitute a 'reasonable excuse' for the purposes of the *Royal Commissions Act*. A comprehensive list of the circumstances where the defence is available would provide far greater certainty to witnesses and their legal counsel.
>
> In our view, there should be a similar list for other public inquiries.[99]

19.82 Other stakeholders considered that the list should be non-exhaustive because it was difficult to foresee all the circumstances in which it might be reasonable to refuse to comply.

19.83 In DP 75, the ALRC made a number of proposals clarifying the term 'reasonable excuse'.[100] These proposals specified as 'reasonable excuses' matters that the courts have held to constitute reasonable excuses, including impossibility or impracticability of compliance; privileges or public interest immunity; and other legal obligations preventing disclosure.

19.84 A few submissions addressed these proposals. The Australian Intelligence Community supported the clarification of public interest immunity as a 'reasonable excuse'.[101]

19.85 Kym Bills expressed concern that the proposal clarifying 'reasonable excuse', in relation to refusals or failures to produce documents or other things, or answer a question, were 'couched too broadly' and had the potential to lead 'to extended argumentation from a company with "deep pockets" that wishes to delay an inquiry or constrain its access to important information'.[102]

Procedure for determining claims

19.86 In DP 75, the ALRC also proposed that an inquiry member should have power to consider a claim of reasonable excuse, or that a person is unable to comply, and if

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

100 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposals 18–4, 18–5.

101 Australian Intelligence Community, *Submission RC 12,* 2 June 2009.

102 K Bills, *Submission RC 19,* 17 September 2009.

the member considered the claim had been made out, the member may vary or revoke the requirement in his or her discretion.[103]

19.87 Dr Ian Turnbull, in the only submission directly addressing this issue, expressed support for a procedure to determine reasonable excuses. He noted that refusals to produce information should be tested in closed sessions of an inquiry, or in courts, where such refusals were substantial and likely to hinder the inquiry.[104]

ALRC's view

Clarification of 'reasonable excuse'

19.88 As discussed in Chapters 17 and 18, it is desirable to clarify which privileges and immunities, and which statutory exemptions of obligations to disclose information, would excuse a person from failing to produce a document or thing required by a Royal Commission. Similarly, it is desirable to clarify when a person has a reasonable excuse for failing to attend a hearing. A person should understand in what circumstances he or she may refuse to comply without being subject to criminal sanctions.

19.89 In the ALRC's view, a non-exhaustive list of the circumstances which constitute a reasonable excuse would clarify what is meant by the term. It is difficult to foresee all of the possible circumstances in which it might be reasonable not to comply with a notice or direction, and therefore a non-exhaustive list is appropriate.

19.90 Nevertheless, there are a number of clear cases in which an excuse would be reasonable, and these can be specified in the legislation. For example, it would be a 'reasonable excuse' if an inquiry member determined it was impossible or impracticable for a person to attend a hearing for a range of physical or practical reasons, such as illness or inability to travel. There also may be physical or practical matters that make it reasonable not to comply with a requirement to produce a document or thing, such as the impracticability of producing the volume of documents required within the time allowed, or an inability to locate the documents after taking all reasonable steps to do so.

19.91 Further, it should be a 'reasonable excuse' to fail to produce a document or thing if the document or thing is protected by a privilege or public interest immunity, or by a secrecy provision, subject to any modifications made to these matters in the Act (as discussed in Chapters 17 and 18).[105] It would also be a 'reasonable excuse' to refuse or

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103 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 18–6.

104 I Turnbull, *Submission RC 22,* 21 September 2009.

105 Chapters 17 and 18 discuss the circumstances in which privileges, public interest immunity and secrecy provisions may apply to information compelled by an inquiry. The ALRC recommends that the privilege against self-incrimination should not apply to information compelled by a Royal Commission (although such information could not be used directly in subsequent criminal or penalty proceedings): see Recommendations 17–1, 17–2. The ALRC also recommends that Royal Commissions and Official

fail to produce a document or thing if disclosure of the document or thing is prohibited by the directions or orders of a court, or if disclosure would have the tendency to interfere with the administration of justice.[106]

19.92 These 'reasonable excuses' also should apply to the offence of refusing to answer a question when required by an inquiry. There is not presently a defence of reasonable excuse in respect of this offence. Nevertheless, a 'reasonable excuse' which would justify non-production of documents, such as that the information is subject to privilege, may equally apply to non-disclosure of evidence given orally. There does not, however, appear to be any reasonable excuse for the offence of refusing to swear or affirm, and no defence of reasonable excuse is therefore recommended for that offence.[107]

Procedure for determining claims

19.93 In the ALRC's view, there are two reasons why a procedure to examine a claim of reasonable excuse should be enacted. First, if there is a valid reasonable excuse, a person should be able to resolve the dispute without either risking prosecution or instituting court proceedings. Secondly, if there is a claim that there is a reasonable excuse, in the interests of efficiency a Royal Commission or Official Inquiry should be able to examine the reasons for the claim and decide whether the document or other thing should still be required.

19.94 The ALRC recommends, therefore, that the *Inquiries Act* should include provisions that enable an inquiry member to consider a claim of reasonable excuse, and which empower the member to vary or revoke the requirement to produce information or answer a question if the member considers the claim to be justified.

19.95 The question of whether there is a 'reasonable excuse' is a question of law, as is the question of whether a document is privileged. If there is a dispute between the chair and a participant about whether there is a reasonable excuse, the participant can choose (as is now the case) to seek judicial review of the decision. In addition, as discussed in Chapter 14, the inquiry should have the power to refer such a dispute to a court as a question of law.

Relevance

19.96 It is a defence to a prosecution under ss 3(2) and 3(4) of the *Royal Commissions Act*, and under s 6AB, that the documents or other things sought are not relevant to the matters into which the Commission is inquiring.[108] Similarly, under s 6, a witness is

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Inquiries should be able to override a secrecy provision, subject to two exceptions: see Recommendations: 18–2, 18–3.

106 This is discussed in detail in Ch 14.

107 The general defences in pt 2.3 of the *Criminal Code* (Cth) (such as lack of capacity, mistake of fact, and duress) would continue to apply.

108 *Royal Commissions Act 1902* (Cth) ss 3(3), 6AB(6).

only required to answer questions that are 'relevant to the inquiry'. A similar requirement exists in relation to refusals to answer questions in court.[109]

19.97 As it is the role of a Royal Commission to undertake a broad investigation, courts have been generous in defining what might be considered relevant to an inquiry. In *Ross v Costigan*, the High Court found that Royal Commissions will not be prevented from pursuing a line of inquiry unless they are 'going off on a frolic of their own':

> [Where] there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the Commission is required to investigate under its letters patent, such a line of questioning should … be treated as relevant to the inquiry.[110]

19.98 There has been no suggestion that this defence of relevance causes problems. In the ALRC's view, it is clearly desirable that a person should be penalised only in relation to material or answers that are relevant to an inquiry, liberally interpreted. The *Inquiries Act* should provide a defence of relevance in relation to the offences of refusing or failing to answer a question, or provide a document or other thing.

Continuing offence

19.99 Section 6C of the *Royal Commissions Act* provides that if a person has on one day done or omitted to do something constituting an offence under ss 3 or 6 of the Act, and does or omits to do the same thing on a different day, each act or omission is to be treated as a separate offence.

19.100 Section 4K of the *Crimes Act* includes a general provision that has a similar effect:

> (1) Where, under a law of the Commonwealth, an act or thing is required to be done within a particular period or before a particular time, then, unless the contrary intention appears, the obligation to do that act or thing continues, notwithstanding that the period has expired or the time has passed, until the act or thing is done.
>
> (2) Where a refusal or failure to comply with a requirement referred to in subsection (1) is an offence against a law of the Commonwealth, a person is guilty of an offence in respect of each day during which the person refuses or fails to comply with that requirement, including the day of a conviction for any such offence or any later day.

19.101 The *Guide to Framing Commonwealth Offences*, referring to s 4K, states that 'continuing offences provide a strong incentive for compliance with a continuing

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109 See *Attorney General v Mulholland* [1963] 2 QB 477; *Attorney General v Lundin* (1982) 75 Crim App R 90.

110 *Ross v Costigan* (1982) 59 FLR 184, 335. See S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 46. This issue is also discussed in Ch 14.

obligation (for example, to submit an annual report by a specified day) in the aftermath of an initial contravention'.[111] The *Guide* notes that, if this section applies, this should be made clear in the legislation and the maximum penalty should be set as a daily penalty—that is, it should be set significantly lower than if the penalty was a global maximum.[112]

19.102 No suggestion has been made to this Inquiry that s 6C of the *Royal Commissions Act* causes problems in practice. In the ALRC's view, such a provision has the desirable effect of providing a continuing incentive to comply with a notice to produce information. However, s 6C no longer appears necessary in light of the general provision in s 4K of the *Crimes Act*. Consequently the ALRC does not recommend that a similar provision be included in the *Inquiries Act*.

Recommendation 19–1 The recommended *Inquiries Act* should provide, with respect to Royal Commissions and Official Inquiries, that a person commits an offence if the person, without reasonable excuse, intentionally refuses or fails to:

(a) swear an oath or make an affirmation when required to do so by an inquiry member;

(b) answer a question when required by do so by an inquiry member, or a person authorised by an inquiry member to ask the question;

(c) comply with a notice requiring a person to attend or appear; or

(d) comply with a notice requiring a person to produce a document or other thing, in the custody or control of that person.

Recommendation 19–2 The recommended *Inquiries Act* should provide that a notice requiring a person to attend or appear before, or requiring a person to produce a document or other thing to, a Royal Commission or Official Inquiry should include:

(a) the consequences of not complying;

(b) what is a reasonable excuse for not complying, as provided in the Act;

(c) the time and date for compliance; and

111 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 41.

112 Ibid, 41–42. Section 4K reflects the common law, where a failure to comply with a notice within a prescribed time is likely to be considered a continuing offence: *Hopfner v Flavel* (1990) 48 A Crim R 149.

(d) the manner in which the person should comply with a notice requiring the production of a document or other thing.

Recommendation 19–3 The recommended *Inquiries Act* should provide that the offence of refusing or failing to answer a question is committed only if the person refuses or fails to answer after being informed that it is an offence to do so.

Recommendation 19–4 The recommended *Inquiries Act* should provide that it is a reasonable excuse to refuse or fail to comply with a notice to attend or appear before, or to produce a document or other thing to, a Royal Commission or Official Inquiry if an inquiry member determines that it is impossible or impracticable for the person to comply, for example, for physical or practical reasons.

Recommendation 19–5 The recommended *Inquiries Act* should provide that a reasonable excuse to refuse or fail to produce a document or other thing, or answer a question, includes the fact that the document, thing, or answer:

(a) is protected by client legal privilege, the privilege against self-incrimination, parliamentary privilege, or public interest immunity, subject to the provisions of the recommended Act;

(b) is prohibited from being disclosed by the provision of another Act, subject to the provisions of the recommended Act;

(c) is prohibited from disclosure by an order of a court; or

(d) would have the tendency to interfere with the administration of justice, if disclosed.

Recommendation 19–6 The recommended *Inquiries Act* should provide that it is a defence to a prosecution for a refusal or failure to answer a question, or produce a document or other thing, if the answer, document or other thing was not relevant to the matters into which the Royal Commission or Official Inquiry was inquiring.

Recommendation 19–7 The recommended *Inquiries Act* should provide that, upon receiving a notice requiring attendance or production of documents or other things, a person may make a claim to a member of a Royal Commission or Official Inquiry that he or she has a reasonable excuse for not complying. If the member considers that the claim has been made out, the member may vary or revoke the notice in his or her discretion.

Contravention of directions

19.103 Section 6D(3) of the *Royal Commissions Act* empowers a Royal Commission to direct that material should not be published, or not be published except in the manner, and to such persons, as the Commission specifies. This material includes evidence given or produced, the contents of any document, a description of any thing, and any information identifying witnesses.[113] Section 6D(4) makes it an offence to make 'any publication in contravention' of any such direction. The section does not include any defences, although the general defences under Chapter 2 of the *Criminal Code* apply.[114]

19.104 Chapter 16 discusses the power to prohibit or restrict publication in order to protect important public interests. For example, such a power may be exercised to protect: the confidentiality of sensitive personal or government information; a witness from undue hardship or prejudice; or the administration of justice in a related legal proceeding.

19.105 In Chapter 16, the ALRC recommends that Royal Commissions and Official Inquiries be empowered to make directions prohibiting or restricting public access to a hearing, publication of any information that might enable a person to identify a person giving information to the inquiry, or publication of any information provided to the inquiry.[115] In Chapter 13, the ALRC recommends that Royal Commissions and Official Inquiries be empowered to make directions relating to the form of production or use of national security information.[116] These directions may relate, for example, to: restrictions on who has access to national security information; the way national security information is disclosed; and the use, reproduction and disclosure of national security information.

19.106 A number of issues arise in relation to the directions that an inquiry may make under the *Inquiries Act* recommended in this Report. First, should there continue to be an offence of contravening a direction not to publish certain material?

19.107 Secondly, should there also be offences in relation to contraventions of the other types of directions—directions prohibiting or restricting public access to a hearing, and directions relating to national security information—recommended in this Report? Thirdly, if there are to be offences for contravening directions, should there be a requirement that the person knew of the direction before an offence is committed?

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113 Section 6D(3) applies only to evidence once it has been given or produced: *McDonald v Brott* [1989] VR 177 .

114 These include defences of lack of capacity, defences of mistake of fact, and defences involving external factors: *Criminal Code* (Cth) pt 2.3.

115 Recommendation 16–1.

116 Recommendation 13–2.

19.108 In IP 35, the ALRC asked whether any changes should be made to s 6D(4) of the *Royal Commissions Act.*[117] Few stakeholders in this Inquiry addressed these questions. However, those that did supported the existence of offences for contravening such directions.[118]

Need for offences

19.109 The breach of a direction not to publish certain matters has the potential to cause serious harm affecting a wide range of interests, and to cause hardship and prejudice to individuals and interfere with the administration of justice. The potential for harm is identical to that which may occur in relation to the breach of a suppression order of a court. Further, if there was no serious legal consequence for breaching such a direction, the authority of the inquiry would be undermined. In the ALRC's view, contravention of non-publication directions should continue to be deterred by the presence of a criminal sanction.

19.110 The same reasons justify a similar offence in relation to contraventions of directions relating to public access to hearings. The power to prohibit or restrict public access to a hearing serves interests similar to non-publication directions, and similar types of harm may be caused by a contravention.

19.111 The justification applies with even greater force to directions relating to national security information. Clearly, disclosure of information which has the potential to prejudice national security information may cause serious harm.[119] The seriousness of the potential harm warrants a criminal sanction to deter such breaches.

Requirement of knowledge

19.112 A person should be punished for contravening the directions of an inquiry only if he or she is aware of the direction, or should have been aware of the direction. There are concerns about the availability and accessibility of similar orders made by courts, and there is a risk that a person may inadvertently contravene a direction and be subject to criminal sanctions.[120] This concern is reinforced in the context of Royal Commissions or Official Inquiries which may often be held in private, not sit at a regular place or time, and not have a media liaison officer who can ensure media organisations are aware of directions not to publish or attend.

19.113 In the ALRC's view, it would be unfair to impose criminal sanctions unless a person knew, or ought to have known, of the direction—that is, in the terminology of

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117 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 9–4.

118 Australian Intelligence Community, *Submission RC 28,* 28 September 2009; I Turnbull, *Submission RC 22,* 21 September 2009.

119 National security information is discussed in Ch 13.

120 New Zealand Law Commission, *Suppressing Names and Evidence*, IP 13 (2008), [7.14]–[7.15]. The Australian Standing Committee of Attorneys-General is proposing, however, a national register of suppression orders: Standing Committee of Attorneys-General, *Communique* (November 2008).

the *Criminal Code*, either knowledge or recklessness as to the existence of the direction should be required.[121] This seems preferable to making the offence one of strict liability, as it places the responsibility on the inquiry to ensure that the media and other people know about the direction.[122]

Recommendation 19–8 The recommended *Inquiries Act* should provide that a person commits an offence by contravening a direction of a Royal Commission or Official Inquiry, where that person knew of, or was reckless as to, the existence of that direction. The offence should apply to directions made under the Act concerning national security information, the prohibition or restriction of public access to a hearing, and the prohibition or restriction of publication.

Interference with evidence or witnesses

19.114 The *Royal Commissions Act* includes a number of offences that prohibit interference with evidence or witnesses. It prohibits giving false or misleading information to a Commission and the destruction or alteration of evidence.[123] It also prohibits a number of acts that would influence the evidence of witnesses, including: preventing witnesses from attending or giving evidence;[124] bribery;[125] fraud, deceit or false representations;[126] inflicting injury or disadvantage on witnesses;[127] and dismissing witnesses or prejudicing their employment.[128]

Parallel offences in the *Crimes Act 1914* (Cth)

19.115 There are similar offences in the *Crimes Act* that apply to 'judicial proceedings'.[129] 'Judicial proceedings' are defined to include a proceeding before a body or person acting under the law of the Commonwealth in which evidence may be taken on oath,[130] which would include Royal Commissions.[131] Section 7 of the *Royal*

121 *Criminal Code* (Cth) ss 5.3, 5.4.
122 Breach of a suppression order in a court may be justified as a strict liability offence because of the difficulty of proving the knowledge of a media organisation: New South Wales Law Reform Commission, *Contempt by Publication*, Report 100 (2003), Ch 10.
123 *Royal Commissions Act 1902* (Cth) ss 6H, 6K.
124 Ibid s 6L.
125 Ibid s 6I.
126 Ibid s 6J.
127 Ibid s 6M.
128 Ibid s 6N.
129 *Crimes Act 1914* (Cth) ss 35–40. These offences were reviewed in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 7: Administration of Justice Offences* (1998). The recommendations of the Model Criminal Code Officers Committee have not yet been implemented by the Australian Government.
130 *Crimes Act 1914* (Cth) s 31.

Commissions Act also provides that witnesses shall be 'subject to the same liabilities in any civil or criminal proceeding … as a witness in any case tried in the High Court'. This section ensures that witnesses are subject to the sanctions of the *Criminal Code*.

19.116 One issue for this Inquiry is whether the offences in the *Royal Commissions Act* should be removed where a parallel offence exists in either the *Criminal Code* or the *Crimes Act*. The table below sets out the parallel offences prohibiting interference with evidence or witnesses under the *Royal Commissions Act* and *Crimes Act* respectively.

Table 19.1: Parallel Offences

Offence	***Royal Commissions Act***	***Crimes Act***
False or misleading information	s 6H	s 35[132]
Bribery of witness	s 6I	s 37
Fraud on witness	s 6J	s 38
Destroying documents or other things	s 6K	s 39
Preventing witness from attending	s 6L	s 40
Injury to witness	s 6M	s 36A
Dismissal by employers of witness	s 6N	s 36A

19.117 There are some differences between these parallel offences. The giving of false or misleading evidence prohibited under s 6H of the *Royal Commissions Act* would generally be punishable under s 35 of the *Crimes Act*, but s 35 does not cover misleading evidence. The giving of false or misleading information or documents, however, is also prohibited under ss 137.1 and 137.2 of the *Criminal Code*, although this attracts a much lower maximum penalty.[133]

19.118 The offence in the *Royal Commissions Act* of destroying documents or other things is more easily proven than the equivalent offence under the *Crimes Act*. This is because the offence under the *Royal Commissions Act* only requires that a person be reckless as to whether the document or thing is, or may be, required in evidence and does not require an intention to prevent it being used in evidence.

19.119 The offence of injury to a witness under s 6M of the *Royal Commissions Act* is also slightly different from its close equivalent in s 36A of the *Crimes Act*, in that it

131 *Royal Commissions Act 1902* (Cth) s 2(3). A similar conclusion was recently reached by the Queensland Court of Appeal in respect of the similarly defined term 'judicial proceeding' in the *Criminal Code* (Qld): *R v Deemal* [2009] QCA 131.

132 See also *Criminal Code* (Cth) ss 137.1, 137.2, which apply to false or misleading information.

133 This is discussed in Ch 21.

extends to injuries caused as a result of a person having given evidence or produced a document. Section 36A, however, extends to injuries for or on account of a person having appeared as a witness, or being about to appear as a witness.

19.120 The *Guide to Framing Commonwealth Offences* states that where offences in the *Criminal Code* or *Crimes Act* apply, similar offences should not be created in other Acts because:

> broadly framed provisions of general application were placed in the *Criminal Code* to avoid the technical distinctions, loopholes, additional prosecution difficulty and appearance of incoherence associated with having numerous slightly different provisions to similar effect across Commonwealth law.[134]

19.121 In *Contempt*, the ALRC recommended the repeal of statutory offences where the same ground was fully covered by the *Crimes Act*.[135]

19.122 In DP 75, the ALRC proposed that the offences relating to interference with evidence or witnesses in the *Royal Commissions Act* should not be retained. Instead, reliance should be placed upon the similar offences in the *Criminal Code* and *Crimes Act*, and a legislative note indicating the application of these offences should be inserted in the *Inquiries Act.*[136] The Law Council, the only stakeholder to address the issue, supported this proposal.[137]

ALRC's view

19.123 Interference with evidence or witnesses is subject to offences in the *Royal Commissions Act*. The conduct is also covered by similar offences in the *Crimes Act* or the *Criminal Code*. In the ALRC's view, there is no need for the recommended *Inquiries Act* to include such offences, for the reasons set out below. Instead, reliance should be placed on the general offences in the *Crimes Act* or *Criminal Code*.

19.124 There are a few differences between the offences in the *Royal Commissions Act* and the offences under the *Crimes Act*. These differences, however, are not justified by reference to the special context of inquiries, but appear to reflect different legislative choices made at an earlier time. For example, the slightly broader offence of destroying a document or other thing in the *Royal Commissions Act* requires recklessness, rather than intention as required under the *Crimes Act*. The requirement of intention, however, is consistent with the general principles under the *Criminal*

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134 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 16.

135 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [773].

136 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 18–8.

137 Law Council of Australia, *Submission RC 9,* 19 May 2009; Law Council of Australia, *Submission RC 30,* 2 October 2009.

Code that conduct should ordinarily be penalised only if committed intentionally.[138] These differences, therefore, need not be retained.

19.125 A potential difficulty with reliance on the offence provisions in the *Crimes Act* or *Criminal Code* is that those subject to the sanctions may be unaware of their liability under these provisions, as it may not be obvious that offences 'relating to the administration of justice' apply to inquiries. The inquiries legislation of the ACT deals with this difficulty by including a legislative note indicating the application of the relevant offences in its *Criminal Code*.[139]

19.126 A legislative note would be a convenient way of ensuring that those potentially subject to the sanctions in the *Crimes Act* or *Criminal Code* are aware of those sanctions. The ALRC recommends, therefore, that there should be a note in the *Inquiries Act* alerting the reader to the offences that apply under the *Crimes Act* and the *Criminal Code*. This note may be inserted, for example, underneath the offences of non-compliance in the recommended Act.

19.127 There may be a need, however, to adapt some of the terminology in the offences under the *Crimes Act*. These offences refer to 'witness', 'subpoena' or 'summons' and 'testimony'. This terminology may not capture some of the more informal procedures which may be used by inquiries, as discussed in Chapter 15. This would have the undesirable effect of criminalising some actions in respect of inquiries conducted formally, while not criminalising the same actions in respect of inquiries conducted more informally. The drafting of the *Inquiries Act* or these offences may need to be adapted to ensure that more informal types of inquiry procedures are included.

Offences relating to Commissioners or staff

19.128 The *Royal Commissions Act* does not contain any offences dealing with the bribery or corruption of Commissioners, legal practitioners assisting the Commission. Nor does it contain any offences prohibiting interference with Commissioners, staff, and legal practitioners assisting.

19.129 Such conduct may be subject to *Criminal Code* offences relating to malfeasance by 'Commonwealth public officials'. This term is defined broadly in the Dictionary to the *Criminal Code*, and would include individuals employed by the Commonwealth or contracted service providers to the Commonwealth, or any individual exercising powers or performing functions under the recommended *Inquiries Act*.

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138 *Criminal Code* (Cth) s 5.6.

139 *Royal Commissions Act 1991* (ACT), s 45; *Inquiries Act 1991* (ACT) s 35.

19.130 The offences relating to Commonwealth public officials include: bribery[140] and provision of corrupting benefits;[141] abuse of public office;[142] causing harm, or threatening to cause harm, to a Commonwealth public official;[143] making unwarranted demands of a Commonwealth public official;[144] and obstruction of a Commonwealth public official.[145]

19.131 As discussed above, the ALRC is of the view that the recommended *Inquiries Act* should not duplicate any offences in the *Criminal Code* or *Crimes Act*. Instead, it recommends that these offences should be referred to in a legislative note, extending the terminology where appropriate. The same legislative note should also refer to these offences under the *Criminal Code*, for the sake of clarity.

Disclosures by Commissioners or staff

19.132 Finally, it should be noted that s 70 of the *Crimes Act* prohibits certain disclosures of information obtained by members of Royal Commissions and Official Inquiries, its staff or counsel and solicitors assisting the inquiry, as they will be 'Commonwealth officers' for the purposes of that section.[146] There is no need, therefore, for a specific secrecy provision in the *Inquiries Act*.

19.133 The ALRC is currently undertaking a review of secrecy provisions in Commonwealth legislation and is examining, among other things, whether s 70 should be repealed and replaced by an updated offence in the *Criminal Code*.[147] In the Discussion Paper, *Review of Secrecy Laws* (DP 74), the ALRC proposes the replacement of s 70 of the *Crimes Act* with a general secrecy provision that focuses on harm to specified interests. Under the ALRC's proposal, the general secrecy offence would apply to 'Commonwealth officers', defined in a way that would include inquiry members, legal practitioners assisting an inquiry, and inquiry staff.[148] The ALRC further proposes in DP 74 that Commonwealth secrecy offences should generally be repealed where the scope of the offence substantially replicates the recommended general secrecy offence.[149]

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140 *Criminal Code* (Cth) s 141.1.
141 Ibid s 142.1. This differs from bribery of Commonwealth public officials in that there is no need for intent to influence the official.
142 Ibid s 142.2. This prohibits them from using their position, or influence or information acquired because of it, with the intention of dishonestly obtaining a benefit or causing detriment to another.
143 Ibid ss 147.1, 147.2.
144 Ibid ss 139.1, 139.2.
145 Ibid s 149.1.
146 Commonwealth officers are defined as those appointed to an office, or employed by the Commonwealth, and also include those outside this definition who perform services for the Commonwealth: *Crimes Act 1914* (Cth) s 3.
147 That Inquiry is required to provide its report to the Attorney-General in December 2009.
148 Australian Law Reform Commission, *Review of Secrecy Laws*, DP 74 (2009), Proposals 6–1, 7–1, 8–1.
149 Ibid, Proposal 12–1(a).

19.134 As the ALRC is recommending in this Inquiry that the existence of other offences under the *Crimes Act* or *Criminal Code* should be indicated by a legislative note, it would also be appropriate to refer in that note to the application of s 70 of the *Crimes Act*.

Recommendation 19–9 The recommended *Inquiries Act* should include a legislative note indicating that the following offences apply to Royal Commissions and Official Inquiries:

(a) offences under Part III of the *Crimes Act 1914* (Cth) that prohibit interference with evidence and witnesses;

(b) offences under Parts 7.6 and 7.8 of the *Criminal Code* (Cth) that prohibit certain conduct in relation to Commonwealth public officials; and

(c) offences in the *Crimes Act 1914* (Cth) that restrict the disclosure of information by Royal Commissions and Official Inquiries.

20. Contempt

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Introduction

20.1 In this chapter, the ALRC examines the offence created by s 6O of the *Royal Commissions Act 1902* (Cth). Other offences created by the Act are dealt with in Chapter 19. The offence created by s 6O requires separate consideration because of its relationship with a distinct branch of the law, the law of contempt of court.

20.2 In this chapter, the ALRC commences with an explanation of the law of contempt of court, and its relevance to s 6O of the *Royal Commissions Act*. The chapter then examines whether any of the conduct prohibited by s 6O should continue to be prohibited, before discussing whether the law of contempt should be applied to

inquiries established under the *Inquiries Act* recommended in this Report, namely, Royal Commissions and Official Inquiries.[1]

Contempt of court

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

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

Types of contempt

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

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

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1 Recommendation 5–1.
2 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987).
3 While the Australian Government prepared a position paper on the final recommendations and four jurisdictions initially agreed to work together for the purpose of agreeing on uniform contempt legislation, there appears to have been no further progress on the issue.
4 See A Arlidge and D Eady, *The Law of Contempt* (1982), Ch 1.
5 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [22].
6 Ibid, [23]–[26].

20.7 Thirdly, it may be contempt of court to fail to comply with an order made by a court, or an undertaking given to a court. A failure to comply with court orders or undertakings traditionally has been considered a 'civil' rather than a 'criminal' contempt, although this distinction increasingly has become less important.[7]

20.8 Much of the conduct that constitutes contempt may also constitute a separate criminal offence. For example, bribery of witnesses and destruction of evidence constitute offences under Part III of the *Crimes Act 1914* (Cth).[8] As discussed in Chapter 19, the *Royal Commissions Act* includes a number of criminal offences that cover similar conduct in relation to Royal Commissions, such as failing to comply with notices to attend or produce evidence. The Act also contains a number of provisions prohibiting interference with evidence or witnesses.[9]

Procedure

20.9 The procedure by which contempt is punished is its most unusual feature. An ordinary criminal offence is dealt with in one of two ways: either by trial on indictment before a judge and, usually, a jury; or a summary trial by a magistrate. The latter is described as summary because it is faster and more informal than the procedure on indictment.[10]

20.10 Contempt also is punished by a procedure referred to as 'summary', because the procedure is speedy and informal. The contempt procedure differs from other summary proceedings principally because cases of alleged contempt are dealt with by a judge or judges sitting without a jury. The contempt procedure does not involve any preliminary proceedings—such as committal proceedings before a magistrate—which usually precede a trial on indictment.[11]

20.11 The evidence used in the contempt procedure is different from that used in an ordinary criminal trial. In cases of 'contempt in the face of the court', what the presiding judge saw or heard is the primary source of evidence, and in some cases, the same judge may punish the contempt.[12] In other contempt proceedings, the evidence is presented in the form of affidavits (written statements of evidence which are sworn or affirmed), and the persons so swearing or affirming may be cross-examined.

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7 In *Witham v Holloway* (1995) 183 CLR 525, the High Court considered the distinction to be artificial, and suggested that all contempt proceedings were realistically criminal.

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

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

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

11 Ibid.

12 In *Keeley v Brooking*, Stephen J expressed the view that the power of a presiding judge to punish for contempt in the face of court should rarely be resorted to, except in exceptional cases where the conduct 'cannot wait to be punished' because it is 'urgent and imperative to act immediately' to preserve the integrity of a trial in progress or about to start. Instead, the presiding judge may refer the matter elsewhere: *Keeley v Brooking* (1979) 143 CLR 162, 174.

Sentencing powers

20.12 A criminal contempt may be punished by a fixed term of imprisonment, a fine or an order to give security for good behaviour. Although the sentence must be for a fixed term of imprisonment, there is no upper limit on the term that may be stipulated. This is in contrast to ordinary criminal offences for which a maximum penalty generally is set by statute.[13]

20.13 Civil contempt may be punished by: a sentence of imprisonment with no fixed limit, but which is specified to last until the person obeys the order or undertaking or indicates a willingness to do so; or a fine that increases during the period of disobedience. A fixed term prison sentence or a fine may be imposed in respect of past disobedience.[14]

Section 6O of the *Royal Commissions Act*

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

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

20.15 A person who contravenes s 6O may be subject to a maximum penalty of $220,[15] or imprisonment for three months.[16] The section prohibits a range of conduct that, if done in court, would constitute contempt in the face of court, and scandalising the court. Further, as it prohibits 'any intentional contempt' of a Royal Commission, the scope of the offence partly depends on the scope of the law of contempt of court.

20.16 Section 6O(2) provides that, if the president or chair of a Royal Commission, or a sole Royal Commissioner, is a judge:

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

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13 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [37].

14 Ibid, [38].

15 The section states the maximum penalty is $200, but this is adjusted to $220 by the *Crimes Act 1914* (Cth) ss 4AA(1), 4AB.

16 Penalties are discussed in Ch 21.

20.17 This provision seeks to confer on certain Royal Commissioners the power to punish a person for contempt in the same manner as a judge of the High Court, but only in relation to contempts in the face of the Royal Commission—namely, intentional insults and disturbances of a Royal Commission, or interruptions of a Royal Commission.[17]

The prohibited conduct

20.18 Whether any of the conduct currently punishable under s 6O of the *Royal Commissions Act* should continue to be punished by way of a criminal offence is the first question which arises. What form any such sanction should take is the second.

Contempt in the face of a Royal Commission

20.19 Section 6O prohibits a person from intentionally disturbing, or interrupting, a Royal Commission. These forms of conduct would, if done in court, constitute 'contempt in the face of the court'.

20.20 This provision is designed to protect Royal Commissions against the disruption of their proceedings. Although the proceedings of a Royal Commission tend to be less formal than court proceedings, the political controversy that can accompany Royal Commissions often makes it more likely that their proceedings will be disrupted.[18]

20.21 The ALRC recommended in *Contempt* that it should be an offence to cause substantial disruption of a hearing of a tribunal or commission, if the disruption was intended or recklessly caused.[19] It further recommended that this should extend to behaviour outside the premises which disrupted the hearing.[20]

20.22 The ALRC also recommended that Royal Commissioners should have the power to expel people from a hearing if the Commissioners believed, on reasonable grounds, that the person would otherwise disrupt the proceedings.[21] The power should be exercised only after an inquiry member had warned the person and adjourned the proceeding, and the expulsion should last only as long as necessary to ensure the inquiry could proceed without disruption.[22]

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

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

19 Ibid, Rec 114.

20 Ibid, [762]–[763].

21 Ibid, Rec 116.

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

20.23 The ALRC's recommendations are consistent with the subsequent recommendation of the Royal Commission into the Building and Construction Industry (2003). In that inquiry, the Commissioner, the Hon Terence Cole QC, recommended that Royal Commissioners should be empowered to expel persons, and that officers should be protected from the legal consequences of using any reasonable force necessary to give effect to such a direction.[23]

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

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

Insults and false and defamatory words

20.25 Section 6O prohibits a person from 'insulting' a Royal Commission, and using insulting language to, or false and defamatory words of, a Royal Commission.[24] There are similar provisions in some of the older legislation governing public inquiries in Australian states and territories.[25]

20.26 The language of s 6O indicates a distinction between 'insulting' a Royal Commission, and using insulting language towards a Royal Commission. The former appears to refer to insults directed at members of a Royal Commission during a hearing, based on a form of contempt in the face of the court.[26] Using 'insulting language towards a Royal Commission', on the other hand, appears to refer to insults outside of a hearing, based on the form of contempt of court traditionally known as 'scandalising the court'.[27] As they raise similar issues, however, they are discussed together in this section.

20.27 The rationale for the prohibition on 'scandalising the court' is that public faith in the administration of justice would be undermined if the respect and dignity of courts and their officers were not maintained.[28] This form of contempt, however, is controversial.[29] It has been argued that public criticism of judges is part of a healthy

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

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

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

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

27 Ibid, 226–242.

28 Ibid, 226.

29 See, eg, O Litaba, 'Does the "Offence" of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?' (2003) 8 *Deakin Law Review* 113.

democratic discussion and acts as a form of accountability,[30] and that prohibiting such criticism unduly restricts freedom of expression.[31] It is possible that s 6O impermissibly infringes the freedom of political communication which the High Court has interpreted as being implicit in the *Australian Constitution*.[32] A similar, although differently worded, statutory offence in relation to the former Industrial Relations Commission was held to be constitutionally invalid on a number of grounds, including that it infringed the freedom of political communication.[33]

20.28 Further, critics have suggested that such a prohibition is largely ineffective, because one cannot coerce respect through the use of the criminal law. As Mr Henry Burmester QC has suggested, the prohibition 'resembles some antique weapon which will probably do more harm to those who use it than to those against whom it is used'.[34] These objections led the ALRC to recommend in *Contempt* that the common law liability in respect of this conduct relating to courts should be abolished, and replaced with a limited statutory offence.[35]

20.29 Can this form of contempt be justified in relation to Royal Commissions and Official Inquiries? In *Contempt*, stakeholders were divided on the issue of applying contempt in an inquiries context. Some submissions strongly urged that Royal Commissions should not be protected from public debate, given the political context in which they operate. On the other hand, other stakeholders submitted that some form of remedial action seemed justified when imputations were made against the integrity of a Royal Commissioner.[36]

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

31 Freedom of expression is guaranteed under art 19 of the *International Covenant on Civil and Political Rights*, which Australia ratified on 13 August 1980: *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976). The offence of scandalising the court has been held to infringe the right to freedom of expression under the *Canadian Charter of Rights and Freedoms*: *R v Kopyto* 62 OR (2d) 449. Cf the decision of the Privy Council in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, and the Constitutional Court of South Africa in *S v Mamabolo 2001 (3) SA 409 (CC)*. See generally O Litaba, 'Does the "Offence" of Contempt by Scandalising the Court Have a Valid Place in the Law of Modern Day Australia?' (2003) 8 *Deakin Law Review* 113; M Addo, 'Are Judges Beyond Criticism under Article 10 of the European Convention of Human Rights?' (1998) 47 *International Comparative Law Quarterly* 425.

32 The implied freedom of political communication was recognised in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The common law powers of contempt, however, are unlikely to infringe this implied freedom: *Hoser v The Queen* [2003] VSCA 194, [25]; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 187.

33 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. While the Court unanimously held it was constitutionally invalid, the judges differed on the grounds for doing so.

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

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

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

20.30 As the ALRC noted in *Contempt*, the inherently political nature of a Royal Commissioner's appointment makes it unlikely that an attack on a particular Royal Commissioner would affect respect for Royal Commissions as a whole. The objects of Royal Commissions should not be divorced from their political contexts, and the establishment and membership of Royal Commissions are political decisions which should not be removed from public debate.[37] In *Contempt*, therefore, the ALRC recommended that this form of conduct should not be prohibited in relation to Royal Commissions.[38]

20.31 The prohibition on insults directed to a Royal Commission during a hearing rests on a different rationale than the prohibition on insulting language used outside of a hearing—namely, that a Royal Commission should have the power to control proceedings.[39] Nevertheless, insults directed to the Commission in a hearing raise similar issues concerning freedom of expression. For example, in one case, a trade unionist was convicted of insulting a Royal Commission during a hearing when he criticised the decision to establish a Royal Commission to inquire into the activities of a union. He argued that the decision to establish the Royal Commission was motivated by a political attack on unions and their members. The Federal Court of Australia, upholding his conviction, considered that this criticism amounted to an attack upon the Royal Commission itself.[40]

20.32 In *Contempt*, the ALRC concluded that there should be no offence relating to insulting behaviour during the proceedings of a Royal Commission.[41] The ALRC stated that:

> The central concern in this context is the efficient and effective running of government. It is even more inappropriate to use the criminal law to try to induce respect for Commissions and tribunals than for the judicial system. If insults and disrespectful conduct during a hearing do not actually interfere with the operation of such bodies, the law should not step in to punish it.[42]

Residual contempt

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

37 Ibid. The ALRC also noted that judges feel that their position in the community inhibits them from answering their critics publicly or taking any legal action against them, but that this does not apply to Royal Commissioners as they have entered the public arena.
38 Ibid, Rec 120.
39 N Lowe and G Borrie (eds), *Borrie and Lowe's Law of Contempt* (2nd ed, 1983), 6–7, 14–15.
40 *R v O'Dea* (1983) 10 A Crim R 240.
41 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [764].
42 Ibid.

reference to intention is somewhat unclear.[43] Inquiries legislation in four Australian states includes similar provisions that equate the powers of contempt of a Royal Commission to that of a court.[44] The *Royal Commissions Act 1923* (NSW), however, restricts this power to Royal Commissions chaired or constituted by a superior court judge, where the Letters Patent specify these additional powers apply.[45]

20.34 The primary argument against a residual contempt provision is its breadth. Conduct may be punished even though it does not fall within a specifically prohibited activity.[46] Further, as discussed above, it 'is difficult to "transplant" the technical notion of contempt from its judicial context to the executive context of Royal Commissions'.[47]

20.35 Another difficulty with a residual contempt provision is that it would seem that an act that would be prohibited by a specific offence under the *Royal Commissions Act* would appear to be punishable also as an intentional contempt under s 6O.[48] Finally, such a provision means those dealing with Royal Commissions, and Royal Commissioners without legal training, may not have a clear idea of what behaviour is unacceptable.[49]

20.36 For these reasons, the ALRC recommended in *Contempt* that there should be no such general provision. Rather, specific offences should be created.[50] Whether this is the best approach elicited divergent views. Professor Enid Campbell, for example, considered it preferable that the *Royal Commissions Act* 'set out exhaustively the acts and omissions punishable under the Act'.[51] On the other hand, Dr Leonard Hallett thought such a residual clause was desirable because 'it is not possible to envisage all the actions which might prejudice an inquiry', and considered that it would not be unduly unfair to defendants since it would be used rarely.[52]

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43 In *Bell v Stewart* (1920) 28 CLR 419, 427, Isaacs and Rich JJ took the view that a similar phrase in the *Conciliation and Arbitration Act 1904* (Cth) required actual intention to prejudice the administration of justice. This interpretation was adopted in relation to s 6O of the *Royal Commissions Act 1902* (Cth) in *R v O'Dea* (1983) 10 A Crim R 240, 250–251.

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

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

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

47 Ibid.

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

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

50 Ibid, Rec 113.

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

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

Submissions and consultations

20.37 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether the types of behaviour currently covered by s 6O(1) of the *Royal Commissions Act* should constitute an offence. In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed that s 6O should not be included in a new *Inquiries Act* providing for the establishment of Royal Commissions and Official Inquiries.

20.38 In general, the proposition that interruptions and disruptions to Royal Commissions and other inquiries should be sanctioned was strongly supported by stakeholders who addressed the issue.[53]

20.39 There was also support for the ALRC's recommendation in *Contempt* that Royal Commissions—and, by analogy, Official Inquiries—should have the power to expel persons from a hearing room. For example, the Law Council of Australia (Law Council) stated that it

> share[d] the ALRC's view that a wide-ranging contempt power such as that contained in section 6O of the [*Royal Commissions Act*] may not be necessary provided there are alternative means of preventing interference with the conduct of the inquiry.[54]

20.40 The Law Council was the only stakeholder to address the issue of whether other forms of conduct prohibited by s 6O should continue to be prohibited. It was concerned that the prohibition on false and defamatory words unduly restricted freedom of speech, and noted that the ALRC had recommended the removal of similar provisions in relation to sedition.[55] It also submitted that the residual provision was unnecessary, given that conduct amounting to intentional contempt—such as failing to attend a hearing when required by a summons—amounted to a specific offence under the *Royal Commissions Act*.[56]

ALRC's view

20.41 Royal Commissions and Official Inquiries require powers to deal with disruption of their proceedings. Inquiries need to be able to control proceedings in the same way as courts. In the ALRC's view, sanctions should apply in cases of disruption. In the next section, the ALRC considers what form such sanctions should take.

20.42 Royal Commissions and Official Inquiries should be empowered to expel a person from the place at which an inquiry is being conducted. This power should apply if a person is disrupting an inquiry, and not merely where members of Royal

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

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

55 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), Recs 4–1, 11–1, 11–2.

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

Commissions and Official Inquiries believe a person might disrupt an inquiry. The power should allow an officer, or a person duly authorised by a Royal Commission or Official Inquiry, to use reasonable force and help as necessary in order to expel the person. This power will protect those responsible for expelling people from an inquiry from the legal consequences of using reasonable force.[57] The ALRC recommends, therefore, that a provision similar to s 15A(3) of the *Royal Commissions Act* (WA), set out above, should be included in the *Inquiries Act*.

20.43 The other forms of conduct currently prohibited by s 6O should not be prohibited by the *Inquiries Act*.[58] A specific prohibition on the use of insults, insulting language, or false and defamatory words is likely to restrict freedom of expression in relation to matters that are properly the subject of political comment. The use of such language may still be sanctioned, however, if it disrupts an inquiry, as discussed below.

20.44 Further, a residual provision making it an offence to commit any other form of intentional contempt is unnecessary. Such a provision is not sufficiently clear for the purposes of imposing punishment, and overlaps with existing criminal offences.[59]

Recommendation 20–1 The recommended *Inquiries Act* should provide that if a person is disrupting the proceedings of an inquiry, a member of a Royal Commission or Official Inquiry may exclude that person from those proceedings, and authorise a person to use necessary and reasonable force in excluding that person.

Form of sanction

20.45 There are several ways of sanctioning the kind of conduct currently sanctioned by s 6O of the *Royal Commissions Act*. First, the conduct could continue to be sanctioned as contempt. Secondly, it could be sanctioned solely through the enactment of statutory offences. A third option is for the *Inquiries Act* to include both statutory offences and a power to apply to a court to punish the conduct currently sanctioned by s 6O.

20.46 In many Australian states and territories, the legislation governing Royal Commissions allows for punishment for contempt of Royal Commissions.[60] For

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

58 Recommendation 20–4.

59 For example, it may overlap with offences such as those presently in the *Royal Commissions Act 1902* (Cth) and with offences of interference with evidence or witnesses in Part III of the *Crimes Act 1914* (Cth). These offences are discussed in Ch 19.

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

example, in New South Wales, disobedience of any order or summons issued by a Royal Commissioner, as well as acts that would constitute contempt of court if done in a court, constitute a contempt of a Royal Commission.[61] This is punished by the Royal Commission certifying the matter to the Supreme Court, which hears the matter and punishes the person in the same way as if that contempt had been committed in the court.[62] Conduct that may constitute a contempt of a commission also may constitute one of the specific offences set out in the *Royal Commissions Act* (NSW).[63]

Contempt sanctions

20.47 The appropriateness of contempt powers for inquiries was considered by the ALRC in *Contempt*,[64] and more recently by the New Zealand Law Commission (NZLC) and the Law Reform Commission of Ireland (LRCI) in their reports on inquiries.[65] In *Contempt*, the ALRC recommended that s 6O of the *Royal Commissions Act* should be repealed and replaced by a statutory offence.[66] As noted in *Contempt* and the reports of the NZLC and LRCI, there are a number of disadvantages in sanctioning contempt in the context of Royal Commissions and other public inquiries.

Disadvantages of contempt

20.48 Some of these disadvantages relate to the unusual procedure for punishing contempt of court. As the ALRC noted in *Contempt*, the procedure enables a judge to act as complainant, prosecutor, witness and judge.[67] This is incompatible with three fundamental principles of criminal law: that a judge should be free from bias; there should be a presumption of innocence; and there should be a power to confront a witness. Further, as it is difficult to define the limits of the conduct that may constitute contempt of court, contempt also conflicts with the principle that criminal offences should be defined with sufficient precision to enable all citizens to understand what types of conduct will incur criminal liability.[68]

20.49 Another disadvantage is that it may be inappropriate to apply the concept of contempt to non-judicial bodies such as Royal Commissions and other public inquiries. Contempt is based on the concept of an interference with the administration of justice. This is not readily applicable to Royal Commissions and other public inquiries, which

61 *Royal Commissions Act 1923* (NSW) s 18A.
62 Ibid s 18B.
63 Ibid ss 19–23A.
64 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Ch 15. See also Western Australian Law Reform Commission, *Report on Review of the Law of Contempt*, Project No 93 (2003), 71–72.
65 New Zealand Law Commission, *A New Inquiries Act*, Report No 102 (2008), [8.24]; Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), 107–115, 118.
66 Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), Rec 113, [757].
67 Ibid, [92]–[93].
68 Ibid, [92]–[93].

are inquisitorial in nature and established by the executive arm of government in a political context.[69]

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

> The problem is, how to apply to a Royal Commission which is not concerned in the administration of justice at all, doctrines designed solely to prevent interference with the administration of justice. … The very touchstone whereby the question of contempt or no contempt is to be judged has been withdrawn … Difficulties will arise in forcing the old doctrines to new uses …[70]

Punishing for contempt

20.51 A further difficulty arises in the context of the *Royal Commissions Act*. Section 6O(2) of that Act purports to put certain Royal Commissioners in the same position as that of a judge in determining some forms of contempt, subject to the imposition of a maximum statutory penalty. There is a strong argument that this subsection is unconstitutional because it is inconsistent with the separation of powers in the *Australian Constitution*.[71] Section 71 of the *Australian Constitution* provides that the judicial power of the Commonwealth shall be vested in various courts. As noted by the High Court in *Attorney-General (Cth) v The Queen*,[72] judicial power can only be conferred on a 'court' within the meaning of s 71.

20.52 The issue has been succinctly stated by Campbell:

> A jurisdiction to try and punish offences created by federal law clearly involves an exercise of the judicial power of the Commonwealth, and under the Constitution this power is exercisable only by the courts listed in s 71.[73]

20.53 Several factors make it very likely that a power to punish for contempt is an exercise of judicial power. These include: the close association between the law of contempt and the judicial power;[74] the criminal and punitive nature of the proceedings;[75] the power to imprison a person; and the power to determine the sentence.[76]

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

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

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

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

73 E Campbell, *Contempt of Royal Commissions* (1984), 47. Similar views have been expressed by G Lindell, *Tribunals of Inquiry and Royal Commissions* (2003), 61; S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), 27; A Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48.

74 See *R v Foster, ex parte Roach* (1951) 82 CLR 587, 598; *Badry v Director of Public Prosecutions* [1983] 2 AC 297; *Re Colina; Ex parte Torney* (1999) 200 CLR 386; *Lane v Morrison* (2009) 83 ALJR 993, [32], [99]–[100].

75 In *Lord Saville of Newdigate v Harnden* (2003) NI 239, a similar contempt power was held to be criminal and punitive in nature.

76 See *Hinds v The Queen* [1977] AC 195; *Browne v The Queen* [2000] 1 AC 45.

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

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

20.55 If, as s 6O(2) provides, a Royal Commissioner determines the guilt of a person charged with contempt, it can be argued that the offender has not received a fair hearing by an 'independent and impartial tribunal' as required by art 14 of the ICCPR.[77] A similar argument was accepted by the European Court of Human Rights in relation to contempt of Parliament in Malta.[78]

20.56 In any event, it seems highly undesirable to confer a power to imprison a person on someone who, while a judge in one capacity, is not acting in that capacity. It is notable that, although the constitutional issue does not arise in relation to Australian states or territories,[79] only the South Australian and Queensland inquiries legislation confers upon Royal Commissioners a power to punish similar conduct.[80] In Queensland, a chair of a Royal Commission who is not a judge of the Supreme Court may only impose a maximum penalty of $200, and is not empowered to imprison the person.[81] Other Australian states and territories require a Royal Commission to refer the matter to the relevant Supreme Court, which examines the evidence and may punish the person as if the person had committed contempt of court.[82]

20.57 In *Contempt*, the ALRC also noted practical difficulties with the power of a Royal Commissioner to punish contempt in the face of the Commission. In particular, the sentence of imprisonment imposed could expire after the Royal Commission had concluded. As the ALRC noted, it is clearly preferable for the body which convicted the offender to be in existence and approachable during the term of a sentence.[83]

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77 See S Odgers, *Contempt in Relation to Commissions and Tribunals—Research Paper No 1* (1986) Australian Law Reform Commission, 48; E Campbell, *Contempt of Royal Commissions* (1984), 63. In *Balewa v Doherty* [1963] 1 WLR 949, the Privy Council held a similar power conferred on Commissions of Inquiry in Nigeria infringed constitutional rights relating to deprivation of liberty and the right to an independent and impartial tribunal. While these rights are similar to art 9 and art 14 of the ICCPR, the Nigerian provisions are more specific in their terms, and specifically confer a right to have a criminal charge heard by a 'court'.

78 *Demicoli v Malta* (1991) 14 EHRR 47.

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

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

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

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

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

Advantages of contempt

20.58 Notwithstanding the above, there may be some value in retaining a statutory procedure, such as that set out in s 6O, in the *Inquiries Act* recommended in this Report. The summary procedure used by courts to punish contempt of court has two major advantages over ordinary criminal procedure—timeliness and, arguably, effectiveness.

Timeliness

20.59 First, conduct can be sanctioned rapidly through a summary procedure, which arguably makes this a more effective deterrent. An ordinary federal criminal offence—such as an offence in the *Royal Commissions Act*—is prosecuted if there is a prima facie case with reasonable prospects of securing a conviction and the public interest requires a prosecution.[84] This process can lead to significant delays. For example, in the Royal Commission into the Activities of the Federated Ship Painters and Dockers Union (1984), the prosecution of union members who refused to comply with orders of the Royal Commission took, on average, eight months.[85] In contrast, a person aggrieved by the failure of another person to comply with orders may instigate contempt proceedings in a court. Such proceedings usually proceed more rapidly than criminal proceedings.

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

20.61 In 2001, the Australian Government proposed to empower the forerunner to the ACC, the National Crime Authority, to apply to the Supreme Court of a state or territory for the court to deal with specified conduct as if it were contempt of court.[86] The proposal, however, was defeated in the Senate.

20.62 In 2007, Mark Trowell QC conducted an independent review into the effectiveness of the *Australian Crime Commission Act* (Trowell Inquiry). The report of that inquiry (Trowell Report), recommended that the ACC should be empowered to apply to a court to deal with conduct as if it were contempt of court.[87] The Trowell Report concluded that such a power was desirable because:

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84 See Commonwealth Director of Prosecutions, *Prosecution Policy of the Commonwealth* (2008), [2.1]–[2.14].

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

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

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

> The existing process is just too slow. It fails to give sufficient weight to the need, when circumstances require, of an immediate or at least proximate response to a refusal to submit to the legislative requirements of an ACC examination. Given the ACC uses the examination process as an investigative tool, it makes no tactical sense to deprive an examiner of the power to respond quickly and effectively in circumstances where it is obviously necessary to do so. The inability to respond immediately devalues the inquisitorial capacity of the ACC to effectively deal with organised or serious crime.[88]

20.63 The Trowell Report noted that stakeholders generally supported the ACC having the power to apply for a court to deal with acts of contempt.[89] At the end of 2008, the Parliamentary Joint Committee on the ACC agreed with this aspect of the Trowell Report. The Committee recommended that the *Australian Crime Commission Act* be amended to include a statutory definition of contempt and a power of referral to a court.[90] In July 2009, the Australian Commission for Law Enforcement Integrity advised a parliamentary inquiry that it would be useful for it to have a similar power.[91]

Effectiveness

20.64 Secondly, as the procedure for punishing contempt allows a judge to sentence a person to imprisonment until they agree to comply with the order of the court, it may be more effective than a criminal prosecution in coercing compliance. For example, in *Wood v Galea*,[92] the court considered a court order for contempt was 'necessary in order to prevent a witness avoiding his obligation to answer merely by paying the fine'.[93]

Application to enforce orders

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

> (1) This section applies where ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Part (other than Division 8).
>
> (2) ASIC may by writing certify the failure to the Court.

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88 Ibid, [158].
89 Ibid, [132].
90 Parliament of Australia—Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007* (2008), Rec 6.
91 Australian Commission for Law Enforcement Integrity, *Submission No 14*, Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006*, July 2009.
92 *Wood v Galea* (1995) 79 A Crim R 567.
93 Ibid, 573.

> (3) If ASIC does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

20.66 ASIC submitted to the Trowell Inquiry that it frequently considered the use of this power since it generally aims to secure compliance rather than impose punishment.[94] The effect of the provision is that, if the court orders the person to comply with the requirement, a failure to obey that order may be punished as contempt of court.

20.67 The provision in the ASIC Act is similar to inquiries legislation in other jurisdictions. For example, in Ireland, in addition to criminal offences, a tribunal of inquiry may apply to the High Court for an order enforcing an order of the tribunal which has not been complied with.[95] In its 2005, *Report on Public Inquiries Including Tribunals of Inquiry*, the LRCI recommended that this dual approach should be retained.[96] The NZLC, noting the Irish provision, recommended that New Zealand inquiries legislation should include a similar provision enabling the Solicitor-General to initiate proceedings in the High Court.[97]

20.68 Similarly, while the *Inquiries Act 2005* (UK) provides for specific criminal offences to punish non-compliance, s 36 also provides for enforcement by a court:

> (1) Where a person —
>
> (a) fails to comply with, or acts in breach of, a notice under section 19 [restricting public access] or 21 [requiring production of evidence] or an order made by an inquiry, or
>
> (b) threatens to do so,
>
> the chairman of the inquiry, or after the end of the inquiry the Minister, may certify the matter to the appropriate court.
>
> (2) The court, after hearing any evidence or representations on a matter certified to it under subsection (1), may make such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the court.[98]

20.69 The Australian Government Attorney-General's Department *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (*Guide to Framing Commonwealth Offences*) advises that it may be appropriate to include a

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

95 *Tribunals of Inquiry (Evidence)(Amendment) Act 1997* (Ireland) s 4.

96 See Law Reform Commission of Ireland, *Report on Public Inquiries Including Tribunals of Inquiry*, LRC 73 (2005), [6.61]; Tribunals of Inquiry Bill 2005 (Ireland) cll 31, 52.

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

98 The procedure under s 36 is civil rather than criminal in nature, and requires a judge to make an independent assessment of the issues: *Re Paisley Junior* [2009] NIQB 40.

mechanism for enforcement of contempt by a court if there 'is a strong incentive to withhold information because releasing information may expose a person to a large penalty for their substantive misconduct'.[99] Such a mechanism may be more easily justified if:

- the enforcing agency serves a critical regulatory or enforcement function which will be frustrated if a strong incentive to withhold information persists;
- access to information via a notice is likely to be critical to successful prosecution of substantive misconduct;
- defendants typically have significant financial resources at their disposal; and
- the public interest requires that persons be prevented from frustrating criminal investigations by withholding information to defeat the interests of justice.[100]

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

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

Other issues

Evidentiary certificates

20.72 In *Contempt*, the ALRC considered whether Royal Commissions, if they had the power to institute proceedings in court for offences akin to contempt, should have the power to certify facts to a court and, if so, what evidentiary status such a certificate should have.[101] While a clear majority of stakeholders thought a person presiding at a

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

100 Ibid.

101 Provisions providing that certificates of inquiries are evidence of the facts, unless rebutted, exist in *Royal Commissions Act 1923* (NSW) s 18B(4); *Royal Commissions Act 1968* (WA) s 15B(4). Such provisions do exist in *Commissions of Inquiry Act 1950* (Qld) s 10; *Commissions of Inquiry Act 1995* (Tas) s 31. See the discussion in analogous circumstances in M Trowell, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee,* (2007), [165]–[168].

tribunal should be required to furnish to a court a certificate or affidavit setting out the tribunal's understanding of the relevant facts, stakeholders were divided as to whether such a certificate should be treated as correct on its face unless positively rebutted. The ALRC decided not to recommend the use of such a certificate, since it had not recommended such a provision in relation to courts.[102]

20.73 The provision in the ASIC Act that empowers ASIC to apply for enforcement of orders does not provide that a certificate by ASIC is proof of the facts within it. Dr Stephen Donaghue has suggested that ASIC's power was not 'designed to ensure rapid compliance with these orders … since the court must inquire into the case itself before ordering compliance'.[103] He observed that, in the interests of efficiency, it would be desirable for a certification procedure to be introduced, but noted that the section prevented ASIC 'from being judge of its own cause and restricts the power to impose potentially draconian coercive sanctions to judges'.[104] Donaghue concluded that 'the costs in terms of efficiency may therefore be outweighed by the benefits of a fair contempt procedure'.[105]

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

> Evidentiary certificate provisions are only suitable where they relate to formal or technical matters that are not likely to be in dispute but that would be difficult to prove under the normal evidential rules, and should be subject to appropriate safeguards.[106]

Venue

20.75 Another issue is which court or courts should exercise the power to punish contempt on an application from an inquiry. In relation to the ACC, the Trowell Report recommended that the Federal Court should have jurisdiction to hear such an application, in addition to the Supreme Courts of the Australian states and territories.[107] It noted that several provisions in the *Australian Crime Commission Act* already provided for applications to a judge of the Federal Court, and that federal criminal law had developed significantly in recent years.[108]

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

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

104 Ibid.

105 Ibid. See also L Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (1982), 108.

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

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

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

Double punishment

20.76 The Trowell Report also recommended that the *Australian Crime Commission Act* should provide that a person should not be liable to be prosecuted both for contempt and an offence under the Act.[109] Equivalent provisions are also provided in some state and territory inquiries legislation, which enable the same act or omission to constitute either contempt or an offence.[110]

20.77 The *Guide to Framing Commonwealth Offences* advises that

> it is important to ensure that if a person is dealt with by way of a contempt order, then that person is not also liable to be prosecuted for a non-compliance offence for the same conduct, and vice versa.[111]

20.78 The *Guide to Framing Commonwealth Offences* also notes that s 4C of the *Crimes Act*, which protects against double punishment in relation to two or more offences, does not apply to contempt proceedings, because they are not included in that section.[112]

Discussion Paper Proposals

20.79 In IP 35, the ALRC asked whether the types of behaviour currently covered by s 6O(1) of the *Royal Commissions Act* should constitute an offence under inquiries legislation.[113]

20.80 In DP 75, the ALRC proposed that s 6O of the *Royal Commissions Act* should not be included in the *Inquiries Act.*[114] It proposed that the *Inquiries Act* should provide that it is an offence to cause substantial disruption to the proceedings of a Royal Commission or Official Inquiry, with the intention to disrupt the proceedings, or recklessness as to whether the conduct would have that result.[115] The ALRC also proposed that: the *Inquiries Act* should provide that the chair of an inquiry may apply to the Federal Court to enforce an order as if the matter had arisen in proceedings

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

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

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

112 Ibid.

113 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Question 9–7.

114 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposal 19–5.

115 Ibid, Proposal 19–3.

before the Court; and a person is not liable to be punished both under the proposed *Inquiries Act* and for contempt of court.[116]

Submissions and consultations

Contempt

20.81 Several of the stakeholders who addressed the issue of s 6O of the *Royal Commissions Act* expressed concerns about applying the concept of contempt to executive bodies. For example, one stakeholder submitted:

> I much favour the ALRC view on contempt. The term 'contempt' whilst highly appropriate to a court proceeding does not sit well with the term 'inquiry'.[117]

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

> the powers invested in Royal Commissioners under subsection 6O(2) create the perception of a 'star chamber', as they empower a commissioner to act at once as informant, prosecutor and judge.[118]

20.83 It also was noted in consultations that, where there was non-compliance with the summonses or notices of Royal Commissions, the existing criminal sanctions were largely ineffective. This was partly due to the inadequacy of the penalties, but also because of issues of timeliness in commencing proceedings.[119]

20.84 In relation to s 6O(2)—which confers on suitably qualified Royal Commissioners the power to punish contempt—most stakeholders who commented on the issue were of the view that the provision was unconstitutional.[120]

Referral power

20.85 The proposal that an inquiry should have the power to apply to a court to enforce an order was supported by the stakeholders who addressed it.[121]

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116 Ibid, Proposals 19–1, 19–2.
117 I Turnbull, *Submission RC 6,* 16 May 2009.
118 Law Council of Australia, *Submission RC 9,* 19 May 2009, citing A Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 55.
119 Penalties are discussed in Ch 21.
120 See, eg, I Turnbull, *Submission RC 22,* 21 September 2009; Law Council of Australia, *Submission RC 9,* 19 May 2009.
121 Law Council of Australia, *Submission RC 30,* 2 October 2009; I Turnbull, *Submission RC 22,* 21 September 2009.

ALRC's view

Contempt sanctions

20.86 In the ALRC's view, the concept of contempt should not be applied to bodies established by the executive arm of government. The law of contempt was developed to protect the administration of justice, and is not directly applicable to public inquiries. Applying the concept of contempt to Royal Commissions and other public inquiries confuses the role and functions of the judiciary with the role and functions of public inquiries, which are established by the executive.[122]

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

Dual approach

20.88 Inquiries do need powers to protect the integrity of their proceedings and ensure compliance with their notices and directions. An attractive model for enforcement of orders is the dual model contained in the United Kingdom and Irish inquiries legislation, and in the ASIC Act. This model allows behaviour to be prosecuted as a criminal offence, or upon application by an inquiry, by a court exercising its power to enforce its own orders. The ALRC sees advantages in empowering a Royal Commission to apply to a court for enforcement of its notices and directions. This would apply in addition to criminal offences of refusing to comply with such notices or requirements.[123] In the ALRC's view, the policy justification for this approach—namely, the need for more timely sanctions for non-compliance—applies equally to Official Inquiries.

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

20.90 The ALRC recommends that a provision similar to s 36 of the *Inquiries Act* (UK) be included in the *Inquiries Act* recommended in this Report. Such a

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

123 In Ch 19, the ALRC recommends that the *Inquiries Act* should provide, with respect to Royal Commissions and Official Inquiries, that a person commits an offence if the person, without reasonable excuse, refuses or fails to comply with a certain notice or requirement: Recommendation 19–1.

provision would enable a Royal Commission or Official Inquiry to apply to a court for enforcement of its notices to attend or produce evidence, or to enforce a requirement to answer a question. The ALRC does not recommend that s 36 of the *Inquiries Act* (UK) be replicated in full, however. In particular, it does not seem necessary to enable the certification of a matter after a Royal Commission or Official Inquiry has concluded.

Other issues

20.91 In the ALRC's view, the Federal Court is the appropriate court to enforce the notices or directions of Royal Commissions and Official Inquiries. This is consistent with the procedure set out in the ASIC Act.

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

20.93 The ALRC recommends in Chapter 19 that it should be a criminal offence to refuse or fail to comply with a notice to attend or produce evidence before a Royal Commission or Official Inquiry, or a requirement to answer a question asked in a Royal Commission or Official Inquiry. The *Inquiries Act*, therefore, should provide that a person is not liable to be punished twice for the same act or omission, if the act or omission would constitute both an offence under the *Inquiries Act* and, if enforced by the Federal Court, contempt of court. This is an important procedural safeguard to ensure that a person is not liable to be prosecuted twice for the same conduct.

Disruption

20.94 The procedure recommended by the ALRC, however, should be limited to ensuring compliance with notices or directions. In the ALRC's view, a court should not be asked to enforce orders relating to insults during, or disruptions and interruptions to, a hearing. If done in a court, this conduct could be dealt with promptly by the court itself. On the other hand, a Royal Commission or Official Inquiry would have to refer the matter to a court. As such, there would be no real advantage in terms of securing a swift resolution of the matter.

20.95 Instead, the ALRC reiterates its earlier recommendations in *Contempt* that it is desirable to create an offence of causing substantial disruption, with an intention to disrupt proceedings, or recklessness as to whether conduct would have that result. A criminal sanction is warranted only where the disruption is substantial—that is, it is

more than trivial or minimal, but not necessarily total.[124] The same considerations apply equally to Official Inquiries. Although it is anticipated that Official Inquiries may be conducted in a more procedurally flexible manner than Royal Commissions, Official Inquiries may hold public hearings that would justify similar prohibitions and powers.

Recommendation 20–2 The recommended *Inquiries Act* should provide that, where a person fails to comply with a notice or a direction of a Royal Commission or Official Inquiry, or threatens to do so, the chair of the inquiry may refer the matter to the Federal Court. The Court, after hearing any evidence or representations on the matter certified to it, may enforce such a notice or direction as if the matter had arisen in proceedings before the Court.

Recommendation 20–3 The recommended *Inquiries Act* should provide that a person is not liable to be punished twice for the same act or omission, if the act or omission would constitute both an offence under the recommended Act and, if enforced by the Federal Court, contempt of court.

Recommendation 20–4 The recommended *Inquiries Act* should provide that it is an offence to cause substantial disruption to the proceedings of a Royal Commission or Official Inquiry, with the intention to disrupt the proceedings, or recklessness as to whether the conduct would have that result.

Recommendation 20–5 Section 6O of the *Royal Commissions Act 1902* (Cth), dealing with contempt of Royal Commissions, should be repealed.

124 See, eg, *R v Rowe* (1996) 89 A Crim R 467, 471–472; *R v Biess* [1967] Qd R 470, 485; *R v Lloyd* [1967] 1 QB 175, 178—179.

21. Penalties, Proceedings and Costs

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Introduction

21.1 The *Royal Commissions Act 1902* (Cth) includes a number of offences, and specifies the maximum penalties that apply to them. The offences are examined in Chapters 19 and 20. In those chapters, the ALRC recommends that the following three offences should apply to Royal Commissions and Official Inquiries—the offence of refusing or failing to comply with a requirement of a Royal Commission or Official Inquiry; the offence of contravening a direction of a Royal Commission or Official Inquiry; and the offence of causing substantial disruption to the proceedings of a Royal Commission or Official Inquiry.

21.2 This chapter examines the penalties that should apply to the offences recommended in those chapters. It also examines ss 10 and 15 of the *Royal Commissions Act*. Section 10 deals with the way in which a proceeding for an offence under the Act may be instituted, while s 15 confers a power on a court to award costs in relation to such a proceeding.

Setting penalties

21.3 The two main forms of penalties are monetary penalties or a term of imprisonment. Provisions creating federal offences typically specify the maximum penalty for the offence, which is intended for the worst type of case covered by the offence.[1] Parliament determines the maximum penalties, and courts in sentencing federal offenders are required to determine the sentence or order 'that is of a severity appropriate in all the circumstances of the case'.[2]

21.4 Those setting maximum penalties are guided by two main principles, namely, proportionality and consistency.[3] These principles inform the discussion of penalties in this chapter.

21.5 The principle of proportionality requires that the penalty bears a reasonable, or proportionate, relationship to the criminal conduct in question. That is, a maximum penalty should be 'adequate and appropriate to act as an effective deterrent to the commission of the offence to which it applies, and reflect the seriousness of the offence in the relevant legislative scheme'.[4] In particular, a 'heavier penalty is appropriate where there are strong incentives to commit an offence, or where the consequences of the commission of the offence are particularly dangerous or damaging'.[5]

21.6 The principle of consistency requires that the penalty for an offence should be consistent with penalties for offences of a similar kind or seriousness, and that the penalties within a given legislative regime should reflect the relative seriousness of the offences within that scheme.[6]

21.7 One way of ensuring a degree of consistency in penalties in federal legislation is through the setting of 'penalty benchmarks', which establish the appropriate penalty for a given type of offence in Commonwealth law. Some penalty benchmarks are set out in the Australian Government Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (*Guide to Framing Commonwealth Offences*).[7]

21.8 The *Crimes Act 1914* (Cth) also includes a number of provisions relating to penalties. These provisions adjust some of the penalties in the *Royal Commissions Act*. They also provide general principles for ensuring consistency in the setting of penalties

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1 *Ibbs v The Queen* (1987) 163 CLR 447, 451–452; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 478.
2 *Crimes Act 1914* (Cth) s 16A(1).
3 These are discussed in detail in the related context of sentencing in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Ch 5.
4 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 38.
5 Ibid.
6 Ibid.
7 Ibid, 47–48.

in federal legislation, which should apply unless there is a good reason to depart from them.[8]

21.9 The *Crimes Act* converts monetary penalties specified in dollars into 'penalty units', which are then amended to reflect changes in the value of the dollar.[9] A penalty unit is currently $110.[10] If no monetary penalty is specified, the *Crimes Act* also applies a maximum monetary penalty by multiplying the number of months in the maximum term of imprisonment by five.[11] For example, if the maximum penalty is imprisonment for 12 months and no monetary penalty is specified, the applicable monetary penalty is 60 penalty units or $6,600.

21.10 The *Crimes Act* also provides that a court may impose a maximum monetary penalty upon a body corporate that is five times the monetary penalty payable by a natural person.[12] A term of imprisonment for 12 months, where no penalty is specified, therefore, would enable a court to impose a monetary penalty on a body corporate of 300 penalty units or $33,000.

21.11 The *Crimes Act* makes provision for indictable and summary offences. An offence may be tried either on indictment (that is, by a trial before a judge or jury in a County Court, District Court or Supreme Court) or summarily (that is, by a magistrate without a jury). Summary offences are typically less serious than indictable offences.

21.12 The *Crimes Act* provides that, if not otherwise stated, an offence with a maximum penalty of 12 months or less is a summary offence,[13] which means that offences with a maximum penalty exceeding 12 months are usually indictable offences. The *Crimes Act* provides, however, that, unless otherwise stated, indictable offences with a maximum penalty of 10 years imprisonment or less may be tried summarily, if the prosecutor and defendant consent.[14]

21.13 If an indictable offence with a maximum penalty of five years imprisonment or less is tried summarily, then a maximum penalty of 12 months imprisonment or 60 penalty units applies, unless otherwise stated.[15] If an indictable offence with a higher maximum penalty is tried summarily, then the maximum penalty is two years imprisonment or 120 penalty units, unless otherwise stated.[16]

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8 Ibid, 40–41, 44, 46.
9 *Crimes Act 1914* (Cth) s 4AB.
10 Ibid s 4AA(1). This has the effect of increasing the specified monetary penalties in the *Royal Commissions Act 1902* (Cth) by 10%.
11 *Crimes Act 1914* (Cth) s 4B(2).
12 Ibid s 4B(3).
13 Ibid s 4H.
14 Ibid s 4J.
15 Ibid s 4J(3)(a).
16 Ibid s 4J(3)(b).

Present penalties

21.14 The *Royal Commissions Act* sets a maximum penalty of six months imprisonment or 10 penalty units (presently $1,100) for failing to attend or produce documents, or for refusing to be sworn or make an affirmation, or answer a question. The Act sets a maximum penalty of 12 months imprisonment or 20 penalty units ($2,200) for making any publication contrary to a direction of a Royal Commission. All of these offences are summary offences.[17]

21.15 The *Royal Commissions Act* also includes a number of offences penalising interference with evidence or witnesses. As discussed in Chapter 19, there are parallel offences in the *Crimes Act* that apply to Royal Commissions, which also would apply to the Official Inquiries recommended in this Report.[18] The offence in the *Royal Commissions Act* dealing with false or misleading evidence also parallels offences in the *Criminal Code* (Cth), which also apply to Royal Commissions and would apply to Official Inquiries.[19] In Chapter 19, the ALRC recommends that the offences in the *Royal Commissions Act* dealing with interference with evidence or witnesses should not be included in the *Inquiries Act*, and instead reliance should be placed on the offences in the *Crimes Act* and *Criminal Code*.[20]

21.16 This recommendation makes it unnecessary to deal in this chapter with the penalties relating to those offences, since the maximum penalties in the *Crimes Act* and *Criminal Code* would apply. The table below sets out the maximum penalties applicable under the *Royal Commissions Act* and the maximum penalties applicable to the equivalent offences under the *Crimes Act* or *Criminal Code*, with differences between the penalties indicated in bold type.[21] These are the maximum penalties applicable to a natural person, where the offence is tried on indictment.

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17 *Royal Commissions Act 1902* (Cth) s 6D(4).

18 *Crimes Act 1914* (Cth) s 31.

19 *Criminal Code* (Cth) ss 137.1(1)(c)(ii), 137.2(1)(c).

20 Recommendation 19–9.

21 The Model Criminal Law Officers Committee (MCLOC), a committee of the Standing Committee of the Attorneys-General, is developing a Model Criminal Code in an ongoing project of harmonising Australian criminal laws. MCLOC has recommended alteration of some of these maximum penalties, with two levels of maximum penalty: 5 years or 7 years. See Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 7: Administration of Justice Offences* (1998), Appendix 2.

Table 21.1: Penalties

Offence	Penalty under the *Royal Commissions Act*	Penalty under the *Crimes Act* or *Criminal Code* (differences between penalties are in **bold** type)
False or misleading evidence	5 years, or 200 penalty units	5 years, or **300 penalty units** for false evidence (*Crimes Act*, s 35)
		12 months, or **60 penalty units** for false or misleading information or documents (*Criminal Code* ss 137.1, 137.2)
Bribery of witness	5 years, or 300 penalty units	5 years, or 300 penalty units (*Crimes Act*, s 37)
Fraud on witness	2 years, or 120 penalty units	2 years, or 120 penalty units (*Crimes Act*, s 38)
Destroying documents or other things	2 years or 100 penalty units	**5 years,** or **300 penalty units** (*Crimes Act*, s 39)
Fabricating evidence	Not an offence in the Act	**5 years, or 300 penalty units** (*Crimes Act*, s 36)
Preventing witnesses from attending	1 year, or 60 penalty units	1 year, or 60 penalty units (*Crimes Act*, s 40)
Injury to witness	1 year, or 10 penalty units	**5 years, or 60 penalty units** (*Crimes Act*, s 36A)
Dismissal by employers of witness	1 year, or 10 penalty units	**5 years, or 60 penalty units** (*Crimes Act*, s 36A)

Submissions and consultations

21.17 In the Issues Paper, *Review of the Royal Commissions Act* (IP 35), the ALRC asked whether there should be any changes to the penalties in the *Royal Commissions Act* and what penalties, if any, should apply to other forms of public inquiries established by statute.[22] In the Discussion Paper, *Royal Commissions and Official Inquiries* (DP 75), the ALRC proposed a number of maximum penalties for specific

22 Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009), Questions 9–8, 9–9.

offences, based on the general principles underlying the sections in the *Crimes Act* discussed above.[23]

21.18 Few stakeholders addressed the issue of penalties in either submissions or consultations. In consultations, some stakeholders indicated a concern that the penalties for non-compliance were too low and therefore ineffective. There was very little comment from stakeholders on whether different penalties ought to apply to other forms of inquiry established by legislation.

21.19 The Law Council of Australia was the only stakeholder to address the issue in its submissions. It expressed the view that there was no justification for the variation in the penalties between the *Royal Commissions Act* and the *Crimes Act* or *Criminal Code*, and that the offences for non-compliance should attract the same maximum penalty.[24] It also expressed its support for harmonisation of penalties in line with penalty benchmarks in the *Guide to Framing Commonwealth Offences*.[25]

Penalties for Official Inquiries

21.20 The ALRC has considered whether different levels of penalty ought to apply to Royal Commissions and Official Inquiries. For example, offences of refusing or failing to comply with the requirements of a Special Commission of Inquiry in New South Wales (NSW) attract a higher maximum penalty than in relation to Royal Commissions in that jurisdiction, although in both cases the penalties are very small.[26]

21.21 As discussed in Part B, the statutory framework for inquiries recommended in this Report preserves Royal Commissions as the highest form of executive inquiry. Royal Commissions should be established only where the most intrusive information-gathering powers are required, and where the matter for inquiry is of substantial public importance.[27]

21.22 It could be argued that Royal Commissions will deal with matters that justify higher penalties than Official Inquiries, because there is a higher prospect that criminal activity of a serious kind may be involved. In the ALRC's view, however, the penalties should be the same for both Royal Commissions and Official Inquiries. Whether the inquiry is established as a Royal Commission or an Official Inquiry may depend on a number of different factors, and the seriousness of the conduct that is the subject of the inquiry is only one factor.

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23 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposals 20–1, 20–2, 20–3, 20–4. Those proposals are discussed later in this chapter.

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

25 Law Council of Australia, *Submission RC 30,* 2 October 2009.

26 *Special Commissions of Inquiry Act 1983* (NSW), ss 25, 26 (10 penalty units); *Royal Commissions Act 1923* (NSW) ss 19, 20 (4 penalty units).

27 Recommendations 5–1, 6–2.

21.23 It will not necessarily be the case, for example, that a failure to comply with a notice or direction of a Royal Commission will be more serious than a failure to comply with a notice or direction of an Official Inquiry. For example, an Official Inquiry may be established to investigate an alleged systemic criminal matter because it is anticipated that the investigation will be quite confined. A Royal Commission may be established to inquire into a policy issue because of the substantial public interest of the policy involved.

21.24 Since the form of the inquiry will not necessarily dictate the seriousness of the conduct to be deterred, the same maximum penalty is recommended in relation to both Royal Commissions and Official Inquiries. The seriousness of the conduct can be considered, however, as a factor in sentencing.

21.25 This approach is adopted in other jurisdictions with different forms of inquiry. For example, the Australian Capital Territory and Victoria provide the same penalties in respect of Royal Commissions and Boards of Inquiry.[28] The Inquiries Bill 2008 (NZ) contains the same penalties in respect of its three different forms of inquiry.[29] Offences by witnesses in federal courts also attract consistent penalties.[30]

Penalties for non-compliance

21.26 In Chapter 19, the ALRC recommends that it should be an offence under the *Inquiries Act* for a person, without reasonable excuse, to refuse or fail to:

- swear an oath or make an affirmation when required to do so by an inquiry member;
- answer a question when required to do so by an inquiry member, or a person authorised by an inquiry member to ask the question;
- comply with a notice requiring a person to attend or appear; or
- comply with a notice requiring a person to produce a document or thing, in the custody or control of that person.[31]

21.27 In Chapter 20, the ALRC recommends that inquiries also should be able to apply to the Federal Court for enforcement of their orders, as an alternative mechanism to ensure compliance.[32]

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28 *Evidence Act 1958* (Vic) ss 16, 19, 20; *Royal Commissions Act 1991* (ACT) s 46; *Inquiries Act 1991* (ACT) s 36.

29 Inquiries Bill 2008 (NZ) cl 30.

30 See, eg, *Federal Magistrates Act 1999* (Cth) s 65; *Federal Court of Australia Act 1976* (Cth) s 58. There is no equivalent offence for the High Court, which punishes similar conduct as contempt: *Judiciary Act 1903* (Cth) s 24.

31 Recommendation 19–1.

32 Recommendation 20–2.

21.28 As noted above, the existing offences of non-compliance in the *Royal Commissions Act* attract a maximum penalty of six months imprisonment or 10 penalty units ($1,100). The maximum term of imprisonment is consistent with the penalty benchmark for similar offences in the *Guide to Framing Commonwealth Offences*.[33] It is also consistent with the penalties imposed for similar conduct in federal courts[34] and tribunals.[35] It is higher than the penalty imposed for non-compliance in hearings before the Australian Securities and Investments Commission (ASIC),[36] although lower than the penalty imposed for non-compliance in hearings before the Australian Competition and Consumer Commission.[37]

21.29 Existing penalties for offences of non-compliance are broadly consistent with the penalties for equivalent offences in state and territory legislation—which typically range from imprisonment for three to six months, with the highest penalty being imprisonment for one year.[38]

21.30 The only maximum penalties for similar conduct that are significantly higher are contained in legislation governing standing crime and corruption commissions. Similar offences relating to the Australian Commission for Law Enforcement Integrity (ACLEI) attract a maximum penalty of two years imprisonment, or 120 penalty units,[39] while in NSW similar offences relating to the Independent Commission Against Corruption (ICAC) attract a maximum penalty of two years imprisonment.[40]

21.31 Similar conduct before the Australian Crime Commission (ACC) attracts the highest maximum penalty for comparable offences—five years imprisonment or 200 penalty units. This maximum penalty was set in 2001.[41] This level of penalty was recommended for Royal Commissions by the Hon Terence Cole QC, who headed the Royal Commission into the Building and Construction Industry (2003) (Building Royal Commission).[42] Before 2001, the penalties for ACC offences were similar to those in the *Royal Commissions Act*.

21.32 The increase in penalties in 2001 was part of a package of reforms designed to overcome the problem of significant non-compliance by witnesses. In 2007, in an

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33 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 47.
34 *Federal Magistrates Act 1999* (Cth) s 65; *Federal Court of Australia Act 1976* (Cth) s 58.
35 *Administrative Appeals Tribunal Act 1975* (Cth) ss 61, 62; *Migration Act 1958* (Cth) ss 370–371, 432–433; *Defence Act 1903* (Cth) ss 61CY, 86.
36 *Australian Securities and Investments Commission Act 2001* (Cth), s 219(4) (3 months).
37 *Trade Practices Act 1974* (Cth) s 160 (12 months or 20 penalty units).
38 See, eg, *Commissions of Inquiry Act 1950* (Qld) (1 year); *Royal Commissions Act 1917* (SA) s 11 (3 months); *Criminal Code* (ACT) s 721 (6 months).
39 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 78.
40 *Independent Commission Against Corruption Act 1988* (NSW) s 86.
41 *National Crime Authority Legislation Amendment Act 2001* (Cth) sch 1, cl 7.
42 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 44.

independent review of this increase in penalties,[43] the ACC reported that the higher penalties had facilitated the performance of its functions.[44] The statistics set out in that report show that before the amendments, the penalties imposed by courts ranged from a $500 fine to four months imprisonment. During 2005–06, the typical penalty imposed was 12 months imprisonment.[45] The reviewer concluded that, in light of the varying circumstances of cases, the 'best that can be said is that the prevailing range of sentences imposed by the courts … has increased'.[46]

ALRC's view

21.33 The current maximum penalty of six months imprisonment for offences of non-compliance is an appropriate penalty. The maximum monetary penalty, however, should be adjusted to 30 penalty units ($3,300) in line with the formula in the *Crimes Act* for converting the maximum term of imprisonment into a maximum monetary penalty. This level of penalty is consistent with a broad range of federal legislation, including legislation governing courts and tribunals.

21.34 In the ALRC's view, while similar conduct before the ACC attracts a higher level of penalty, a maximum penalty for Royal Commissions in the range of five years imprisonment is unjustified. The ACC is a standing organisation responsible for investigating serious and organised crime. Witnesses before the ACC are likely to be facing significant criminal penalties, and a higher level of deterrence therefore may be necessary. The ACC is also subject to a much higher level of accountability than an ad hoc inquiry, with oversight mechanisms including a Board, an Inter-Governmental Committee, and a Parliamentary Joint Committee.[47] Similar considerations apply to the penalties applicable to ACLEI proceedings.

21.35 Royal Commissions and Official Inquiries, in contrast, are ad hoc bodies which are not established for the purpose of enforcing laws or investigating breaches of laws, but rather to inquire, report and make recommendations to government. The penalty required to deter non-compliance, therefore, is less than that required in investigations of serious and organised crime or corruption. Of course, Royal Commissions have in the past investigated allegations of criminal activity and corruption. Nevertheless, the purpose of a Royal Commission of this nature remains in the end very different from the purpose of bodies such as the ACC or ACLEI.

21.36 A higher level of penalty would also be out of proportion to the penalties imposed for interference with evidence or witnesses. As noted above, the *Crimes Act* imposes maximum penalties in the range of one to five years imprisonment for these offences. These offences would generally involve a more culpable interference with the

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

44 Ibid, [94].

45 Ibid, [103].

46 Ibid, [104].

47 *Australian Crime Commission Act 2002* (Cth) pt II, div 1; pt III.

processes of a Royal Commission or Official Inquiry than mere non-compliance, and this should be reflected in the applicable penalties.

21.37 The ALRC recommends, therefore, that the offences of refusing or failing to swear or affirm, answer a question, or comply with notices requiring attendance or the production of evidence, should attract a maximum penalty of six months imprisonment, or 30 penalty units.

Recommendation 21–1 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the offences of refusing or failing to swear or affirm, answer a question, or comply with notices requiring attendance or the production of documents or things, is six months imprisonment or 30 penalty units.

Unauthorised publications

21.38 In Chapter 19, it is recommended that there should be an offence of contravening a direction which concerns national security information, the prohibition or restriction of public access to a hearing, or the prohibition or restriction of publication of certain information before an inquiry.[48] This recommendation extends the existing offence of publication contrary to a direction of a Royal Commission in s 6D(3) of the *Royal Commissions Act* to directions prohibiting or restricting public access to a hearing, which involve similar considerations to that of publication.

21.39 In Chapter 13, the ALRC discusses the power of an inquiry to make directions concerning national security information. In that chapter, the ALRC recommends that inquiry members may make directions relating to national security information, including specifying the forms in which national security information may be produced or otherwise used, and imposing restrictions on access, subsequent use and disclosure of such information.[49]

21.40 As noted above, the existing offence in s 6D(3) of the Act attracts a maximum penalty of 12 months imprisonment, or 20 penalty units. The *Guide to Framing Commonwealth Offences* does not provide a penalty benchmark for these kinds of offences.

21.41 The maximum penalty of 12 months imprisonment is the same as that which applies to unauthorised publications in relation to ASIC,[50] the ACC,[51] and ACLEI.[52] It

48 Recommendation 19–8.
49 Recommendation 13–2.
50 *Australian Securities and Investments Commission Act 2001* (Cth) ss 55, 66.
51 *Australian Crime Commission Act 2002* (Cth) s 25A(9), (14).
52 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 90(6).

is the highest penalty provided for offences in inquiries legislation in Australia.[53] It is also consistent with the comparable penalty relating to ICAC proceedings.[54]

21.42 The offences in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), which restrict disclosure of national security information including disclosures in breach of court orders, attract a maximum penalty of two years imprisonment.[55] Similarly, s 58 of the *Defence Force Discipline Act 1982* (Cth) imposes a maximum penalty of two years imprisonment for unauthorised disclosures by defence members or defence civilians which are likely to prejudice the security or defence of Australia.

21.43 The *Guide to Framing Commonwealth Offences* specifies a penalty benchmark of two years imprisonment or 120 penalty units for breach of secrecy provisions,[56] although higher penalties sometimes apply to secrecy offences relating to national security information.[57]

21.44 The ALRC is currently conducting an inquiry into secrecy provisions, and has recommended in its 2009 Discussion Paper, *Review of Secrecy Laws* (DP 74), that a general secrecy offence be introduced. Among other things, the general secrecy offence would prohibit disclosures that harm, were reasonably likely to or were intended to harm, the national security, defence or international relations of the Commonwealth.[58] The penalties proposed in DP 74 for that offence range from two years imprisonment to seven years imprisonment.[59]

21.45 In DP 75, the ALRC proposed that the appropriate maximum penalty for the offence of breaching prohibitions or restrictions on public access to hearings or publication should be 12 months imprisonment or 60 penalty units. The maximum penalty proposed for the offence of contravening directions concerning national security information was two years imprisonment or 120 penalty units.[60] The Australian Intelligence Community, which was the only stakeholder to address this issue, supported these proposals.[61]

ALRC's view

21.46 The offence of unauthorised publication should continue to attract a maximum penalty of 12 months imprisonment, as this is consistent with similar offences in

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53 It is equivalent to the maximum penalty in *Royal Commission (Police Service) Act 1994* (NSW) s 27.
54 *Independent Commission Against Corruption Act 1988* (NSW) s 112.
55 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 40–46G.
56 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 47.
57 See Australian Law Reform Commission, *Review of Secrecy Laws*, DP 74 (2009), [11.115].
58 Ibid, Proposal 7–1.
59 Ibid, Proposal 9–3.
60 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009), Proposals 20–2, 20–3.
61 Australian Intelligence Community, *Submission RC 28,* 28 September 2009.

federal legislation. The maximum monetary penalty should be adjusted in line with the ratio between months of imprisonment and penalty units in the *Crimes Act*, so the offence would carry a maximum monetary penalty of 60 penalty units ($6,600) rather than the existing 20 penalty units.

21.47 This penalty is higher than the penalty for non-compliance, discussed above. This is justified because the consequences of unauthorised disclosure can be serious and damaging to the interests that are sought to be protected by a non-publication order. For example, an unauthorised publication could cause significant harm to people participating in an inquiry, such as a threat to their safety or a significant breach of their privacy. The potential for harm as a result of unauthorised publication, therefore, is greater than the potential for harm caused by other forms of non-compliance.

21.48 In the ALRC's view, no distinction should be made in terms of the penalty between the offence of unauthorised publication and the offence of contravening a direction prohibiting or restricting public access to hearings. Both directions not to publish and directions restricting public access to hearings are designed to minimise the same kinds of harm, and the contravention of a direction restricting public access has the potential to cause the same kinds of harm as a direction restricting publication.

21.49 The offence of contravening a direction concerning national security information, however, should attract a higher penalty of two years imprisonment, or 120 penalty units. National security information involves a critical public interest, and disclosure of such information may cause substantial damage to national interests, members of the security and intelligence agencies, and others. The maximum penalty of two years imprisonment is consistent with that applicable in court proceedings under the *National Security Information (Criminal and Civil Proceedings) Act*. The seriousness of the conduct and the prospect of harm are similar whether such disclosures contravene the orders of courts and tribunals or the directions of inquiries.

Recommendation 21–2 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the offence of contravening a direction concerning the prohibition or restriction of public access to a hearing, or the prohibition or restriction of publication, is 12 months imprisonment or 60 penalty units.

Recommendation 21–3 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the offence of contravening a direction concerning national security information is two years imprisonment or 120 penalty units.

Offence of substantial disruption

21.50 Section 6O of the *Royal Commissions Act* prohibits a range of conduct such as disturbing or interrupting proceedings, or using insulting language towards a Royal Commission. This offence is discussed in Chapter 20. Section 6O is subject to a maximum penalty of three months imprisonment, or two penalty units ($220).

21.51 In Chapter 20, the ALRC recommends that s 6O should be replaced by a more limited offence of causing substantial disruption to a proceeding of a Royal Commission or Official Inquiry, with the intention to disrupt the proceedings, or recklessness as to whether the conduct would have that result.[62] The ALRC also recommends that members of Royal Commissions or Official Inquiries should have the power to exclude a person from the proceedings of an inquiry if that person is disrupting the inquiry.[63]

21.52 In the Building Royal Commission, Commissioner Cole criticised the penalty for s 6O as 'manifestly inadequate' and recommended it be increased to at least $5,000.[64] As noted above, the *Guide to Framing Commonwealth Offences* specifies that the ratio of months of imprisonment to penalty units in s 4B(2) of the *Crimes Act*—namely, that one month of imprisonment should equate to five penalty units—should generally apply when setting penalties. If this advice was followed, a maximum penalty of $5,000 would require a maximum term of imprisonment of at least 10 months.

21.53 The maximum penalty of three months is also contrary to the advice in the *Guide to Framing Commonwealth Offences*, which directs those framing Commonwealth offences to refrain from imposing terms of imprisonment of less than six months. It states that:

> Avoiding provision for short term prison terms underlines the message that imprisonment is reserved for serious offences and also avoids the potential for burdening State/Territory correctional systems with minor offenders.[65]

21.54 In contrast, in its report, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103), the ALRC recommended that sentences of imprisonment of less than six months should continue to be available in the sentencing of federal offenders.[66] The ALRC expressed the view that the federal sentencing regime protects

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62 Recommendation 20–4.
63 Recommendation 20–1.
64 T Cole, *Final Report of the Royal Commission into the Building and Construction Industry* (2003), vol 2, 44.
65 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007), 42–43.
66 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 7–8.

against the inappropriate imposition of short sentences.[67] The ALRC noted anecdotal evidence that suggests that the abolition of short sentences may have perverse consequences, resulting in offenders receiving longer sentences of imprisonment than would otherwise have been warranted.[68]

21.55 The penalty of three months imprisonment is also shorter than in comparable legislation. In ACLEI and ASIC proceedings, similar conduct attracts a maximum penalty of six months imprisonment and 12 months imprisonment respectively.[69] In the ACT, conduct of this kind before a Royal Commission would attract a maximum penalty of 12 months imprisonment.[70] Similar conduct before the ACC would attract a penalty of two years imprisonment, although the offence also covers other conduct such as obstruction.[71]

ALRC's view

21.56 A maximum penalty of six months imprisonment and a maximum monetary penalty of 30 penalty units—in line with the ratio in the *Crimes Act*—would be appropriate for the offence of causing substantial disruption. It is consistent with the penalty recommended for offences of non-compliance. In the ALRC's view, the act of causing substantial disruption to the proceedings of an inquiry may be as serious an obstruction to its proceedings as refusing to comply with notices requiring production of documents.

21.57 The offence of causing substantial disruption does not justify the same penalty as the offence of unauthorised publication which, as discussed above, should attract a maximum penalty of 12 months imprisonment, or 60 penalty units. The offence of causing substantial disruption causes harm to the inquiry itself, while the offence of unauthorised publication has the potential to cause harm to a wide range of interests such as the physical safety and privacy of those participating in an inquiry.

Recommendation 21–4 The recommended *Inquiries Act* should provide that, in the case of Royal Commissions and Official Inquiries, the maximum penalty for the offence of causing substantial disruption is six months imprisonment or 30 penalty units.

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67 The *Crimes Act 1914* (Cth) s 17A provides that a sentence of imprisonment should not be imposed for a federal offence unless the court is satisfied that no other sentence is appropriate in the circumstances of the case.

68 See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [7.70]–[7.72].

69 *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 94; *Australian Securities and Investments Commission Act 2001* (Cth) ss 66, 200, except for s 220 (which applies to such conduct before a Disciplinary Board).

70 *Royal Commissions Act 1991* (ACT) s 46.

71 *Australian Crime Commission Act 2002* (Cth) s 35.

Proceedings

21.58 Offences may be prosecuted in one of two ways—either summarily (that is, before a magistrate without trial by jury) or on indictment (before a judge or jury in the County, District or Supreme Court). As noted earlier, the *Crimes Act* provides that, unless otherwise stated, the procedure for prosecution depends on the level of the maximum penalty that applies to the offence.

21.59 Under the recommendations made in this chapter, all of the offences under the *Inquiries Act* will be summary offences. The exception to this is the recommended offence of contravening a direction concerning national security information, which would be an indictable offence but could be tried summarily if the prosecutor and defendant consent.[72]

21.60 Federal offences are typically prosecuted in the criminal courts of Australian states or territories, and the procedure for prosecution in that state or territory normally applies.[73] Usually, summary proceedings may be initiated by any person by laying a charge, information or complaint.[74]

21.61 In proceedings on indictment, before a person is tried before a judge or jury, there is usually a committal hearing before a magistrate.[75] The function of the committal hearing is to determine whether there is a sufficient case against a person to warrant a trial.[76] While any person may institute a committal proceeding, the person cannot be tried on indictment unless the prosecution is in the name of the Attorney-General or such other person as the Governor-General has appointed in that behalf.[77] The Commonwealth Director of Public Prosecutions (CDPP) also has the power to prosecute a person on indictment, or take over a prosecution of an offence commenced by another person.[78]

Section 10 of the Royal Commissions Act

21.62 Section 10 of the *Royal Commissions Act* outlines the way in which proceedings for summary offences against the Act may be instituted. It provides as follows:

> proceedings in respect of any offence against this Act (other than an indictable offence) may be instituted by action, information, or other appropriate proceeding, in

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72 Recommendation 21–3; *Crimes Act 1914* (Cth) s 4J.

73 These rules are applied to Commonwealth offences under the *Judiciary Act 1903* (Cth) s 68.

74 *Crimes Act 1914* (Cth) s 13(b).

75 The Attorney-General or the Director of Public Prosecutions may also present an ex officio indictment, in which case a committal hearing is unnecessary, although this practice is discouraged: *Barton v The Queen* (1980) 147 CLR 75. There are guidelines as to when such a practice may be appropriate: see the Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008), [6.28]–[6.32].

76 Thomson Reuters, *Laws of Australia*, vol 11 Criminal Procedure, 11.5, [1] (as at 29 June 2009).

77 *Judiciary Act 1903* (Cth) s 69.

78 *Director of Public Prosecutions Act 1983* (Cth) s 9(1), (3), (5). The CDPP, however, cannot take over a prosecution for an indictable offence commenced by the Attorney-General or Special Prosecutor.

> the Federal Court of Australia by the Attorney-General or the Director of Public Prosecutions, or by information or other appropriate proceeding by any person in any court of summary jurisdiction.

21.63 In addition to the usual procedure for summary offences, this section expressly empowers the Attorney-General or CDPP to initiate proceedings in the Federal Court. The CDPP also may take over a summary prosecution commenced by another person.[79]

21.64 It is unusual for the Federal Court to have jurisdiction over these kinds of offences. The Federal Court does not have jurisdiction over offences that prohibit similar conduct in other federal bodies. As a practical matter, proceedings for offences under the *Royal Commissions Act* generally are not instituted in the Federal Court, but, rather, are instituted in state and territory courts.[80]

21.65 Originally, this provision of the *Royal Commissions Act* provided that proceedings in respect of an offence under the Act, other than an indictable offence, could be brought in the High Court of Australia. The Federal Court was substituted for the High Court in 1979.[81] The section, in its original form, was inserted in 1912 as a result of a prosecution for non-attendance before a Royal Commission which had taken 10 or 11 weeks in a court of summary jurisdiction by the time the amending Act was introduced. The then Attorney-General emphasised that the amending Act provided for a direct reference to the High Court in order to expedite matters, because the High Court then despatched business much more quickly than courts of summary jurisdiction.[82]

Consent requirements

21.66 In some overseas jurisdictions, the legislation provides that prosecutions for these kinds of offences can be instituted only with the consent of the CDPP.[83] The primary justification for a requirement for the Attorney-General or the CDPP to consent to a prosecution is that it provides an additional safeguard to ensure that prosecutions are brought only in appropriate circumstances.[84] The CDPP's *Prosecution Policy of the Commonwealth* advises that a consent provision may be included, for example, where 'it was not possible to define the offence so precisely that it covered the mischief aimed at and no more' or for offences that 'involve a use of the criminal

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79 Ibid s 9(5).

80 For example, the prosecution of Martin Kingham following the Building Royal Commission was conducted in the Melbourne Magistrates Court: S Balogh, 'Unions Aim to Build on First Round Win', *The Australian* (Sydney), 8 May 2003, 4.

81 *Jurisdiction of Courts (Miscellaneous Amendments) Act 1979* (Cth) sch.

82 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, 1187 (W Hughes—Attorney-General).

83 *Inquiries Act 2005* (UK) s 35(6); *Commissions of Investigation Act 2004* (Ireland) s 49.

84 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2008), [2.25].

law in sensitive or controversial areas, or must take account of important considerations of public policy'.[85]

21.67 In 1996, with respect to the repeal of certain provisions requiring the Attorney-General's consent to prosecution, the then Attorney-General, the Hon Daryl Williams QC MP, observed that consent provisions were originally enacted for the purpose of deterring private prosecutions brought in inappropriate circumstances—particularly for offences relating to national security or international treaty obligations.

> However, since establishing the office of the Commonwealth Director of Public Prosecutions the retention of those provisions is difficult to justify. That is particularly so now that the Director of Public Prosecutions has the power to take over and discontinue a private prosecution brought in relation to a Commonwealth offence.[86]

21.68 Consent requirements also may raise concerns about whether the decision to institute proceedings is politicised, as the ALRC noted in its inquiry into federal sedition laws.[87]

21.69 The application of s 10 to offences under the *Royal Commissions Act*, other than indictable offences, raises a minor issue. As noted above, the ALRC recommends a maximum penalty of two years imprisonment for the offence of contravening directions concerning national security information, which would make that offence an indictable offence. There is no reason why s 10 should not apply to that offence, however, if that offence is prosecuted summarily with the consent of the prosecutor and defendant. If a provision similar to s 10 is to be included in the *Inquiries Act*, therefore, it should apply to any offence under the Act tried summarily.

21.70 No stakeholder in this Inquiry addressed the ways in which proceedings were instituted.

ALRC's view

21.71 There are no compelling reasons why the usual practice of allowing any person to initiate a summary proceeding should not apply to Royal Commissions or Official Inquiries offences. In particular, there is no reason why the consent of the Attorney-General or Director of Public Prosecutions should be necessary in relation to prosecutions in state or territory courts. The kinds of offences in the *Inquiries Act* do not raise any of the special considerations that might justify such a requirement.

21.72 While it is unusual to confer jurisdiction on the Federal Court in these cases, there appears to be no reason why the Federal Court should not have this jurisdiction.

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85 Ibid, [2.27].

86 Commonwealth, *Parliamentary Debates,* House of Representatives, 4 December 1996, 7714, (D Williams—Attorney-General). Under s 9(5) of the *Director of Public Prosecutions Act 1983* (Cth), the CDPP can take over a private prosecution and terminate it.

87 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC 104 (2006), Ch 13.

The ALRC acknowledges, however, that in practice it is likely that such offences will continue to be prosecuted in state or territory courts.

21.73 A provision equivalent to s 10 of the *Royal Commissions Act* should be retained in the *Inquiries Act*. As noted above, this section should apply to all offences under the Act which are tried summarily, so that it also applies consistently to the offence of contravening a direction relating to national security when that offence is prosecuted summarily.

Recommendation 21–5 The recommended *Inquiries Act* should include a provision dealing with the institution of proceedings for offences under the Act in equivalent terms to s 10 of the *Royal Commissions Act 1902* (Cth).

Costs

Costs in criminal proceedings generally

21.74 Like most federal offences, the offences under the *Royal Commissions Act* are normally prosecuted in state or territory courts, and the costs of these proceedings are determined by the laws of the state or territory in which the offence is prosecuted.[88] The rules relating to the recovery of costs of proceedings under the *Royal Commissions Act*, therefore, may differ depending on where the charges are heard.

21.75 A range of competing interests need to be considered when determining who should bear the costs of criminal proceedings. On the one hand, it is ordinarily unjust if an innocent person suffers financial hardship as a result of being unable to recover the costs of a successful defence. On the other hand, the administration of criminal justice may be adversely affected if the initiation and conduct of prosecutions are unduly influenced by the risk of an adverse costs order.

21.76 In all Australian states or territories, different costs rules apply depending on whether the offence is prosecuted summarily or on indictment. In summary proceedings, the court usually has a broad power to award such costs to either party as it thinks is just and reasonable in the circumstances of the case.[89] The purpose of the award is to reimburse the successful party for the reasonable costs the party has incurred, rather than to punish the unsuccessful party.[90] The discretion, however, is subject to different conditions in each state and territory.

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88 *Judiciary Act 1903* (Cth) ss 68(1), 79.

89 *Criminal Procedure Act 1986* (NSW) ss 116, 212–218; *Magistrates' Court Act 1989* (Vic) s 131(1); *Justices Act 1886* (Qld) ss 157, 158; *Criminal Procedure Act 2004* (WA) s 67; *Summary Procedure Act 1921* (SA) s 189; *Justices Act 1959* (Tas) s 77(1), (2), (2A); *Justices Act 1928* (NT) ss 77–79.

90 *Latoudis v Casey* (1990) 170 CLR 534, 543.

21.77 Although these statutory discretions are often framed broadly, they must be exercised in accordance with the principles outlined by the High Court in *Latoudis v Casey*.[91] In that case the High Court ruled that, in summary proceedings, 'in ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs'.[92] In exceptional cases, however, it may be just and reasonable to deprive a successful defendant of his or her costs—for example, where the defendant's conduct, after the alleged offence took place, brought the prosecution upon himself or herself.[93]

21.78 In indictable proceedings, the successful defendant is entitled to recover his or her costs only in exceptional circumstances. In most jurisdictions, no costs may be awarded for or against the prosecution in trials, although in some jurisdictions the relevant statutes may allow costs to be recovered in limited circumstances.[94]

21.79 In its report, *Costs Shifting—Who Pays for Litigation* (ALRC 75), the ALRC examined the way costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction.[95] In relation to costs for criminal proceedings, the ALRC recommended that there should be no distinction between summary and indictable proceedings.[96] The ALRC recommended that, in criminal proceedings, the prosecution should pay the reasonable costs of an accused who is successful in obtaining a dismissal, acquittal or withdrawal of charges, unless the court was satisfied in all the circumstances of the case that some other order should be made.[97] The ALRC listed a number of factors which might indicate that some other order should be made.[98] These were similar to those identified by the courts as reasons for depriving a successful defendant of his or her costs in summary proceedings. This recommendation has not yet been implemented.

21.80 The Law Reform Commission of Western Australia, considering the same issue in the context of a review of the criminal justice system, recommended that no costs should be awarded to successful defendants in either summary or indictable proceedings.[99]

Costs in the Royal Commissions Act

21.81 Section 15 of the *Royal Commissions Act* provides that a court 'may award costs against any party' in any proceedings for an offence against the Act, other than proceedings for the commitment for trial of a person charged with an indictable

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91 Ibid.
92 Ibid, 542.
93 Ibid, 544.
94 *Costs in Criminal Cases Act 1967* (NSW) ss 2, 4; *Costs in Criminal Cases Act 1976* (Tas) ss 4, 5.
95 Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation?*, ALRC 75 (1995).
96 Ibid, 91.
97 Ibid, Rec 23.
98 Ibid, Rec 23.
99 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project 92 (1999), [31.15]–[31.17].

offence. A similar provision in s 8ZN of the *Taxation Administration Act 1953* (Cth) has been interpreted as conferring a general power to award costs according to the principles outlined in *Latoudis v Casey*.[100] That is, costs in a summary proceeding ordinarily should be awarded to a successful defendant, although in exceptional circumstances a successful defendant may be deprived of the costs.

21.82 Importantly, the Court also held that s 8ZN was directly inconsistent with, and therefore rendered invalid, a state provision which set out criteria to be satisfied before the making of a costs order.[101] Applying this reasoning, s 15 of the *Royal Commissions Act* will also render invalid any state provision that restrains in any way the discretion of the court to order costs.[102]

21.83 One difference between s 15 of the *Royal Commissions Act* and s 8ZN of the *Taxation Administration Act* is that s 15 also appears to apply to proceedings on indictment, other than committal proceedings. The power to award costs in indictable proceedings is unusual, in light of the general provisions restricting recovery of costs in indictable proceedings. As noted earlier, the ALRC's recommendation that reliance be placed on general offences under the *Crimes Act* and *Criminal Code* prohibiting interference with evidence or witnesses means that there is only one indictable offence under the *Inquiries Act*, namely the contravention of directions relating to national security information.[103] Consistently with s 10 of the *Royal Commissions Act*, discussed above, if a provision equivalent to s 15 is to be retained in the *Inquiries Act*, it should apply to all offences under the Act, where tried summarily.

21.84 Section 15 also provides that 'all provisions of this Act relating to the recovery of penalties, except as to commitment to gaol, shall extend to the recovery of any costs adjudged to be paid'. This part of the provision is redundant as there are no longer any provisions in the Act dealing with the recovery of penalties.[104] The *Crimes Act* provides that a law of an Australian state or territory relating to the enforcement or recovery of fines applies to a person convicted in the state or territory of an offence against the law of the Commonwealth.[105]

21.85 In this Inquiry, no stakeholder addressed the issue of costs of criminal proceedings under the *Royal Commissions Act*.

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100 *Commissioner of Taxation v MacPherson* [2000] 1 Qd R 496.

101 Under s 109 of the *Australian Constitution.*

102 The provisions of state and territory legislation that operate to constrain discretion were discussed in *Latoudis v Casey* (1990) 170 CLR 534, 546–557.

103 Recommendation 21–3.

104 Sections 12 and 14 of the Act, dealing with the recovery of pecuniary penalties imposed for offences against the Act, were repealed by the *Royal Commissions Amendment Act 1982* (Cth).

105 *Crimes Act 1914* (Cth) s 15A.

ALRC's view

21.86 A provision similar to s 15 of the *Royal Commissions Act* should be retained in the *Inquiries Act.* In most cases, the power to award costs will be conferred on the state or territory court in which the offence is prosecuted. There are, however, differences between the jurisdictions in relation to the approach taken to costs, and it is desirable that someone charged with a federal offence is not disadvantaged in recovering costs because of the place in which he or she is prosecuted.

21.87 A provision similar to s 15 of the *Royal Commissions Act* would apply the prevailing rules relating to costs in summary proceedings. All of the offences under the recommended *Inquiries Act*, with one exception, are summary offences. This is consistent with the policy underlying the ALRC's earlier recommendation concerning costs for criminal proceedings.

21.88 Some changes, however, ought to be made to any provision replicating s 15. The provision should apply to offences under the Act tried summarily so that it applies consistently to all of the offences under the Act, and to ensure it does not apply to indictable proceedings. It should omit the part of s 15 dealing with the recovery of penalties, which is now redundant.

Recommendation 21–6 The recommended *Inquiries Act* should provide for the award of costs in criminal proceedings in terms equivalent to those in s 15 of the *Royal Commissions Act 1902* (Cth), but the part of s 15 dealing with the recovery of penalties for offences under the *Royal Commissions Act* should be repealed.

Appendix 1. List of Submissions

Name	*Submission Number*	*Date*
Accountability Round Table	RC 29	30 September 2009
The Australian Collaboration	RC 24	22 September 2009
Australian Commission for Law Enforcement Integrity	RC 18	10 September 2009
Australian Government Department of Immigration and Citizenship	RC 11	20 May 2009
Australian Government Solicitor	RC 15	18 June 2009
	RC 31	6 October 2009
Australian Intelligence Community	RC 12	2 June 2009
	RC 28	28 September 2009
K Bills	RC 19	17 September 2009
A Bressington	RC 16	25 June 2009
Civil Liberties Australia	RC 17	1 September 2009
Commonwealth Ombudsman	RC 13	4 June 2009
	RC 32	13 October 2009
Community and Public Sector Union	RC 10	22 May 2009
	RC 25	22 September 2009
Confidential	RC 14	18 June 2009

Construction, Forestry, Mining and Energy Union	RC 08	17 May 2009
Inspector-General of Intelligence and Security	RC 02	12 May 2009
Law Council of Australia	RC 09	19 May 2009
	RC 30	2 October 2009
Liberty Victoria	RC 01	6 May 2009
	RC1A	12 May 2009
	RC 26	27 September 2009
I Mackintosh	RC 07	19 May 2009
	RC 23	21 September 2009
D McKenzie	RC 27	28 September 2009
G Millar	RC 05	17 May 2009
	RC 21	21 September 2009
National Archives of Australia	RC 20	18 September 2009
N Rogers	RC 04	21 May 2009
I Turnbull	RC 06	16 May 2009
	RC 22	21 September 2009
Victorian Society of Computers and the Law	RC 03	12 May 2009

Appendix 2. List of Agencies, Organisations and Individuals Consulted

Name	*Location*
K Alexander, Senior Lawyer, Australian Government Solicitor	Sydney
Australian Government Attorney-General's Department	Canberra
Australian Government Department of Defence, Directorate of Military Administrative Law	Canberra
Australian Government Department of Prime Minister and Cabinet	Canberra
D Bamber, Magistrate, Northern Territory Magistrates Courts	Alice Springs
Dame M Bazley DNZM, former member of a number of New Zealand commissions of inquiry	Wellington
T Begbie, General Counsel, Australian Government Solicitor	Canberra
A Berger, General Counsel, Australian Government Solicitor	Canberra
The Hon Chief Justice M Black AC, Federal Court of Australia	Sydney
S Butler, former Executive Office of Royal Commissions and public inquiries	Melbourne
The Hon I Callinan AC QC, former judge of the High Court of Australia	Telephone Conference
Emeritus Professor E Campbell AC OBE, former Dean, Monash University	Melbourne
C Carruthers QC, Barrister	Wellington

Central Australian Aboriginal Legal Aid Service	Alice Springs
Central Land Council	Alice Springs
The Hon S Charles QC, former judge of the Victorian Court of Appeal	Telephone conference
P Clark SC, Barrister	Sydney
The Hon J Clarke QC, former judge of the Supreme Court of New South Wales and the New South Wales Court of Appeal	Sydney
L Coffey, Acting Northern Territory Anti-Discrimination Commissioner	Darwin
The Hon T Cole AO RFD QC, former judge of the Supreme Court of New South Wales and the New South Wales Court of Appeal	Sydney
Commonwealth Ombudsman	Canberra
Community and Public Sector Union	Canberra, Sydney
Construction, Forestry, Mining and Energy Union	Sydney
Professor R Creyke, Director, Australian Centre for Military Law and Justice, Australian National University	Canberra
E Cubillo, Consultant, Indigenous Employment and Development, University of South Australia	Adelaide
C Currie, Senior Associate, Holding Redlich	Melbourne
S Daley, Special Counsel Litigation, Australian Government Solicitor	Sydney
Dr S Donaghue, Barrister	Melbourne
The Hon G Eames AO QC, former judge of the Supreme Court of Victoria and the Victorian Court of Appeal	Melbourne
P Flood AO, former chair of a number of federal inquiries	Canberra
Dr I Freckelton SC, Barrister	Melbourne

The Hon Justice P Hall, Supreme Court of New South Wales	Sydney
The Hon K Hammond AO QC, former head of the Corruption and Crime Commission of Western Australia	Perth
Inspector-General of Intelligence and Security	Canberra
M Johns, State Coroner, Coroner's Court of South Australia	Adelaide
M Johnson, Director, Magistrates Court and Tribunals, Court and Tribunal Services, Western Australian Government Department of the Attorney General	Perth
The Hon Justice J Judd, Supreme Court of Victoria	Melbourne
Liberty Victoria	Melbourne
A Markus, Special Counsel Immigration Litigation, Australian Government Solicitor	Sydney
D Marr, Journalist, The Sydney Morning Herald	Sydney
The Hon Chief Justice W Martin, Supreme Court of Western Australia	Perth
R McClure, Senior Executive Lawyer, Australian Government Solicitor	Melbourne
R McIlwaine, Senior Solicitor, New South Wales Legal Representation Office	Sydney
D Meagher QC, Barrister	Telephone conference
G Millar, former Executive Officer of Royal Commissions and public inquiries	Sydney
The Hon T Mullighan QC, former judge of the Supreme Court of South Australia	Adelaide
K Murray, Barrister	Wellington
National Archives of Australia	Telephone conference

New Zealand Department of Internal Affairs	Wellington
New Zealand Law Commission	Wellington
North Australian Aboriginal Justice Agency	Darwin
Northern Territory Aboriginal Interpreter Service	Darwin
Northern Territory Community Justice Centre	Darwin
Northern Territory Law Society (Round Table)	Darwin
Northern Territory Legal Aid Commission	Alice Springs
The Hon Judge C O'Brien, District Court of Western Australia	Telephone conference
The Hon Justice N Owen, Western Australian Court of Appeal	Perth
D Page, Senior General Counsel, Australian Government Solicitor	Canberra
M Palmer AO APM, former chair of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, Inspector of Transport Security	Telephone conference
K Pettit SC, Barrister	Perth
Professor S Prasser, Australian Catholic University	Sydney
H Prince, Barrister	Perth
H Rapke, Partner, Holding Redlich	Melbourne
The Hon Acting Justice R Sackville AO QC, New South Wales Court of Appeal	Sydney
A Schapel, Deputy State Coroner, Coroner's Court of South Australia	Adelaide
T Sharp, State Solicitor, Western Australian State Solicitor's Office	Perth
Professor P Shergold AC, University of New South Wales	Sydney

The Hon I Stevens, former judge of the District Court of South Australia	Adelaide
R St John, Special Counsel, Johnson Winter & Slattery, former Executive Officer of the HIH Royal Commission	Melbourne
Transparency International (Australia)	Sydney
D White QC, Barrister (now the Hon Justice White, High Court of New Zealand)	Wellington
The Hon J Wood AO QC, former judge of the Supreme Court of New South Wales	Sydney
The Hon J Wootten AC QC, former judge of the Supreme Court of New South Wales	Sydney

Appendix 3. List of Abbreviations

AAT	Administrative Appeals Tribunal
ACC	Australian Crime Commission
ACLEI	Australian Commission for Law Enforcement Integrity
ADF	Australian Defence Force
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977* (Cth)
AFM	Advance to the Finance Minister
AGD	Australian Government Attorney-General's Department
AGS	Australian Government Solicitor
AIC	Australian Intelligence Community
ALRC	Australian Law Reform Commission
ALRC 35	Australian Law Reform Commission, *Contempt,* ALRC 35 (1987)
ALRC 75	Australian Law Reform Commission, *Costs Shifting—Who Pays for Litigation,* ALRC 75 (1995)
ALRC 89	Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000)
ALRC 95	Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002)
ALRC 103	Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders,* ALRC 103 (2006)

ALRC 107	Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107 (2007)
ALRC 108	Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008)
APRA	Australian Prudential Regulation Authority
APS Code of Conduct	Australian Public Service Code of Conduct
APSC	Australian Public Service Commissioner
ARC	Administrative Review Council
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ATSB	Australian Transport Safety Bureau
AWB Inquiry	Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme (2006)
Building Royal Commission	Royal Commission into the Building and Construction Industry (2003)
Building Royal Commission Report	*Final Report of the Royal Commission into the Building and Construction Industry* (2003)
CDF	Chief of the Defence Force
CDPP	Commonwealth Director of Public Prosecutions
CFMEU	Construction, Forestry, Mining and Energy Union
Clarke Inquiry	Inquiry into the Case of Dr Mohamed Haneef (2008)

Commissioner Cole	The Hon Terence Cole AO RFD QC
Commissioner Hope	Hon Justice Robert Hope
Commonwealth Paedophile Inquiry	Inquiry into the Manner in which DFAT has dealt with Allegations of Paedophile Activities (1996)
Comrie Inquiry	Inquiry into the Circumstances of the Vivian Alvarez Matter (2005)
Costigan Royal Commission	Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1984)
CPGs	*Commonwealth Procurement Guidelines*
CPSU	Community and Public Sector Union
DAFF	Australian Government Department of Agriculture, Fisheries and Forestry
DFAT	Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship
DIGO	Defence Imagery and Geospatial Organisation
DIO	Defence Intelligence Organisation
DPP	Director of Public Prosecutions
DP 74	Australian Law Reform Commission, *Review of Secrecy Laws,* Discussion Paper 74 (2009)
DP 75	Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75 (2009)
DSD	Defence Signals Directorate
Exposure Draft Bill	Exposure Draft of the National Security Legislation Amendment Bill 2009 (Cth)

Finance Minister	Minister for Finance and Deregulation
Fitzgerald Inquiry	Inquiry into Possible Illegal Activities and Associated Police Misconduct (1989)
Guide to Framing Commonwealth Offences	Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2007)
ICAC	New South Wales Independent Commission Against Corruption
ICC	Independent Inquiry Committee into the United Nations Oil-For-Food Programme
ICCPR	*International Covenant on Civil and Political Rights*
IGIS	Inspector-General of Intelligence and Security
IP 35	Australian Law Reform Commission, *Review of the Royal Commissions Act*, Issues Paper 35 (2009)
Keeping Secrets	Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004)
Law Council	Law Council of Australia
LRO	New South Wales Legal Representation Office
LRCI	Law Reform Commission of Ireland
MCLOC	Model Criminal Law Officers Committee
Model Rules	*Model Rules of Professional Conduct and Practice*
Monitor	National Security Legislation Monitor
National Archives	National Archives of Australia
NSI Act	*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)

NSI Regulations	*National Security Information (Criminal Proceedings) Regulations 2005* (Cth)
NSI Requirements	Australian Government Attorney-General's Department, *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings*
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
NZLC	New Zealand Law Commission
ONA	Office of National Assessments
OPC	Office of Parliamentary Counsel
Palmer Inquiry	Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (2005)
PM&C	Department of the Prime Minister and Cabinet
Principled Regulation	Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002)
PSM	*Australian Government Protective Security Manual*
QCJC	Queensland Criminal Justice Commission
QLRC	Queensland Law Reform Commission
RCIADIC	Royal Commission into Aboriginal Deaths in Custody (1991)
SA	South Australia
Salmon Royal Commission	Royal Commission on Tribunals of Inquiry (1966)
Senate Committee	Senate Standing Committee for the Scrutiny of Bills

Stewart Royal Commission	Royal Commission of Inquiry into Drug Trafficking (1983)
TLRI	Tasmania Law Reform Institute
Trowell Inquiry	Independent Review of the Provisions of the *Australian Crime Commission Act 2002* (2007)
Trowell Report	*Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee* (2007)
UK	United Kingdom
VSCL	Victorian Society for Computers and the Law
Wilson	*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1

Appendix 4. Federal Royal Commissions established since March 1983*

Name	*Date*	*Commissioners*
Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme	November 2005–November 2006	Cole
Royal Commission to Inquire into the Centenary House Lease	June 2004–December 2004	Hunt
Royal Commission into the Building and Construction Industry	August 2001–February 2003	Cole
HIH Royal Commission	August 2001–April 2003	Owen
Commission of Inquiry into the Relations between the CAA and Seaview Air	October 1994–October 1996	Street (1994–95), Staunton (1994–96)
Royal Commission of Inquiry into the Leasing by the Commonwealth of Accommodation in Centenary House	May 1994–November 1994	Morling
Commission of Inquiry into the Australian Secret Intelligence Service	March 1994–May 1995	Samuels, Codd
Royal Commission into Aboriginal Deaths in Custody	October 1987–May 1991	Muirhead (Chair 1987–89), Johnston (Chair 1989–91), Wootten, Wyvill, O'Dea, Dodson

* Source for inquiries on this list: Parliamentary Library—Parliament of Australia, *Royal Commissions and Commissions of Inquiry*, <www.aph.gov.au/library/INTGUIDE/LAW/royalcommissions.htm> at 22 October 2009.

Royal Commission into Grain Storage, Handling and Transport	October 1986–March 1988	McColl
Royal Commission of Inquiry into Chamberlain Convictions	April 1986–June 1987	Morling
Royal Commission of Inquiry into Alleged Telephone Interceptions	March 1985–May 1986	Stewart
Royal Commission into British Nuclear Tests in Australia	July 1984–December 1985	McClelland (Chair), Fitch, Jonas
Commission of Inquiry into Compensation Arising from Social Security Conspiracy Prosecutions	February 1984–June 1986	Mitchell
Royal Commission on Australia's Security and Intelligence Agencies	May 1983–May 1985	Hope
Royal Commission on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam	May 1983–August 1985	Evatt
Royal Commission of Inquiry into the Activities of the Nugan Hand Group [extension of the Royal Commission of Inquiry into Drug Trafficking 1981–1983]	March 1983–November 1985	Stewart

Appendix 5. Non-Royal Commission Federal Public Inquiries established since March 1983*

Name	*Date*	*Chair of Inquiry*
National Human Rights Consultation	December 2008–September 2009	Brennan
Inquiry into the Case of Dr Mohamed Haneef	March 2008–November 2008	Clarke
Northern Territory Emergency Response Review Board	June 2008–September 2008	Yu
Equine Influenza Inquiry	September 2007–June 2008	Callinan
Access Card Consumer and Privacy Taskforce	May 2006–March 2008	Fels
Taskforce on Reducing the Regulatory Burden on Business	October 2005–January 2006	Banks
Biennial Review of the Medicare Provider Number Legislation	August 2005–December 2005	Phillips
Aviation Security and Policing Review	June 2005–September 2005	Wheeler
Legislation Review Committee into the *Prohibition of Human Cloning Act 2009* and the *Research Involving Human Embryos Act 2000*	June 2005–December 2005	Lockhart

* Source for inquiries on this list that reported in 2005 and earlier: S Prasser, *Royal Commissions and Public Inquiries in Australia* (2006), Appendices 8–9.

Taskforce on Biofuels	May 2005– August 2005	O'Connell
Review of the Regulation of Access to Communications	March 2005– August 2005	Blunn
Taskforce on Export Infrastructure	March 2005– May 2005	Ergas
Beef Quota Review Panel	February 2005– July 2005	Taylor
Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau	February 2005– July 2005	Palmer
National Inquiry into the Teaching of Literacy	November 2004– December 2005	Rowe
Review of Australian Symphony and Pit Orchestras	May 2004– March 2005	Strong
Inquiry into Australian Intelligence Agencies	March 2004– July 2004	Flood
National Review of School Music Education	March 2004– November 2005	Seares
Expert Committee on Complementary Medicines in the Health System	May 2003– September 2003	Bollen
Review of Closer Collaboration between Universities and Major Publicly Funded Research Agencies	May 2003– March 2004	McGauchie
National Inquiry on Bushfire Mitigation and Management	October 2003– April 2004	Ellis
Livestock Export Review	October 2003– December 2003	Keniry

Defence Procurement Review	December 2002–August 2003	Kinnaird
National Corporate Governance Review	November 2002–July 2004	Uhrig
Aboriginal and Torres Strait Islander Commission Review Panel	November 2002–November 2003	Hannaford
Review of the Role of Divisions of General Practice	November 2002–February 2003	Phillips
Independent Review of the National Institute of Clinical Studies	October 2002–n/a 2004	Owen
Review of Pricing Arrangements in Residential Aged Care	September 2002–April 2004	Hogan
Independent Review of Soccer	August 2002–May 2003	Crawford
Higher Education Bandwidth Advisory Committee	August 2002–December 2002	Sargent
Regional Telecommunications Inquiry	August 2002–November 2002	Estens
Review of Rural Veterinary Services	July 2002–January 2003	Frawley
Independent Review of the Australian Greenhouse Office	May 2002–June 2002	Smith
Review of Wine Exports and Wine Tourism	May 2002–November 2002	Trebeck
Review of the Competition Provisions of the *Trade Practices Act 1974*	May 2002–April 2003	Dawson
Committee for Review of Veterans' Entitlements	February 2002–January 2003	Clarke
Independent Assessment of the Sugar Industry	February 2002–June 2002	Hildebrand

Independent Review of Energy Market Directions	September 2001–November 2002	Parer
Review of Impact of *Trade Practices Act* on Doctors in Rural and Regional Australia	August 2001–November 2002	Wilkinson
Review of the *Managed Investments Act 1998*	July 2001–December 2001	Turnbull
Inquiry into the Contemporary Visual Arts and Craft Sector	July 2001–May 2002	Myer
Committee of Inquiry into Fuel Taxation	July 2001–March 2002	Trebeck
National Review of Nursing Education	April 2001–September 2002	Heath
Review of Australian Defence Force Remuneration Arrangements	March 2001–October 2001	Nunn
Review of the Implementation of the Whole of Government Information Technology Outsourcing Initiative	November 2000–January 2001	Humphry
Inquiry into Definitional Issues Relating to Charitable, Religious and Community Service Not-For-Profit Organisations	September 2000–March 2001	Sheppard
Telecommunications Services Inquiry	March 2000–October 2000	Besley
Inquiry into Access to Australia's Biological Resources in Commonwealth Areas	December 1999–September 2000	Voumard
Reference Group on Welfare Reform	September 1999–March 2001	McClure
Taskforce on Industry Self-Regulation	August 1999–March 2001	Collier

Review of the Australian Blood Banking and Plasma Product Sector	July 1999–March 2001	Stephen
Intellectual Property and Competition Review Committee	July 1999–September 2000	Ergas
Independent Review Panel of the End of War List—Vietnam	May 1999–September 1999	Tanzer
Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955–1975	April 1999–March 2000	Mohr
Inquiry into Collins Class Submarine and Related Matters	March 1999–June 1999	McIntosh
Wool Industry Future Directions Taskforce	February 1999–June 1999	McLachlan
Major Performing Arts Inquiry	December 1998–December 1999	Nugent
Review of *Aboriginal Land Rights Northern Territory Act 1976*	November 1997–August 1998	Reeves
Review of the *Endangered Species Protection Act*	November 1997–April 1998	Boardman
Review of Policy Advice and Support to the Minister for Aboriginal and Torres Strait Islander Affairs	October 1997–December 1997	Taylor
Review of the Repatriation Medical Authority and the Specialist Medical Review Council	April 1997–July 1998	Pearce
Review of the Social Security Review and Appeals System	January 1997–May 1997	Guilfoyle
Review of Higher Education	January 1997–April 1998	West

Review of Governance Arrangements for Commonwealth Government Business Enterprises	December 1996–March 1997	Humphry
Review of Business Programs	November 1996–June 1997	Mortimer
Review of Attorney-General's Legal Practice	November 1996–March 1997	Logan
Independent Review of the Great Barrier Reef Marine Park Authority	November 1996–September 1997	Brown
Independent Inquiry into Urban Air Pollution	October 1996–September 1997	Stamm
Commonwealth-State Inquiry into the Tasmanian Economy; Tasmania into the 21st Century	October 1996–July 1997	Nixon
Drought Policy Review Taskforce	October 1996–February 1997	McColl
National Taskforce on Whaling	September 1996–June 1997	Puplick
Review of Rural Adjustment Scheme	September 1996–May 1997	McColl
Review of the Australian Film Industry	July 1996–February 1997	Gonski
Review of the Role and Functions of the ABC	July 1996–January 1997	Mansfield
Information Industry Taskforce	June 1996–August 1997	Goldsworthy
Inquiry into the Manner in which DFAT has dealt with Allegations of Paedophile Activities	May 1996–May 1997	Hunt, then Shergold
Inquiry into the Financial System	May 1996–March 1997	Wallis

Small Business Deregulation Taskforce	May 1996–March 1997	Bell
Independent Inquiry into Allegations of Corruption in the Australian Federal Police	March 1996–April 1997	Harrison
National Commission of Audit	March 1996–June 1996	Officer
Commonwealth Hindmarsh Island Report	January 1996–abandoned	Matthews
Review of the Australian Maritime College	n/a 1995–October 1995	Stanley
Committee to Review Australia's Quarantine Policies and Programs	December 1995–June 1996	Nairn
Review of Regulatory Regime for Patent Attorneys	December 1995–June 1996	Johns
Review of the *Aboriginal Councils and Associations Act 1976*	October 1995–April 1996	Fingleton
Review of the *Aboriginal and Torres Strait Islander Heritage Act 1984*	October 1995–June 1996	Evatt
Independent Inquiry into Women's Artistic Gymnastics Program at the Australian Institute of Sport	September 1995–November 1995	Opie
Independent Review of s18 of the *Tobacco Advertising Prohibition Act 1992*	September 1995–April 1996	Rassaby
Review of Higher Education Management	June 1995–February 1996	Hoare
Review of the Commonwealth's New Schools Policy	March 1995–December 1995	McKinnon
Inquiry into the Conduct of the Hon Alan Griffiths MP	March 1995–February 1996	Codd

Information Technology Review Group	December 1994–March 1995	Reinecke
Review of Australian Honours and Awards: A Matter of Honour	October 1994–September 1996	Petre
Committee of Inquiry into Temporary Entry of Business People and Highly Skilled Specialists	October 1994–August 1995	Roach
Review of Better Cities Program	October 1994–November 1995	Clarke
Review of the Role and Functioning of Institutional Ethics Committees	September 1994–March 1996	Chalmers
Civic Experts Group	June 1994–December 1995	Macintyre
Review of Government Business Programs	June 1994–November 1994	Burgess
Review of the Australian Defence Force Personnel and Family Support Services	May 1994–September 1994	Pratt
Inquiry into the Winegrape and Wine Industry	April 1994–June 1995	Scales
Review of the Australian Institute of Criminology	April 1994–June 1994	Tanzer
Review of the Coal Industry	March 1994–March 1995	Taylor
Inquiry into the Law of Joint and Several Liability	February 1994–January 1995	Davis
Broadband Services Expert Group	November 1993–December 1994	Johns

Review Committee of the Bureau of Immigration and Population Research	November 1993–December 1994	Menadue
Taskforce on Urban Design	November 1993–November 1994	Mant
Inquiry into ASIO Security	October 1993–December 1994	Cook
Review of Employment Support for People with Disability	October 1993–January 1995	Baume
National Planning Transport Taskforce	October 1993–December 1994	Webber
Independent Committee of Inquiry into National Competition Policy	October 1993–August 1994	Hilmer
Access to Justice Advisory Committee	October 1993–May 1994	Sackville
Urban and Regional Development Review	September 1993–n/a 1995	Macklin
Review of the National Board of Employment, Education and Training	September 1993–March 1994	Wiltshire
National Review of Nurse Education in the Higher Education Sector	August 1993–August 1994	Reid
Review of the National Health and Medical Research Council	August 1993–January 1994	Bienenstock
Committee to Report on Development of Northern Territory and Darwin as Australia's Northern Link to East Asia	August 1993–June 1995	Wran
Review of Marine Research Organisation	July 1993–October 1994	McKinnon

Commission of Inquiry into the Shoalwater Bay Training Area	May 1993– May 1994	Woodward
Committee of Review of the Australian Customs Service	May 1993– February 1994	Conroy
Taskforce on Regional Development	May 1993– December 1993	Kelty
Independent Inquiry into the Circumstances surrounding the Non-Payment of a Deposit for Satellite Pay TV Licences and related matters	May 1993– May 1993	Pearce
International Liner Cargo Shipping Review	April 1993– January 1994	Brazil
Republic Advisory Committee	April 1993– September 1993	Turnbull
Wool Industry Review Committee	April 1993– August 1993	Garnaut
Inquiry into the Circumstances of Leo McLeay's Compensation	February 1993– April 1993	Street
Committee of Inquiry into National Savings	n/a– June 1993	Fitzgerald
Research Reactor Review	September 1992– May 1993	McKinnon
Review of the Australian Geological Survey Organisation	September 1992– July 1993	Richards
Independent Review of the Civil Aviation Authority's Tender Evaluation Process for the Australian Advanced Air Traffic System	July 1992– December 1992	McPhee
Review of the Structure of Nursing Home Funding	June 1992– February 1994	Gregory

Committee for the Review of the System for Review of Migration Decisions	February 1992–December 1992	McPhee
Review of the National Space Program	November 1991–June 1992	Curtis
Review of the Training for Aboriginals Program	September 1991–November 1992	Johnson
Independent Panel on Intractable Waste	August 1991–November 1992	Selinger
Review of the Future of Drug Evaluation in Australia	March 1991–July 1991	Baume
Industry Taskforce on Leadership and Management Skills	March 1991–April 1995	Karpin
Review of Computing Studies and Information Sciences Education	February 1991–April 1995	Hudson
Review of the Joint Coal Board	October 1990–February 1991	Kelman
Independent Review of Current Practices and Procedures for Dealing with Asbestos in Defence	August 1990–March 1991	Einfield
Review of Australian Wool Industry	July 1990–April 1991	Vines
Review Committee of Training Costs Related to Award Restructuring	June 1990–October 1990	Deveson
Review of the Institute of Advanced Studies, Australian National University	March 1990–November 1990	Stephen
Review of Agriculture in Australia's Colleges and Universities and Related Education	December 1989–April 1991	McColl

Inquiry into Industrial Property Protection for Industrial Design	December 1989–September 1991	Lahore
Building Regulations Review Taskforce	October 1989–November 1991	Nutt
Committee of Review of Commonwealth Primary Industry Statutory Marketing Authorities	August 1989–October 1990	Davis
Defence Force Retirement and Death Benefits Review	August 1989–June 1990	Dole
Review of the Office of the Supervising Scientist	July 1989–November 1989	Taylor
Review of Use of Civil Infrastructure in Australia's Defence–the Defence Force and the Community	May 1989–June 1990	Wrigley
Review of the Commonwealth's Free Limbs Scheme	April 1989–October 1990	Eagleson
Drought Policy Review Taskforce	April 1989–March 1990	McInnes
Review of the Accounting Discipline in Higher Education	March 1989–June 1990	Matthews
Inquiry into the Needs of Australian Merchant Mariners, Commonwealth and Allied Veterans and Allied Mariners	January 1989–September 1989	McGirr
Committee for Review of Export Market Development Grants Scheme	December 1988–June 1989	Hughes
Shipping Reform Taskforce	November 1988–April 1989	Deveson
Review of the Implications for Australia of Economic Growth and Structural Change in East Asia	November 1988–October 1989	Garnaut

Inquiry into Allegations as to the Administration of Aboriginal Affairs	November 1988–June 1989	Menzies
National Committee on Violence	October 1988–December 1989	Chappell
Independent Review of ACT Health Services	October 1988–November 1988	Kearney
Committee to Review Higher Education Research Policy	October 1988–November 1988	Smith
Review of Aboriginal Arts and Crafts Industry	October 1988–March 1989	Altman
Review of the Australian National Parks and Wildlife Service	September 1988–May 1989	MacDonald
Defence Force Discipline Legislation Board of Review	September 1988–March 1989	MacDonald
Review of the Australian Bureau of Mineral Resources and Geophysics	August 1988–September 1988	Woods
Committee to Review the Role and Functions of the National Health Technology Advisory Panel	July 1988–February 1989	Smith
Review Committee on Marine Science and Technology	June 1988–February 1989	McKinnon
National Review of Teacher Education in Mathematics and Science	June 1988–February 1989	Speedy
Taskforce on Aboriginal Education Policy	April 1988–October 1988	Hughes
Social Impact Study of the Casino Development Proposal for Section 19 Civic, ACT	March 1988–July 1988	Caldwell
Review of Australian Maritime College	March 1988–June 1988	Morrison

Joint Taskforce on Intractable Industrial Wastes	December 1987–January 1990	McDonnell and Thomas
Committee of Inquiry into Higher Education Funding	December 1987–April 1988	Wran
Committee of Inquiry into Tourism Shopping in Australia	November 1987–April 1988	Bradbury
Air Safety Regulation Review Taskforce	October 1987–May 1990	Lane
Consultative Group on Biotechnology Industry Development	October 1987–May 1990	Carruthers
Wool Promotion Review Committee	September 1987–January 1988	Harper
Committee to Advise on Australia's Immigration Policies	September 1987–January 1988	Fitzgerald
Review of Tender Procedures for Coastwatch Contracts	September 1987–November 1987	Menzies
Committee of Inquiry into 'Victim' Toys	August 1987–January 1988	Reynolds
Review of Australian Quarantine Arrangements for the Future	May 1987–May 1988	Lindsay
Commission of Inquiry into the Lemonthyme and Southern Forests	May 1987–May 1988	Helsham
Defence Facilities Review	February 1987–July 1988	Cooksey
Committee of Inquiry into Medical Education and the Medical Workforce	January 1987–April 1988	Doherty
Review of Civilian Transport Infrastructure	November 1986–November 1988	Abeles

Review of Engineering Education	September 1986–July 1988	Williams
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Review of National Language Policy	July 1986–May 1987	Lo Bianco
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Review of Alleged Entry of Suspected War Criminals into Australia	July 1986–December 1986	Menzies
Committee of Inquiry into Folklife in Australia	April 1986–August 1987	Anderson
Review of the *Customs Tariff Anti-Dumping Act 1975*	February 1986–March 1986	Lambert, then Gruen
Constitutional Review Commission	January 1986–January 1988	Byers
Australian Government Committee of Inquiry into Tourism	January 1986–December 1986	Kennedy
Committee of Review of Migrant and Multicultural Programs and Services	January 1986–November 1986	Jupp
Independent Inquiry into the Distribution of Federal Road Grants	January 1986–October 1986	Cameron
Review of the Social Security System	December 1985–n/a 1988	Cass
Independent Review of Research and Educational Requirements for Public Health and Tropical Health in Australia	December 1985–January 1986	White

Inquiry into Taxation of the Gold Industry	November 1985–May 1986	Gutman
Merino Export Review Committee	October 1985–May 1987	Newton
Committee to Review TAFE Funding	August 1985–April 1986	Hudson
Inquiry into Australia's Plant Breeding Needs	July 1985–April 1986	Lazenby
Nursing Homes and Hostels Review	July 1985–April 1986	Rees
Inquiry into the Financial and Administrative Arrangements of Grants made Under the Community Housing Expansion Programme	July 1985–August 1985	O'Donovan
Review of International Air Freight Policy Relating to Export of Primary Produce	June 1985–November 1985	Scully
Review of the *Australian Heritage Commission Act 1975*	June 1985–September 1986	Hope
Working Party on the Sugar Industry	May 1985–August 1985	Savage
Committee of Review of Adult Migrant Education Programs	April 1985–August 1985	Campbell
Independent Review of Economic Regulation of Domestic Aviation	March 1985–January 1987	May
Committee to Review Australian Studies in Tertiary Education	March 1985–June 1987	Daniels
Commission of Inquiry into the Current Health Status of the Australian Population	March 1985–October 1986	Llewellyn-Jones

Review of Australia's Defence Cooperations Programs and Policy on Export of Defence Equipment	March 1985–April 1986	Cooksey
Review of Australia's Defence Capabilities	February 1985–May 1986	Dibb
Taskforce on Repetitive Strain Injury in the Australian Public Service	December 1984–August 1985	Linehan
Committee of Review of Aboriginal Employment and Training Programs	October 1984–August 1985	Miller
Taskforce on Shore Based Shipping Costs	September 1984–July 1986	Webber
Taskforce to Review Australia's Overseas Liner Shipping Legislation	September 1984–February 1986	Rowland
Working Party to Review Objective Meat Export Trade Descriptions	September 1984–February 1985	Cameron
Inquiry into the Grape and Wine Industry including the Effect of the 10% Wine Tax	September 1984–June 1985	McKay
Taskforce to Review Australia's International Trade Policy	September 1984–abandoned	Tesse
Review of the Aboriginal Benefit Trust Account (and Related Financial Matters) in the Northern Territory Land Rights Legislation	September 1984–December 1984	Altman
Quality of Education Review Committee	August 1984–April 1985	Karmel
Taskforce on Australian Public Service and Defence Housing Programs	August 1984–January 1985	Monaghan

Taskforce to Review CSIRO's External Communication Activities	July 1984–July 1985	Myer
Review of the Schedule of Medicare Benefits	July 1984–November 1985	Layton
Inquiry into Circumstances Surrounding the Customs Declaration by the Hon M J Young at Adelaide on 5 July 1984	July 1984–August 1984	Black
Review (and Expanded Review) of Commonwealth Criminal Law	June 1984–June 1988	Watson, then Gibbs
Enquiry into Gambling and Amusement Machines in the ACT	June 1984–March 1985	Edmunds
Review of Welfare Services and Policies in the ACT	May 1984–December 1984	Vinson
Expert Committee on the Review of Data on Atmosphere Fallout Arising from Nuclear Tests in Australia	May 1984–June 1984	Kerr
Review of the Offset Policy	May 1984–November 1984	Inglis
Committee of Inquiry into the Establishment of a Manufacturing Advisory Service on Computer Assisted Manufacturing	April 1984–July 1984	Cashman
Review of the Repatriation Hospital System	March 1984–September 1985	Brand
Inquiry into Allegations of SP Gambling Against Telecom	March 1984–September 1984	Vincent
Taskforce on Aboriginal and Islander Broadcasting and Communications Policies	March 1984–August 1984	Wilmot
Independent Inquiry into Aviation Cost Recovery	February 1984–December 1984	Bosch

Panel of Review of the Proposed Incomes and Assets Test	February 1984–May 1984	Gruen
Inquiry into the Running of the ACT Legal Aid Office	February 1984–May 1984	Pryor
Inquiry into the Rights of Private Practice in Public Hospitals	January 1984–June 1984	Pennington
Inquiry into the Superannuation Fund Investment Trust	January 1984–March 1984	Monaghan
Review Committee of the Experimental Building Station at Nth Ryde, NSW	December 1983–April 1984	Ryan
Committee of Review of the Special Broadcasting Service	December 1983–March 1985	Connor
Committee of Inquiry into Labour Market Programs	December 1983–December 1984	Kirby
Taskforce on Shipbuilding	November 1983–February 1984	Somes
Committee of Review to Examine Completion of Launceston General Hospital and Hospital Development Needs of Northern Tasmania	November 1983–March 1984	Shaun
Committee of Inquiry into Homelessness and Inadequate Housing in the ACT and Surrounding Regions	November 1983–January 1984	Drake
Taskforce on Self-Government for the ACT	November 1983–March 1984	Craig
Independent Economic Inquiry into Transport Services to the Northern Territory	October 1983–December 1983	Hill

Inquiry into National Aboriginal Conference, Aboriginal Development Commission, Aboriginal Hostels, and Department of Aboriginal Affairs	October 1983–May 1984	Coombs
National Road Freight Industry Inquiry	September 1983–September 1984	May
Committee of Review of Private Overseas Student Policy	September 1983–March 1984	Goldring
Review of the Industries Assistance Commission	August 1983–January 1984	Uhrig
Copyright Law Review Committee	August 1983–October 1988	Sheppard
Taskforce on Education and the Arts for Young People	August 1983–November 1984	Boomer
Committee of Review of Australian Institute of Multicultural Affairs	July 1983–November 1983	Cass
Working Party concerning Asbestos in Commonwealth Government Buildings in the ACT	July 1983–December 1983	Selinger
Panel to Review the Australian Trade Commissioner Service	July 1983–October 1983	Curran
Committee of Review into Australian Industrial Relations Law and Systems	July 1983–May 1985	Hancock
Inquiry into Aboriginal Legal Aid Services	July 1983–October 1985	Harkins
Review of the *Aboriginal Land Rights (Northern Territory) Act 1976*	June 1983–December 1983	Toohey
Committee to Review the Australian Overseas Aid Program	May 1983–March 1984	Jackson

Taskforce on ACT Health Services	May 1983– September 1983	Molony
Inquiry into Australia's Financial System	May 1983– January 1984	Martin
Committee of Inquiry into Safety Standards at the CSIRO Applied Organic Chemistry and Advanced Materials Laboratories at Fishermen's Bend, Melbourne and the Death of CSIRO Employee, Dr R Bergamasco	April 1983– May 1983	Andrew
Committee of Review into the Impact of Radford College on ACT Schools	April 1983– July 1983	Anderson

Appendix 6. Table of Consequential Amendments

Name of Commonwealth Act	Section	Name of provision	Amendment
Anti-Money Laundering and Counter-Terrorism Financing Act 2006	5	Definitions (definition of 'Commonwealth Royal Commission')	**Consequential amendment may be required** Definition also could include Official Inquiries.
	22(1)(h)	Officials of designated agencies etc (include legal practitioners appointed to assist a Royal Commission, or otherwise appointed by members of a Royal Commission)	**Consequential amendment may be required** Provision also could apply to legal practitioners appointed to assist Official Inquiries.
Archives Act 1983	22	Records of Royal Commissions	**Consequential amendment may be required** Provision also could apply to records of Official Inquiries. Also see Recommendation 8–4 and accompanying discussion in Chapter 8.
Australian Securities and Investments Commission Act 2001	127(2B)	Confidentiality	**Consequential amendment may be required** Provision also could apply to disclosure of information to an Official Inquiry.

Building Industry Act 1985	4(5)(d)	Application to Commission for declaration in relation to [the Australian Building Construction Employees' and Builders Labourers' Federation]	**Repeal of provision may be required** Provision may be obsolete—allows the Australian Conciliation and Arbitration Commission to consider evidence given in the proceedings of a Royal Commission appointed to inquire into the activities of the Australian Building Construction Employees' and Builders Labourers' Federation.
Child Support (Assessment) Act 1989	150(4D), (4E)	Secrecy	**Consequential amendment may be required** Provisions also could apply to Official Inquiries.
Child Support (Registration and Collection) Act 1988	16(4D), (4E)	Secrecy	**Consequential amendment may be required** Provisions also could apply to Official Inquiries.
Civil Aviation Act 1988	32AN	Definitions (definition of 'court')	**Consequential amendment may be required** Provision also could exclude Official Inquiries from definition.
Crimes Act 1914	15XT	Disclosing real identities during court proceedings etc	**Consequential amendment may be required** Provision also could refer expressly to Official Inquiries.
Financial Transaction Reports Act 1988	3	Interpretation (definition of 'official, in relation to a Royal Commission')	**Repeal of provision may be required** Provision appears to be obsolete—officials and Royal Commissions not referred to in other provisions of the Act.
Freedom of Information Act 1982	4(1)	Definitions (definition of 'prescribed authority')	**Consequential amendment may be required** Provision also could exclude expressly Official Inquiries from the definition.

	13(3)(a)	Documents in certain institutions	**Consequential amendment may be required** Provision also could apply to records of Official Inquiries.
Health Insurance Act 1973	124Z(1)	Minister may authorise disclosure of information about a serious offence	**Consequential amendment may be required** Provision also could refer expressly to Official Inquiries.
Income Tax Assessment Act 1997	842–105	Amounts of Australian source ordinary income and statutory income that are exempt	**Consequential amendment may be required** Provision also could refer to members of Official Inquiries.
Income Tax Assessment Act 1936	16(1), (4)(k), (4A), (4B), (4C), (4AAA)	Officers to observe secrecy	**Consequential amendments may be required** Provisions also could refer to officers of Official Inquiries.
Inspector-General of Intelligence and Security Act 1986	34A	Information and documents may be given to Royal Commissioners	**Repeal of provision may be required** The ALRC recommends that this provision should be repealed: See Recommendation 13–5 and accompanying discussion in Chapter 13.
Inspector of Transport Security Act 2006	91(b)	Powers of Parliament and Royal Commissions not affected	**Consequential amendment may be required** Provision also could apply to Official Inquiries.
Parliamentary Privileges Act 1987	3(1)(b)	Interpretation (definition of 'tribunal')	**Consequential amendment may be required** Provision also could refer expressly to Official Inquiries.

Privacy Act 1988	7(1)(a)(v)	Acts and practices of agencies, organisations etc	**Consequential amendment may be required** Provision also could exempt acts and practices of Official Inquiries.
Surveillance Devices Act 2004	47(7)	Protection of surveillance device technologies and methods	**Consequential amendment may be required** Provision also could apply to Official Inquiries.
	48	Protected information in the custody of a court, tribunal or Royal Commission	**Consequential amendment may be required** Provision also could apply to protected information in the custody of Official Inquiries.
Taxation Administration Act 1953	2(1)	Interpretation (definition of 'eligible Royal Commission')	**Consequential amendment may be required** Definition also could include eligible Official Inquiries. NB: Some eligible Royal Commissions currently are set out in reg 3A of the *Taxation Administration Regulations 1976.*
	3D(2)	Provision of taxation information to Australian Crime Commission	**Consequential amendment may be required** Provision also could apply to information communicated to Official Inquiries under s 16(1)(4)(k) of the *Income Tax Assessment Act 1936*.
	3E	Use of tax information by law enforcement agencies and eligible Royal Commissions	**Consequential amendment may be required** Provision also could apply to Official Inquiries.

	17C	Requests to be prescribed as an eligible Royal Commission	**Consequential amendment may be required** Provision also could apply to Official Inquiries.
Trade Practices Act 1974	155AAA(9), (10), (11)	Protection of certain information	**Consequential amendment may be required** Provision also could apply to disclosure of information to Official Inquiries.
Transport Safety Investigation Act 2003	63(b)	Powers of Parliament and Royal Commissions not affected	**Consequential amendment may be required** Provision also could provide that disclosure of information to Official Inquiries is not affected by relevant provisions.
Witness Protection Act 1994	26	Commissioner and members not to be required to disclose information	**Consequential amendment may be required** Provision also could apply to documents and information disclosed to Official Inquiries.
	28	Identity of participant not to be disclosed in court proceedings etc	**Consequential amendment may be required** Provision also could refer expressly to Official Inquiries.

Name of Commonwealth Regulations	Regulation	Name of regulation	Amendment
Australian Prudential Regulation Authority Regulations 1998	4A	Prescription of prudential regulation framework laws	**Consequential amendment may be required** Regulation could provide that the recommended *Inquiries Act* is a prudential regulation framework law for the purposes of the *Australian Prudential Regulation Authority Act 1998.*
Electronic Transactions Regulations 2000	Sch 1	Laws of the Commonwealth to which certain provisions of the Act do not apply	**Consequential amendment may be required** Regulation could provide that relevant provisions of the *Electronic Transactions Act 1999* apply to the recommended *Inquiries Act.*
Jury Exemption Regulations 1987	7(2)(b)	Exemptions relating to public administration	**Consequential amendment may be required** Regulation also could provide expressly that a person is exempted from liability to serve as a juror if he or she is performing duties as Secretary to an Official Inquiry.
Maternity Leave (Commonwealth Employees) Regulations 1982	Sch 3	Prescribed persons to whom the *Maternity Leave (Commonwealth Employees) Act* applies	**Consequential amendment may be required** Regulation could apply to members of Official Inquiries.

Taxation Administration Regulations 1976	3A	Prescribed Royal Commissions (Act s 2, definition of 'eligible Royal Commission')	**Consequential amendment may be required** Regulation also could apply to prescribed Official Inquiries.
Telecommunications Regulations 2001	5.3	Disclosure of information — assistance to Royal Commission into Building and Construction Industry (Act s 292)	**Repeal of regulation may be required** Regulation may be obsolete—regulates disclosure of information to Royal Commission into the Building and Construction Industry (2003).
Treaty of Peace Regulations 1920	19	Power to summon witnesses and require production of documents	**Repeal of regulation may be required** Regulation may be obsolete—conferred on a minister powers of a Royal Commission appointed under the *Royal Commissions Act 1902–1912* for proceedings before the Mixed Arbitral Tribunal.

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